PRIVATE INTERNATIONAL LAW IN MYANMAR

မြန်မာနိုင်ငံရှိ
ပုဂ္ဂလိကဆိုင်ရာ အပြည်ပြည်ဆိုင်ရာ ဥပဒေ

PRIVATE INTERNATIONAL LAW

IN MYANMAR

by

Adrian Briggs

Professor of Private International Law
University of Oxford;
Barrister

with a Foreword by

Dr Than Nwe

Professor and Head of Department (retired)
Law Department, Yangon University;
Member of the Myanmar Academy of Arts and Sciences

မြန်မာနိုင်ငံရှိ

ပုဂ္ဂလိကဆိုင်ရာ အပြည်ပြည်ဆိုင်ရာ ဥပဒေ

အေဒရီယန် ဘရစ်ဂ်စ်

ပုဂ္ဂလိကဆိုင်ရာ အပြည်ပြည်ဆိုင်ရာ ဥပဒေ ပါမောက္ခ
အောက်စဖို့ဒ် တက္ကသိုလ်
ဝတ်လုံတော်ရရှေ့နေ

ပြုစုရေးသားပြီး

ဒေါက်တာ သန်းနွဲ့

ပါမောက္ခ နှင့် ဌာနမှူး (အငြိမ်းစား)
ဥပဒေပညာဌာန
ရန်ကုန်တက္ကသိုလ်

ဥယျောဇဉ် ရေးထားသည်။

FOREWORD

Private International Law or Conflict of Laws subject is my favourite subject. This subject was unknown to us when I was a law student at Yangon University in 1965. But I became a young Tutor at the Law Department in 1967. I was assigned to be the leader of the discussion at this subject and I had to attend the lectures of my Professor U Hla Aung, who brought this course from Harvard Law School in the United States of America. Since then I have had much interest in this subject. Very luckily, I became the student of Professor Graveson at Kings College, University of London, in 1976. My study was Comparative Study of Private International Law, and it was the year in which particular emphasis was placed on the Law of Contract. Since then I realized that Myanmar needed to establish a specific Myanmar Private International Law. I felt that to develop this subject was my responsibility, but I could not do that.

In this age of globalization, and in the transitional period of Myanmar, we urgently need to have well established rules for cases which involve foreign elements, especially for commercial transactions. This book places its emphasis on the commercial transactions, looking at the issues which have been decided in Myanmar, and considering and commenting on issues which may be expected to arise in Myanmar in the future. This book will be very useful not only for the academicians but also for the Judges.

This book, written by the eminent Professor, Adrian Briggs, fills up the gap in the Myanmar Legal System. Let me express my deep appreciation to Professor Adrian Briggs, Professor of Private International Law, Oxford University, for his kind interest in Myanmar and for his book on "Private International Law in Myanmar".

Daw Than Nwe
Yangon, April 20th, 2015

ဥယျောဇဉ်

ပုဂ္ဂလိကဆိုင်ရာ အပြည်ပြည်ဆိုင်ရာ ဥပဒေ သို့မဟုတ် ဥပဒေချင်း ပဋိပက္ခဖြစ်မှု ဘာသာရပ်သည် ကျွန်မ အနှစ်သက်ဆုံး ဘာသာရပ်ဖြစ်ပါသည်။ ၁၉၆၅ ခုနှစ်တွင် ကျွန်မသည် ဥပဒေကျောင်းသူ အဖြစ် ရန်ကုန်တက္ကသိုလ်တွင် တက်ရောက်စဉ်က ဤဘာသာရပ်အကြောင်း ကျွန်မတို့ မသိရှိ ခဲ့ကြပါ။ သို့သော် ၁၉၆၇ ခုနှစ်တွင် ဥပဒေပညာဌာန၌ ကျွန်မသည် လူငယ်နည်းပြတစ်ဦး ဖြစ်လာခဲ့ ပါသည်။ ထိုအခါ ဤဘာသာရပ်အကြောင်း ဦးဆောင်ဆွေးနွေးရန် ကျွန်မကို တာဝန်ပေးလာ ပြီးနောက် ကျွန်မသည် ပါမောက္ခ ဦးလှအောင်၏ ပို့ချမှုကို တက်ရောက်သင်ယူခဲ့ရပါသည်။ ဦးလှအောင်သည် အမေရိကန်နိုင်ငံ ဟားဗတ်ဥပဒေကျောင်းတွင် သင်ယူပြီးနောက် မြန်မာနိုင်ငံကို ဤဘာသာရပ် ယူဆောင်လာခြင်း ဖြစ်ပါသည်။ ထိုအချိန်မှစ၍ ကျွန်မသည် ဤဘာသာရပ်ကို အလွန်စိတ်ဝင်စားခဲ့ပါသည်။ ကျွန်မ အလွန် ကံကောင်းသည်မှာ ၁၉၇၆ ခုနှစ်တွင် ကျွန်မသည် လန်ဒန်တက္ကသိုလ်၊ ဘုရင့် ကောလိပ်တွင် ပါမောက္ခ Graveson ၏ တပည့် ဖြစ်လာပါသည်။ ကျွန်မ လေ့လာသည်မှာ ပုဂ္ဂလိကဆိုင်ရာ အပြည်ပြည်ဆိုင်ရာ ဥပဒေကို နှိုင်းယှဉ်လေ့လာခြင်းဖြစ် သည်။ ထို့အပြင် ထိုနှစ်က ကျွန်မအထူးပြုလေ့လာခဲ့သည်မှာ ပဋိညာဉ်ဥပဒေ ဖြစ်ပါသည်။ ထိုအချိန်မှ စ၍ ကျွန်မ နားလည်သဘောပေါက်လာသည်မှာ မြန်မာနိုင်ငံ တွင်လည်း သီးသန့် ပုဂ္ဂလိက အပြည်ပြည်ဆိုင်ရာ ဥပဒေ တစ်ရပ် ပေါ်ပေါက်လာရန် လိုအပ်နေသည့် အချက်ဖြစ်သည်။ ကျွန်မ စိတ်ထဲတွင်လည်း ဤဘာသာရပ် ဖွံ့ဖြိုးလာစေရန်မှာ ကျွန်မ၏ တာဝန်တစ်ရပ် အဖြစ် ခံစားမိသည်။ သို့သော် ကျွန်မ မလုပ်ဆောင်နိုင်ခဲ့ပါ။

ယနေ့ကဲ့သို့ ကမ္ဘာလွှမ်းခြုံမှုဖြစ်စဉ် ခေတ်တွင်၊ မြန်မာနိုင်ငံတွင် အသွင်ကူးပြောင်းနေသည့် ကာလ၌ အထူးသဖြင့် ကူးသန်းရောင်းဝယ်ရေးဆိုင်ရာ လုပ်ငန်းများတွင် နိုင်ငံခြားနှင့် ဆက်စပ်သည့် အချက်အလက်များပါဝင်သည့် အမှုများအတွက် ခိုင်မာသည့် နည်းဥပဒေများ အရေးတကြီး လိုအပ် လျှက် ရှိပါသည်။ ဤစာအုပ်သည် ကူးသန်းရောင်းဝယ်ရေးလုပ်ငန်းများအပေါ် အထူးအလေးပေး ထားပြီး မြန်မာနိုင်ငံတွင် ကျင့်သုံးခဲ့သော အစဉ်အလာများကို လေ့လာကြည့်ရှုထားသည့်အပြင် အနာဂတ် မြန်မာနိုင်ငံတွင် ပေါ်ပေါက်လာမည်ဟု မျှော်လင့်နိုင်သော အကြောင်းအရာများကိုလည်း လေ့လာသုံးသပ် ပြီး ဆန်းစစ်ဝေဖန် ထားပါသည်။ ဤစာအုပ်သည် တက္ကသိုလ်ပညာရှင်များအတွက် သာမက တရား သူကြီးများအတွက်ပါ အလွန်အသုံးဝင်မည့် စာအုပ် ဖြစ်ပါသည်။

ထင်ရှားကျော်ကြားသည့် ပါမောက္ခ အေဒရီယန် ဘရစ်ဂ်စ် ရေးသားပြုစုသည့် ဤစာအုပ်သည် မြန်မာနိုင်ငံဥပဒေစနစ်တွင် ဖြစ်ပေါ်နေသော ကွက်လပ်တစ်ခုကို ဖြည့်ဆည်းပေးပါသည်။ အောက်စဖို့ဒ် တက္ကသိုလ်၊ ပုဂ္ဂလိကဆိုင်ရာ အပြည်ပြည်ဆိုင်ရာ ဥပဒေ ပါမောက္ခ အေဒရီယန် ဘရစ်ဂ်စ်ကို ၎င်း၏ မြန်မာနိုင်ငံအကြောင်း အထူးတလည် စိတ်ဝင်စားမှုနှင့် "မြန်မာနိုင်ငံရှိ ပုဂ္ဂလိကဆိုင်ရာ အပြည်ပြည် ဆိုင်ရာ ဥပဒေ" စာအုပ် ပြုစုရေးသားမှုအပေါ် ကျွန်မအနေဖြင့် အထူးတန်ဖိုးထားလျက် ကျေးဇူးတင် ကြောင်းပြောကြားလိုပါသည်။

ဒေါ်သန်းနွဲ့
ရန်ကုန်၊ ၂၀ ဧပြီ ၂၀၁၅

PREFACE

The aim of this book is to identify, state, and explain the rules of private international law which form that part of the law of Myanmar today.

Law Departments in universities in Myanmar are having to adjust very quickly to a world which is very different to the one on which the country closed its doors 50 years ago. The Faculty of Law of the University of Oxford has for some time been working, with the Department of Law at Yangon University and others, to provide practical help of various kinds. The first thing, of course, was for us to listen carefully, for there are too many whose calculation of what they can do for Myanmar is no more than a reflection of what they think Myanmar can do for them. But it seems that among the things which Oxford can offer, and provide with no strings attached, is help with the fundamental skills of legal teaching and doctrinal writing, from which everything else that should go on in a law school will spring. So far as legal teaching is concerned, academic visits by members of the Oxford Faculty have taken, and will, no doubt, continue to take place; but other forms of contribution may sometimes be more productive, and less disruptive, than a brief visit from a slightly disoriented professor. Law departments need modern materials with which to do their job, and as Oxford has been producing such texts for a very long time, our ability to do this may provide something more durable than whatever remains after visits which are over almost before they have even begun.

The idea for this book came from a visit made to the Department of Law at Yangon University in September 2014. As to that, of course, my first and happy task is to thank the Head of the Department, Dr Khin Mar Yee, and her colleagues, for their kindness and hospitality despite the many and much more important demands on their time. I was also able to hold classes with Dr Mon Mon Tar and her colleagues at Dagon University, and to do the same with at East Yangon University. Colleagues in these Departments work under really challenging conditions with insufficient resources. Those of us in well-upholstered universities in other common law jurisdictions, where life has never been less than comfortable, should perhaps count our blessings and be happy to share some of them. It was in discussion at East Yangon University with Dr Marlar Aung, Dr May Htar, and Dr Khin Chit Chit, that the possibility of writing a book for the modern teaching of this subject was broached. It seemed that the only way to see whether it was an idea which might work was to sit down and try to produce a book, using Myanmar material where it was available, common law to fill the gaps, and Oxford's experience to weave it all together. This is the book which resulted; it will be for those to whom it is offered to judge whether it has worked.

The manuscript was prepared in Oxford. Dr Daw Than Nwe, Professor and formerly Head of the Law Department at Yangon University, and now member of the Executive Committee of the Myanmar Academy of Arts and Science with special responsibility for legal education, very kindly agreed to be my collaborator in Myanmar, to help with materials not available in England or in English, and to write the Foreword. All this was my good fortune. A foreigner cannot sensibly work by himself to produce a book on Myanmar law for Myanmar lawyers; we hope that, together, our efforts have produced something which neither would have been able to accomplish alone. We also hope that, by making it freely available on line, as it is intended, anyone in Myanmar who wishes to explore their country's rules of private international law will be able to.

The 13 Volumes of the Myanmar Code are an astonishing statutory resource, providing the framework and structure for principled development of the modern law. But even when these written laws were made they were not complete, and as the world moves on, new questions are always arising. As was said in 1965, in a judgment of the Chief Court:

'The Act may not be exhaustive, and a particular point not specifically dealt with must be governed upon general principles. It is not necessary that every order of a Court should be supported by a specific statutory provision, and where there is neither provision nor prohibition it has to be guided by ordinary principles of common sense, justice, equity and good conscience. Since the laws are general rules, they cannot regulate for all time to come so as to make express provisions against all the cases that may possibly happen.'

This may actually be the most important statement of Myanmar law to be found in the books. It was actually said in relation to an issue which is examined in Chapter 2, but its significance is far wider than that. The amount of private international law contained in the Myanmar Code is small, and is mostly well hidden. We have found what we could, and we have used it to show how a court in Myanmar may now understand its private international law. So far as the decisions of courts are concerned, Oxford has a fair collection of Lower Burma/Rangoon/Burma law reports from 1900 to the late 1960s, but after that the shelf is bare; and more recent reports of cases published in Myanmar contain very little in the way of private international law. It should be clearly understood that responsibility for any errors is mine alone. If there are lapses in the book - and first editions rarely get everything right - suggestions for amendment and improvement would be received with gratitude.

Many of the issues examined in this book have yet to come before a court in Myanmar; some of those which have been before the courts did so such a long time ago that it cannot always be assumed that they would or should be dealt with in the same way today. Yet unless Myanmar is content to allow the judicial resolution of its disputes to be taken away from it by foreign courts and tribunals, and by foreign lawyers who will enrich only themselves at Myanmar's expense, these issues must arise soon, and when they do, the legal profession and legal system will need to deal with them properly. This book represents our attempt to help teachers and students, lawyers and law reformers, courts and tribunals, in Myanmar to recognise and understand the law which they already have. There is much more of it than people probably realise, and it is robust, sensible, and perfectly usable common law. Rather like the magnificent heritage architecture of downtown Yangon, all it needs is to be properly appreciated.

Adrian Briggs
Oxford, April 14th, 2015

နိဒါန်း

ဤစာအုပ်၏ ရည်ရွယ်ချက်သည် မြန်မာဥပဒေ၏ တစ်စိတ်တစ်ပိုင်းအဖြစ် ပါဝင်နေသော ပုဂ္ဂလိက အပြည်ပြည်ဆိုင်ရာ ဥပဒေ၏ စည်းမျဉ်းဥပဒေများကို ဖော်ထုတ်စစ်ဆေးရန်၊ ပြသရန် နှင့် ရှင်းပြရန် ရည်ရွယ်ပါသည်။

မြန်မာနိုင်ငံရှိ တက္ကသိုလ်များ၏ ဥပဒေပညာဌာနများသည် နှစ်ပေါင်း ၅၀ ကြာ တံခါးပိတ်ခံထားရသည့် နိုင်ငံတစ်ခု မြင်တွေ့ခဲ့ရသည့် ကမ္ဘာနှင့် အလွန်ခြားနားသော ကမ္ဘာတစ်ခုနှင့် အလွန်လျှင်မြန်စွာ ချိန်ညှိနေရပါတယ်။ အောက်စဖို့ဒ်တက္ကသိုလ် ဥပဒေဌာနသည် ရန်ကုန်တက္ကသိုလ် ဥပဒေပညာဌာန နှင့် အခြားတက္ကသိုလ်များသို့ လက်တွေ့ကျသည့် အကူအညီအမျိုးမျိုးကို ပေးနိုင်ရန် ဆောင်ရွက်နေသည်မှာ အချိန်အတော်ကြာပြီ ဖြစ်သည်။ ကျွန်တော်တို့အတွက် ပထမဆုံးအဆင့်မှာ ဂရုတစိုက် နားထောင်ရန်ပင် ဖြစ်သည်။ အကြောင်းမှာ မြန်မာနိုင်ငံအတွက် ၎င်းတို့ ဘာလုပ်ပေးနိုင်သည်ဆိုသည်မှာ မြန်မာနိုင်ငံက ၎င်းတို့အတွက် ဘာလုပ်ပေးနိုင်သည်ကို စဉ်းစားကြသည့် ထင်ဟပ်မှုတစ်ခုထက် မပိုသော တွက်ချက်သူများ အလွန်များနေသောကြောင့် ဖြစ်သည်။ သို့သော် အောက်စဖို့ဒ်က နှောင်ကြိုးမဲ့ ကူညီရန် ကမ်းလှမ်းနိုင်သည့် အချက်များထဲတွင် ဥပဒေဆိုင်ရာ သင်ကြားမှု နှင့် အယူဝါဒဆိုင်ရာ ရေးသားခြင်းတို့နှင့်ပတ်သက်သည့် အခြေခံကျွမ်းကျင်မှုများဖြင့် ကူညီခြင်းပင် ဖြစ်သည်။ ထိုမှတစ်ဆင့် ဥပဒေကျောင်း တစ်ခုတွင် ဆက်လက်လုပ်ဆောင်သင့်သည့် အခြားအရာများလည်း ပေါ်ပေါက်လာမည် ဖြစ်သည်။ ဥပဒေဆိုင်ရာ သင်ကြားမှုနှင့် စပ်လျဉ်း၍မူ အောက်စဖို့ဒ် ဥပဒေဌာနမှ အဖွဲ့ဝင်များက ပညာရေးဆိုင်ရာ လည်ပတ်မှုအဖြစ် သွားရောက်ခဲ့ကြပြီး ဆက်လက်ပြီးလည်း သွားရောက်ကြမည်မှာ သံသယဖြစ်စရာ မရှိပါ။ သို့သော် တခါတရံတွင် အနည်းငယ်မျက်စိလည်နေသည့် ပါမောက္ခတစ်ဦး သွားရောက်လည်ပတ်ခြင်းထက် အခြားပုံစံများဖြင့် ပံ့ပိုးကူညီလျှင် ပို၍ အကျိုးများကောင်း များနိုင်ပြီး အလျဉ်ပြတ်မှု နည်းနည်းဖြင့် ပိုမိုလုပ်ဆောင်ကောင်း လုပ်ဆောင်နိုင်ပါသည်။ ဥပဒေဌာနများအနေဖြင့် ၎င်းတို့၏ အလုပ်တာဝန်များကို ဆောင်ရွက်ရန်အတွက် ခေတ်သစ် အချက်အလက် စာအုပ်စာတမ်းများ လိုအပ်ပါသည်။ ထို့အပြင် အောက်စဖို့ဒ်သည် ယင်းစာတမ်းများကို ပြုစုရေးသားနေသည်မှာ ကာလအတော်ကြာနေပြီ ဖြစ်သည့်အတွက် ယင်းအလုပ်တာဝန်တို့အပေါ် ကျွန်ုပ်တို့၏ ဆောင်ရွက်နိုင်စွမ်းသည် အစမပြုမီလောက်ကပင် ပြီးဆုံးတတ်သည့် လည်ပတ်မှုများအပြီး ကျန်ရစ်ခဲ့သော အရာများထက် ပိုမိုကြာရှည်ခံသည့် တစုံတရာကို စီစဉ်ပေးနိုင်ပါသည်။

ဤစာအုပ်ရေးသားရန် စိတ်ကူးကို ၂၀၁၄ စက်တင်ဘာလက ရန်ကုန်တက္ကသိုလ် ဥပဒေပညာဌာနသို့ သွားရောက် လည်ပတ်ပြီးနောက် ရလာခဲ့ခြင်း ဖြစ်သည်။ ယင်းနှင့်ပတ်သက်၍မူ ကျွန်ုပ်အနေဖြင့် ပထမဆုံးနှင့် ဝမ်းမြောက် ဝမ်းသာ လုပ်ဆောင်ရမည့် တာဝန်မှာ ဌာနမှူး ဒေါက်တာ ခင်မာရီနှင့် သူမ၏ လုပ်ဖော်ကိုင်ဖက်များအပေါ် ကျေးဇူး တင်ရန်ပင်ဖြစ်သည်။ ၎င်းတို့သည် ထိုအချိန်က ၎င်းတို့၏ အခြား အရေးကြီးသည့် အလုပ်များ မြောက်များစွာ ရှိနေသည့် ကြားကပင် နွေးထွေးစွာဖြင့် ညှော်ဝတ်ကျေပွန်ခဲ့ကြပါသည်။ ကျွန်တော်သည် ဒဂုံတက္ကသိုလ်တွင် ဒေါက်တာ မွန်မွန်တာ နှင့် သူမ၏ လုပ်ဖော်ကိုင်ဖက်များအတွက် သင်တန်းများ ပို့ချပေးနိုင်ခဲ့သည့်နည်းတူ ရန်ကုန်အရှေ့ပိုင်း တက္ကသိုလ်တွင်လည်း အလားတူ ဆောင်ရွက်နိုင်ခဲ့ပါသည်။ ယင်းဌာနများမှ လုပ်ဖော်ကိုင်ဖက်များသည် မပြည့်စုံမလုံလောက်သည့် ရင်းမြစ်များနှင့် အလွန်ပင် ခက်ခဲသည့် အခြေအနေအောက်တွင် အလုပ်လုပ်ကြရပါသည်။ အင်္ဂလိပ်ဥပဒေကျင့်သုံးသော အခြားသောနိုင်ငံများရှိ ကြီးမားပြည့်စုံသည့် တက္ကသိုလ်ကြီးများတွင် အစစအရာရာ သက်တောင့်သက်သာရှိကြသော ကျွန်ုပ်တို့အနေဖြင့် ကျွန်ုပ်တို့၏ ကောင်းမြတ်မှုတချို့ကို ဝမ်းမြောက်ဝမ်းသာ မျှဝေသင့်ပါသည်။ ရန်ကုန်အရှေ့ပိုင်းတက္ကသိုလ်တွင် ဒေါက်တာ မာလာအောင်၊ ဒေါက်တာ မေထား၊ ဒေါက်တာ ခင်ချစ်ချစ် တို့နှင့် ဆွေးနွေးရင်း ဤဘာသာရပ်ကို ခေတ်သစ်ပုံစံဖြင့် သင်ကြားရန်အတွက် စာအုပ်တစ်အုပ်ရေးရန် ဖြစ်နိုင်ချေရှိမရှိကို အစပျိုးခဲ့ကြခြင်းပင် ဖြစ်သည်။ ဤစိတ်ကူး တကယ်ဖြစ်နိုင် မဖြစ်နိုင်ကို သိရှိရန် တစ်ခုတည်းသော နည်းလမ်းမှာ မြန်မာနိုင်ငံဆိုင်ရာ အချက်အလက်စာအုပ်စာတမ်းများကို အသုံးပြုခြင်း၊ လိုအပ်ချက် ကွက်လပ်များကို ဖြည့်ရန် အင်္ဂလိပ်ဥပဒေကို အသုံးပြုခြင်း၊ ထို့နောက် အောက်စဖို့ဒ်အတွေ့အကြုံနှင့် ပေါင်းစပ်ကာ ထိုင်ပြီး ချရေးကြည့်ရန်သာ ရှိခဲ့ဟန် တူပါသည်။ ယင်း၏ ရလဒ်အနေဖြင့် ယခုစာအုပ် ထွက်ရှိလာပြီး ဤစာအုပ် တကယ်လက်တွေ့ အလုပ်ဖြစ်မဖြစ်မှာ ဤစာအုပ်ကို အကဲဖြတ်ပေးရန် ကမ်းလှမ်းခံရသူတို့၏ တာဝန်သာ ဖြစ်ပေမည်။

စာအုပ်၏ စာမူကြမ်းကို အောက်စဖို့ဒ်တွင် ပြင်ဆင်ခဲ့ပါသည်။ ရန်ကုန်တက္ကသိုလ်၊ ဥပဒေပညာဌာန၏ ပါမောက္ခ နှင့် အငြိမ်းစား ဌာနမှူးဖြစ်ပြီး ယခုအခါ မြန်မာနိုင်ငံ ဝိဇ္ဇာနှင့် သိပ္ပံပညာရှင်အဖွဲ့တွင် ဥပဒေပညာရေးအတွက် အထူးတာဝန်ယူထားသော အမှုဆောင်ကော်မတီဝင်တစ်ဦးလည်း ဖြစ်သည့် ဒေါက်တာ ဒေါ်သန်းနွဲ့သည် အင်္ဂလန်တွင် မရနိုင်သည့် သို့မဟုတ် အင်္ဂလိပ်ဘာသာဖြင့် မရနိုင်သည့် အချက်အလက်စာအုပ်စာတမ်းများအတွက် မြန်မာနိုင်ငံမှ ပူးပေါင်းဆောင်ရွက်သူအဖြစ် ကူညီပံ့ပိုးပေးရန် နှင့် ဥယျာဇဉ်ရေးပေးရန် အထူးခင်မင် ထောက်ထားစွာဖြင့် သဘောတူညီခဲ့ပါသည်။ ဤအရာအားလုံးမှာ ကျွန်ုပ်အတွက် ကံကောင်းထောက်မမှုပင် ဖြစ်သည်။ နိုင်ငံခြားသားတစ်ဦးအနေဖြင့် မြန်မာရှေ့နေများအတွက် မြန်မာဥပဒေအကြောင်း စာအုပ်တစ်အုပ်ကို သူ့ဘာသာ သင့်တင့်မှန်ကန်စွာ ရေးသားထုတ်လုပ်ရန်မှာ မဖြစ်နိုင်ပေ။ ကျွန်ုပ်တို့ မျှော်လင့်သည်မှာ ကျွန်ုပ်တို့၏ ကြိုးပမ်းမှုဖြင့် မည်သူမျှ တစ်ဦးတည်းအားဖြင့် အောင်မြင်အောင် ဆောင်ရွက်နိုင်စွမ်းမရှိသည့် အရာတစ်ခုကို အတူတကွ ပူးပေါင်းပြီး ထုတ်လုပ်နိုင်ခဲ့ကြသည်ဟု မျှော်လင့်ပါသည်။ ကျွန်ုပ်တို့ နောက်ထပ် မျှော်လင့်သည်မှာ ဤစာအုပ်ကို အွန်လိုင်းတွင် အခမဲ့ တင်ထားရန် ရည်ရွယ်ထားသည့်အတိုင်း ယင်းသို့ တင်ထားပေးခြင်းအားဖြင့် မြန်မာနိုင်ငံ၏ ပုဂ္ဂလိက အပြည်ပြည်ဆိုင်ရာ ဥပဒေ စည်းမျဉ်းများကို ရှာဖွေစူးစမ်းရန် စိတ်ဝင်စားသည့် မြန်မာနိုင်ငံမှ မည်သူမဆို စူးစမ်းနိုင်ကြမည် ဖြစ်သည်။

မြန်မာဥပဒေ အတွဲ ၁၃ ခုစလုံးသည် အံ့ဩဖွယ်ရာကောင်းသည့် ပြဋ္ဌာန်းဥပဒေဆိုင်ရာ ရင်းမြစ်တစ်ခုပင် ဖြစ်ပြီး ခေတ်သစ်ဥပဒေကို စနစ်တကျ ဖွံ့ဖြိုးတိုးတက်ရန်အတွက် မူဘောင်နှင့် ပုံစံတို့ကို ချမှတ်ပေးထားပါသည်။ သို့သော် ယင်းဥပဒေများ ရေးသားပြဋ္ဌာန်းစဉ်ကပင် ပြည့်စုံခဲ့ခြင်း မရှိခဲ့သကဲ့သို့ ကမ္ဘာကြီးက ပြောင်းလဲနေသည့်အခါ မေးခွန်းသစ်များလည်း အမြဲတမ်း ပေါ်ပေါက်နေပါသည်။ ၁၉၆၅ ခုနှစ်က တရားရုံးချုပ် စီရင်ချက်တစ်ခုတွင် ဖော်ပြသည့်အတိုင်း ဆိုလျှင် -

'ဤဥပဒေသည် ပြည့်စုံလုံလောက်ချင်မှ လုံလောက်ပါမည်။ ထို့အပြင် သီးသန့်ကိုင်တွယ်မထားသည့် တစ်စုံတစ်ရာသော အချက်တစ်ခုခုကို အထွေထွေ အခြေခံမူများက လွှမ်းမိုးအုပ်ချုပ်နိုင်သည်။ တရားရုံးတစ်ခု၏ အမိန့်တိုင်းကို ပြဋ္ဌာန်းဥပဒေပါ အချက်တစ်ခုခုက ထောက်ပံ့ပေးသင့်သည်ဆိုသည့် အချက်မှာ မလိုအပ်ပေ။ ထို့အပြင် ပြဋ္ဌာန်းချက် သို့မဟုတ် တားမြစ်ချက်တစ်ရပ်ရပ် မရှိသည့်အခါမျိုးတွင် ပင်ကိုယ်အသိဉာဏ်၊ တရားမျှတမှု၊ ညီမျှမှုနှင့် ကောင်းမွန်သည့်အသိစိတ်ဆိုင်ရာ သာမန်အခြေခံမူများက လမ်းညွှန်ပေးရပါမည်။ ဥပဒေများသည် အထွေထွေ စည်းမျဉ်းများ ဖြစ်သည့်အတွက် ယင်းတို့သည် ဖြစ်ပေါ်နိုင်သည့် အမှုအားလုံးအတွက် ပြဋ္ဌာန်းချက်များကို ရှင်းရှင်း လင်းလင်း ရေးသားဖော်ပြရန်ကိစ္စမှာ ဖြစ်ပေါ်လာမည့်အချိန်တိုင်းအတွက် ယင်းဥပဒေများဖြင့် ထိန်းညှိ၍ မရနိုင်ပေ။'

ဤအချက်သည် စာအုပ်များထဲတွင် တွေ့ရသည့် မြန်မာဥပဒေ၏ အရေးကြီးဆုံးအချက်တစ်ခု အမှန်တကယ် ဖြစ်ကောင်း ဖြစ်နိုင်ပါသည်။ ယင်းကို အခန်း ၂ တွင် စောကြောဆန်းစစ်ထားသည့် ကိစ္စရပ်တစ်ခုနှင့် စပ်လျဉ်းပြီး အမှန်တကယ်ပင် ပြောပြထားပါသည်။ သို့သော် ယင်း၏ အရေးပါမှုမှာ ထိုကိစ္စထက် အများကြီး ကျယ်ပြန့်ပါသည်။ မြန်မာဥပဒေတွင် ပုဂ္ဂလိက အပြည်ပြည်ဆိုင်ရာဥပဒေ အကြောင်း ပါဝင်မှုပမာဏမှာ သေးငယ်ပြီး အများအားဖြင့် တိမ်မြုပ်နေပါသည်။ ကျွန်ုပ်တို့အနေဖြင့် ကျွန်ုပ်တို့ တတ်နိုင်သ၍ ရှာဖွေတွေ့ရှိခဲ့ပြီး မြန်မာနိုင်ငံရှိ တရားရုံးတစ်ခုသည် ယခုအခါ ယင်း၏ ပုဂ္ဂလိက အပြည်ပြည်ဆိုင်ရာဥပဒေကို မည်သို့ နားလည်နိုင်သည်ကို ပြသရန် ကျွန်ုပ်တို့၏ ရှာဖွေတွေ့ရှိချက်ကို အသုံးပြုထားပါသည်။ တရားရုံးများ၏ ဆုံးဖြတ်ချက်များနှင့် ပတ်သက်၍မူ ၁၉၀၀ ပြည့်နှစ်မှ ၁၉၆၀ ပြည့်လွန်နှစ်များ နှောင်းပိုင်းအထိ အောက်မြန်မာပြည်/ရန်ကုန်/မြန်မာ ဥပဒေအစီရင်ခံစာများမှာ အောက်စဖို့ဒ်တွင် အတော်များများ ရှိနေပါသည်။ သို့သော် ယင်းနောက်ပိုင်းနှစ်များအတွက်မူ စာအုပ်စင်တွင် စာအုပ်သိပ်မတွေ့ရပါ။ ထို့အပြင် မြန်မာနိုင်ငံတွင် ထုတ်ဝေသည့် နောက်ပိုင်းပိုကျသော အမှုအစီရင်ခံစာများတွင် ပုဂ္ဂလိက အပြည်ပြည်ဆိုင်ရာ ဥပဒေနှင့်ပတ်သက်၍ မပါသလောက်ပင် ဖြစ်သည်။ အမှားအယွင်းတစ်စုံတစ်ရာ ရှိခဲ့လျှင် ကျွန်ုပ်တစ်ဦးတည်း၏ တာဝန်သာဖြစ်ကြောင်း ရှင်းလင်းစွာ နားလည်ထားသင့်ပါသည်။ ဤစာအုပ်တွင် လစ်ဟင်းမှုများ ရှိခဲ့ပါက - ထို့အပြင် ပထမတည်းဖြတ်ထုတ်ဝေမှုများတွင် အရာအားလုံးမှာ မှန်ကန်သည်ဟု ပြောနိုင်လေ့ မရှိသည့်အတွက် - ပြင်ဆင်ရန်နှင့် တိုးတက်ကောင်းမွန်ရန် အကြံပြုချက်များကို ကျေးဇူးတင်စွာဖြင့် ကြိုဆိုလက်ခံမည် ဖြစ်ပါသည်။

ဤစာအုပ်တွင် ဆန်းစစ်ထားသည့် ကိစ္စရပ် အများအပြားသည် မြန်မာနိုင်ငံရှိ တရားရုံးတစ်ခုရှေ့မှောက်တွင် မရောက်ရှိဖူးသေးပါ။ တရားရုံးများရှေ့တွင် ရောက်ဖူးသည့် အချို့ကိစ္စရပ်များသည်လည်း ကာလ အလွန်ကြာမြင့်ခဲ့ပြီ ဖြစ်၍ ယနေ့ခေတ်တွင် ယင်းကဲ့သို့ ကိုင်တွယ်သင့်သည်၊ ကိုင်တွယ်လိမ့်မည်ဟု အမြဲတမ်း မယူဆနိုင်ပါ။ သို့တိုင်အောင်ပင် မြန်မာနိုင်ငံသည် ယင်း၏ အငြင်းပွားမှုများအတွက် တရားရေးဖြေရှင်းမှုများကို နိုင်ငံခြားတရားရုံးများနှင့် နိုင်ငံခြားခုံရုံးများတွင် ဖြေရှင်းစေရန်ထိ ဆန္ဒမရှိလျှင်၊ ထို့အပြင် မြန်မာနိုင်ငံ၏ ကုန်ကျစရိတ်ဖြင့် ၎င်းတို့သာလျှင် ချမ်းသာကြွယ်ဝသွားမည့် နိုင်ငံခြားရှေ့နေများက ဖြေရှင်းရန်ထိ ခွင့်မပြုလိုလျှင်၊ ယင်းကိစ္စရပ်များသည် မကြာခင် ပေါ်ပေါက်လာဖို့ရှိပြီး ယင်းသို့ ပေါ်ပေါက်လာသည့်အခါ ဥပဒေပညာရှင်များနှင့် ဥပဒေစနစ်တစ်ခုက ယင်းတို့ကို စနစ်တကျကိုင်တွယ်ဖြေရှင်းရန် လိုအပ်လာပါလိမ့်မည်။ မြန်မာနိုင်ငံရှိ ဆရာနှင့် ကျောင်းသားများ၊ ရှေ့နေနှင့် ဥပဒေပြုပြင်ပြောင်းလဲရေး သမားများ၊ တရားရုံးနှင့် ခုံရုံးများ အနေဖြင့် ၎င်းတို့တွင် ရှိထားနှင့်ပြီးသော ဤဥပဒေကို နားလည် သဘောပေါက်လာအောင် ဤစာအုပ်က ထောက်ကူနိုင်စေရန် ကျွန်ုပ်တို့ ကြိုးပမ်းထားခြင်းပင် ဖြစ်သည်။ ဤဥပဒေသည် လူအများ နားလည် လက်ခံထားကောင်း လက်ခံထားသည့်အတိုင်းအတာထက် ပိုမိုနိုင်ပြီး ယင်းသည် တောင့်တင်း ခိုင်မာသော၊ သင့်တင့်လျောက်ပတ်သော၊ ပြည့်ပြည့်စုံစုံ အသုံးပြုနိုင်သော အင်္ဂလိပ်ဥပဒေတစ်ခုပင် ဖြစ်ပါသည်။ ရန်ကုန်မြို့လယ်က ခန့်ညားထည်ဝါသည့် ရှေးဟောင်းဗိသုကာလက်ရာများကဲ့သို့ပင် ယင်းကို စနစ်တကျ ခံစားသုံးစွဲနိုင်ရန်သာ လိုအပ်ပါသည်။

အေဒရီယန် ဘရစ်ဂ်စ်
အောက်စဖို့ဒ်၊ ၁၄ ဧပြီ ၂၀၁၅

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(Listed by the titles in which they appear in the Table of Cases)

AC	Appeal Cases (Law Reports: English and Privy Council decisions)
AIR	All India Reports
AIR (Ran)	All India Reports, Rangoon decisions
BLR	Burma Law Reports
CLR	Commonwealth Law Reports (Australian High Court decisions)
ILR	Indian Law Reports
ILR (Ran)	Indian Law Reports, Rangoon decisions
LBR	Lower Burma Rulings
KB	King's Bench (Law Reports: English decisions)
LR IA	Law Reports, Indian Appeals (Privy Council decisions)
LR QB	Law Reports, Queen's Bench (English decisions)
Mad LJ	Madras Law Journal (Indian decisions)
RLR	Rangoon Law Reports
SCC	Supreme Court Cases (Indian decisions)
SCR	Supreme Court Reports (Indian decisions)

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10 PRIVATE INTERNATIONAL LAW: A PARTIAL STATEMENT OF MYANMAR LAW

CHAPTER 1

GENERAL PRINCIPLES OF PRIVATE INTERNATIONAL LAW

We start with the discussion of some general questions and general principles.

(1) What is private international law ? Why does a legal system need it ?

From earliest times legal systems have recognised that there are some cases in which it would not be right to treat the case before the court as one which should be dealt with simply by the application of the laws of the country which were made for and which apply to domestic cases. Roman law, two thousand years ago, understood that some cases should be dealt with by the application of laws which applied to disputes between citizens, but that other cases - usually where one or more of the parties was not a Roman citizen, a foreigner - should be dealt with by a separate set of rules which applied to all persons, Roman and non-Roman, alike. It called this set of rules the '*ius gentium*', or the laws which applied to all people, and reserved the '*ius civile*' for cases in which both parties were Roman citizens

In those days, there were very few foreign legal systems whose rules could be applied, which is why the Roman legal system developed a set of rules for application to foreigners and to persons who dealt with foreigners. Today, however, there are as many legal systems as there are countries. If a dispute comes before a Myanmar court in which both parties are Myanmar nationals and the facts which give rise to the dispute are all located in Myanmar, a court will obviously apply domestic Myanmar law: that is, the laws in the Myanmar Code and in other legal sources.

But what if one of the parties is a foreigner ? Or if both parties are foreigners, such as two employees of a Japanese company who are working in Myanmar ? Or if the dispute arises between two Myanmar nationals but who were overseas - visiting Singapore, for example - when one injured the other ? If the dispute is brought before a Myanmar court, it would certainly be possible for a Myanmar court to apply ordinary Myanmar law to resolve the issues. But if one of them argues that the court should apply the laws of Japan or of Singapore, and (using the rules which are explained in this book) can justify to the court why it should do this, then the court will apply (first) the rules of Myanmar private international law, and may then apply (second) the actual rules of a foreign legal system.

When a court in Myanmar does this - and this is a really important point - it is applying Myanmar law. But it is applying that part of Myanmar law which contains the separate chapter or set of rules which spring into life when the issue between the parties has a foreign, which means a non-Myanmar, element to it. The result is that a Myanmar court may dispose of a case by using the rules of a foreign legal system to do it.

All civilised legal systems have rules which provide for cases which have a foreign component to them. These rules can be very elaborate: those of the common laws systems, particularly in England and the United States of America, have developed some very complex detail. Those of civilian systems, which are usually contained in a code, such as those of Switzerland or China, may appear to be rather more straightforward.

But all civilised systems have them. The reason is obvious: there are some cases, which come before our courts, in which it would not be in keeping with our sense of justice for us to ignore the fact that part of the issues is foreign. As Myanmar resumes its place in the modern world, particularly the world of international commerce, its legal system will accept what all civilised legal systems accept: that sometimes is it necessary to make a special allowance for the fact that some or all of the facts and matters before the court are foreign.

Until the middle of the 20th century, the legal systems which make up common law dealt with the 'foreignness' of a case by developing a set of rules which explained to the court and to the parties whether the court should apply its own domestic law, or the law of another country, to deal with the issue which had come before the court. These were sometimes called rules for 'choice of law', that is, they were rules which directed the court whether to choose and apply its own domestic law or the law of another country. These rules still form a major part of private international law, in Myanmar as well as the rest of the common law world, and in this book we look at the most important of them in Chapters 4 to 8.

But in recent decades, the common law has come to accept that if a defendant is unwilling to face trial in the court in which the plaintiff has instituted proceedings against him, he ought to be entitled to explain to the court why it would be more appropriate for the claim against him to be brought before the courts of a foreign country. After all, if the plaintiff wishes the case to be heard in Myanmar, but the defendant wishes it to be heard in a court outside Myanmar, why should the plaintiff always be the one who gets what he wants ? It is now widely accepted that equality and the rule of law mean that the defendant should be able to argue that the court of a foreign country is the proper place for the suit, and that the court should be able, if it agrees with him, to terminate the proceedings there and then. This solution to the problem is not directly concerned with choice of law, but with the choice of jurisdictions, and in this book we look at these rules in Chapter 2. Although there is little sign that Myanmar private international law has developed rules to deal with the conflict of jurisdictions, it is obvious that it will need to do so, and fast.

And of course, if a foreign court has already given a judgment which relates to the issues which are before the Myanmar court, it is necessary to decide what account should be taken of the foreign judgment, or even to ask if the foreign judgment may be enforced in Myanmar. On this important issue the answer is found in the Civil Procedure Code. In this book we look at these rules in Chapter 3.

Once upon a time this subject used to be called 'The Conflict of Laws', because the main concern was whether the law of one country or another should be applied by the court. But today, although we are still concerned with the conflict of laws, we are also concerned with the conflict of jurisdictions and with the conflict of judgments. It therefore makes more sense to call our subject 'Private International Law', and to call all of these rules, as they apply in Myanmar and in Myanmar courts, as 'The Private International Law of Myanmar'. And that is the reason why this book has the title which it bears.

(2) *Private* law rather than public law

Some readers may assume that 'international' in the expression 'private international law' refers to what is usually described as 'public international law', or the law or laws which regulate relations between states, the laws of war and of peace, the international laws of the sea and of the environment, the laws which deal with the sovereigns, governments, and diplomats.[1] They would be wrong. It is rarely necessary to deal with any issues of public international law when analysing issues of private international law, and vice versa, and the instances in which rules of public international law have an impact on a private law dispute can be dealt with where they arise.[2] To illustrate the fact that this book is concerned with private, but not with public, law, the contents of the book may be described as follows.

As a starting point, Chapter 4 will deal with the general techniques of private international law. Then Chapter 5 will deal with contracts, made between individuals, or between companies, or between individuals and companies. It will therefore also deal with valid contracts, broken contracts, voidable contracts, void contracts, contracts which have been breached, or frustrated; and with the cases in which the parties do not agree on whether there was a contract in the first place. But where special laws apply to contracts made with states and agencies of the state, they are outside the scope of this book. As commerce, including international commerce, starts to grow in Myanmar, there will be many cases in which a contract gives rise to a dispute between the parties to it. The question whether a Myanmar court will or should adjudicate a contract dispute brought before it will be examined in Chapter 2; but if it does adjudicate, the rules which tell it whether to apply the domestic law of Myanmar, or the Myanmar rules of private international law (which may direct the court to the rules of a foreign legal system) are examined in Chapter 5.

Chapter 6 will deal with torts involving individuals and companies, but it will not address torts or allegations of wrongs committed by states. It will deal with torts and with allegations of tort, and it will need to deal with the particular problems which arise when the elements of an alleged tort are not all concentrated in a single place. It is easy enough to deal with a tort which takes place in a single country. But suppose a claim is made against a pharmaceutical company which designed a drug in country A, manufactured it is country B, tested it in country C, sold it to a company in country D which sold it over the internet to a purchaser in country E who used it when he was in country F, where it injured him. Such cases are always difficult, and we will have to see how a sensible answer can be found.

Chapter 7 will deal with issues of property, which really means questions of title to property. There are many kinds of property: immoveable (land) and moveable. Moveable property divides into tangible (things which can be touched) and intangible (property which cannot be touched, such as debts: in modern commercial law, debts are a commodity which can be bought and sold, pledged and charged). Some species of

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[1] *Ramaswamy Iyengar v Velayudhan Chettiar* BLR (1952) SC 25.

[2] It has been held that public international law does not form part of the domestic law of Myanmar as applied by its courts unless and until the government promotes legislation to incorporate a rule of public international law (or an international treaty) into the domestic law of Myanmar: *Kovtunenko v U Law Yone* BLR (1960) SC 51 (a case on sovereign or diplomatic immunity). The position may in fact be more complex than this: in *The King v Maung Hmin* (1946) RLR 1, and *Dr T Chan Taik v Ariff Moosajee Dooply* (1948) BLR 454 it was apparently accepted that principles of international law might be accepted as part of the law of Myanmar if they were consistent with Myanmar law.

property have special rules: negotiable instruments are a good example. But the problems associated with the private international law of intellectual property (patents, copyright, trade marks) have led many states to enter into international conventions to secure rights and protections in a way which ordinary laws probably cannot achieve.

Chapter 8 will deal with the law of companies and corporations formed under private laws like the Companies Act, but it will not explain the special issues which arise in relations with state corporations. It will have to deal with the relationship between the private international laws of contracts and of corporations when, for example, it is argued that a person who acted on behalf of a company in making a contract did not have full authority, or even any authority, to do so. And it will deal with insolvency, at least in outline. For in the modern world, the insolvency of corporations often has effects across national borders. The common law has, in many countries, been modified by a set of rules made by the United Nations Commission on International Trade Law, but these have not yet been adopted in Myanmar.

Chapter 9 will briefly mention other issues of private international law which are not covered in this book. These are really three in number. First, there will no detailed examination of family law, the law of persons, the law of family property and the law of succession. This would be a huge topic, too specialised for a book which is mainly concerned with civil and commercial matters, and more heavily influenced by Myanmar traditional laws than the topics examined here. Second, there will be no treatment of international conventions on particular matters, such as maritime law, or the international transport of goods. This also is rather specialised; and as Myanmar has not subscribed to many of these conventions, they need not be addressed in detail here. Third, there will be no detailed examination of arbitration. There are several reasons for this, but the main one is that the whole point of arbitration is to keep the resolution of disputes as far away from the courts as possible. In a number of cases, parties to a contract do not trust the courts to be expert and impartial, and therefore prefer to select an arbitral tribunal. This book, by contrast, is really concerned with the law as it is applied in courts. Moreover, the law of international arbitration in Myanmar is changing. At the time of writing, a draft Arbitration Law was being considered by the legislative organs of the state, but it was not clear whether or when it was going to be enacted. The law of international arbitration is a very important topic, but it is best examined in its own right by specialists, rather than being squeezed into a small chapter of a book on private international law.

Criminal law is not included; the rules of private international law do not apply to criminal matters. This is so for a number of reasons, but the rule of private international law is that a court does not enforce the penal laws of another country.[3] A state does not, therefore, prosecute a person by applying foreign law, or enforce the penal judgments of another state. The only time that jurisdiction is an issue in a criminal matter is when a person is extradited to another country for a criminal trial, but this is a matter of treaty law with the other state. For all these reasons, penal law is not a part of this subject.

(3) *International*, in the sense that there is at least one non-Myanmar element in the situation before the court

If A makes an agreement to sell his bicycle to B, and both are Myanmar citizens, and the bicycle is to be delivered in Myanmar and paid for in kyats, any dispute which comes

[3] See below, Chapter 4, point (39).

before the Myanmar court will be determined in accordance with the domestic law of Myanmar, which probably means by applying the Contract Act. But if C makes a contract with D, and both are US citizens working temporarily in Myanmar, it is not so obvious that a dispute between them ought to be determined by applying the rules of the (Myanmar) Contract Act. There are several reasons for this, but we may mention three at this point. First, when the Contract Act was enacted, it was intended to operate and apply in situations which were entirely local to Myanmar. If one were to ask whether the enacting authority intended it to apply to disputes between foreigners, the answer is not certain, but may be negative. Second, when two US citizens make a contract with each other, they probably expect the law of the United States to apply to their contract. The point would be even clearer if they were to make the contract in the departure lounge at Yangon Airport. Third, if C and D were to state in their contract that they intended it to be governed by US law, it would be very surprising if a Myanmar court were to ignore this and apply Myanmar law instead. On the assumption that Myanmar law is a common law legal system, it would be contrary to Myanmar's rules of private international law to apply the domestic law of Myanmar to a contract where there had been an agreement between the parties that it should be governed by the law of a foreign country.

What makes the case, or the issue, one which is governed by Myanmar rules of private international law, is the presence of an international, meaning a non-Myanmar, element. The non-Myanmar element may be any one of a number of things: the residence or nationality of one of the parties, the place where the relevant acts were done or not done, the intentions of the parties as to the law which should be applied to the relationship between them, and so on. Any non-Myanmar element will do.

This may sound rather imprecise, and it may suggest that it is easy to prevent the domestic law of Myanmar from applying in a particular case. But that would not be correct. There are three points to be made. First, the rules of Myanmar private international law will, in a significant number of cases, point the court to the domestic law of Myanmar: just because there is an international element in the case, it does not follow that the rules of Myanmar private international law will tell the judge to apply the law of a foreign country. Second, the usual rule in common law systems is that a court has to consider rules of private international law only if one of the parties before the court asks it to. If both parties are content to have their dispute governed by and determined in accordance with the domestic law of Myanmar, they are free to do so: the court will simply apply the domestic law of Myanmar and everyone will be happy. And third, the private international law of Myanmar contains rules which, in various places, direct a Myanmar court to apply the domestic law of Myanmar even though the rules of Myanmar private international law would have told it to do something different. In these cases, the domestic law of Myanmar 'overrides' the answer which would otherwise be given by the rules of private international law.

This is an important practical point. In common law systems around the world, there are cases which come before the courts on a daily basis, in which either party might invite the court to apply its rules of private international law, but in which neither party does. In such a case, a court will apply its own domestic law. If the parties are happy that the court should proceed in this way, there is no good reason for the court to do any differently.

(4) The reasons for sometimes not exercising jurisdiction

We said at the end of the previous paragraph that there are circumstances in which the parties to a dispute before the Myanmar courts may agree - by not doing anything to indicate that they disagree - to have the court decide the dispute before them by the application of domestic Myanmar law. Something very similar is true of the law of jurisdiction.

We will see in Chapter 2 that a very large part of private international law, particularly in the field of commercial relationships, is concerned with the question where a suit should be tried. There are many reasons for this, but in general one may say that the outcome of a commercial dispute is likely to be influenced by the question of where it is dealt with. To take a simple case, if there is a dispute between a Myanmar and a Singapore company, and the Myanmar company wishes to sue the Singapore company because, as it says, the Singapore company has breached its contract, it may start proceedings in the Myanmar courts. Of course, when it does so, the Singapore company may be willing to defend the claim before the Myanmar courts. But the Singapore company may prefer to defend the claim against it in Singapore instead. This may be because it has greater confidence in the Singapore courts, or because it wishes to use Singapore lawyers to defend the claim who are not permitted to practice in Myanmar, or because it is uncomfortable about defending a claim before a court in proceedings which will be conducted in the Myanmar language, or because it considers that the pre-trial procedure which will operate if the case is heard in Singapore will be more beneficial than if the case remains in Myanmar.[4] It may therefore invite the Myanmar court to decide that the jurisdiction which the plaintiff has established should not be exercised, and that the case before it should not be proceeded with.

It is accepted across the common law world - with details which vary a little, but which do not alter the general proposition - that a defendant must be allowed to explain to the court why, as he contends, the court should decline to exercise the jurisdiction which it has and which the plaintiff has invoked. When the plaintiff caused proceedings to be commenced, this will have been his decision, and the defendant will have played no part in it. It is only fair that the defendant, the other party to the dispute, should be allowed to make arguments to the court which support his contention that the interests of justice would be better served by suspending the proceedings commenced before the Myanmar court, and leaving the plaintiff to go instead to another court, to sue the defendant there instead.

If one asks where in the private international law of Myanmar it is provided that the defendant is entitled to do this, the answer appears to be that it has not yet been made clear that the defendant may oppose the exercise of jurisdiction in this way. But three things may be said. First, it is the universal view of courts in common law systems that the defendant is permitted to do this. Second, the Supreme Court of India, which has in its Code of Civil Procedure the same rules of jurisdiction as are found in the Myanmar Civil Procedure Code, has confirmed that as a matter of Indian law, a defendant is permitted to object to the exercise of jurisdiction by pointing to a foreign court in which the ends of justice would be better served.

[4] As will be seen in Chapter 4, point (32), the pre-trial procedure will almost always be governed by the procedural rules of the court in which the trial will eventually take place. This procedure is often very important in allowing a party to get a sense of how strong or weak his opponent's case actually is.

And third, in many modern contracts, the parties will have made a contractual agreement that proceedings may be brought in one country but will not be brought in another: such contract terms tend to be known as jurisdiction agreements, or exclusive jurisdiction agreements (depending on how they are worded). It would be an astonishing thing if a Myanmar court could not give effect to such a contractual agreement. Suppose that in the contract referred to above, between a Myanmar company and a Singapore company, there had been a term which provided that the parties agree that 'all disputes between the parties arising from or in connection with this contract shall be submitted to the exclusive jurisdiction of the courts of Singapore'. If the Myanmar company were to bring proceedings before the Myanmar court, this would appear to breach its contractual promise not to do so, and in those circumstances it is difficult to see why a Myanmar court would allow this to be done. If the Singapore company were therefore to appear before the Myanmar court to object to the exercise of jurisdiction, one would expect the Myanmar court to accept that the objection was a proper one.

But the fact that the parties agreed in advance that proceedings would not be brought in Myanmar is only one of the several reasons why it may not be appropriate for the case to proceed before the Myanmar court. Suppose that the dispute calls for the application of a foreign law, either because that was the law which the parties chose or because the rules of Myanmar private international law point to that conclusion. It may be that in such a case, a trial before a foreign court, which will be applying its own law, will serve the interests of justice more reliably than a trial in Myanmar, with a court attempting (and, possibly, not succeeding very well) to apply the rules of a system of law with which it is not familiar. Suppose that the case is one in which there are many parties involved in the dispute, as may happen when a large and complex contract, such as a construction contract, leads to disputes involving a large number of parties. If a court in one country would be able to hold a single trial, into which all interested parties could be joined, the interests of justice may favour allowing the proceedings to go ahead in that court, even though a part of the overall dispute could be brought before the Myanmar court for trial.

These are only examples of circumstances in which a defendant may be able to persuade a court in Myanmar, in which the plaintiff has commenced proceedings, to conclude that the interests of justice would be better served by halting the Myanmar proceedings and allowing the plaintiff – because the Myanmar court cannot force the plaintiff – to bring proceedings instead before a foreign court. These are all examples of cases in which a Myanmar court could, and perhaps should agree with a defendant who argues that the interests of justice mean that the proceedings in Myanmar should not be continued.

(5) The reasons for sometimes applying a law which is not Myanmar domestic law

We should first remind ourselves that whenever a court in Myanmar accepts that the law of a foreign country should be applied in the case which has come before it, it does so because, and only because, the rules of Myanmar private international law tell it to do so. There is no justification for the argument – which is occasionally heard, but which is completely wrong – that it damages the law or the sovereignty of a country when its courts apply the law of a foreign country. The courts can only do this when their law – in this case their rules of private international law – tell them to. The real question is therefore this: why does the law of Myanmar, which means the private international rules of Myanmar law, sometimes direct a court in Myanmar to apply the law of a foreign country ?

There are several answers to this question. The first answer is that the rules of private international law accept that parties to a contract should be allowed to choose the law which governs their contract, and in almost every case, the interests of justice are best served by giving effect to that choice of law. In England, if parties to a contract choose the law of Myanmar to govern it, an English court will apply (or will try to apply) the law of Myanmar to determine the rights and duties of the parties. After all, if the parties are entitled to choose the terms of the contract, they should be able to choose this one as well. In those cases in which the right to choose the law is less obviously genuine, such as where one party is a consumer, or young, or illiterate or blind, and the so-called choice of law has really been imposed on him, a court will be able to disregard an apparent choice which was not really genuine. But in principle, where the parties have chosen the law to govern their relationship, it is difficult to see why a system of private international law would not give effect to it.

In other cases, the application of foreign law will correspond to the expectations of the parties. For example, most people naturally assume, when overseas, that if they act in a way which may amount to a wrong, the law which will determine whether they owe liability (and if so, for what) to another will be the law of the place where they did the thing complained of. Most systems of private international law look to the law of the place of commission of the tort to determine any liability which may arise. In such a case, the application of foreign law is justified because it reflects what reasonable people probably expect the law to be.

When it comes to dealing with questions of property law, the natural assumption is that issues will be answered by applying the law of the place where the property was. The argument is at its strongest in the case of land: if a court were ever to determine the ownership of land in India, the only sensible way to proceed would be to do so by applying Indian law. In fact, as we shall see, the common law has generally held that the claim of Indian law to apply in such a case is so strong that a court outside India should not determine the question for itself, but should leave the matter to the Indian courts to determine. But this just goes to show the strength of the principle that title to land should be determined by the law of the place where the land it.

Most people will also assume that questions of ownership of moveable property should be answered by the application of the law of the place where the thing was when it was deal with. For example, if I buy a watch at a street market in Thailand, the question whether I became owner of the watch (or did not become owner, because, for example, I bought it from a thief) will be answered by Thai law. The rule that our courts refer the question to the law of the place where the thing was when it was sold reflects what most people would naturally think, and as a result it contributes to commercial certainty. An English tourist in Myanmar will naturally assume that if he buys something in Myanmar, or finds something which appears to have been lost by its owner, the law which will tell him whether he became owner, by purchase or by finding, will be the domestic law of Myanmar.

As may be seen from this brief introduction, there are many circumstances in which the private international law rules of Myanmar, which are really the private international law rules of the common law, can be explained and justified on grounds which are simple and clear, and which probably reflect what ordinary people would expect the answers to be if they were to think about it. If a court in Myanmar, applying its rules of private

international law, applies the law of a foreign country to answer a particular question, it is very likely that, in doing so, it is giving effect to the natural assumptions of reasonable people. This, generally speaking, is the justification for the rules of private international law, not only in Myanmar but across the world.

Of course, there are some situations in which the law of Myanmar will be applied, even though the private international law rules of Myanmar would have told the court that is should apply the law of a foreign country. For example, suppose a contract is made with a Chinese company to sell to it a quantity of teak, or precious stones, and that the parties agree that the contract is to be governed by Chinese law. Suppose that Chinese law considers that the contract is valid and binding on the parties, and must be performed by each party, but that as a matter of Myanmar law the contract is an illegal contract, because the seller did not obtain the necessary licence or permission to sell the goods. In any litigation before the Myanmar court, it would be concluded that the contract was not enforceable. Even though the private international law of Myanmar generally permits parties to choose the law to govern their contract, it will not allow them to do so in circumstances in which a contract would be illegal as a matter of Myanmar domestic law. This is a situation in which the domestic law of Myanmar overrides the rule of private international law which would otherwise have been applied.

There will be several areas in which a rule of Myanmar law – almost always a rule of Myanmar statute law – overrides or displaces the law which would be identified by the private international law rules of Myanmar law. There will be other cases in which the application of a rule of foreign law, to which the court has been pointed by its rules of private international law, would be offensive to the fundamental legal policy of Myanmar law. This is sometimes described as 'public policy', but the label which is given to it is less important than the rule which is being described. Suppose a Myanmar person is employed by a Korean company which is doing construction work in Myanmar, and that he has a contract of employment which states that it is governed by Korean law. Suppose the contract also states that if the employee may be deprived of his wages for the whole of any month in which he is absent from work for more than a single day. If an employee is absent from work for two days, and the company refuses to pay his wage, and he brings a claim against the company in the Myanmar courts, there would be three steps in the analysis. The starting point would be that the employee's claim would be governed by Korean law, on the basis that the contract which the parties made chose Korean law to govern all their rights and duties. The court would ask whether the deduction provision in the contract of employment was lawful according to the law of Korean law. If the answer is that it is valid and lawful as a matter of Korean law, the court will apply Korean law and dismiss the claim unless it considers that the application of this rule of Korean law is so contrary to the public policy of Myanmar that it would be offensive to Myanmar law to apply it. If it concluded that the rule of Korean law, which treated the contract term as valid, was really, really objectionable, it could refuse to apply it, and could refuse to reach the conclusion which this rule would have pointed it to.[5]

As we shall see, the question whether a court in Myanmar will apply a rule of foreign law is answered by a set of rules of Myanmar private international law. These sometimes

5 Of course, in the light of Section 74 of the Contract Act, it may be difficult to argue that the rule of Korean law is so offensive that a Myanmar court should refuse to apply it as part of the law which governs the contract. But the general point is still sound.

point in different directions, and one of the things which this book will do is to show how they are kept in balance.

(6) The reasons for sometimes giving effect to foreign judgments

The only judgments which are binding, and which must be obeyed in Myanmar, are the judgments of Myanmar courts. This is obvious. The adjudication of disputes is a matter of sovereign power, and the orders and judgments of a foreign judge have no force in Myanmar: Section 2(5) of the Civil Procedure Code makes it clear. The Myanmar Constitution, and the Judiciary Law, will specify how judges are appointed, and who may be appointed. It is these judges, and only these judges, whose judgments are effective in Myanmar. The same rule will be found (with only slight differences of detail) in the laws of all other states.

However, there are courts in almost all the countries of the world, and it would not be sensible for Myanmar law to completely ignore them and their judgments. There is a clear public interest in accepting that once a dispute has been heard and adjudicated, the dispute between the parties should be at an end. Otherwise, if the losing party could try again, perhaps before the courts of a different country, there would be no end to litigation: the parties would never know where they stood, and the only people who would be made rich would be the lawyers. That would make no sense.

As a result, all systems of private international law, including that of Myanmar, have rules to determine the circumstances in which the judgment of a foreign court may be treated by a court in Myanmar as having finally settled the matter which was in dispute before it. That serves to bring disputes to an end, to allow those who are entitled to compensation to gain it and not risk losing it again, and to allow those who are found not to be at fault to know that they will not be troubled again. It lets everyone get back to work.

The effects of a foreign judgment in Myanmar may be two in number. First, a court in Myanmar may 'recognise' a foreign judgment as settling the issues which have arisen between the parties. Recognition involves treating the issues which were decided by the foreign court as having been settled, with the consequence that if one of the parties to that dispute asks a court in Myanmar to try the case again, the Myanmar court will simply say that the issue has already been decided: in the Latin expression which is understood the world over,[6] that the issues are *res judicata*: something which has already been adjudicated on. But if the foreign judgment ordered the defendant to pay money to the plaintiff, and the defendant has not yet satisfied the judgment, it is possible to bring proceedings before a court in Myanmar to obtain an order that this sum of money be paid, just as any other debt should be paid. We call this 'enforcing' the foreign judgment.

The next question is which foreign judgments may have this effect in Myanmar. The answer is provided by Sections 13 and 14 of the Civil Procedure Code, which is a very fine piece of legislation. We will examine it in detail in Chapter 3, but it sets out, clearly, the basis for the law of foreign judgments and their effect in the private international law of Myanmar. Almost all foreign countries have rules by which they give effect to foreign judgments, but the laws of these countries are very divergent. Very few countries, apart from Myanmar and India, have legislation on this question which is as clear and helpful as Sections 13 and 14 of the Civil Procedure Code are.

[6] And in Part I of the Civil Procedure Code.

(7) The sources of Myanmar's private international law

The law on foreign judgments is almost the only part of the private international law of Myanmar which is stated in clear form in Myanmar legislation. We will also see that on the law of jurisdiction, examined in Chapter 2, there are some rules - but which are very incomplete - of private international law in the Civil Procedure Code; and some parts of the private international law of companies, which we examine in Chapter 8, are dealt with in the Companies Act (now under reconsideration and review). But in other respects, little of the private international law of Myanmar is to be found in the written laws of Myanmar.

If that is so, where is the private international law of Myanmar to be found ?

(a) General approach to sources

The Myanmar Code does contain some provisions which are rules of private international law, even though that Code does not have a statute setting out the rules of private international law in a complete and comprehensive form. Perhaps one day in the future the Union government will decide that there should be codification of the rules of private international law as these apply in the courts of Myanmar, but until that happens, the existing rules must be found by other means.

Where the rules of private international law are found in the Civil Procedure Code, the contents of that Code are substantially the same as those in the Indian Code of Civil Procedure. Where the meaning of those provisions has been examined by the judgments of Indian courts, those judgments may assist in the explanation of the corresponding provisions of Myanmar law. Some assistance may be found from the main Indian textbook on the subject.[7]

Where the rules of private international law are not found in or based on the legislative provisions of the Myanmar Code, they will be found in, or will be derived from, the general principles of the common law, as these are understood in the principal jurisdictions of the common law, especially England and India. We say this for the following reasons. In a couple of cases decided after independence,[8] the Myanmar courts confirmed, in effect, that the common law rules of private international law were part of Myanmar law. In 1952, the Supreme Court expressed the view that the rules which identified the law to govern a contract of agency were the rules of private international law of the English common law.[9] And in 1961, the High Court approved several rules of the common law relating to foreign laws and their effect on land in Myanmar, appearing to accept that these applied in Myanmar just as they would in, say, England.[10]

So far as the previous decisions of courts are concerned, the question whether a court is Myanmar is obliged to follow earlier decisions of courts, whether from before or after independence is not considered in this book. Neither do we consider whether (or when)

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[7] Atul M Setalvad, *The Conflict of Laws*, (LexisNexis, Delhi, 2007).

[8] In the years before independence it was more common for judges to make express reference to English law, including English private international law: see, for example, *VERMNCT Chettyar v ARARRM Chettyar Firm* (1934) ILR 12 Ran 370.

[9] *Ramaswamy Iyengar v Velayudhan Chettiar* BLR (1952) SC 25.

[10] *State Bank of India v Collector of Rangoon* BLR (1961) HC 336.

it would be proper to refer a court in Myanmar to the decisions of a court outside Myanmar. These are important issues, but they are part of the law regulating the legal system and the judiciary; they are not matters of private international law. We have referred to pre-independence and to foreign judicial decisions to help the reader understand the way in which the legal issues might be evaluated in Myanmar today.

The Union Attorney General recently stated that Myanmar law was part of the family of the common law, and that the legal maxims and principles of that law are part of Myanmar law.[11] Although he did not have private international law specifically in mind, the approach of the Attorney General is entirely consistent with the view which we advance in this book. Where there appear to be gaps in the law as already understood, they are gaps which the common law is well designed to fill. We now explain the legal basis on which this filling of gaps is based.

(b) Justice, equity and good conscience

One may start by referring to a judgment of the Chief Court,[12] in which the Court had been pressed with the argument that where the written laws of Myanmar did not make express provision for the relief applied for, there was nothing the court could do: its hands were tied. In a splendid passage which is so important that it deserves to be set out in full and committed to memory, the Court said:

'The Act may not be exhaustive, and a particular point not specifically dealt with must be governed upon general principles. It is not necessary that every order of a Court should be supported by a specific statutory provision, and where there is neither provision nor prohibition it has to be guided by ordinary principles of common sense, justice, equity and good conscience. Since the laws are general rules, they cannot regulate for all time to come so as to make express provisions against all the cases that may possibly happen. The inherent power of the Court to act *ex debito justitiae*[13] is expressly recognised in Section 151[14] of the Code of Civil Procedure.'

This general observation may not, by itself, justify every single detail of the statement of Myanmar's private international law as it is set out in this book. But the reference to 'justice, equity and good conscience is a reference to Myanmar Laws Act,[15] section 13(3) of which provides that:

> **13. Law to be administered in certain cases… (3)** In cases not provided for by sub-section (1),[16] or by any other enactment for the time being in force, the decision shall be in accordance with justice, equity and good conscience.

[11] The speech of Dr Tun Shin was reported in *The New Light of Myanmar*, Vol 20, No 296, 10 February 2013.
[12] *Steel Bros & Co Ltd v YA Ganny Sons* BLR (1965) CC 449. The passage quoted is at p 463.
[13] Translated: 'as a duty arising from the justice of the matter'.
[14] Section 151 is set out in Chapter 2, under point (15), below.
[15] Of course, the Act was originally made as the Burma Laws Act, appearing in Volume 1 of what was originally the Burma Code. We have replaced references to 'Burma' with 'Myanmar' throughout, even though this creates a difference between the published version of the legislation and the present-day designation of it. We hope that it does not cause confusion.
[16] Which is concerned with certain issues of succession.

It was observed by a former Chief Justice that Section 13(3) has a lot of work to do in Myanmar law, and that it served as the basis for the law of torts not otherwise provided for by enactment.[17] However, the issues which arise in private international law are, especially in the 21st century, too complex for the very general language of Section 13(3) to provide a wholly satisfactory answer to the many particular questions which may arise. The view which we have taken, therefore, is that the rules which a Myanmar court would follow, when deciding in accordance with 'justice, equity and good conscience' are, in general, those of the English common law. The Indian courts, which have or had a similar rule, have relied on the 'justice, equity and good conscience' provision to incorporate into their private international law rules taken from the English common law rules of private international law.[18] Certainly, once such a rule has been taken up and given effect in Myanmar in accordance with Section 13(3), that rule will be established as part of the private international law of Myanmar. As we see it, a court in Myanmar would be entitled to use the 'justice, equity and good conscience' clause of the Myanmar Laws Act to declare the private international law of Myanmar in the way which we seek to describe it. This, therefore, is the approach we have taken in this book, making reference to material from other common law systems where we judge that will help us to explain the private international law of Myanmar. As Myanmar inherited its laws from a common law, or Anglo-Indian, legal tradition, and has not legislated since independence in the field of private international law, we proceed on the basis that the common law principles of private international law are, for good or ill, part of the inheritance of laws, and that they form the basis for the answers which a court in Myanmar, or legal advisers in Myanmar, may be called upon to give in the years before a more radical reform is undertaken.

There are rather few reported cases from the courts of Myanmar which have applied principles of private international law.[19] We have identified all those of which we were aware. Most are rather old, and even if they were correct at the time they were decided, the law moves on as societies change and develop. As Myanmar re-connects with the modern world of business, commerce, and law, issues of private international law are bound to come before the Union Supreme Court and before the High Courts of Divisions. It is important that courts are ready for this when it happens. There are lawyers in other countries who will seek to entice companies and individuals from Myanmar to litigate in these overseas courts, so making an enormous profit for themselves, at the expense of Myanmar and of those who do business there. It is understandable, if regrettable, that some will accept this invitation, perhaps because they consider the courts of Myanmar to lack the commercial experience which is to be found in other places. Some people may lack confidence in the abilities of the courts of

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[17] *Kovtunenko v U Law Yone* BLR (1960) SC 51. It was also used to extend or apply the Carriage of Goods by Sea Act, which is expressed to apply to shipments out of a Myanmar port, to a case involving shipment *to* a Myanmar port: *China-Siam Line v Nay Yi Yi Stores* BLR (1954) HC 270.

[18] See *Govindan Nair v Achutha Menon* (1915) 2 LW 290 (Mad). For a comprehensive analysis of 'justice, equity and good conscience' as it has been understood in Indian law, see JMD Derrett, *Justice, Equity and Good Conscience in India* (1962) 64 Bombay Law Reporter, 129. The paper was republished by the author in Derrett, *Essays in Classical and Modern Hindu Law*, Vol 4, pages 8-26 (Brill, Leiden, 1978),

[19] We leave aside matters of marriage and succession, for which there are also some cases, and in which context Section 13(3) has been used as the basis for the applicable rule of private international law applied by the court: see for example *Ma Khin Mya v Maung Sit Han* (1937) RLR 103.

Myanmar; some people may worry that the law of Myanmar, including the private international law of Myanmar, is not clear.

This is, as we see it, a serious concern. It will damage the sovereignty of Myanmar if those who do business in Myanmar are not willing or able to settle their disputes before the courts of Myanmar; the idea that Myanmar business should have to be dealt with by foreign courts, tribunals, and lawyers is not satisfactory. It is therefore necessary for all those who can to play a part in improving the clarity and completeness of the laws of Myanmar, and for all those in legal practice, to develop the law of Myanmar to the point where it is natural for Myanmar business to be sorted out in Myanmar courts, and not by foreigners, in foreign courts and tribunals. This book seeks to take a modest step in that direction.

We have therefore tried to set out the principles as we understand them, and to discuss and analyse them to the extent that this seems helpful. At the end of the book we summarise the existing principles, as we understand them, in the form of a Statement or Restatement: the correct term is a matter of personal preference.

(8) International conventions on matters of private international law

Even in countries with a highly developed system of private international law, it is understood that there are some things which cannot be achieved by national legal systems alone. In recent years there has been an awareness that some legal developments, which are really needed, can only be achieved by international convention. A couple of specific examples will make the general point.

In international commercial arbitration, there has been a remarkable international consensus that courts should respect and enforce arbitration agreements. This means in particular. First, courts should not allow a plaintiff to bring legal proceedings in respect of a dispute which he has agreed to settle by arbitration; and second, courts should be willing to accept without review, and to enforce if called upon to do so, an award[20] made by an arbitral tribunal. Of course, if there is a dispute before the court on the question whether the parties did agree to arbitration, a court will have to form some kind or preliminary view, but it ought to allow the arbitrators to decide for themselves whether the parties agreed to proceed to arbitration. If there is a genuine dispute about the arbitrators' award, a court may have to reach a conclusion whether to accept the award as conclusive; but in each case, there is a strong interest in leaving the arbitrators to conduct the arbitration, and for the courts to keep clear.

It was not clear that this policy could be found in every country's law, but the terms of an international convention to provide clear and uniform rules for these issues, settled at New York in 1958, has now been signed by 150 countries. Myanmar signed and ratified the New York Convention in 2013, and legislation to translate the Convention into the

[20] The term 'award' is used to refer to the decisions of an arbitral tribunal; the terms 'judgment' and 'decree' ('decree' is used by Civil Procedure Code, Section 2(2) to refer to the formal part of the judgment of a court in Myanmar) are used to refer to the decisions of a court; and 'foreign judgment' is used to refer to the judgment of a foreign court (Civil Procedure Code, Section 2(6)).

domestic and private international law of Myanmar was under consideration at the time of writing this book.[21]

International conventions have been made in other important areas of commercial life. Conventions providing for the arrest of sea-going ships have been signed by a large number of states which take part in the carriage of goods by sea. A Convention made under the auspices of the United Nations was made to simplify and smooth out the problems created by a cross-border insolvency. When a large bank, or other company, goes into insolvency, there may be assets, and creditors, all across the world. If each separate jurisdiction were to deal with the insolvency all by itself, in isolation from other states dealing with portions of the same larger problem, it would mean that there was a duplication of effort, and that assets, which should be paid to the creditors, are absorbed in professional fees. The UNCITRAL Model Law on Cross-Border Insolvency[22] provides a uniform law which reduces the risk of conflicting and unnecessary legal proceedings. Myanmar, however, has not signed up to these agreements. Perhaps there was little need to when the state was rather closed to the outside world, but as it has opened up it seems inevitable that this will need to be reconsidered.

There are also regional treaties. In Europe, in particular, there are conventions which provide uniform rules to regulate and harmonise the jurisdiction of courts, the recognition and enforcement of judgments from other European states, and even the rules for choice of law. The issues which we examine from the perspective of Myanmar law in Chapters 2 to 8 are, in Europe, covered by European agreements. Occasional suggestions that ASEAN should embark on a similar harmonisation of laws have not been taken up.

(9) Family law and the laws of family property

This book does not examine, in any detail, the laws of the family and the laws of family property, including succession.[23]

The reasons are practical ones, because questions of family law and succession law do arise in cases with international elements. But the Myanmar Laws Act of 1898 provides for the application of Buddhist law, or Muhammadan law, or Hindu law (as the case may be) when a court in Myanmar has to decide any question regarding succession, inheritance, marriage or caste. The relationship between this provision and the ordinary rules of private international law as they apply to family law and to the law of family property, including succession, is difficult, and it is not examined in this book beyond the short summary in Chapter 9.

(10) Arbitration

This book does not examine, in any detail, the law and procedure of arbitration.[24]

In many countries, and in most law schools, the law of commercial arbitration is studied separately from the law of civil procedure; and the law of international commercial

[21] The legislation is expected also to incorporate into Myanmar law the substance of the UNCITRAL Model Law on International Commercial Arbitration (1985; amended in 2006).
[22] Made on 30th May 1997.
[23] See Maung Maung, *Law and Custom in Burma and the Burmese Family* (Springer, Dordrecht, 1963).
[24] See Moser, *Arbitration in Asia* (2nd edn, 2008), Part L (Myanmar).

arbitration is studied separately from private international law. There are good reasons for this, but the practical consequence is that arbitration is not included in this book. It is, however, sensible to give some indication of the reasons which underlie this conclusion.

Judicial adjudication before a court is (more or less) done in public. The rules of law which apply are the rules of law which apply in the court in which the litigation takes place. There is little opportunity for the parties to devise their own procedures for dealing with a case which will be heard in the courts. They cannot expect their judge to be familiar with the particular trade or commercial activity which has given rise to the dispute. They cannot ask or expect the judge to deal with the case by applying a set of rules which is not the law of a particular country, whether Myanmar or a foreign country: they cannot ask the judgment to adjudicate by applying the principles of 'fair dealing and good faith', for example. The litigants have little control over the timetable which the case will follow.[25] A litigant who wishes to be represented by a lawyer qualified and admitted in another country, but not admitted to practice in Myanmar, will not be able to be represented by counsel of his choice.

By contrast, the resolution of disputes before an arbitral tribunal is (more or less) done in private. The rules of law are those which apply to the tribunal in question, but most arbitral tribunals allow the parties to the arbitration to devise and follow their own procedural rules and timetables: at any rate, the parties have a freedom which a court will not extend to them. The parties may expect their arbitrators to have expertise in the area in which the dispute has arisen: indeed, each side will appoint its arbitrator on the basis that he or she has the expertise which that party is relying on. The parties can - subject to the overall control of the law in force at the place which is the 'seat' of the arbitration - ask the arbitrators to settle the dispute by applying something other than the rules of law which would apply in a court: the can ask the arbitrator, for example, to resolve the case by the application of the principles of good faith. The parties have substantial control over the timetable which will be followed; and in principle each party may instruct and be represented by the lawyer of his choice. Whereas a court will be bound to apply the law to the facts in an objective way, an arbitral tribunal may, perfectly legitimately, be more concerned to find a resolution which is fair but less technical.

All this helps to explain why dispute resolution by arbitration is very different from dispute resolution before the courts of Myanmar. Arbitration is, certainly, a very important component of international trade and commerce, and in countries in which there is not (or not yet) great confidence in the quality of the courts, of which Myanmar is probably one, arbitration may be an attractive option for the resolution of disputes. But arbitration is very different from what goes on in courts. In universities it is often taught by people who are expert in arbitration but who know rather less about what takes place in a court; private international law tends to be taught by people who understand what goes on in courts but who have no necessary first-hand knowledge of arbitration.

Myanmar will soon have a new Arbitration Act to replace the Arbitration Act 1944. This new Act will have a focus on international arbitration, rather than on the domestic arbitration which is the main focus of the 1944 Act. It should provide for the initial stages of arbitration, for the duty of courts to enforce agreements to arbitrate when one

[25] And this, in a judicial system which is slow and creaky, may be a real problem, particularly in cases in which an urgent decision, even a provisional one, is required.

party fails to comply with it, for the supervision and assistance of arbitration by the court, for the recognition and enforcement of awards made by tribunals in Myanmar, and for the recognition and enforcement by tribunals outside Myanmar. It may well make arbitration more attractive to those who agree to have their disputes resolved in this way. But for all the cases in which this agreement is not present and disputes are resolved before the courts, and for all disputes which proceed to an arbitration in which the tribunal is called upon to apply the laws of Myanmar, including its rules of private international law, the rules examined in this book will apply.

CHAPTER 2

JURISDICTION: EXISTENCE, EXERCISE, AND NON-EXERCISE

In this Chapter we examine the rules which define the jurisdiction of a court in Myanmar, which are a mixture of written law and unwritten law. We also examine the circumstances in which a court may properly decline to exercise the jurisdiction which it has. Our concern is with the international jurisdiction of the courts of Myanmar: does Myanmar have jurisdiction or will the matter be left to the courts of another country ? We do not address the question whether, within Myanmar, the courts of one Division or another have jurisdiction, or whether the Supreme Court or other Court has original jurisdiction, for this is a matter of national law rather than private international law.

(11) The legal basis for jurisdiction over a defendant who is an individual

Before considering the basis for jurisdiction over a defendant, it is necessary to note that the only persons who, as plaintiffs, are prevented from bringing proceedings before a Myanmar court are alien enemies. Apart from them, the nationality of the plaintiff is irrelevant. According to Section 83 of the Civil Procedure Code:

> **83. When aliens may sue (1)** Alien enemies residing in the Union of Myanmar with the permission of the President of the Union, and alien friends, may sue in the Courts of the Union of Myanmar as if they were citizens of the Union…

It is not therefore necessary to say any more about the identity or characteristics of the plaintiff: Myanmar is not at war with any state, and all foreigners are therefore alien friends. The remainder of this point, and of those immediately following, is concerned with the position of a defendant. For the law of Myanmar, as with almost all other laws, places limits on those who may be sued in its courts. In some cases these limits are defined by reference to the personal characteristics of the defendant; in other cases these limits are defined by reference to the nature of the claim made.

The jurisdiction of a court in Myanmar over a defendant is defined by statute. This makes Myanmar different from many common law jurisdictions. In England, Australia, Canada and the United States, by contrast, the rule of jurisdiction is that if a defendant is present in the territory of the state, the court has jurisdiction over him if he is served with the writ of summons: the physical presence of the defendant is all that is needed to give the court jurisdiction over him.

But in Myanmar it is completely different. The jurisdiction of a Myanmar court over a defendant is set out in Civil Procedure Code, Sections 16 to 20. Sections 16 to 18 are concerned with claims concerning land, and do not need to be studied in detail at this point.[26] Sections 19 and 20 are the central provisions, and they state as follows:

> **19**. **Suits for compensation for wrongs to person or moveables**. Where a suit for compensation for wrong done to the person or to moveable property, if the wrong was done within the local limits of the jurisdiction of one court, and the

[26] They are examined below: Chapter 7, point (62).

defendant resides, or carries on business, or personally works for gain within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of the said courts.

20. Other suits to be instituted where defendants reside or cause of action arises. Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction -

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually works and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) a cause of action, wholly or in part, arises.

The rules set out in Sections 19 and 20 were designed to answer the question of which court, or which Division, in Myanmar is to have judicial jurisdiction.[27] This can be seen from the Illustrations to Section 19 of the Civil Procedure Code: the first of which explains that if A resides in Mandalay and beats B in Rangoon, B may sue A either in Rangoon or in Mandalay. In other words, these jurisdictional rules were made to deal with cases which were wholly internal to Myanmar. They were not designed or drafted to apply to cases which have a connection to a country outside Myanmar.

However, the Indian courts, whose jurisdictional rules are practically identical, have shown that these rules apply to cover international as well as purely internal cases; and it is clear that a Myanmar court would do likewise. These rules therefore tell us whether a court in Myanmar has jurisdiction over a defendant who is not in Myanmar as well as dealing with the case in which the defendant is in Myanmar; but the fact that the rules are being adapted for 'international cases' may mean that they are slightly modified in effect where there is an international element to the facts.

The result is that proceedings may be commenced against a defendant in a court in four categories of case, which we examine as (a) to (d) below. A further case, (e), examines the important question whether a Myanmar court may have jurisdiction over a defendant in one case not set out in the legislation. If the court has jurisdiction according to these rules, the fact that the defendant is out of Myanmar is irrelevant: the jurisdiction of the court is unaffected.[28]

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[27] For example, *Shantilal Surajmal Mehta v Mariam Bibi* BLR (1960) HC 359, and *State Commercial Bank v Thibaw Commercial Syndicate Ltd* BLR (1966) CC 1131, were concerned with the question whether the High Court or Chief Court had original jurisdiction in a matter in which the cause of action had arisen partly within the jurisdiction of the Court, and in relation to which Union Judiciary Act 1948, Section 15, imposed a requirement that the leave of the Court be obtained before jurisdiction could be taken. In holding that where leave had been required but had not been sought the Court had no jurisdiction the Court was answering a question of internal, not international jurisdiction.

[28] *Cooverjee Ladha v Suleman Ismail & Co* (1903-4) 2 LBR 47; see also *Mohamed Khan v Damayanthi Parekh* BLR (1952) HC 356 (which considered this obviously correct conclusion to be reinforced by then Union Judiciary Act, s 15).

(a) Jurisdiction in cases concerning land established by reference to where the land is

In the first category of cases, the jurisdiction of the Myanmar courts over claims which concern land is determined by focusing on the land with which the claim is concerned. As a result of Sections 16 to 18, proceedings may be brought in Myanmar if the claim concerns the recovery of land, or the enforcement of other rights in relation to land, if the land is situated in Myanmar. But if the claim concerns land which is not situated in Myanmar, but the relief sought against the defendant may be obtained by his personal obedience to the order of the court, proceedings may be brought against him in Myanmar if Myanmar is where the defendant actually and voluntarily resides, or carries on business, or works for gain, or where the cause of action arose in part.[29]

It is almost universally agreed that claims which have at their heart a question of the right to land should be tried, and should only be tried, where the land is situated. If the land which is the subject of the dispute is in Myanmar, the court should find that it has jurisdiction over the defendant in relation to the claim, even if he is not in Myanmar. On the other hand, if the land is outside Myanmar, a court in Myanmar should consider that it does not have jurisdiction over the defendant in relation to the claim. By way of exception to this, if the court is not asked to determine title to land but, for example, to order a defendant to do something, such as pay money or perform his contractual duty to convey title to land which he contracted to sell, the relief will be something which may be 'obtained through his personal obedience', as is said in the proviso to Section 16,[30] a court will not be prevented from exercising jurisdiction.[31]

(b) Jurisdiction established by reference to the personal circumstances of the defendant

In the second category of case, the jurisdiction of the Myanmar courts is established by focusing on the defendant. As a result of Section 20(a), a defendant may be sued in Myanmar if Myanmar is where he actually and voluntarily resides, or if Myanmar is where he carries on business, or if Myanmar is where he personally works for gain.

The meanings of these terms are reasonably clear. As to 'resides', a possible point of departure is that a person resides where he normally eats, drinks, and sleeps,[32] but especially today there will be cases which are not so easy to deal with as this homely suggestion would indicate. A person may certainly reside in two places, so a person may be found to reside in Myanmar even though he also resides in another country. His connection to Myanmar must be more than as a transient in the country. A person who is on holiday for a month in Myanmar probably does not count as being resident in Myanmar, but if he is staying in Myanmar for a period while he studies or works in the country, it is possible to say that he resides there for the period during which he is in the

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[29] That is, if there is personal jurisdiction under Section 20 of the Civil Procedure Code: *Ayesha Bee v Gulam Husein Suleman Aboo* (1921-22) 11 LBR 188. For further analysis of this point, see Chapter 7 in general, and *State Bank of India v Collector of Rangoon* BLR (1961) HC 336 in particular.

[30] However, a claim to enforce a mortgage by sale of the mortgaged land, which proceedings allow the borrower to pay up and redeem, is not within this principle, because the right enforced is that of the mortgagee to sell the land, not that of the mortgagee to be repaid by the borrower, even if this is in some sense ancillary to the claim: *VERMNCT Chettyar v ARARRM Chettyar* (1934) ILR 12 Ran 178. It must therefore be brought where the land is.

[31] Cf *State Bank of India v Collector of Rangoon* BLR (1961) HC 336.

[32] *Re Ramnira Jan Lhila v Daw Than* BLR (1966) CC 763 (appeal dismissed: BLR (1968) CC 67).

country. The decision of a Myanmar court[33] that a person is resident in the place in which he is imprisoned, on the ground that he must be taken to be there voluntarily as any intention to escape would be an unlawful intention, seems to stretch the law perhaps further than it will really go. A Myanmar student, who leaves the country to study overseas, may still be found to be resident in Myanmar, for Myanmar remains his home, to which he will return. But a longer absence, or one which is not of fixed purpose of duration, may mean that the person is no longer resident in Myanmar.

A person may also be sued where he carries on business or works for gain. It is not a requirement that the claim arise out of the business carried on, or work done, at that place: as long as the person carries on business in Myanmar, or works in Myanmar for gain, he is liable to be sued there just as clearly as if he were resident in Myanmar.

(c) Jurisdiction established by reference to the personal circumstances of a co-defendant

In the third category of case, the jurisdiction of the Myanmar courts is established by focusing not on the defendant, but upon the person who is to be sued with him, that is, on a co-defendant. As a result of Section 20(b), if a co-defendant is liable to be sued in Myanmar and the defendant agrees to be sued in Myanmar as well, the court will have jurisdiction over him. But if the defendant does not agree to be sued alongside the co-defendant, and is not otherwise subject to the jurisdiction of the court, the court will have jurisdiction if it decides to give the plaintiff permission to sue the defendant there.

This rule makes a lot of sense. If there is a claim against several defendants, and one of them is subject to the jurisdiction of the Myanmar courts, it is obviously sensible that the claim against all defendants be heard and disposed of in a single proceeding by which all will be bound. For it would be very unsatisfactory if a court were to hear a claim against one defendant, while another court heard the same claim against a different defendant: there would be a real chance of inconsistent outcomes, which would be inefficient and undesirable. If, therefore, the defendant who is not otherwise subject to the jurisdiction of the Myanmar court agrees to defend the claim, he accepts and submits to the jurisdiction of the Myanmar court. But if the defendant does not agree, it will be necessary to apply to the court for permission to proceed against him. In dealing with the application for permission, the court will wish to be sure that there is a genuine, rather than an artificial, connection between the defendants, and that the application to join the defendant is based on grounds which are proper and sufficient.

(d) Jurisdiction established by reference to the elements of the cause of action

In the fourth category of case, the jurisdiction of the Myanmar courts is established by focusing on the particulars of the cause of action. As a result of Sections 19 and 20(c), if the case concerns wrongs to the person, the court will have jurisdiction if Myanmar is where the wrong was committed. If the case concerns wrongs to moveable property, the court will have jurisdiction if Myanmar is where the wrong was committed.[34] And in other cases, the court will have jurisdiction if Myanmar is where the cause of action, or part of it, arose.[35]

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[33] *Re MVR Veluswamy Thevar* (1935) ILR 13 Ran 192.

[34] See for illustration, *Shantilal Surajmal Mehta v Mariam Bibi* BLR (1960) HC 359 (claim alleging conversion of jewellery).

[35] This is the effect of Section 20(c). In *Shantilal Surajmal Mehta v Mariam Bibi* BLR (1960) HC 359, and *State Commercial Bank v Thibaw Commercial Syndicate Ltd* BLR (1966) 1131 CC, the court

The 'cause of action' to which Section 20(c) refers, means those elements of the claim which must be pleaded and established in order for the plaintiff to succeed.[36] For this rule to operate, it is necessary to distinguish between the elements which must be proved to sustain the claim, and those which are part of the narrative, or which are relevant to the computation of the loss, but which are not essential to the existence of the cause of action.

Take a case of breach of contract as an example. The plaintiff will need to prove that the contract was made, and was breached: he may also (depending on the claim he makes) need to prove that he has performed his side of the contract. The Myanmar court will have jurisdiction under this rule if the contract was made in Myanmar, or breached in Myanmar or (if the case is one in which the plaintiff has to prove that he has performed his part of the contract) performed in Myanmar.[37] But as it is not necessary to prove loss to establish a cause of action in contract, it will not be sufficient that loss occurred in Myanmar if none of the other elements of the contract claim did.

In general, a claim based on a contract will give the court jurisdiction under Section 20(c) if the contract was made in Myanmar or broken (by act done, or by act not done but which ought to have been done, as the case may be) in Myanmar.[38] In the case of a claim based on an implied promise to pay money pursuant to a contract or in respect of an analogous obligation, the place of the required payment is at the creditor's place of business, because the general rule about the place of payment of money is that the debtor must seek out his creditor. If the creditor is in Yangon, the cause of action will be held to have arisen in Yangon.[39] By contrast, the communication of a refusal to pay, as distinct from the failure to pay, is not a fact which needs to be established to found a cause of action in contract, and if the refusal was sent from Myanmar to another place, the refusal sent from Myanmar would not be sufficient to satisfy Section 20(c).[40]

In a claim on a contract of property insurance, the making of the contract and the payment of money are elements of the cause of action, but it has been held that the loss of the property is not a part of the cause of action. It is not clear that this is correct. It was held to be justified on the basis that jurisdictional rules were to be construed restrictively, as there was no discretion to not exercise jurisdiction conferred on the court by the Code.[41] However, if it is now accepted that a court has a discretion to exercise

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observed that the Union Judiciary Act 1948 laid down a different rule for the original jurisdiction of the High Court. This aspect of the case does not need to be considered further.

[36] There are many cases which have commented on this: see *U Saung v U Khin Maung* BLR (1959) HC 314; see also *Shantilal Surajmal Mehta v Mariam Bibi* BLR (1960) HC 359, and *State Commercial Bank v Thibaw Commercial Syndicate Ltd* BLR (1966) CC 1131.

[37] So if the payment is due in Myanmar, because the rule is that the debtor must seek out his creditor and pay him at the creditor's place of business, the cause of action will arise in part in Myanmar: *Soniran Jeetmull v Tata & Co Ltd* (1927) ILR 5 Ran 541 (Privy Council).

[38] *State Commercial Bank v Thibaw Commercial Syndicate Ltd* BLR (1966) CC 1131.

[39] *Soniram Jeetmull v Tata & Co Ltd* (1927) ILR 5 Ran 451 (Privy Council on appeal from High Court); *NKLP Palaniappa Chettyar v STSP Subbiah Chettyar* AIR (1937) Ran 443; *KSLPA Annamalai Chettyar v Daw Hin U* ALR (1936) Ran 251.

[40] *Shantilal Surajmal Mehta v Mariam Bibi* BLR (1960) HC 359.

[41] *Jupiter General Insurance Co Ltd v Abdul Aziz* (1923) ILR 1 Ran 231. In *The American International Underwriters (Burma) Ltd v U Maung San* BLR (1961) HC 41, at p 45, the High Court noted, but did not agree with, certain Indian decisions which had disagreed with the approach in the *Jupiter* case.

jurisdiction, or not exercise jurisdiction, in an appropriate case, this strictness may not be so important a requirement.

Let us now turn to a case framed in tort. It will be necessary for the plaintiff to prove the commission of a tort, and damage, for a cause of action in tort generally requires damage, or is not complete until there is damage. If the tort is a wrong to the person or to moveable property, then if the tort was committed in Myanmar, the court will have jurisdiction under Section 19. If the tort was not committed in Myanmar but damage resulted in Myanmar, the court will have jurisdiction under Section 20(c), because in a tort claim, damage is normally an essential part of the cause of action. It appears from the Illustrations to Section 19 that defamation is considered a wrong to the person. If, therefore, a person overseas publishes in Myanmar statements which are defamatory of the plaintiff who resides in Myanmar, the plaintiff may sue the defendant in Myanmar.

If the tort is not one concerning a wrong to the person or to moveable property, Section 19 will not apply. If the claim is based on the wrongful infliction of economic loss, therefore, Section 20(c) will give the court jurisdiction if the wrongful act or the damage resulting from it arose in Myanmar. Likewise, if a defendant who is overseas publishes a defamatory statement about a person who is not resident in Myanmar, Section 19 will not give the court jurisdiction. But if the damage which results from the publication is (in part) in Myanmar - for example, because persons in Myanmar will no longer engage in trading relations with him - it may be argued that part of the cause of action has arisen in Myanmar, and the Myanmar court will have jurisdiction under Section 20(c).

Section 20(c) is in one respect an easy jurisdictional rule to satisfy, because it is not generally necessary to establish that the entire cause of action arose in Myanmar. In an early case, it was held that the court would have jurisdiction if the wrong was done in Myanmar.[42] Take for example a claim arising from a pharmaceutical product which has caused illness or injury to the person who used it. If the product was designed in country A, manufactured in country B, tested in country C, sold to a wholesaler in country D, purchased from a chemist in country E, and used by the ultimate customer in country F, it may be very hard indeed to say which is the country in which the cause of action arise. But if the question is whether it arose in part in any of countries A to F, the answer will be that it arose in part in each of them, because it appears that all the elements identified above form part of the cause of action. If any of these six countries is Myanmar, the Myanmar court will have jurisdiction under Section 20(c).

(e) Jurisdiction by submission to the court ?

Apart from Section 20(b), which provides for jurisdiction 'by acquiescence' where the suit is against several defendants, Sections 16 to 20 do not expressly provide that a defendant who answers the summons and does not dispute the jurisdiction of the court, even if he might have had good grounds to have done so, submits to the jurisdiction of the court and thereby gives the court jurisdiction over him, but there should be no doubt that this is the law.[43] The point is not clearly settled; it is dealt with under point (15). It is

[42] *Ma Myit v Shwe Tha* (1905-6) 3 LBR 164 (a case on the earlier Civil Procedure Code).
[43] Voluntary submission (or its absence) is the basis on which a foreign state may be sued (or not) before a Myanmar court: *U Kyaw Din v United Kingdom* (1948) BLR 524.

mentioned here because of its practical importance to the overall question of when a Myanmar court has jurisdiction.[44]

(12) The legal basis for jurisdiction over a defendant which is a company

The rules of jurisdiction in Sections 19 and 20 of the Civil Procedure Code apply equally to claims against a company. There is nothing in the Sections to suggest that the rules only apply to claims against individuals. So if a company is alleged to have committed a wrong against a person or against moveable property in Myanmar, Section 19 will be a possible basis for the jurisdiction of the court.

Where jurisdiction over a company is proposed to be based on Section 20, the position is a little more complex. This is because a company does not 'reside' in the same that a natural person resides, and does not carry on business in the same way that a natural person does: a company has to act through human beings, whereas a natural person can carry on business without anyone else being involved. The application of Section 20 to claims against companies always was a little more difficult than its application to natural persons.

And as technology has advanced, it has become possible for a company to do business with persons in Myanmar without having any personal or physical presence, or any place of business of its own, in Myanmar. If a foreign company has a website which is accessible from Myanmar by anyone who has a computer, and allows customers in Myanmar to make contracts with it, the result is that a company has made a contract with a Myanmar customer without having any presence of its own in Myanmar, and without having any place of business in Myanmar. The jurisdictional rule in Section 20, therefore, has to be interpreted in a special way if it is to apply in a sensible way to claims against companies.

The law is considered in part in Explanation II to Section 20. According to this, a corporation (which includes a company) shall be deemed to carry on business at its sole or principal office in the Union of Myanmar, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place. This is, as will be shown, not very helpful as an explanation of the rules of private international law: it may be better for it to be understood as a rule of internal or domestic law only. The true position is as follows.

If the company is established under the Companies Act, it may be sued in Myanmar. This is obvious, and Section 148 of the Companies Act provides for service of documents on a company formed under the Companies Act at its registered office.[45] If the company is formed and established under Myanmar law, therefore, it may be sued in Myanmar and no more needs to be said.

If the company is not a Myanmar company, it will have been incorporated outside Myanmar: there are then two possibilities. If it carries on business in Myanmar, it will require a permit granted in accordance with Section 27A Companies Act. If the company complies with this requirement, and establishes a place of business in Myanmar, it

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[44] See *Raj Chandra Dhar v Ray* (1924) ILR 2 Ran 108; also *The American International Underwriters (Burma) Ltd v U Maung San* BLR (1961) HC 41.

[45] See Chapter 8, point (72) below.

appears that service may be made on it there.[46] In any event, jurisdiction over a company may be taken under Section 20 of the Civil Procedure Code, and by reason of Section 20(a), the jurisdiction of the Myanmar court will not be limited to claims which arise out of the activities of the company within Myanmar.

But if the company is not a Myanmar company, and does not have a place of business in Myanmar, it will be concluded that it does not do business in Myanmar, because 'doing business in' means 'doing business from a place of business in' Myanmar. The plaintiff may still rely on Section 20(c) to establish the jurisdiction of the court jurisdiction if the cause of action against the company arose in whole or in part in Myanmar. A Myanmar customer who makes a contract with a foreign company over the internet, and who now wishes to sue that foreign company for breach of contract, will be able to say that the cause of action arose in part in Myanmar, where he carried out his acts in making the contract, and Section 20(c) therefore applies. There is no reason to suppose that Section 20(c) is available only when a company carries on business in Myanmar; and for this reason the Explanation to Section 20 is not helpful.

(13) The legal basis of jurisdiction over a defendant who is not present in Myanmar

It will have become clear that the jurisdictional rules set out in Sections 16 to 20, which say nothing at all about cases in which the defendant is outside Myanmar altogether, still apply, and in just the same way, even though the defendant is not present anywhere in Myanmar.[47] Although the rules were devised to establish, for example, whether a defendant who was resident in Yangon could be sued in Mandalay, they also answer the question whether a person who is resident in England (for example) may be sued in Myanmar. This was the conclusion reached by the Indian courts in several cases,[48] and it is to be taken to be correct as a matter of Myanmar law. For otherwise there would be no rule of written law to explain when a court in Myanmar had or did not have jurisdiction over a person outside Myanmar. As we shall see below, Myanmar law makes provision for service of documents on a person who is out of Myanmar, but this rule does not explain when the court does or does not have jurisdiction over the person whom it is proposed to serve. The basic point is that the jurisdiction of the Myanmar courts under Sections 16 to 20 takes no account of whether the defendant is in or out of Myanmar.

In this respect, the laws of Myanmar and of India are materially different from those which are found in other common law jurisdictions. In the case of England, Australia, Canada, and the United States, the rules which allow a court to take jurisdiction over a defendant who is present within the jurisdiction are very different from (and are much

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[46] Section 277 of the Companies Act, which required an unregistered company to inform the Registrar of Companies of the details of those persons in Myanmar who may be served with a writ which has been taken out against the company, was repealed in 1955. This is regrettable, as Section 277 made it easier to see how jurisdiction could be taken over a foreign company. It is likely that the Companies Act will be reformed in the near future, and that the requirement that a foreign company, which does business in Myanmar, will need to be registered and will need to notify the Registrar of the persons authorised to accept service of process upon it.

[47] *Cooverjee Ladha v Suleman Ismail & Co* (1903-4) 2 LBR 47; *Mohamed Khan v Damayanthi Parekh* BLR (1952) HC 356.

[48] *Maistry Rajabhai Narain v Haji Karim Mamod* (1935) Mad LJ 189; *Gaekwar Baroda State v Sheik Habi Ullah* AIR (1934) All 740; *S Neelakannada Pillai v KA Kunju Pillai* (1942) 68 Mad LJ 806; *Swaminathan Chettiar v Somasundaram Chettiar* AIR (1938) Mad 731.

simpler than) those rules which apply when the defendant is not within the jurisdiction of the court. The reasons for this are, no doubt, historical, but they do reflect an aspect of the principle of comity: that states do not interfere in the legal business of other states, and so on. But it means in the case of Myanmar (and India) that the arguments which may be made to ask a court to not *exercise* the jurisdiction which it has under Sections 16 to 20 of the Civil Procedure Code assume greater importance.

The reason why a defendant who is present in Myanmar may be summoned to a court in Myanmar is that he has chosen to put himself in a position in which he may be ordered by the authority of the Myanmar state to appear in court: whether he is summoned to appear in Yangon or Mandalay is not really important. But a defendant who is not present in Myanmar is in a completely different position. Not only that: to summon a defendant who is (for example) in China to appear in court in Myanmar may be thought to be an interference with the sovereignty of the Chinese state and its courts. And although it is no harder for a person present in Myanmar to defend himself in Mandalay or in Yangon, it is harder, because it is more inconvenient and expensive, for a defendant to have to come to Myanmar from a foreign country to defend a claim before the Myanmar courts.

For all these reasons, it is usually said that a court should be more cautious when it allows a plaintiff to summon a person who is not in Myanmar to answer a claim which has been introduced before the Myanmar courts. The court may have jurisdiction under Sections 16 to 20 even though the defendant is many thousands of miles away from Myanmar, as the cases from India and Myanmar confirm, but this does not and should not mean that the Myanmar court is obliged to exercise the jurisdiction which the Code gives it.[49] Any court has a right, and perhaps a duty, to control the exercise of its powers so that it serves the interests of justice. There are circumstances in which the interests of justice may favour not exercising a power, or a jurisdiction, which the court possesses. We will examine under point (16) below the arguments which may be made to persuade a court to not exercise the jurisdiction which it has under the law.

But we are getting ahead of ourselves. If the plaintiff has filed a plaint and issued a summons, he must arrange to have it served on the defendant. It is, in practical terms, only after that has taken place that the question of whether a court has jurisdiction, and if it has, will exercise jurisdiction, will arise for consideration. This is because the decision to issue a summons, and to serve it on a defendant, is one for the plaintiff alone. The court is not involved, except in a purely formal way. No judge will have considered whether the Myanmar court really does have jurisdiction over the defendant; no judge will have considered whether a Myanmar court should exercise or not exercise any jurisdiction which it may have. The plaintiff simply issues and serves his writ, and waits to see what happens next: whether the defendant disputes the jurisdiction of the court, or does not do so. It is therefore necessary to examine the law on the service of summonses, so that we can then consider what takes place after the service of the writ of summons.

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[49] In *Cooverjee Ladha v Suleman Ismail & Co* (1903-4) 2 LBR 47 it was said that if the court had it, the exercise of jurisdiction was obligatory, and that the court did not have discretion not to exercise it; to the same effect is *Mohamed Khan v Damayanthi Parekh* BLR (1952) HC 356. At that time, an English court would have taken exactly the same view of its own jurisdictional rules: the view that the court had a discretion to not adjudicate did not appear in common law systems until the 1980s, and the fact that very old Myanmar cases do not mention it is irrelevant to the question which would arise for answer today; see further under point (16) below.

(14) Service of process on a defendant

As a matter of general common law, and as a matter of Myanmar law as well, a defendant who is to be sued must be served with the document which institutes the proceedings. The law of Myanmar draws a distinction between the mechanism for service of a summons on a defendant within Myanmar, and the service of a summons on a defendant who is out of Myanmar. And as will also be seen, the law is contained in part in the Civil Procedure Code, and partly in rules of court.

The fact that there has been service does not mean that the jurisdiction of the court has been established: service is a necessary, but not a sufficient, condition for the court to proceed to adjudicate. Whether the court has jurisdiction is determined by Sections 16 to 20 of the Civil Procedure Code. Service is necessary to put the proceedings into motion; if there has been no service, then even if the defendant is plainly within Section 20 of the Civil Procedure Code, for example, nothing will happen because until there has been service of the writ of summons, the proceedings have not effectively begun.

(a) Service of a summons on a defendant who is within the territory of Myanmar

Order 5 of the Civil Procedure Rules (Schedule 1 to Civil Procedure Code) sets out the mechanism for the service of a summons within the territory of the Union of Myanmar. It makes provision for service of the summons on the defendant or an agent of his (usually his lawyer), and for cases in which the defendant cannot be found but service may be made on his family (though not on his servants),[50] and for cases in which the defendant is in another Division, and for cases in which, because it is not possible to serve the defendant, the court makes an order for substituted service. These are important provisions, but they are properly examined as part of the law of civil procedure rather than private international law.

(b) Service of a summons on a defendant who is outside the territory of Myanmar

According the Order 5, rule 25 of the Civil Procedure Rules it is possible to serve a summons outside Myanmar:

> **Order 5, rule 25**. Where the defendant resides out of the Union of Myanmar and has no agent in the Union of Myanmar empowered to accept service, the summons may be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the court is situate.

In addition, Order 5, rule 21A, makes provision for the language in which the documents are to be prepared if they are to be served outside Myanmar.[51]

No permission is needed to serve the summons on a defendant who is not present within Myanmar. The plaintiff may do so even if the claim he makes is not one which the Myanmar court, according to Sections 16 to 20 of the Civil Procedure Code, has

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[50] For illustration (though for no broader a point), see *U Ko Ko Gyi v Daw Khin Thaung* BLR (1958) HC 387; *U Wa v U Ba Tun* BLR (1962) CC 389.

[51] Some further detail is given in the Courts Manual (4th edn, 1999) at p 525.

jurisdiction to hear; but if this happens the defendant will be able to apply to the court for an order setting aside the service, and dismissing the claim, on the ground that the claim is not one the court has jurisdiction to entertain. This is different from the procedure in many other common law countries, in which a plaintiff would need to obtain the permission of the court before serving the writ on a person who is outside the territorial jurisdiction of the court: the thinking in those countries is that service of a writ of summons, demanding that a person appear before the court, is an assertion of sovereign power, and that it should not be done within the territory of another sovereign state unless a court has approved it first. But in Myanmar there are no such concerns, and a Myanmar summons may be sent to the defendant by registered[52] post, wherever he is.

It is unclear whether Myanmar law now allows the service of summonses by more modern and speedy means, such as fax or e-mail. In many countries the rules on service of process have been amended to allow this to be done; Myanmar has not done this yet.[53] If a plaintiff sends a summons by attachment to an e-mail, it does not obviously comply with Order 5 rule 25. On the other hand, if the purpose of the service is to notify a defendant that a claim has been instituted against him, and if an e-mail will bring this fact to his attention, it is hard to see why service by these means would be regarded as ineffective. It is hard to see why a Myanmar court would insist on a method of communication which has been overtaken by faster and more reliable methods, but one cannot predict what a court in Myanmar would actually say if the point were to be raised before it.

(15) The distinction between the legal basis for jurisdiction and the exercise of jurisdiction

There is, in all common law systems, an important distinction between two issues which are closely related to each other but which must be kept apart. For a court to adjudicate a claim which the plaintiff wishes to bring, the court must have jurisdiction according to the law. In Myanmar, these rules of jurisdiction are, in most cases, found in Sections 16 to 20 of the Civil Procedure Code.

But the fact that a court has jurisdiction does not necessarily mean that it is obliged to exercise that jurisdiction in every case in which the plaintiff commences legal proceedings.[54] A court, as the common law understands it, always has a power, which is probably inherent in the very nature of being a superior court, to not exercise its jurisdiction. A court in Myanmar has jurisdiction to make an order of this kind by Section 94(5) of the Civil Procedure Code, but also has an inherent power:

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[52] With acknowledgment paid for: see Courts Manual (4th edn, 1999), p 525.

[53] On the other hand, it could not be argued that the Civil Procedure Rules prohibited service by means which could not have been imagined when the Rules were drafted; as to the role of common sense in such cases, see Chapter 1, point (7) above.

[54] Even though *Cooverjee Ladha v Suleman Ismail & Co* (1903-4) 2 LBR 47 says otherwise, and that jurisdiction is not discretionary. But as early as 1913, it appears that the court would, in certain circumstances, accept that it had a limited power to deprive the plaintiff of his preference of court if there was a 'manifest preponderance of convenience' in remitting the matter to another court: *Muthiya Chetty v Arunachalam Chetty* (1913-14) 7 LBR 129. The much broader principle of jurisdictional discretion was adopted in *The American International Underwriters (Burma) Ltd v U Maung San* BLR (1961) HC 41; and this latter approach is plainly a preferable one.

> **94. Supplemental proceedings**. In order to prevent the ends of justice from being defeated, the Court may, if it is so prescribed…
> **(5)** make such other interlocutory orders as may appear to the Court to be just and convenient.
>
> **151**. **Saving of inherent powers of Court**. Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

These provisions will certainly give the court power to make an order by which it declines to exercise the jurisdiction which it has, if the court considers that the making of such an order is in the interests of justice. The Chief Court so held in 1965, and it was plainly right to have done so.[55]

To take one example, if the court considers that the proceedings have been instituted for a wholly improper purpose, the court must have power to find the proceedings to be an abuse of the legal process, and to refuse to allow the case to proceed. To put the point another way, the court is not the puppet of the plaintiff. It is the plaintiff who asks the court to adjudicate; and on some occasions it would be contrary to the interests of justice for the court to do what the plaintiff asks it to do.

This may be particularly true in a case in which there are non-Myanmar elements in the case before the court. Take for example the case of proceedings brought in Myanmar against a defendant who appears to be resident in Myanmar and who, if he is resident, is subject to the jurisdiction of the court according to Section 20(a). If he is unhappy about the prospect of being sued in Myanmar, he may consider doing two things, by way of objection to the jurisdiction, which we now examine. We will also consider the position if he does neither of these two things.

It is first necessary to identify the statutory rule which explains how this is to be done. According to Section 21 of the Civil Procedure Code:

> **21**. **Objections to jurisdiction**. No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

This is a slightly curious provision, for it deals with the consequences of making and of not making an objection to the jurisdiction, but does not precisely explain how the objection is to be made. It is, however, clear that the objection is to be made by application on notice to the court of first instance, at the earliest possible opportunity.

(a) Defendant objecting that the court has no jurisdiction over him in relation to the claim

The defendant may wish to argue that the court does not have jurisdiction over him. If the plaintiff was relying on Section 20(a), the defendant may argue that he was not actually resident in Myanmar; he may argue that although he had been present in

[55] *Steel Bros & Co Ltd v YA Ganny Sons* BLR (1965) CC 449.

Myanmar, that presence was not enough to make him actually resident in Myanmar. A similar argument would be possible if the plaintiff was seeking to rely on Section 20(c), but the defendant contended that no part of the cause of action had arisen in Myanmar.

As the objection to jurisdiction has to be raised at the earliest opportunity, if the court decides to rule on it at that stage, it will obviously be uncertain about the facts of the case: all it will know are the facts and matters which the parties allege. It will therefore be sufficient for the court to conclude that there is a properly arguable case that the court has jurisdiction according to the terms of the Civil Procedure Code. If instead the court decides to hear the case in its entirety and to rule on the issue of jurisdiction only at the end of the hearing, it will decide the question according to the usual civil standard of a balance of probability. In many common law jurisdictions, procedural rules require the court to determine any objection to its jurisdiction at the beginning, and before any steps are taken towards the trial of the substantive hearing. The Civil Procedure Rules in Myanmar do not appear to make it clear whether a court in Myanmar will follow this procedure. In principle, therefore, the court has a choice. But if it decides to hear the case on its merits, and to rule on jurisdiction only at the end of the hearing, the defendant will need to be careful to maintain, and to carry on maintaining to the court, that it should rule that it has no jurisdiction. If he stops making this objection, and simply defends the case on its merits, he will be taken to have abandoned his objection and to have submitted to the jurisdiction: this was the effect of a decision of the Supreme Court of India,[56] and subject to what is said below about jurisdiction by submission, it seems to be correct.

If the court rules that it had no jurisdiction, it must necessarily dismiss the claim, though it may do this by the mechanism of setting aside the summons and returning the plaint.

(b) Defendant objecting that although the court has jurisdiction, the interests of justice would be served by the court not exercising its jurisdiction

Alternatively, or at the same time as he objects to the jurisdiction, the defendant may object that, even if the court concludes that it has jurisdiction, it should not exercise its jurisdiction: at least, the common law allows him to, and the Indian courts have accepted that this is their understanding as well. If this possibility is allowed, the defendant may say, for example, that even if the court finds that he was resident in Myanmar, the dispute has little or nothing to do with Myanmar or its courts, and that the plaintiff should sue him in a different country. He may say that the parties made a contractual agreement that the dispute between them would be settled before the courts of another country, such as the High Court in London. He may say that there is a dispute between the parties already pending before the courts of another country, and that although this does not mean that the Myanmar court is forbidden to try the claim, because, as the Explanation to Section 10 of the Civil Procedure Code states, the pendency of a suit in a foreign Court does not preclude the Courts in the Union of Myanmar from trying a suit founded on the same cause of action, it may still be argued that the interests of justice would be served if the Myanmar court were to decide that it will not exercise the jurisdiction which it has over the defendant in relation to the claim.[57] He may say that the cause of action arose in part in Myanmar, but that it would be more appropriate to allow a court outside Myanmar to hear the claim against him.

[56] See *Bahrein Petroleum Co Ltd v PJ Pappu* [1966] 1 SCR 461.

[57] *The American International Underwriters (Burma) Ltd v U Maung San* BLR (1961) HC 41.

If the court accepts the defendant's argument, it will make an order under its inherent jurisdiction as confirmed by Section 151, or under Section 94(5), suspending or staying, or dismissing the proceedings: the particular form of relief will depend on the facts of the case.[58] But when a court makes an order in a case like this, it is saying, in effect, that the interests of justice would be better served by leaving the plaintiff to sue the defendant before the courts of a country outside Myanmar. We will look in greater detail under point (16) at the particular arguments which may be available to a defendant who wishes to object to the exercise of jurisdiction on the footing that he is permitted to advance the argument in the first place.

(c) Defendant appearing to the summons and not objecting to the jurisdiction: an uncertain case

A defendant who has been served with the summons may decide not to object to the jurisdiction of the court. He may be perfectly willing to defend the claim against him in Myanmar. Or he may take the view that he is outside Myanmar, will not return to Myanmar, has no property in Myanmar, does not believe that a Myanmar judgment will be enforceable outside Myanmar, and that he will ignore the summons altogether.

In the former case, if the defendant appears in answer to the summons and does not, at the first opportunity, object to the jurisdiction, most common law systems would accept that he had submitted to the jurisdiction of the court, and that the court had jurisdiction as a result.[59] Although this is not explicitly stated in the Civil Procedure Code, common sense might be taken to suggest that if a defendant appears to the summons and does not object to the jurisdiction of the court, he submits to the jurisdiction.[60] The Supreme Court of India has interpreted its Code of Civil Procedure in this way,[61] and it is submitted that the approach is a sound one which should find (and has found[62]) favour in Myanmar. Almost every legal system accepts that if a defendant submits to the jurisdiction, the court has jurisdiction and may proceed to exercise it: indeed, the common law even extends the principle that submission furnishes jurisdiction into several other areas, particularly (as we shall see in Chapter 3) the law on foreign judgments. And Section 20(b) of the Civil Procedure Code gives some support to the principle of jurisdiction by acquiescence; one might expect the point to be a general one.

It must be admitted that there is some Myanmar authority to contrary effect. This would support the view that if the court does not have jurisdiction by reference to the written

[58] *Steel Bros & Co Ltd v YA Ganny Sons* BLR (1965) CC 449.

[59] In the case of proceedings against a foreign state (which did not submit), see *U Kyaw Din v United Kingdom* [1948] BLR 524.

[60] *Steel Bros & Co Ltd v YA Ganny Sons* BLR (1965) CC 449, 463 (quoted in Chapter 1, point (7), above).

[61] *Viswanathan v Rukm-ul-Mulk Syed Abdul Wajid* [1963] 1 SCR 22; *British India Steam Navigation Co Ltd v Shanmugha Vilas Cashew Industries* [1990] 3 SCC 481. So also in a maritime case, where the defendant appears to secure the release of a ship which has been arrested: *MV Elisabeth v Harwan Investment & Trading Pvt Ltd Goa* AIR (1993) SC 1014.

[62] *Raj Chandra Dhar v Ray* (1924) ILR 2 Ran 108 is certainly consistent with this view; also *The American International Underwriters (Burma) Ltd v U Maung San* BLR (1961) HC 41. In *VAS Arogya Odeyar v VRRMNS Sathappa Chettiar* BLR (1951) HC 211 it was held that a defendant who contested the merits of the claim as well as the jurisdiction of the Myanmar court submitted to the jurisdiction of the Myanmar court was was for that reason liable to have orders made against him. But it may be different in a case in which the objection to jurisdiction is taken prior to the raising of a defence to the merits of the claim.

law in Sections 16 to 20 it has no jurisdiction at all, that any proceedings would be a complete nullity, and that despite Section 21, the objection to the existence of jurisdiction could be taken at any time, early or late, in the proceedings.[63] As to this, the following four points are made. First, the question before the court in each case was whether the High Court or Chief Court, exercising original civil jurisdiction, had jurisdiction despite the fact that the cause of action had not arisen wholly within its jurisdiction and no leave to proceed had been applied for.[64] This may be seen as a matter of internal (High Court or District Court) jurisdiction, rather than one of international jurisdiction; it may also be seen as a case in which there was a statutory prohibition on jurisdiction unless leave had been obtained. Second, one may recall the wise judicial observation that, just because there is nothing in the written law to provide for something, it does not necessarily follow that the court is prohibited from granting relief.[65] Viewing the matter in that light, there would be no compelling reason to accept that if Sections 16 to 20 do not confer jurisdiction, then the court is bound to conclude that the court is prohibited from dealing with the case. Common sense might be taken to suggest that where there is no statutory prohibition, a defendant who does not object to the jurisdiction cannot later change his mind and assert that the proceedings were, and had always been, a nullity: it would allow him to challenge jurisdiction when he finds that the court is against him on the merits, but to keep quiet if he is winning, which is a very unattractive state of affairs. Third, Myanmar law has long accepted that even if there were grounds upon which a defendant could have challenged the jurisdiction of the Myanmar court and asked the court to rule that it had no jurisdiction, if he does not do challenge it, the judgment of the court will bind on him, just as it would if there had been no doubt as to the jurisdiction of the court. It could hardly be otherwise: it would lead to anarchy if a defendant was free to ignore the judgment of a Myanmar court because he could have, but did not, challenge its jurisdiction.[66] In effect, if not in law, this supports the idea that a court has jurisdiction if a defendant submits voluntarily to its jurisdiction. And fourth, if most of the common law world now accepts that if a defendant submits to the jurisdiction of a court, the court has jurisdiction, there is no obvious reason why Myanmar should take the opposite view. To be sure, it cannot be claimed that the law of Myanmar at this point is so clear that there is nothing to argue about. But what is clear, it is submitted, is what the answer should be: submission to the court should establish the jurisdiction of the court.

(d) Defendant ignoring the summons

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[63] *Shantilal Surajmal Mehta v Mariam Bibi* BLR (1960) HC 359; *State Commercial Bank v Thibaw Commercial Syndicate Ltd* BLR (1966) CC 1131. In earlier support of this view, see *Bank of Chettinad v The Chettiyar Firm SPKVR* (1935) ILR 14 Ran 94; for the opposite view, disapproved in *Shantilal Surajmal Mehta v Mariam Bibi* , see *Mohamed Siddiq v Mohamed Ahmed* (1929) ILR 6 Ran 680.

[64] The Union Judiciary Act 1948, Section 15, following the Letters Patent, imposed such a limitation on the original jurisdiction of the High Court. It is not clear that this jurisdictional rule is in force in Yangon today; we have proceeded on the basis that it is not and that the general rules of the Civil Procedure Code apply.

[65] *Steel Bros & Co Ltd v YA Ganny Sons* BLR (1965) CC 449, 463 (quoted in Chapter 1, point (7), above). It is arguable that in *Shantilal Surajmal Mehta v Mariam Bibi* and *State Commercial Bank v Thibaw Commercial Syndicate Ltd*, there was an actual prohibition on jurisdiction, and that those were not cases in which there was 'neither provision nor prohibition', as it had been put in *Steel Bros & Co Ltd v YA Ganny Sons.*

[66] *Nathan v Samson* (1931) ILR 9 Ran 480; *VERMNCT Chettyar v ARARRM Chettyar Firm* (1934) ILR 12 Ran 370; *Bank of Chettinad v SPKPVR Chettyar Firm* (1935) ILR 14 Ran 94 (reversing *Bank of Chettinad v SPKPVR Chettyar Firm* AIR (1935) Ran 517).

A defendant may ignore the summons: he may do this if he is not in Myanmar, but may also ignore the summons even though he is in Myanmar. This is not to say that he would be wise to do it, but the consequences need to be understood.

If a defendant does not appear in response to the summons, the court may proceed *ex parte*, without the presence of the defendant. Order 9 of the Civil Procedure Rules contains certain conditions which are designed to ensure that the defendant has been given a proper and timely opportunity to defend himself before the court, but if the defendant does not appear, the plaintiff must be allowed to proceed to obtain judgment. Otherwise, a defendant who had no defence to the claim would defeat the ends of justice by refusing to answer the summons to attend court, and that would make no sense.

In such a case, in which the defendant does not make any objection to the jurisdiction, the court will proceed to examine the matter without the participation of the defendant. It is more difficult, in such a case, to argue that the defendant has submitted to the jurisdiction, but if the defendant does not appear, and does not make an objection to the jurisdiction, it seems correct that that the court simply proceed to deal with the merits of the claim, and if the plaintiff appears to be entitled to it, to give judgment.

In some other common law jurisdictions, a court would allow a plaintiff to enter judgment without itself making any enquiry into the merits of the claim. This sometimes leads to problems when an attempt is made to enforce the judgment overseas, because the merits of the claim have not been considered by the court.[67] This should not be such a problem with a Myanmar judgment, for if the court proceeds *ex parte* in the absence of the defendant, it does still consider the merits of the claim, and gives judgment on that basis.

(16) Grounds upon which a defendant may object to the exercise of jurisdiction

We have examined the mechanism by which a defendant may object to the jurisdiction of a Myanmar court. We have also seen the grounds on which he may argue that the court has no jurisdiction, for these are simply the reverse of Sections 16 to 20 of the Civil Procedure Code. We should now say more about the arguments, which have special relevance to private international law, which may be made by a defendant who objects that the Myanmar court should not exercise jurisdiction, even though it has jurisdiction.

We set out above the statutory basis which would permit a Myanmar court to make an order by which it declined to exercise its jurisdiction. Both Section 94(5) and Section 151 of the Civil Procedure Code allow the court to make orders in the interests of justice or to prevent the misuse of the procedures of the court. We assume that a court in Myanmar would adopt a position on this issue which is broadly in line with the common law jurisdictions which allow the defendant to make this argument. And we repeat an important point. The rules of jurisdiction in Sections 16 to 20 were designed for cases which are internal to Myanmar (answering the question whether a claim may be brought at one place or another in Myanmar), and in relation to which it may well be proper to apply them strictly. When, however, they are adapted and used for cases with an

[67] See *Keymer v Visvanatham Reddi* (1916) LR 44 IA 6; *Oppenheim v Mahomed Haneef* [1922] 1 AC 422 (refusing to enforce an English judgment, which had been given in default of appearance by the defendant and without any examination by the court of the merits of the claim, by reference to Section 13 of the Indian Code of Civil Procedure). These decisions will be accurate as statements of Myanmar law, as Section 13 of the Civil Procedure Code is identical to that of India.

international dimension, there is good reason to apply them in a more flexible manner, reflecting the fact that the international context is a rather different from the purely domestic one.

In the field of private international law, there are two arguments which have particular importance when seeking to persuade a court that it should not exercise the jurisdiction which it has. These are (a) that the plaintiff is acting in breach of a contractual promise which he made not to bring the proceedings before a court in Myanmar; and (b) that the case is so much more closely connected to a foreign court that the interests of justice would be better served if that foreign court were to deal with the claim. We deal with them in that order.

(a) Objecting to the exercise of jurisdiction on the ground that the plaintiff is breaching his contract by bringing the proceedings in the Myanmar court

If the plaintiff had made a contractual promise not to bring the proceedings which he has brought before the Myanmar court, it is very hard to see how the ends of justice could be served by allowing the proceedings to be brought.[68] If the defendant objects to the suit on the ground that the plaintiff is breaching his contract, the Myanmar court ought to, and will, enforce the contract by refusing to exercise jurisdiction over a claim which the plaintiff contracted not to bring.[69] If the plaintiff objects that an agreement to oust the jurisdiction of the Myanmar court is void, or contrary to public policy, his argument should be rejected. It is true that Contract Act 1872, Section 28, provides that

> **28. Agreements in restraint of legal proceedings void**. Every agreement by which any party thereto is restrained absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

But an agreement to bring proceedings before the courts of a country outside Myanmar, or to proceed to arbitration, can be construed as being partial, but not an 'absolute', restraint on access to a court. It therefore does not fall within the prohibition contained in Section 28 of the Contract Act.[70]

Almost all common law systems, and most civilian systems as well, will give effect to an agreement of this kind;[71] but such agreements have effects which go beyond the law of objections to the jurisdiction of a court. In order to understand the real importance of agreements about jurisdiction, and the many ways in which they have an effect in private international law, the issue is considered in the round under point (17) below. At this point is it sufficient to say that if the plaintiff is shown to be breaching his contract by bringing the proceedings which he has brought, an objection to the exercise of

[68] *The American International Underwriters (Burma) Ltd v U Maung San* BLR (1961) HC 41.
[69] *Steel Bros & Co Ltd v YA Ganny Sons* BLR (1965) CC 449.
[70] *Steel Bros & Co Ltd v YA Ganny Sons* BLR (1965) CC 449. It is, for the same reason, not prohibited by Contract Act 1872, Section 23. Contrast *VIE Ismolansa Kajar v Ebrahim Ram Co Ltd* BLR (1962) CC 152, where the arbitration agreement was invalidated by Section 28 as it purported to remove every possibility of recourse to the courts, even after the award. It is not clear that this decision should be followed today.
[71] For the practice of the Indian courts, see also *Modi Entertainment Network v WSG Cricket Pte Ltd* [2003] 4 SCC 341.

jurisdiction by the court should be upheld. Of course, the Myanmar court is not obliged to stay or dismiss the proceedings if they have been brought in breach of contract, for specific and equitable relief is discretionary, and a court is allowed, in a proper case, to decline to give specific effect to such a jurisdiction agreement for a foreign court. But there is a strong expectation that it will enforce the jurisdiction agreement by specific relief.[72]

A particular example of a breach of contract of this kind may be seen where parties have agreed to resolve any dispute by commercial arbitration.[73] A promise to go to arbitration, rather than to bring a dispute before the courts, is taken very seriously. According to the Arbitration Act 1944, Section 34, if proceedings are brought before a court in Myanmar and the defendant, right at the beginning, shows the court that the parties had agreed to settle the dispute by arbitration, the court may make an order staying its proceedings if there is no sufficient reason not to. This means that the Myanmar court will, in most cases, give effect to the arbitration agreement, but the language of the Section suggests that it has some discretion in the matter.[74]

But, as was said earlier, an international Convention, made at New York in 1958 and adopted by more than 150 states, which now include Myanmar, requires the courts of Member States to respect and enforce agreements to arbitrate. The New York Convention seeks to impose a stricter duty on courts to respect agreements to arbitrate. Until the Arbitration Act 1944 is updated to reflect the provisions of the New York Convention, a Myanmar court will still be able to use Section 34 of the Arbitration Act to stay proceedings brought before a Myanmar court but which should have been raised in an arbitration. When an updated Arbitration Act is adopted in Myanmar, it will contain a specific provision imposing on the court a stricter duty to stay legal proceedings which conflict with the parties' agreement to arbitrate.

However, no similar legislation applies to require a court to give effect to a jurisdiction agreement, and the powers of the court to grant relief will be those in Sections 94(5) and 151 of the Civil Procedure Code.

(b) Objecting to the exercise of jurisdiction on the ground that Myanmar is a forum non conveniens

The second broad objection to the exercise of jurisdiction, adopted throughout the common law world, has always been given a Latin name: forum non conveniens. This may suggest to some people that it has its roots in civilian legal systems, but nothing could be further from the truth. It is a common law principle, and as it has been adopted by the Indian courts, and is considered by them to be wholly consistent with the Indian Code of Civil Procedure. Although older Myanmar cases have suggested (just as older English cases held) that if a court has jurisdiction it should simply and always exercise

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[72] *Steel Bros & Co Ltd v YA Ganny Sons* BLR (1965) CC 449.

[73] The enforcement of an arbitration agreement is in any event specifically excluded, by Exception 1 to Section 28 of the Contract Act 1872, from any prohibition on agreements which restrict absolutely the right of recourse to a court.

[74] There is no reason to suppose that Section 34 applies only to agreements for arbitration in Myanmar: *Steel Bros & Co Ltd v YA Ganny Sons* BLR (1965) CC 449 and *VIE Ismolansa Kajar v Ebrahim Ram Co Ltd* BLR (1962) CC 152 make it clear that an agreement to arbitrate outside Myanmar could be given effect by the court. For specific enforcement of agreements which do not fall within the Arbitration Act 1944, see Specific Relief Act, Section 21.

it,[75] and should not consider itself to have a discretion not to, this approach would, today, be out of line with common law across the world. It is therefore submitted that a Myanmar court should be prepared to allow a defendant to argue that the court should not exercise the jurisdiction which it admittedly has, and in an appropriate case, to grant relief accordingly.

According to this principle, a defendant may ask a court not to exercise its jurisdiction if the courts of another country are clearly more appropriate than the courts of Myanmar for the trial of the proceedings. If the defendant is able to persuade the Myanmar court that the courts of another country are clearly more appropriate for the trial of the proceedings, the Myanmar court should suspend its proceedings unless the plaintiff can persuade the court that it would be unjust for him to be required or expected to bring his claim before the courts of the other country. At the end of the arguments, the Myanmar court will be required to take a broad decision about what is called for in the interests of justice; but it will be guided in its decision by these two parts of the overall enquiry. It is important to understand that if it decides to grant relief, the Myanmar court does not order the plaintiff to go to the foreign court: it has no power to do that, and it has no power to order a foreign court to entertain proceedings. But it can make an order which means that it will decline to adjudicate the substance of the claim, leaving it up to the plaintiff to decide what to do next.

For the defendant to show that there is a court in another country which is clearly more appropriate than Myanmar for the trial of the proceedings, many factors may be relevant. Examples may be given, but no single issue is decisive all by itself. The defendant may point to (i) the fact that the cause of action arose within the territory of the foreign court; (ii) the fact that the parties have a stronger personal connection to the foreign country than they do to Myanmar; (iii) the fact that the witnesses who will give evidence would be able (and could be compelled) to give evidence to the foreign court, but would find it inconvenient (and could not be compelled) to travel to Myanmar to give their evidence; (iv) the fact that the relevant documents are in a foreign language, and would all have to be translated for use in a Myanmar court; (v) the fact that the foreign court would be applying its own domestic law to the issues in dispute, whereas the Myanmar court would be trying to apply what is, for it, a foreign law; (vi) there are other persons who were involved in the broader dispute, and some or all of them cannot be brought before the Myanmar court, with the result that there will a trial in two countries which will be wasteful and will risk inconsistent verdicts; (vii) that the case will come to trial more quickly in the foreign country than it would in Myanmar; (viii) that there are related proceedings already pending before the foreign court; (ix) that the order which the court is asked to make is a discretionary one (such as for specific relief) which would be better made and supervised by another court because the defendant is absent;[76] and (x) - though this is much more controversial - that the foreign court has much more experience than the Myanmar court in the particular kind of litigation.

None of these factors is decisive, but any of them may help a court in Myanmar to assess whether there is a court elsewhere which is more appropriate than it would be for the

[75] See *Cooverjee Ladha v Suleman Ismail & Co* (1903-4) 2 LBR 47; *Mohamed Khan v Damayanthi Parekh* BLR (1952) HC 356 (see also *VRARM Chettyar Firm v CRACT Nachiappa Chettyar AIR* (1935) Ran 301, though this case may simply stand for the proposition that if the court has jurisdiction, it cannot allow the plaintiff to change his mind and withdraw it on jurisdictional grounds).

[76] *Mohamed Khan v Damayanthi Parekh* BLR (1952) HC 356; for Indian authority, see *Noor Jehan Begum v Tiscenko* AIR (1942) 2 Cal 325.

trial of the action. Of the factors listed above, it may be said that (v) is particularly important. Everyone understands that the interests of justice are served by an accurate application of the law; everyone understands that a court applies its own law much more reliably than does a court for which it is a foreign law. As to (viii), we have seen from the Illustration given in relation to Section 10 of the Civil Procedure Code that a Myanmar court is not precluded from hearing a case just because there is a closely-related case pending before the courts of another country, but this may still be a good reason for the Myanmar court to decline to exercise the jurisdiction which it has.

If the defendant can show that there is a court in another country which is or would be clearly more appropriate for the trial of the action, the plaintiff is allowed to try to persuade the Myanmar court to continue hearing the case itself, on the broad ground that it would be unjust to expect him to go before the foreign court instead. He cannot hope to succeed on this point simply by saying that he prefers to sue in Myanmar: a court must be even-handed when the litigants disagree about where their dispute should be brought before a judge.

A plaintiff cannot succeed by showing the court that his chances of success are better in Myanmar than they would be before a foreign court, because the interests of justice require a court to be neutral on the question of who should succeed in litigation. Neither can he succeed by showing that he has a valid cause of action before a court in Myanmar, but would have no cause of action (because its law is different) before a foreign court. Once again, the court must be even-handed. But if the plaintiff can show that he is wholly unable to afford the cost of proceedings before a foreign court (the cost of legal proceedings in some countries is absolutely enormous), he may then say that there would be complete denial of justice if he were not allowed to proceed in Myanmar.

And if the plaintiff can show - it will not be easy - that the foreign court is corrupt, or will not give him a fair trial for reasons of race or religion, or other reason, then the Myanmar court should proceed to hear the case. It will, however, be very difficult for a litigant to persuade a court if Myanmar to make such a finding about a court in another state.

(17) The importance of contractual agreements about jurisdiction

We have already mentioned how an agreement made by the parties may be significant when a defendant tries to persuade a court in Myanmar not to exercise jurisdiction.[77] But in modern private international law, agreements which are made about the jurisdiction of a court or courts have a significance which goes beyond disputes about the exercise of jurisdiction. An appreciation of private international law, especially in the area of international trade and commerce, really requires that attention be specifically given to contractual agreements on jurisdiction. Only then will it be clear why they are so important, and why so much effort is[78] devoted to drafting them.

(a) Distinguished from a choice of law clause or agreement on choice of law

[77] *The American International Underwriters (Burma) Ltd v U Maung San* BLR (1961) HC 41; *Steel Bros & Co Ltd v YA Ganny Sons* BLR (1965) CC 449.

[78] Or should be, which is not the same thing at all.

An agreement on choice of court is an agreement by which the parties promise each other where proceedings will and/or will not be brought if matters come to the point of litigation. Whether a court – chosen or un-chosen – will give effect to such an agreement is determined by the procedural laws of that court, but nowadays, most courts will, generally, respect and give effect to such agreements, which are seen to serve an important purpose.

A choice of court must be distinguished from a choice of law clause. An agreement on choice of law is a term of a contract by which the parties identify the substantive law which they intend to apply to and govern their contract. Of course, if a dispute arises between the parties, and they come to court, the question whether effect will be given to the agreement on choice of law will be determined by the private international law rules of the court before which the dispute comes, but nowadays, most courts will, generally, respect and give effect to such agreements. However, the primary purpose of a choice of law agreement is not focused on litigation, but on the definition and regulation of the rights and duties of the parties as they perform their respective obligations.

Parties to a contract will often choose a jurisdiction as well as a law, and incorporate such a dual term into their contract. There is no obligation to choose a court and a law from the same legal system: the parties may perfectly well choose English law and Myanmar jurisdiction, or Myanmar law and Hong Kong arbitration. It will often make sense for parties to choose a court as well as a law, for it tends to make life more predictable, but they may elect to choose one, while saying nothing about the other. Suppose the parties choose a court but do not choose a law. There is, on the face of it, no choice of law, and a court called on to identify the law which governs the contract will have to do so by using the rules which apply in the absence of a choice made by the parties.[79] They *may* seek to infer a choice of law, describing it as a choice which the parties made but did not express, but although this sometimes happens, it seems wrong, for parties may – if they wish – decide *not* to choose a law to govern their contract.[80] Suppose, on the other hand, that the parties choose a law to govern their contract but do not choose a court for litigation. When that happens, it is obvious that there has been no choice of court; a choice of law to govern a contractual rights and duties says nothing about where any future litigation may take place, which must then by answered by the general law of jurisdiction in the court in which the plaintiff seeks to institute proceedings.

Great and avoidable confusion is liable to arise if the distinction between clauses which choose a court and clauses which choose a law is not maintained. The two clauses are perfectly separate and distinct, in substance and in effect, even when combined in a dual clause. It is, in truth, hard to see why there should be any confusion; it is rather shocking to see how often experienced lawyers in developed legal systems seem to be unable to grasp this elementary distinction.

(b) Potential effect and impact of a jurisdiction agreement

If the parties make a contract which contains a term specifying the court in which any proceedings between them should be brought, the term may, depending on what it says (i) provide a reason why a court which has jurisdiction should nevertheless not exercise

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[79] See Chapter 4, points (43) and (44), below.
[80] It may not be a very sensible thing to do, but it is a consequence of party autonomy.

it,[81] (ii) provide a reason why a court which would not otherwise have jurisdiction should allow the claim to be brought, (iii) may provide the basis for an application for an injunction to prevent a party to the agreement, who has brought proceedings in a foreign court in breach of contract, from bringing or continuing those proceedings,[82] (iv) may provide the basis for a claim for damages for breach of contract if a party to the contract brings proceedings in a court in which he promised not to,[83] (v) may provide a reason to recognise and enforce a foreign judgment if the judgment was obtained from a court to whose jurisdiction the parties had agreed,[84] and (vi) may provide a reason to refuse to recognise a judgment from a court if the judgment has been obtained from a court in which the parties had promised not to sue.[85]

The only point which calls for an additional explanation at this point is (ii): that where, for example, the parties have agreed by contract that the courts of Myanmar are to have jurisdiction, the agreement of the parties will justify the Myanmar court in taking jurisdiction. It is quite correct that there is nothing specific in Sections 16 to 20 of the Civil Procedure Code to justify this, but as has been said above,[86] the general principle of the common law is that if a defendant submits to the jurisdiction of a court, that court has jurisdiction over him; it has been submitted that an agreement on jurisdiction for the courts of Myanmar will suffice to give the court jurisdiction over the defendant in relation to the claim, even though this is not stated in Sections 16 to 20 as a basis of jurisdiction in Myanmar.[87] If the law were not to accept this, the law would be seriously deficient.

(c) Interpretation of a jurisdiction agreement

The issues discussed above are relatively easy to understand in a case in which the parties agree that they made the agreement on jurisdiction, and that it applies to the dispute between them. But suppose that this consensus is not present and that one of the parties, who wishes to disavow the jurisdiction agreement, says (i) that it is ineffective because the contract in which it was contained is itself invalid as a source of legal obligations, or (ii) that the wording of the agreement is not wide enough to apply to the particular proceedings with which the court is concerned, or (iii) that the agreement is worded to as to be permissive, but not mandatory: that is to say, it permits proceedings to be brought in a particular court, but does not require them to be brought in that court.

Any argument along these lines has to be assessed by reference to the law which governs the contract of which this provision is a term. We examine choice of law in contract in Chapter 5, but the principle is clear enough: any term of a contract which is governed by Myanmar law is assessed by reference to Myanmar law; any term of a contract which is governed by English law is assessed by reference to English law, and so on. We will assume that the law which actually governs the contract is Myanmar law, or is not materially different from Myanmar law.

[81] See the discussion under point (16)(a) above.
[82] See the discussion under point (19) below.
[83] See the discussion under point (19) below.
[84] See Chapter 3, point (25) below.
[85] See Chapter 3, point (26) below.
[86] Under point (16), above.
[87] *The American International Underwriters (Burma) Ltd v U Maung San* BLR (1961) HC 41.

To take (i) first, if it is argued that the jurisdiction agreement is invalid because the contract in which it was contained was invalid - procured by fraud or coercion, for example - this does not generally affect the validity of the jurisdiction agreement. This may come as a surprise to some people, for if a contract is void as a source of obligation, so must all its terms be. But though there is nothing wrong with the theory, this would not make practical sense. In the context of arbitration, which is discussed under point (18), it has long been accepted that an arbitration agreement is separate, or severable, from the contract in which it is contained. There is no reason why a jurisdiction agreement should be treated any differently. Next, when parties make an agreement on jurisdiction, and designate a court for the trial of disputes, they probably intend that to be the court which will determine whether the contract is valid and enforceable in the first place: they intend that to be the court which will deal with complaints concerning the performance and non-performance of the contract, as well as arguments about mistake, fraud, coercion, and undue influence. It would make no sense to say that the jurisdiction agreement is binding on the parties only if the contract in which it is contained is valid and binding as a source of legal obligation. At this point the legal theory is a little untidy, but the common sense is clear.

So far as concerns (ii), it is true that sometimes a jurisdiction clause is worded in a rather narrow way. If it says 'all disputes arising from this contract shall be determined by the courts of Myanmar', would it apply to a case in which the plaintiff argued that, as a result of fraud or misrepresentation, he was not bound by the contract ? He might say that the dispute does not arise from the contract, but from some behaviour which took place outside and before the making of the contract, with the result that the jurisdiction agreement does not apply to it. But this would be a very unfortunate result, for it would mean that some cases, which will eventually decide whether the contract is valid, will fall inside the jurisdiction agreement, while others do not. This would make no sense: it is hard to see why parties to a contract would wish to bring about a situation in which some parts of the claim could be brought in one court, while other parts of the claim could not. This thinking has led courts in many common law jurisdictions - England and Australia being the most obvious two - to give the words of a jurisdiction agreement a generous meaning and a broad scope. Any argument which tries to show that the dispute between the parties does not fall within the four corners of a jurisdiction agreement which they made, and which they intended to be binding, will be viewed with great suspicion.

So far as (iii) is concerned, if it is to be argued that the plaintiff is breaching his contract by bringing certain proceedings, in Myanmar or overseas, it will be necessary to show that the jurisdiction agreement, on its proper construction, required the parties to sue in a particular court, rather than permitting them to sue in that court. Sometimes the terms of the agreement make this an easy thing to do: a term which provides that 'the parties submit to the exclusive jurisdiction of the courts of Myanmar' means that for either party to bring proceedings before the courts of a country outside Myanmar is to commit a breach of contract, from which certain consequences (in terms of specific relief and damages for breach) follow as a matter of law.

But if the term is worded in a less clear way: for example, that 'the parties submit to the jurisdiction of the courts of Myanmar', it is not immediately clear whether this means that they agreed that their disputes *may* be or *must* be submitted to those courts. Where this happens, the court will have to decide the correct meaning of the term used, and it is obvious that this will not always be an easy thing to do.

(18) The effect of an arbitration agreement on the jurisdiction of a Myanmar court

As was mentioned above, where the parties have agreed to arbitrate their differences or disputes, the agreement to arbitrate is generally understood to be separate or separable from the contract of which it would otherwise be a part. This is because the international arbitration community has long understood that an important part of the arbitrators' task is to determine whether the contract between the parties was valid and binding or not. It would make no sense if one party could argue that the contract was not valid (because he had rescinded it for fraud, for example), and that the arbitration agreement had ceased to be valid, and that the arbitral tribunal had been eliminated, as a result. The principle that an arbitration agreement was separate from the contract in which it was usually[88] contained, and that its validity was separate and distinct from the validity of the contract in which it may have been contained, is almost universally accepted. It is not currently clear whether it has been accepted as part of the law of Myanmar, but there is no reason to doubt that it will be accepted. Even those countries - especially those countries - which have legal systems of questionable reliability respect and give effect to arbitration agreements. Entities from Russia, China, Vietnam, and other places in which the legal system is not wholly trustworthy, know that if they are to enter into commercial relations with foreign parties, the foreign party will only enter into relations if it is clear that all disputes will be kept away from the courts and dealt with instead by arbitration.[89] The practical need to respect and defend the integrity of agreements to arbitrate is almost universally understood and accepted.

Further analysis of the law of commercial arbitration is outside the scope of this book, for reasons which were outlined in Chapter I. It is also likely that the law of Myanmar on arbitration, as mostly contained in Arbitration Act 1944, will soon be reformed by legislation, and it is therefore unnecessary to say any more about it here.

(19) The power of a Myanmar court to interfere with proceedings before a foreign court

Suppose that the parties have agreed that the courts of Myanmar are to have exclusive jurisdiction to decide matters which are now in dispute between them, but that one of the parties brings proceedings before the courts of a foreign country, or that the parties agreed to arbitrate in Myanmar but one of them has brought proceedings before the courts of a country outside Myanmar, or that proceedings have been brought before the courts of a foreign country in circumstances in which the proper place to have brought them would have been Myanmar. Suppose that the party who objects to having been sued before a foreign court applies to the Myanmar court for an injunction to restrain his opponent from bringing the proceedings: may the court grant the relief ?

Although there is little history of a court in Myanmar having granted such relief in the past, the High Court was prepared in principle to do so on at least one previous

[88] Not all arbitration agreements are made as part of a larger contract. It is perfectly possible to make an agreement to arbitrate separately from the contract or other relationship which has given rise to a dispute, or to enter into an agreement to arbitrate even after a dispute has arisen.

[89] As to whether it is possible, in the light of Contract Act, Section 28, to have an agreement which amounts to an agreement to arbitrate and which prevents all access to the court, even for the purpose of challenging the award, see above, point (16).

occasion,[90] and there is no reason why specific relief, in the form of an injunction, should not be granted in a proper case. The courts of all other common law jurisdictions, including India, allow applications for such relief in appropriate circumstances.

An injunction is specific relief, and in principle at least, it is available against a wrongdoer, and is ordered to restrain the commission of a wrong. It is not aimed or directed at the foreign judge in whose court the foreign proceedings are taking place: this is obvious, for a court in Myanmar has no right or power to make orders against a foreign judge who is not party to the proceedings before the Myanmar court. But the foreign judge may well feel that another court has interfered (directly or indirectly) with the proceedings in his court, and as a result the Myanmar court will exercise considerable caution before making the order.

An injunction is specific relief, and is available only against a person who is, or who has been made, subject to the jurisdiction of the Myanmar court. This means he must either be party to pending proceedings in Myanmar, in which case the injunction may be sought as specific relief in those proceedings, or he must be subject to the jurisdiction of the Myanmar court as provided for by Sections 16 to 20 of the Civil Procedure Code, and must have been served with summons or other document by which the injunction is claimed. It may follow, therefore, that if the party who is suing before the foreign court is not in Myanmar, and none of Sections 16 to 20 applies to him, there will be no jurisdiction to bring him before the Myanmar court, and no basis for an injunction to be ordered.

(a) Injunction to restrain a party who is breaching his contract by suing overseas

If the party to be restrained had agreed by contract to sue only in the courts of Myanmar, it may be said that he is breaching his contract. If this plea may be sustained, one might think that the court should generally order specific relief in the form of a perpetual injunction.[91] A contractual promise not to sue in the court in which proceedings have now been brought creates an obligation, and Section 54 of the Specific Relief Act justifies the ordering of an injunction to enforce that obligation. It is unlikely that a claim for damages for breach of contract would be sufficient to compensate the applicant for the loss - for one thing, damages will very difficult to quantify - with the result that an injunction is consistent with Sections 12 and 54 of the Specific Relief Act.

In many countries of the common law world, it is accepted that the need to exhibit caution in the granting of an injunction is not really appropriate when the basis for relief is that the foreign proceedings are brought in breach of a legal obligation not to do so. The fact that the foreign court has not prevented the bringing of the proceedings before it will make little or no difference.

[90] *VAS Arogya Odeyar v VRRMNS Sathappa Chettiar* BLR (1951) HC 211.

[91] *Steel Bros & Co Ltd v YA Ganny Sons* BLR (1965) CC 449 is authority for the proposition that the court may enforce a jurisdiction agreement for a foreign court by dismissing proceedings brought before the Myanmar courts; it would take the authority further to argue that an injunction should be ordered to prevent a person who had agreed to the exclusive jurisdiction of the Myanmar court from breaching his contract. But the passage from the judgment in *Steel Bros & Co Ltd v YA Ganny Sons*, which is in Chapter 1, point (7), would provide a general justification for the relief. Common sense, equity, and good conscience all suggest that a court should enforce contractual promises.

It may be argued that Section 56 of the Specific Relief Act means that there is a further limitation on the power of the Myanmar court to grant relief to enforce a jurisdiction agreement. Section 56 provides that:

> **56. Injunction when refused**. An injunction cannot be granted
> (a) to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;
> (b) to stay proceedings in a Court not subordinate to that from which the injunction is sought.

But this Section is not applicable in the present context. Section 56(b) applies only to proceedings in a court in Myanmar, which means that it is irrelevant in this context. Section 56(a) should also be interpreted as being confined to cases in which judicial proceedings are pending in separate proceedings in Myanmar. There is no need to consider it to apply where the proceedings to be restrained - more properly, where the person bringing those proceedings is to be restrained - from instituting or continuing proceedings in a court outside Myanmar.

It should also be noted that where the foreign proceedings are brought in breach of a contractual agreement to arbitrate differences, an injunction to reinforce the arbitration agreement is correct in principle.

(b) Injunction to restrain a party who is committing an equitable wrong by suing overseas

The idea that a court may grant an injunction to restrain the party who is bringing proceedings before a foreign court, when his doing so does not involve the breach of a legal right or obligation, is more challenging. But a person who brings proceedings in circumstances which may be considered as vexatious or oppressive may be restrained from commission of what is an equitable wrong. The English courts, including the Privy Council, have said so repeatedly; and the Indian courts have agreed with them.[92] Particularly in the case in which there will be a multiplicity of proceedings if the foreign proceedings are allowed to go forward unchecked, but in other cases as well, the Myanmar court should ask whether the interests of justice favour the grant of an injunction, or whether the grant of an injunction would prevent the perpetuation of an injustice.

The English cases hold that an injunction under this head cannot be granted unless the English court would represent the natural forum for the litigation between the parties. It is not completely clear that the Indian courts take quite the same view, but unless the Myanmar court considers that it is clearly the most appropriate place for the litigation of the substantive dispute, it would be surprising for an injunction to be granted on this basis. If the Indian courts take a more relaxed view, their approach should be respectfully questioned.

(c) Pecuniary alternative to an injunction

There may be reasons why a court in Myanmar is unwilling to order an injunction, even in circumstances in which the applicant for specific relief is able to show that the

[92] *Modi Entertainment Network v WSG Cricket Pte Ltd* [2003] 4 SCC 341.

bringing of proceedings before the foreign court is a breach of contract. The impact of the principle of comity, or an unwillingness to interfere, even indirectly and even though it would be legally justified, with a foreign court may be a reason not to order relief.

In such circumstances, an applicant for specific relief who is refused relief on these grounds may bring a claim for compensation for breach of contract. There is no reason in principle why this should not be done, and although it may not be always easy to assess the sums due as compensation for loss caused by the breach, in principle at least, a person who has been the victim of a breach of contract should be awarded compensation to put him into the position which he would have been in if the breach had not occurred. In principle, that means that all the sums paid and lost as a result of the foreign proceedings should be recoverable. Section 73 of the Contract Act is easily satisfied.

English courts have accepted that damages are available, on the basis of a cause of action for damages for breach of contract, where the breach of contract consists of the breach of a jurisdiction or an arbitration agreement. The development is considered to be sound. But in the absence of a breach of contract, it is improbable that a claim for financial compensation can be pleaded.

(20) The power of a foreign court to interfere with proceedings before a Myanmar court

For the sake of completeness, it should be observed that if a plaintiff has brought proceedings against the defendant before the Myanmar courts in circumstances in which this could be said to be a breach of contract, a court in a foreign country may order the plaintiff, by means of an injunction, to discontinue proceedings before the Myanmar court. This may be done where the foreign court considers that the parties were contractually bound to bring their proceedings before it, or where it considers that the parties were contractually bound to arbitrate their dispute in an arbitral tribunal with its seat in the territory of the foreign court.

The injunction in such a case will have no direct effect on the Myanmar court, as the order for specific relief will not be worded so as to apply to the judge. But the party against whom the order is made may feel that he has no practical choice but to conform to the order which has been made against him.

These last points go to illustrate the way in which private international law in the twenty-first century is very different indeed from the way the subject was understood, even in the major commercial centres of the common law, a few decades ago. It is understood that the material examined under points (15) to (20) of this Chapter will have rarely, perhaps never, been raised before a court in Myanmar. But as Myanmar re-joins the common law world, and as it embraces international trade and commerce, arguments of this kind are bound to arise for consideration by its courts. Unless Myanmar, and those who do business in Myanmar, are prepared to surrender their sovereignty and allow all their disputes to be brought before foreign courts, it will be necessary for the legal system in Myanmar to accept and adopt the principles set out, in particular, in this Chapter.

CHAPTER 3

FOREIGN JUDGMENTS AND THEIR EFFECT IN MYANMAR

In this Chapter we consider the effect of foreign judgments in Myanmar. The question is to determine when a foreign judgment has the status of res judicata in Myanmar, and what consequences follow from that status.

(21) The recognition of foreign judgments; the enforcement of foreign judgments

If there has been an adjudication by a foreign court there are circumstances in which that judgment may have an effect in an Myanmar court. This may seem surprising, for the starting point is that only the judgments and decrees of a Myanmar judge have automatic effect in Myanmar; a judge who has not been appointed under Myanmar law has no authority in Myanmar.

But as explained above, and examined in detail in this Chapter, there are good reasons why the law and courts of Myanmar should give some effect to certain foreign judgments, for otherwise there would no end to the litigation between parties, and no-one would have the security of knowing that a dispute had been finally resolved. It is the task of Myanmar private international law to determine which judgments will have an effect in Myanmar.

When a judgment from a court outside Myanmar satisfies the conditions established by the private international law of Myanmar, there are, broadly speaking, two consequences which may be produced: the recognition of the judgment as *res judicata*, and the enforcement of the judgment as a debt. It is helpful to say something about these two consequences at this point, and to examine their details later.

(a) Recognition of judgment as res judicata

The term *res judicata* is a Latin expression, but it is used in the Civil Procedure Code in the context of domestic law. If a court in Myanmar has already tried a case and given a judgment, another court in Myanmar is prevented from trying the case again. As it is put in Section 11 of the Civil Procedure Code:

> **11**. ***Res judicata***. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or an of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

The language of this provision is not completely clear, but its meaning is obvious: if a suit or issue has already been brought before and decided by a Myanmar court, whoever was party to (and who is bound by) the decision of that Myanmar court is not allowed to bring the matter before another Myanmar court. The reason for this is that the second court would recognise the first decision as *res judicata*, as something which has already

been adjudicated. Consider it this way: if a court in Yangon has decided and ruled in a dispute between A and B, and has ruled in favour of B, it would be ludicrous if A could issue a new suit before the same court in Yangon, based on the same claim. It would be no different if A, having lost before the court in Yangon, were to issue a new suit before the court in Mandalay: Section 11 would prevent that as well.

And although Section 11 only applies to proceedings before courts in Myanmar, the desire to treat a judgment as *res judicata* applies where the first proceedings between A and B were in a foreign court, and resulted in a foreign judgment. If the foreign judgment is one which satisfies the requirements of Myanmar private international law, as this is spelled out in Section 13 of the Civil Procedure Code, which we examine in detail under point (24) below, the judgment of that foreign court may be recognised as making the issues with which it dealt *res judicata* in Myanmar. And if the issues are *res judicata*, further proceedings in respect of them before a Myanmar court will be prevented.

This effect, by which a foreign judgment is treated as making the issues *res judicata*, so that that cannot be re-opened and gone into again, is known as the recognition of a foreign judgment.[93] It does not mean that anything which the foreign judge ordered the defendant to do must be done by him in Myanmar. It simply means that that if the same issues were to be raised before a Myanmar judge, he would be obliged to declare that the issues raised in the suit before him have already been decided, that there is nothing more for him to do, and to dismiss the suit.

It is obvious from Section 11, and from general principle, that there are detailed conditions which apply to the principle of *res judicata* and to the recognition of foreign judgments. Suppose that D has made contracts with A, B, and C to sell goods which he has manufactured. If A considers that the goods are defective and sues D, any decision by the court – whether in favour of A or of D – is irrelevant if B then sues D, because A and B are not connected, and their claims against D are not connected either. If A sues D in Yangon and succeeds in his claim, and then B sues D in Mandalay, the judge in Mandalay will have to come to his own decision whether B has a good claim: he should ignore the judgment given in the proceedings between A and D. This follows from Section 11, because A and B are not the same parties. But if A is an individual, and B is a company in which A owns all the shares, it is not so clear that they are not the same parties. In large books on this subject, this kind of point may be discussed at very great length. We do not need to pursue it here.

Similar issues arise when dealing with a foreign judgment: if the judgment was given in proceedings between X and Z, it may be recognised as a matter of Myanmar private international law, but even if recognised, it will not operate in proceedings in Myanmar between Y and Z, for a foreign judgment cannot have a broader effect than a Myanmar judgment would have. However, if X sues Z before a foreign court, but the claim is dismissed, if X were to try to sue Z in Myanmar in respect of the same cause of action, Z would be entitled to ask the Myanmar court to recognise the foreign judgment, and to treat the foreign decision as *res judicata*. If the Myanmar court does that, it will have recognised the foreign judgment as *res judicata*, and will dismiss X's new claim.

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[93] Recognition as *res judicata* applies to all findings which were made by the judge and which needed to be made to sustain the judgment: *U Po Khan v U Ba* AIR (1935) Ran 118.

(b) Enforcement of a foreign judgment in Myanmar

Before any question of enforcement of a foreign judgment can arise to be considered, it is necessary to satisfy the Myanmar court that the foreign judgment is one which will be recognised in Myanmar: the conditions in Section 13 of the Civil Procedure Code tell us which judgments qualify for recognition, and if they do qualify for recognition, when they may have effect as *res judicata*.

But suppose a foreign court has ordered Y to pay damages to X, and that Y has not paid. X may be able to take steps in the foreign country in which the judgment was given, and execute the judgment there. But Y may not be in that foreign country, and may not have any assets in the foreign country. If X believes that Y has assets in Myanmar, he may try to enforce the foreign judgment in Myanmar.

Of course, this is not possible. Part II of the Civil Procedure Code provides for the execution of judgments, orders, and decrees of a Myanmar court, not of a foreign court. But if X, the person who has a foreign judgment in his favour, can use this foreign judgment to obtain a Myanmar judgment and decree, he will be able to enforce and execute that Myanmar judgment. The enforcement of foreign judgments, therefore, actually takes the form of using the foreign judgment to obtain a Myanmar judgment, and executing that Myanmar judgment.

We examine the basis for this method of 'enforcement' under point (23) below, because the procedure by which it is done explains much about the basis of the law. But before we do that, we should understand the theoretical basis for the law on foreign judgments in the common law system, as this will in turn help us to understand how Section 13 of the Civil Procedure Code, which is examined under point (24) below, was intended to be understood and applied. We do this next.

(22) The legal basis for giving a foreign judgment effect under the law of Myanmar

For any reader who wishes to know what the private international law of Myanmar provides, but who does not wish to know why it makes this provision, the material discussed under this point is not essential reading. But for all other persons, it is. It is particularly important in making sense of Section 13(a) of the Civil Procedure Code.

The private international law of Myanmar was drafted by common lawyers and adopted in 1909. It seems very likely that Section 13, which deals with the effect of foreign judgments, was intended to reflect and be consistent with the way in which the common law understood foreign judgments.

The common law became clear in 1870. In that year, a case came before the English courts, concerned with the effect of a non-English judgment in which the foreign court was said to have tried to apply English law to the issue before them, but to have made a serious mistake in doing so. The question for the English court was whether this prevented the recognition of the French judgment. The court held that it did not, reasoning that once a court 'of competent jurisdiction' had given a judgment, that judgment created an obligation by which the parties to the foreign proceedings were bound. The fact that the foreign court might have made a mistake of fact or law was really irrelevant, for if the court was one 'of competent jurisdiction', the judgment itself

was treated as creating and imposing a fresh obligation. The facts of the dispute which had given rise to the judgment were now just a matter of history, and no longer of interest or relevance.

The reference to 'competent jurisdiction' is picked up and used in Section 13 of the Civil Procedure Code, but the so-called 'doctrine of obligation' is the basis for the operation of the law. The judgment is an obligation separate and distinct from the facts which led up to it. From this, several things follow, of which three should be mentioned.

(a) The reason why a foreign judgment creates an obligation

It will be seen below that a foreign judgment creates an obligation, or, more precisely, imposes an obligation on the party against whom it was given – whether he was plaintiff or defendant – if that party has behaved in a way which makes this appropriate. The common law has always taken a clear and strong view of the principle of territoriality. For example, and as we shall see, if property is within the territory of a state, the law of that state, and the acts of officers of that state in respect of that property, will be regarded as effective. If a person is within the territory of a state, he may be summoned to court. And, the common law accepts, if the defendant was present within the territory of a foreign sovereign, he may be summoned to court by that sovereign, and a claim against him adjudicated. He chose to be in that country; it is fair, just, and reasonable that the judgments of the courts of that country given against him be recognised as imposing an obligation upon him. We may think of this as a natural obligation arising from the general principle of respect for the sovereignty of states.

But if he was not present within the territory, an obligation may still arise by agreement with the other party to the dispute. For example, if the parties made an agreement in advance to litigate in a particular court, they will be taken to have agreed to accept and abide by the judgment of that court: the obligation now arises from the bilateral agreement of the parties, almost as though it were a contract. The same is true if there was no prior agreement, but the plaintiff issued a writ and served it on the defendant, and the defendant responded by appearing to defend the claim: almost as though there were a contract by offer and acceptance. This is the basis of the doctrine of obligation, and it explains why a foreign judgment may be given effect in Myanmar without the Myanmar state being involved: if the parties have, in effect, made a bilateral agreement to this effect, no harm is done when it is enforced.

(b) What does the obligation require the obliged party to do ?

The obligation obliges the party bound by it to accept the judgment as an authoritative and binding unless there is an objection which can properly be made. The objections permitted under the private international law of Myanmar are identified in Section 13 of the Civil Procedure Code; in principle they are the kinds of objection which would be expected to negate any obligation between the parties.

It also follows that the obligation is to accept the judgment, whether it is right or wrong,[94] as a final answer to the matter in dispute. Of course, if the judgment of the

[94] The court will not investigate the rightness or wrongness of the foreign judgment if it otherwise satisfies the requirements set out in point (24) and examined below: *SPSN Kasivisvanathan Chettiar v SS Krishnappa Chettiar* BLR (1951) HC 399.

foreign court is not a final judgment - an interlocutory judgment, for example - a Myanmar court will not treat it as final.

(c) Enforcing an obligation to pay money

If the foreign judgment ordered the losing party to pay money to the successful party – the defendant was ordered to pay compensation to the plaintiff, or the unsuccessful plaintiff was ordered to pay costs to the successful defendant – the sum ordered to be paid is regarded as a debt, and the judgment itself may be used as the basis for a suit against the other party. We examine this next.

(23) The method by which a foreign judgment is enforced in Myanmar

As was explained above, a foreign judgment is, technically, not enforceable in Myanmar. But Myanmar law allows a person in whose favour a court has ordered the payment of a fixed sum of money to claim the sum as a debt. It is necessary to distinguish between judgments from foreign countries generally, and judgments from the United Kingdom.

(a) Judgments from foreign countries generally

The way in which a judgment from a foreign country other than England may be enforced in Myanmar can best be understood by considering the standard form of plaint when a suit is commenced by a party in whose favour a foreign court ordered the payment of money. In Appendix A to the Civil Procedure Rules, which gives specimen forms of plaint, Form no 11, entitled 'On a Foreign Judgment', sets out the model form of pleading:[95]

> A.B., the above-named plaintiff, states as follows:
> 1. On the [ ] day of [ ] 20 , at [ ], in the State [or Kingdom] of [ ], the [ ] Court of that State [or Kingdom], in a suit therein pending between the plaintiff and the defendant, duly adjudged that the defendant should pay to the plaintiff [ ] kyats, with interest from the said date.
> 2. The defendant has not paid the money.
> 3. [*Facts showing when the cause of action arose, and that the Court has jurisdiction.*]
> 4. The value of the subject-matter of the suit for the purpose of jurisdiction is [ ] kyats and for the purpose of court fees is [ ] kyats.
> 5. The plaintiff claims [ ] kyats with interest at [ ] per cent from the [ ] day of [ ] 20

It follows from this that if the Myanmar court finds that the foreign judgment is one to which Section 13 applies (or provides no basis for objection), the basis for the plaint is established. But the form still requires the claimant in Myanmar to specify the sum of money which the defendant was ordered to pay.

It also follows that if the foreign court did not order the payment of a fixed and final sum of money, the plaintiff will not be able to point to the judgment as creating a money debt which he may enforce. If, for example, the foreign court ordered the defendant to pay all such sums as represent the profits made by it as a result of the breach (and would

[95] We have updated the date and currency references from the original text in the Myanmar Code.

then order the parties to go off for an assessment of damages), the judgment cannot yet be enforced in Myanmar, because the sum of money ordered to be paid is not ascertained. Likewise, if the foreign court has power under its own law to alter or amend the amount of damages which it ordered to be paid, the judgment will not create a debt which is enforceable in Myanmar, because it will not be possible to say how much, precisely, the defendant has been ordered to pay.[96] The form makes clear the point which the common law always accepted: that a foreign judgment has to be for a fixed sum in money before it can be enforced.

It also means that if the foreign court did not order the payment of money, but ordered the handing over of property, for example, that such a judgment cannot be enforced in Myanmar. If for example a foreign court ordered a defendant to deliver to the plaintiff a piece of machinery which is situated in Myanmar, or ordered the defendant to transfer to the plaintiff the defendant's shares in a Myanmar company, the judgment cannot be enforced: the common law always said so, the law of Myanmar is assumed to say so, and the specimen form of plaint appears to make it clear that this is so.

In such a case, a plaintiff would need to sue on the original cause of action in Myanmar. But this is not as difficult as it may seem, for as soon as the defendant denies that he is liable, the plaintiff will be able to argue that the relevant issues have been made *res judicata* by the foreign judgment (assuming it to be a judgment to which Section 13 applies), with the consequence that the Myanmar court does not need to investigate – and may, by the principle of *res judicata*, be prevented from investigating – the merits of the claim. In accordance with Order 14 of the Civil Procedure Rules, the court should frame the issue between the parties as being whether the foreign judgment is to be given effect in Myanmar as *res judicata*. Once that issue has been dealt with by the court, it will usually be obvious whether the plaintiff is entitled to the remedy for which he asks.

But if civil proceedings are to be brought to enforce and collect the debt created by the foreign judgment, the court in Myanmar must have jurisdiction to entertain them. The final question therefore concerns the application of the jurisdiction rules of Sections 18 to 21 of the Civil Procedure Code to suits to enforce a foreign judgment. A particular point arises if the plaintiff needs to rely on Section 20(c) to establish the jurisdiction of the court, for which it will be necessary to show that the cause of action to enforce the foreign judgment as a debt arises, wholly or in part, in Myanmar. As to that, a part of the cause of action obviously arises at the place at which the judgment was given. It may be possible to argue that if the judgment debt should be paid to the plaintiff in Myanmar, on the basis that a debtor should seek out his creditor and pay him where he resides,[97] and that Section 20(c) may be satisfied on that basis, but this seems rather difficult, for the place at which a judgment debt should be paid is surely where the court decreed it; and if this is the case, Section 20(c) will not be available to give the court jurisdiction.[98] There

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[96] However, if the court ordered payment on a periodical basis, and while it may vary the payments for the future, it has no power to alter those whose date for payment has passed, a debt claim for those missed past payments may be brought: *Walker v Walker* AIR (1935) Ran 284 (periodical payments of spousal maintenance.

[97] *Soniram Jeetmull v Tata & Co Ltd* (1927) ILR 5 Ran 451 (Privy Council on appeal from High Court); *NKLP Palaniappa Chettyar v STSP Subbiah Chettyar* AIR (1937) Ran 443; *KSLPA Annamalai Chettyar v Daw Hin U* ALR (1936) Ran 251. But these were not cases concerned with foreign judgments.

[98] For a similar view taken in India, see *Badat & Co v East India Trading Co* [1964] 4 SCR 19 (SC).

may therefore be a jurisdictional hurdle to overcome if a suit on the foreign judgment is to be brought in Myanmar.

(b) Judgments from courts in the United Kingdom

The procedure for enforcing a judgment from a superior court of England, Scotland, or Northern Ireland is slightly different, as a result of Section 44A of the Civil Procedure Code.[99] This provides that a certified copy of the decree may be filed in a District Court, and that when this has been done, the decree may be executed on in Myanmar as though it had been a decree of the District Court. However, Section 44A(3) allows the person against whom the judgment was given to apply for the refusal of execution, on the basis that any of the objections in Section 13 applies. The effect of all of this is that while the procedure for enforcing an English judgment in Myanmar is a little different from the procedure applicable to all other foreign judgments, the substantive grounds on which the English judgment will or will not be accepted as *res judicata* are the same as for all other foreign judgments.

(24) The foreign judgments which may and may not be given effect in Myanmar

The earlier points of this Chapter sought to explain the basis on which the common law approaches the effect of foreign judgments in the private international law of the state which is asked to give effect to them. It did so because although Section 13 of the Civil Procedure Code is a clear statement of the private international law of Myanmar, the terms of Section 13 still leave questions of interpretation to be answered which can only be answered by understanding the common law foundation on which Section 13 is constructed. It is now time to turn to Section 13 of the Civil Procedure Code, which states as follows:

> **13. When foreign judgment not conclusive**. A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim, litigating the same title, except –
> (a) where it has not been pronounced by a court of competent jurisdiction;
> (b) where it has not been given on the merits of the case;
> (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of the Union of Myanmar in cases in which such law is applicable;
> (d) where the proceedings in which the judgment was obtained are opposed to natural justice;
> (e) where it has been obtained by fraud;
> (f) where it sustains a claim founded on the breach of any law in force in the Union of Myanmar.

Sections 9 to 14 of the Civil Procedure Code deal generally with suing in the courts of Myanmar, and with the principle of *res judicata* after a judgment has been given. This

[99] In fact, Section 44(1) extends this to the courts of any 'reciprocating territory'. It does not appear that Myanmar entered into reciprocal arrangements with any other foreign country, and that this Section only applies to the United Kingdom. But it is possible that the authors have failed to identify a reciprocal arrangement between Myanmar and a foreign country other than the United Kingdom.

principle prevents a second set of proceedings being brought by a party who has already lost on a cause of action which has already been disposed of by a court in Myanmar. It also – in Sections 13 and 14 – makes provision for *res judicata* to be applied to foreign judgments, but it imposes conditions which need to be satisfied before this is done. This is sensible. In every country of the civilised world, a legal system treats its own judgments differently from those of a foreign country. Where a legal system is dealing with one of its own judgments, it knows perfectly how the proceedings will have been conducted. But where it is dealing with a judgment from a foreign country, it will have no knowledge of the foreign legal system. The rules put in place by Section 13 apply to judgments[100] from systems with which Myanmar is very familiar, such as India, but also to judgments from legal systems which are, in every respect, a long way away from Myanmar and from the common law. It would be absurd for the courts of Myanmar to be required to treat any and every foreign judgment as the equivalent of a Myanmar judgment.[101] Only if the foreign judgment satisfied certain conditions, which are principally set out in Section 13, will the judgment have the effect of *res judicata* in Myanmar; but if the foreign judgment can be shown to have that effect, it will be received and accepted into the legal order in Myanmar. Everything then turns on the conditions set out in Section 13.

In addition to the objections allowed for by Section 13, a judgment will be refused recognition as *res judicata* if it was obtained to enforce foreign revenue laws or foreign penal laws, or was based on other public laws of a similar kind;[102] nor will a foreign judgment be given effect if it contradicts the public policy of Myanmar law.[103] These are general rules of private international law which must be taken to apply to the law of foreign judgments even though they are not specifically mentioned in Section 13.

It is slightly strange that the heading to Section 13 is framed in negative terms – when a foreign judgment is not conclusive – rather than positive terms, but in the end this makes little difference to the substance of the law. What is more difficult is that the wording of Section 13(a), in particular, is liable to mislead those who do not understand the common law principles on which Section 13 is based. It is therefore necessary to start our analysis of the details of Section 13 with the meaning and effect of Section 13(a).

(25) The foreign court as one of 'competent jurisdiction' in relation to the party against who the foreign judgment is to be recognised or enforced

According to Section 13(a), a foreign judgment will not be recognised as conclusive where it was not pronounced by a court of competent jurisdiction. This does not mean what it may appear to mean.

The law on foreign judgments[104] is part of the private international law of Myanmar. The question posed by Section 13(a), of whether a foreign court was one of competent

[100] This will mean the decision of a judicial authority; it will not include a decision from a regulatory or administrative authority: see *Technip SA v SMS Holding (Pvt) Ltd* [2005] 5 SCC 465.

[101] An exception is made for judgments from superior courts in the United Kingdom: Civil Procedure Code, Section 44A, above, point (23).

[102] We examine this general principle under Chapter 4, point (39) below.

[103] We examine this general principle under Chapter 4, point (40) below.

[104] It is obvious that the material examined at this point has nothing whatever to do with the ordinary rules of original jurisdiction of a Myanmar court: *Mohammed Khan v Damayanthi Parekh* BLR (1952) HC 356: the law of jurisdiction (of a Myanmar court) and the rules of *res judicata* applicable to a foreign court are completely different things.

jurisdiction, asks whether the foreign court was, in the opinion of Myanmar law, a court of competent jurisdiction. 'Competent jurisdiction', in this sense, means competent to give a judgment which will be recognised as conclusive in Myanmar. It has little or nothing to do with the question of whether the foreign court had jurisdiction according to its *own* law. It is necessary, but also sufficient, that the foreign court had jurisdiction according to the rules of Myanmar's private international law.

This is very important. Foreign legal systems have some rather surprising rules of jurisdiction for a plaintiff who wishes to sue in their courts. In France, the rule is that a French citizen may sue anybody – any foreigner, no matter where he is – before a French court. In Germany, the rule is that a person can be sued in Germany if he has any property in Germany – even an umbrella, which he left behind in a hotel room – even though the claim has nothing to do with that property, or with anything which happened in Germany. No doubt many other countries have rules which appear to be just as strange. They may make perfect sense when they take their place within the Civil Codes of France or Germany, but they provide no proper basis for giving effect to a French or German judgment in Myanmar.

Whether a foreign court is a court of competent jurisdiction for the purpose of Section 13(a) is, therefore, a reference to the common law rules of what makes a court one of competent jurisdiction for the purpose of recognition of a judgment from that court as *res judicata* against the party who lost in those proceedings. It follows that the law asks the question of competent jurisdiction in relation to the defendant if he was the losing party, or in relation to the claimant if he was the losing party. It does not ask the question in a more abstract sense. There are two broad ways to satisfy this condition as against the party who lost before the foreign court.

(a) The party against whom the judgment was given was present or resident within the territory of the foreign court when proceedings were begun there

Suppose a foreign judgment has been given against a defendant. If the defendant was present or resident within the jurisdiction of the foreign court when proceedings were begun, the court will be regarded as one of competent jurisdiction for the purpose of Section 13(a).

It is not completely clear whether the question is to be framed in terms of residence or presence. In favour of residence is the fact that it probably points to a longer-term, or deeper, connection with the foreign court than presence is, which makes it appear to be a stronger basis for the recognition of a foreign judgment. And the courts of Myanmar have jurisdiction, under Section 20(a), over a person who is actually resident, rather than merely present, in Myanmar. And the Indian courts have favoured a test of residence.[105] All of this may suggest that a foreign court is one of competent jurisdiction if a defendant was resident in the foreign country, but not if he was merely present. On the other hand, every person knows where he or she is present on any day, but it may be more difficult to know where they are resident, at least during a period when they are staying away from their home. Is a person who has been sent to study or work abroad still resident in the country which is his home ? Is he also resident in the country in

[105] *Narasimha Rao v Venkata Lakshmi* [1991] 3 SCC 451.

which he studies or works ? It is harder to apply a test of residence rather than presence, and this is a reason to prefer a test of presence to one of residence.[106]

Where a company is concerned, the ideas of presence and residence are to some extent artificial. The law therefore has to apply them by analogy, and it tends to do so by requiring a company to have had a fixed place of business from which it carried on its business. If it does, no doubt a company is present and resident in that country. If it does have a place of business of its own, but does is business through another (say a travel agent sells tours which the company will provide), it may be regarded as present in the foreign country is there is a fixed place of business which belongs to someone else, but at which place contracts with the company are made: it is the making of contracts in a country which indicates the doing of business. But if there is only a representative of the company, who promotes the company but who has no authority to make contracts on the company's behalf, then the company will not be regarded as present in that place; likewise, if the company's chief executive officer goes to Thailand for a holiday, this does not mean that the company is present in Thailand.

(b) The party against whom the judgment was given submitted to (or agreed to accept) the jurisdiction of the foreign court

As explained above, a person who accepts the jurisdiction of a foreign court should be taken to accept its judgment as *res judicata*. It follows that if the foreign court gives judgment against the plaintiff, the court will be one of competent jurisdiction as far as he is concerned, because he invoked the jurisdiction in the first place and must therefore be taken to have submitted or agreed to the jurisdiction of the foreign court.

If the foreign judgment was given against the defendant, the question will be whether the defendant submitted to, or agreed to submit to, the foreign court. Submission by agreement is the simpler case. If the plaintiff and defendant were parties to a contract which provided that all disputes were to be brought before the courts of Singapore, each side should be bound, by reason of their agreement, to accept the judgment pronounced by the court at Singapore. The court is one of competent jurisdiction because of the parties' bilateral agreement to accept its jurisdiction: a court in Myanmar will hold them to their contract and to the consequences of it.

If there was no prior agreement, but the plaintiff issued a writ and summons from the foreign court,[107] and the defendant appeared before the foreign court without making any objection to the jurisdiction of the foreign court, or to the exercise of jurisdiction by that court, he may be taken to have submitted to it; he may also be said to have accepted the invitation of the plaintiff, made in the rather special form of a summons, to accept the jurisdiction of the foreign court. If he does that, the defendant submits to and will in principle be bound by the judgment pronounced by the foreign court because the court will be, for the purpose of Section 13(a), a court of competent jurisdiction.

The position is more complicated if the defendant wishes to object to the jurisdiction of the foreign court. It appears from Section 21 of the Civil Procedure Code that a defendant sued in Myanmar is allowed to object to the jurisdiction of the Myanmar

[106] In England, the law now favours a test of presence rather than residence.

[107] This submission by the plaintiff necessarily extends to his submission to a counter-claim by the defendant: *Walker v Walker* AIR (1935) Ran 284.

court. Almost all foreign legal systems do something similar. Suppose a defendant appears before a foreign court to argue to the foreign court that it does not have, or should not exercise, jurisdiction. If he does that, does the fact that he has appeared in the proceedings mean that he has submitted to the jurisdiction of the foreign court ?

The answer should be no: that a defendant who appears before a foreign court to object to its jurisdiction cannot be said to have agreed to accept, or to have submitted to, its jurisdiction. However, some have argued that if a defendant appears before a foreign judge to ask him to do something, he must have submitted by making the request.[108] This is an unattractive argument, but it has sometimes persuaded courts in common law jurisdictions; it is a pity that this is so. A defendant who appears before a court to protest about its jurisdiction should not be taken to have submitted to the foreign court and to have made it, for the purposes of Myanmar law, a court of competent jurisdiction. Of course, if the foreign court rejects the objection to its jurisdiction, and the defendant then makes a fresh decision to defend the case, he will be taken to have submitted to the jurisdiction of the court, and it will now be considered to be a court of competent jurisdiction.

(c) Factors which do not make a foreign court a court of competent jurisdiction

A foreign court will not be a court of competent jurisdiction for the purposes of Section 13 just because the foreign court had jurisdiction according to its own civil code. As explained above, the civil code, or other rules, in the foreign country may have been very peculiar, and to have allowed a claim to be made against a defendant even though he had no sensible connection to that country or court.

A foreign court will not be a court of competent jurisdiction just because it was a court within whose jurisdiction the cause of action arose in whole of in part. Although this is a basis on which a court in Myanmar may exercise jurisdiction, the private international law of Myanmar on judgments is not a mirror image of its domestic law on jurisdiction: why should it be ? The law of Myanmar does not say – or should not be understood to say – that a foreign judgment will be recognised as *res judicata* just because its jurisdiction was a mirror image of the jurisdiction of a Myanmar court. This precise point was decided under the English common law in 1870,[109] and it is certain that the drafters of the Civil Procedure Code intended to preserve this principle in the Code.

A foreign court is not one of competent jurisdiction just because it comes from a court which would, if the situation were reversed, recognise a judgment from the Myanmar court. This is not the law (although it is the law in a number a legal systems) in Myanmar; and the real objection to it is that it would mean that the decision whether a Myanmar court would recognise a foreign judgment would be dependent on the private international law of a foreign state, rather than being the independent question of Myanmar law which it ought to be.

And a foreign court is not one of competent jurisdiction just because it comes from a court in a country of which the defendant is a national. Although it has occasionally been said that nationality is a basis for jurisdictional competence,[110] no case has actually so

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[108] There is Indian authority to this effect, but it is old, and is not a decision of the Supreme Court. It should not be followed.

[109] *Schibsby v Westenholz* (1870) LR 6 QB 155.

[110] In England, *Emanuel v Symon* [1908] 1 KB 302.

decided, and the suggestion is unsound. Nationality has never played a part in the common law of foreign judgments, though it is much more important in the laws of civil law countries. The common law understands that a person's nationality may be rather remote from the circumstances of his present life; and a person who has dual nationality (or who is stateless) would give rise to problems. Nationality is irrelevant to the private international law of foreign judgments in Myanmar.

(d) What should a defendant do when served with a foreign writ of summons ?

The foreign court will be one of competent jurisdiction if the defendant was present when the proceedings were commenced, or if he submits to its jurisdiction. But if he is not present, and has not made a contractual agreement to submit to the jurisdiction of the foreign court he will, if he ignores service of the summons, ensure that the foreign court is not on of competent jurisdiction so far as Section 13 is concerned. If the only place in which he fears enforcement of the foreign judgment is in Myanmar, because he has assets only in Myanmar, it may be sensible to not appear and to allow the foreign court to enter judgment in default of his appearance, or after proceeding *ex parte*, or whatever its procedural law may say. But he should be aware that other countries may have different rules for the recognition of foreign judgments, and he will need to check the position under those laws as well; and as he will usually be under some time pressure in the court in which proceedings have been instituted, the decision, which is of great practical importance, can be a difficult one to take.

(e) The effect of Section 14 of the Civil Procedure Code

Section 14 of the Civil Procedure Code is a rather surprising provision. It reads:

> **14**. **Presumption as to foreign judgments**. The court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

This means that if a copy of the judgment which complies with Section 14 is produced to the court, which it usually will be, it will be for the defendant to show that the court was not one of competent jurisdiction by reference to the rules set out above; it will not be the duty of the plaintiff to prove that the court was one of competent jurisdiction. Apart from the law of India, where this provision also appears, there is no rule or presumption like this in any other common law jurisdiction. Its practical significance is small.

(26) Permissible objections to the judgment or to way in which the foreign court dealt with case

If the foreign court is shown to have been one of competent jurisdiction, there are other objections which may be raised in an attempt to show the court in Myanmar why the foreign judgment should not be recognised or enforced. These are listed in Section 13(b)-(f), and we examine them here. We examine under point (27) below the objections which a defendant may have, but which are not admissible as objections to the recognition of the foreign judgment in Myanmar.

(a) The foreign court was not one of competent jurisdiction

We have dealt with this above. It is mentioned here only to ensure that the sub-headings under this point are aligned with Section 13 of the Civil Procedure Code.

(b) The foreign judgment was not given on the merits of the case

A foreign judgment is given on the merits if the controversy raised by the parties has been directly adjudicated on by the foreign court. A foreign judgment will not be recognised if it was pronounced without the foreign court investigating the merits of the case. This may seem strange, but in many countries, if a defendant does not appear when summoned to court, the court may allow the plaintiff to enter judgment there and then. If a defendant does not appear, the court will not trouble itself to consider the claim or the evidence and legal argument in support of it. If the defendant does not appear, it is assumed that he has nothing to say in his defence, and there is no need for the court to investigate any further. If this happens, the judgment will not have been given on the merits of the case. The Privy Council said so in two Indian appeals,[111] and there is no doubt that its decision is reliable as part of Myanmar law as well.[112] It gives rise to a practical problem, in that a defendant who has absolutely no defence stays away from the foreign court, he makes it more difficult for the plaintiff to get a judgment which is of any use.[113] In such a case the plaintiff will need to persuade the foreign court to make some form of examination of the merits, even if this is not particularly thorough or detailed.[114]

The judgment will not be given on the merits of the case if the case was dismissed by the foreign court on the ground that it had no jurisdiction, or because the claim was out of time, or for any other reason which meant that the foreign court, though acting entirely in accordance with its own laws and rules of civil procedure, did not make any assessment of the merits of the claim. The judgment will also need to be final, that is to say, not one which represents a provisional view which the same court may revisit a later stage in the proceedings. If it is only provisional, it cannot be said to have been *given* on the merits of the case.

(c) The foreign judgment appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of the Union of Myanmar in cases in which such law is applicable

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[111] See *Keymer v Visvanatham Reddi* (1916) LR 44 IA 6; *Oppenheim v Mahomed Haneef* [1922] 1 AC 422 (refusing to enforce an English judgment, which had been given in default of appearance by the defendant and without any examination by the court of the merits of the claim, by reference to Section 13 of the Indian Code of Civil Procedure, which is identical to Section 13 of the Myanmar Civil Procedure Code). It follows that *Burn v Keymer* (1913-14) 7 LBR 56 cannot be considered to be correct.

[112] A conclusion accepted in *Abdul Rahman v Mahomed Ali Rowther* (1928) ILR 6 Ran 552.

[113] In *Abdul Rahman v Mahomed Ali Rowther* (1928) ILR 6 Ran 552 the court (at p 557) considered it 'absurd' that a defendant could deprive a judgment from a foreign court of the status of *res judicata* by absconding from the foreign court, but it saw no way to avoid the conclusion to which the Privy Council directed it.

[114] *Walker v Walker* AIR (1935) Ran 284. *Saraswati v Manikram Balabux Bajaj* BLR (1956) HC 316 makes the point that the examination of the merits and the evidence made by the court in the absence of the defendant may be cursory, but it will still be sufficient.

It will be rare that a foreign judgment makes an obvious error of international law: it is hard to think of any case in which this has happened. As the error has to be on the face of the proceedings, it will be even rarer that it happens.

But if a foreign court has *refused* to apply the law of Myanmar to the dispute before it when it should have applied Myanmar law, the judgment will not be recognised. The most obvious example might be if the parties have chosen the law of Myanmar to govern their contract, but the foreign court, for whatever reason, refuses to apply the law of Myanmar. In such a case, there is good reason to refuse to recognise the foreign judgment. So also if a court in the less developed parts of the Middle East simply refuses to apply foreign law, and as a consequence does not apply Myanmar law: a judgment of that kind should not be recognised in Myanmar. There may be other examples which could be given, but today the cases are likely to be rare.

Section 13(c) is not triggered where the foreign court has attempted to apply the law of Myanmar but has made an error in doing to. There is a world of difference between refusing to apply a law and trying to apply a law but failing to do it correctly; the fact that a foreign court *failed* to apply Myanmar law does not mean that it *refused* to do so. A refusal requires a determination to not apply the law of Myanmar, so if the parties before the foreign court do not ask the foreign judge to apply the law of Myanmar, and the foreign judge does not apply the law of Myanmar, it cannot be said that he has refused to do so.[115]

(d) The proceedings in which the foreign judgment was obtained are opposed to natural justice

If the foreign court adopted a procedure which is not procedurally fair: it did not give the defendant proper notice of the proceedings, or it did not hear both sides of the case when it should have done so, or it refused to allow the defendant to present evidence or call witnesses, or to have a proper translation of the proceedings, the foreign court will have fallen below the basic standards required by the rule of law. Its judgment will not be recognised in Myanmar. So also if the court appears to have shown bias, or if there is evidence that the court accepted a bribe and as a result did not approach the task of adjudication in an impartial and judicious manner. It ought to be obvious that a judgment produced in such circumstances should not be recognised in any country, foreign or not.

If there is a practical problem with Section 13(d), it is that some foreign procedures may appear to be rather odd when compared with those which apply in Myanmar, but legal systems do very in the way in which courts go about their business. But the standards of natural justice are universal.

Of course, when parties make an agreement, of whichever kind, to accept the jurisdiction of a foreign court and to abide by its judgment, they realise that the court may make a mistake, and that if it does, they will still be expected to accept the judgment. But they expect the court to behave properly; if they were to be asked whether they would be content to accept a judgment which was produced by improper and unjudicial means, the answer would surely be negative. It follows that a failure to abide by the rules of natural justice will nullify the obligation which would otherwise arise from the foreign judgment.

(e) The foreign judgment was obtained by fraud

[115] *Brijlal Ramjidas v Govindram Gordhandas Seksaria* (1947) LR 74 IA 203.

If breach of the rules of natural justice is a failure on the part of the foreign court to conduct itself in a proper manner, a judgment which is obtained in proceedings in which one of the parties conducted itself improperly should also be refused the status of *res judicata* in Myanmar. If one party has produced forged documents, or perjured testimony, in support of his case, the judgment produced as a result is a tainted thing which should not be recognised. Section 13(e) reflects the view taken in almost all common law jurisdictions to judgments obtained by fraud: by wrongful conduct designed to mislead and deceive the foreign court into giving a judgment it would not have given if this misleading had not taken place.

This much is uncontroversial. What would make Section 13(e) more controversial would be for it to be interpreted to reflect the English common law out of which it is derived. For English common law allows a court to investigate whether a foreign judgment was obtained by fraud even though the same objection, and the same evidence in support of it, had already been put before, and rejected by, the foreign court. If, for example, the defendant alleges that the documents on which the plaintiff relies are forged, but the foreign court considers the matter and rejects this, the same point can be raised as an objection to the recognition of the foreign judgment. This does look odd, for it makes it appear that the second court considers itself to be superior to the original court; and in some common law jurisdictions the English approach to the fraud defence has been criticised; indeed, in India it may be that the point in Section 13(e) can only be based on evidence which has come to light since the foreign judgment was given.[116]

But as is sometimes said, 'fraud is a thing apart'. What this means is that fraud is not one of those things which litigants accept as part of the process of litigation. It requires special treatment; and Section 13(e) provides it.

Quite apart from all that, if proceedings were brought before the foreign court in breach of a contractual agreement to bring them before a different court or tribunal, then unless the defendant waived any objection, the judgment will be one which the plaintiff should not have asked for and should not have obtained. Instituting proceedings in breach of contract is, for these purposes, fraud; the resultant judgment will not be res judicata in Myanmar.

(f) The foreign judgment sustains a claim founded on the breach of any law in force in the Union of Myanmar

If a foreign judgment is based on a breach of the laws of Myanmar –for example, it seeks damages for breach of a contract to export goods from Myanmar without a proper permit, it cannot be recognised or enforced in Myanmar. Indeed, Section 13(f) may be the means by which a court in Myanmar refuses to accept as *res judicata* any judgment of a foreign court which is so contrary to the law of Myanmar that it is offensive to Myanmar public policy and therefore shut out from recognition. Other legal systems have such a rule; and Myanmar must also be able to accommodate it. Section 13(f) may be the place for it. The issue is examined again under point (40) below.

(27) Other, mostly impermissible, objections to the judgment or to the way the foreign court dealt with the case

[116] *Sankaran Govindan v Lakshmi Bharathi* [1975] 3 SCC 351.

There are several arguments which a defendant might be tempted to make in order to prevent the recognition of a foreign judgment as *res judicata*, but which are not obviously provided for by Section 13 of the Civil Procedure Code, and which are not allowed under the common law, either. Three of them are mentioned here for the sake of completeness and for the avoidance of doubt.

(a) Error by foreign court is irrelevant

It is irrelevant that, as the defendant may argue, the foreign court made an error of fact or of law or both; it makes no difference if this error is on the face of the proceedings.[117] All courts make mistakes, and anyway, not all allegations of mistake are well founded. If a Myanmar court would refuse to treat a foreign judgment as *res judicata* whenever there was said to have been a mistake made by the foreign court, no foreign judgments would ever be recognised, for any party who was unwilling to abide by the judgment would need only to allege an error, and that would be that. The line that separates error (which is irrelevant and inadmissible) from error resulting from fraud (which is relevant and admissible) is a very important one.

(b) Error by foreign court as to own jurisdiction may or may not be relevant

It is not clear what the correct answer is if the foreign court may have made a mistake in the application of its own rules of jurisdiction. English law would certainly regard this as irrelevant. It appears that the Myanmar courts have done likewise: although a court may have acted without jurisdiction, and may have given a judgment which a court to which an application is made may set aside as a nullity, as between the parties to the judgment it remains valid and binding on them *in personam*.[118] Although the law is well established in relation to decisions of Myanmar courts, it must apply just as much as part of Myanmar law on foreign judgments. A judicial decision binds the parties; it is not a nullity until a court says it is. The only question will be whether the foreign judgment is *res judicata* under the law of the foreign court.

The case will, no doubt, be a rare one, for in most legal systems the submission of the defendant to the jurisdiction of the court cures any defect and establishes that the court has jurisdiction for the purposes of its own law. We need not spend any longer on it.

(c) Judgment still subject to appeal to higher court irrelevant

It is irrelevant that the judgment is subject to appeal to a higher court. The common law was always clear on that. If a court has given its final judgment, its decision is *res judicata*, and the fact that the disappointed party has appealed against it does not prevent its being *res judicata*, even if an appellate or revisional court may quash the decision. A matter is considered to be *res judicata* in a particular court, rather than in the legal system as a whole.

(28) International conventions and the effect of foreign judgments

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[117] *SPSN Kasivisvanathan Chettiar v SS Krishnappa Chettiar* BLR (1951) HC 399.

[118] *VERMNCT Chettyar v ARARRM Chettyar Firm* (1934) ILR 12 Ran 370; *Nathan v Samson* (1931) ILR 9 Ran 480; *Bank of Chettinad v SPKPVR Chettyar Firm* (1935) ILR 14 Ran 94 (reversing *Bank of Chettinad v SPKPVR Chettyar Firm* AIR (1935) Ran 517).

In many parts of the world, such as Europe, and North and South America, there are systems set up by international convention for the mutual recognition of judgments within the particular region. Judgments from courts in Europe are now recognised and enforced almost automatically; something similar is true in North and South America. One day, perhaps, the states of ASEAN will come to trust each other's judicial systems enough to create such a scheme in south-east Asia, but it still appears to be some way off.

A state may also be party to bilateral or multilateral conventions which provide for the mutual recognition of judgments. It does not appear that Myanmar, or Burma before it, was party to any such conventions. The result is that the enforcement of foreign judgments in Myanmar is governed by laws and procedures which were developed over 100 years ago. While there is nothing wrong with them, it is possible that the enforcement of judgments of courts from Myanmar's principal trading partners should be modernised. Other parts of the world have realised that simplification, even harmonisation, of the rules by which legal systems recognise and enforce each other's judgments, is beneficial to all those who participate in cross-border trade and commerce. It is hard to disagree with them.

(29) International conventions and the effect of arbitral awards

For the purpose of providing a useful contrast to the law of foreign judgments, and as illustration of what can be achieved by international conventions, it is convenient to say something about the recognition of awards made by arbitral tribunals.

The law of international arbitration has developed on the basis of international conventions: the contribution of the common law is relatively insignificant. A principal purpose of these conventions is to provide for the recognition and enforcement of awards from foreign arbitral tribunals. The first such Convention, made in Geneva in 1923 was extended to Myanmar by the Arbitration (Protocol and Convention) Act 1939, and its Section 4 is typical of the way these conventions treat arbitration awards:

> **4. Effect of foreign awards. (1)** A foreign award shall, subject to the provisions of this Act, be enforceable in the Union of Myanmar as if it were an award made on a matter referred to arbitration in the Union of Myanmar.
> **(2)** Any foreign award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off of otherwise in any legal proceedings in the Union of Myanmar, and any references in this Act to enforcing a foreign award shall be construed as including references to relying on an award.

The Geneva Convention applied to arbitrations in the countries which became party to the Convention and with which there were reciprocal agreements.[119] The grounds on which a court was permitted to not recognise or enforce a foreign award were restricted; but in due course it was decided that a new Convention, to supersede the Geneva Convention and (among other things) to make the recognition and enforcement of foreign awards even more guaranteed and certain, was required. The New York

[119] As far as Myanmar is concerned, the Act extends to 18 European states and to Thailand: see further, Moser, *Arbitration in Asia* (2nd edn, 2008), Part L (Myanmar).

Convention of 1958, to which Myanmar has now acceded, contains improved provisions which oblige all contracting states to recognise and give effect to awards of arbitrators in proceedings which fall within the terms of the Convention, and severely restrict the arguments which may be raised to object to the recognition and enforcement of the award. A modernised Arbitration Act, to replace the 1939 Act and to align the arbitration law of Myanmar with the obligations which the Union has assumed by adopting the New York Convention, is now needed.

Arbitration awards, therefore, can be enforced in the 150-plus countries which have adopted the New York Convention. It appears that states are entirely content to accept and, if asked, to give effect to awards made by arbitral tribunals in foreign countries, but nowhere near as happy to grant almost unquestioning recognition to the judgments of foreign courts. This is remarkable; most people who learn the information for the first time are amazed by it.

But there are good explanations for it. The first is that needs of international trade are such that commercial pressure, exerted by those taking part in this trade, forced many states to accede to the Convention. Putting the matter in simple terms, if a state sees a sufficient economic need, or advantage, for its citizens and companies, it will be prepared to accede to a Convention. Myanmar will have decided that the recognition and enforcement of arbitration agreements and arbitral awards is in the interests of those who do business in Myanmar and out of Myanmar.

And then there is the fact that arbitration only takes place between parties who agreed to it: it is entirely based on consent. Although there are cases at the margins, where parties may argue about the scope of their alleged agreement, or about the reality of their consent, an arbitral award is, almost by definition, something which the parties agreed to. It is therefore not difficult for states and their legal systems to agree to accept arbitral awards from tribunals in foreign countries.

By contrast, judicial judgments come from courts which may not have agreed to by the parties. The jurisdictional rules upon which those courts operate and give judgments may be widely varied. Judgments and decrees coming from foreign courts cover a far wider range of activities than trade and commerce, and a state may therefore be presented with a foreign judgment which is, to it, rather surprising. It is because arbitral tribunals are always (in principle at least) agreed to by the parties, and their awards limited in material scope, that it is easy to accept an *arbitral* award coming from a tribunal in a country in which *judicial* standards, by sharp contrast, are much less reliable. All this suggests that if there are to be conventions which will lead to the enforcement of foreign judgments in Myanmar, it will be very challenging to settle their terms.

(30) The effect of a Myanmar judgment in a legal system outside Myanmar

This book is concerned with the private international law of Myanmar. It therefore does not deal with the recognition and enforcement of Myanmar judgments in countries outside Myanmar, for this is a matter of foreign law. The question whether a Myanmar judgment will be recognised of enforced in England is a question of English private international law; the question whether a Myanmar judgment will be recognised and enforced in China is a matter of Chinese law, and so on. This book does not deal with these foreign laws.

The effect of a Myanmar judgment in India, however, will be governed by rules which are practically the same as those which apply in Myanmar, as the Indian Code Civil Procedure and the Myanmar Civil Procedure Codes have Section 13 in common. This is the only country for which it is possible to use Myanmar law to try to predict the effect of a Myanmar judgment in a foreign country. Having said that, a Myanmar judgment, given by a court to whose jurisdiction both parties agreed or submitted, is more likely to satisfy the requirements of foreign laws than a judgment from a court to which the defendant did not agree. It is therefore advantageous to obtain the agreement of the defendant to the jurisdiction of the court in which the plaintiff is intending to sue.

CHAPTER 4

PRINCIPLES GOVERNING THE APPLICATION OF FOREIGN LAW

In this Chapter we commence our examination of the rules by which a court in Myanmar decides whether it must, or may, or may not, apply the law of a foreign country when adjudicating the issues which have arisen before it. In doing so we move from an area in which the written laws of Myanmar provide some guidance, to a broad area in which, as far as one can tell, there are no written laws to guide the parties and direct the court. We examine particular areas of law in Chapters 5 to 9, but in this Chapter we examine the framework which applies when a Myanmar court, in exercising its jurisdiction to adjudicate, addresses the question whether it should be applying the domestic laws of Myanmar or, in accordance with the private international law of Myanmar, the laws of a foreign country.

(31) The question whether a court should apply the domestic law of Myanmar or follow the private international law of Myanmar

All legal systems, apart from a small number of extremely primitive legal systems which need not be mentioned by name, are prepared, in appropriate cases, to apply the laws of a foreign legal system to the issue, or to the case, before them for decision. The general reasons why this is sometimes the proper thing to do are not, perhaps, as important as a proper understanding of the rules and procedures by which the court guides itself. But in general terms one may say that in some cases the application of foreign law is consistent with the intentions of the parties in circumstances in which there is no good reason not to give effect to what they intended; in other cases it is consistent with the reasonable expectations of the parties; and in some cases it is justified because of the circumstances of the case: how could a question concerning rights to land not be dealt with according to the law of the country in which the land is situated, for example ?

So far as private international law in Myanmar is concerned, there appears to be practically no legislation which deals with the question whether a court in Myanmar is required to apply its domestic law or its rules of private international law (and through them, the laws of a foreign country) on any issue which comes before it. In the absence of any such statutory instruction to the courts, it seems proper to assume that the courts in Myanmar will generally follow the rules of the common law as these rules may be deduced from the decisions of courts and writing of scholars in England and India in particular. Occasional reference will be made to authorities from other common law jurisdictions, but it will be the common laws of England and India which provide the most reliable sources of the common law as it is presumed to apply in Myanmar. Although we are using foreign material to set out what we understand to be the law of Myanmar, it is not suggested that a court in Myanmar would be obliged to follow these foreign laws. We do it because, as far as we can see, it is the most helpful evidence of what the private international law of Myanmar will be held to be when a court in Myanmar is required to declare it.

The general approach of the common law to the question of whether to apply foreign law is, as we shall see, a passive one. If neither party to the proceedings before the court asks the court to apply the laws of a foreign country, the court will apply the domestic

law of Myanmar, and there will be no more to be said. There is no rule of the common law which requires a court to apply foreign law if the parties do not ask the court to do so. Even if the parties make a contract which provides, in the clearest of terms, that 'the contract shall be governed by, and all disputes shall be determined by the application of Chinese law', if neither of the parties before the court invites the Myanmar court to apply Chinese law to the dispute, then Chinese law will not be applied. This makes the private international law of Myanmar more straightforward in practice than is the case in those other jurisdictions, of which there are many, in which a court would, in a case like this, be required to apply the rules of Chinese law, regardless of whether the parties actually asked it or wished it to by the time the matter came to court.

Why, one may ask, would parties who had agreed in a contract that the law of a foreign country should be applied decide that they did not want the Myanmar court to apply that law after all ? Why, one may ask, would parties involved in what may have been a tort in a foreign country, decide that they did not want the Myanmar court to apply the law of that country ? The answer will, of course vary from case to case, but there are a number of possible reasons.

First, the proof of foreign law is complex and may be expensive. If, for example, a court in Myanmar is going to be asked to apply foreign law, someone will have to tell the court what that foreign law actually says and actually means. After all, a Myanmar judge is not trained in foreign law. According to the Evidence Act, Section 45:

> **45. Opinions of experts**. When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to the identity of handwriting or finger impressions, the opinions of persons upon that point of persons specially skilled in such foreign law, science or art, or in questions as to the identity of handwriting, or finger impressions, are relevant facts. Such persons are called experts.

To bring such opinion evidence before the court, the party who wishes to do so will have to commission a report from an expert in the foreign legal system,[120] which can be extremely expensive, as anyone who has ever commissioned a report on American, or English, or Singaporean law, will know. And anyway, there is no guarantee that the so-called expert really is an expert. If each side of the dispute does this, a fortune may be spent in obtaining what is no more than admissible opinion evidence, which may not impress the judge, who is required to make up his own mind, rather than surrender to the experts,[121] in any event.

Second, the laws of various countries are, on very many points, very similar. All civilised laws provide that contracts are required to be performed and that losses flowing from breach of contract must be compensated. All civilised laws provide that injuries to the person and damage to another's goods should be compensated. And so on, and so on. Of course, these laws will differ in their details, and will be liable to diverge at the edges; but Myanmar law is very similar to the laws of India up to 1948; Myanmar law is similar to much of the common law of England; and on basic private law it is not very different

[120] Having said that, there appear to be a number of cases on family law in which the Myanmar court has been prepared to apply foreign law without any obvious sign that this was given to the court by expert witnesses: see for example *Ma Sein Byu v Khoo Soon Thye* (1931) ILR 9 Ran 310.
[121] *Re U, An Advocate* AIR (1935) Ran 178 (a case on handwriting rather than foreign law, but the principle will be the same).

from the laws of France or Germany, Vietnam or Japan. Why should the parties go to the trouble of providing expert opinion evidence of a foreign law which may not be any different from the domestic law of Myanmar ?

Third, although the Civil Procedure Code, and Evidence Act, in particular, set out the rules by which litigation is to be conducted in a court in Myanmar, the system of justice is adversarial, not inquisitorial. It is the task of the judge in Myanmar to rule on the disputes which are put before him, and on the issues which arise from those disputes, on the basis of the evidence put forward by the parties. He has no obligation to go any further, to poke his nose into matters which the parties have not put before him. If the parties do not wish to put on expert opinion evidence of foreign law, there is no need for them to do so. By contrast, in a country which follows a more inquisitorial system (such as Germany) in which the duty of the judge is more investigative, and in which the judge is required to apply the proper law, whether it is his domestic law or a foreign law, the judge has to be able to find out what the relevant foreign law says. In a country like Germany he may refer to a research institute in which there may well be someone who can help, but the universities of Myanmar are not in a position to provide such a service to a judge. It follows that the approach which is followed in Myanmar, so far as this can be deduced from Section 45 of the Evidence Act, is perfectly suited to the conditions of Myanmar. If a party wishes a court in Myanmar to apply a rule of foreign law, he will need to put before the court expert opinion evidence as to the content of that foreign law. If a party does not wish a court in Myanmar to apply a rule of foreign law, he will simply disregard it and the court will apply the domestic law of Myanmar.

However, in some issues which come before a court in Myanmar, in a case in which the private international law of Myanmar would allow a court to apply the laws of a foreign country, a court is bound to apply the domestic law of Myanmar. Under the next two points we will look at two such categories of legal issue.

(32) Issues which are seen as matters of procedure

Suppose a case is being brought before a court in Myanmar in which it is accepted that the substance of the dispute would, according to the private international law of Myanmar, be resolved by the application of foreign law. But suppose that as part of the broad dispute, some of the following questions arise: (i) is it permissible to serve the summons by fax or by e-mail ? (ii) is it permissible to bring the claim against a representative of the defendant if the actual defendant has disappeared and cannot be traced ? (iii) is it permissible for the proceedings to be brought by a person appointed by a foreign court to act on behalf of a party who is alive but has lost his mind ? (iv) how should the court proceed if, according to the law which will be applied to the substantive issues, the defendant would be presumed to be liable and that the burden of proof would lie on the defendant ? (v) how should the court proceed if, according to the law which will be applied to the substantive issues, an individual would be compellable to give evidence but according to the Evidence Act he would not be required to give evidence ? (vi) how should the court proceed if, according to the law which will be applied to the substance of the dispute, the defendant would not be required to disclose information which would be regarded as privileged, but under Myanmar law the information would not be regarded as privileged ? (vii) how should the court proceed if, according to the law which will be applied to the substantive issues, parol evidence relating to a written document would be permitted to be given in circumstances in which, according to Sections 91 to 93 of the Evidence Act, such evidence would not be allowed ? (viii) how

should the court proceed if, according to the law which will be applied to the substantive issues, specific relief would be ordered in circumstances in which the Specific Relief Act would not allow it ? Suppose that on all these points, the domestic law of Myanmar would give one answer, but the rules of the foreign law which, according to the private international law of Myanmar, would apply to the dispute, would give the opposite answer.

These eight examples are of questions which have one thing in common. The common law rules of private international law, and therefore the private international law rules of Myanmar, regard these issues (and others closely related to them) as 'procedural' in nature. In principle, where an issue which the court has to decide is a procedural one, a court in a common law jurisdiction, and therefore a Myanmar court, will apply the rule found in its own domestic law (sometimes known by the Latin expression, the *lex fori*, the law of the court), and will not apply the corresponding, but different, rule found in the system of law which will be applied to the substance of the claim (sometimes known by the Latin expression, the *lex causae*, the law of the cause or the issue). Where a question arises on issue which is procedural, a court applies its own rule, and does not apply a rule taken from a foreign legal system.

Another way of looking at the point is that rules of procedure do not create rights, or vested rights: they provide the framework of rules within which substantive rights are litigated. It follows that if procedural rules change, a disappointed litigant has no right to complain.[122] The Civil Procedure Code does not confer rights as such.

(a) Rules regulating pre-trial and trial procedure

In relation to example (i) above, the rules which govern the documents and mechanism by which a suit is instituted, and then progressed through the courts, are procedural in nature. Only Myanmar law can say how a suit is to be commenced before the Myanmar courts. Only Myanmar law can say whether and how a Myanmar summons is to be served on the person to whom it is addressed: the fact that foreign law might give a different answer is irrelevant to trial in a Myanmar court. Only Myanmar law can say whether the suit should be tried by a judge or a judge and jury, or tried in one Division or another, or whether the names of the litigants should be made public or anonymised, or the evidence be given in public or in private, *et cetera*.

(b) Rules regulating representative proceedings

In relation to examples (ii) and (iii) above, the question whether a person other than the actual plaintiff or actual defendant can sue or be sued in a court in Myanmar is, mostly, a matter for the domestic law of Myanmar to say. For example, an unincorporated association cannot sue simply because under a foreign law it has some form of legal personality, though as a company formed under a foreign law may litigate by virtue of its legal personality under a foreign law, this rule is not an absolute one. A personal representative of a deceased person appointed under a foreign law has no right to take part in succession proceedings before a Myanmar court without first being appointed by the Myanmar court, but the liquidator of a foreign company may do so in his own right. Indeed, the categories of legal representatives, who have authority to act under a foreign

[122] *Arunachallam Chettyar v Valliappa Chettyar* (1938) RLR 176; *Muthukaruppan Chettyar v Sellami Achi* (1938) RLR 355.

law but who have not been appointed or confirmed by a Myanmar court, are numerous. The rules of law which determine whether a Myanmar court will accept a status conferred on a representative by a foreign law, or will refuse to allow a representative to sue unless he has been appointed or approved by application to the Myanmar courts, are very unclear.

(c) Rules governing the burden of proof, and presumptions

In relation to example (iv), it is often said that the question of which party bears the burden of proof is a matter of procedural law on which a Myanmar court applies its own rule, and in particular those rules set out in the Evidence Act. This may be correct, but the problem with it is that it does have a significant effect on the rights of the parties, and means that the outcome of the case may be different in a Myanmar court from what it would be in another court. Some have argued that this means that the burden of proof should be placed where the law which governs the substance of the claim would locate it, but if this is the law, it cannot be regarded as settled or clear.

(d) Rules governing evidence

In relation to examples (v), (vi), and (vii) it is generally said that the rules of evidence which operate in proceedings in a Myanmar court must be those of Myanmar law, and not those of the law which applies to the substance of the dispute. Up to a point this must be correct. But there may be cases in which this rule should not apply. If the parties make a written contract governed by a law which would allow parol evidence to explain or contradict its written terms, it is a little hard to see why a Myanmar court should apply its own parol evidence rule and by doing so have a significant impact on the operation of the contract which the parties made. But this may be the law; Sections 91 to 93 may be worded in such a way that there is no way around them in a Myanmar court.

(e) Rules governing remedies ordered after rights have been established

In relation to example (viii), the usual understanding is the availability of remedies – which remedies are available, when those remedies are available – is answered by the court applying its own law. It would, it seems, be just too strange if a contract governed by Myanmar law could not be enforced by a decree for specific relief, but a contract which was otherwise identical but governed by a foreign law could be so enforced if that is that the foreign law would have said. This distinction between right and remedy is of particular and surprising importance when a court has to deal with issues of time bars, which are examined under the next point.

It also means that although the law which governs the substance of a claim will determine the heads or kinds of loss for which damages may be ordered, or the principles on which assessment will take place, the actual, numerical quantification of damages is a procedural matter, governed by the law and assessment rules of Myanmar. This point is considered again, in the hope of making it clear, in the chapters dealing with contract and tort. But it is fundamental to the common law.

(33) Limitation of actions, and other forms of time bar

All legal systems have rules which fix the time period after which the plaintiff will not be able to bring a successful claim against the defendant, but there are two ways in which

this can be done, and the approach of a Myanmar court to this general question depends on the way the time-bar rule found in the law which governs the substance of the claim. It can produce results which are rather odd, but the distinction between the two kinds of time bar provision has been reaffirmed by the Indian courts,[123] and is assumed to be preserved in the private international law of Myanmar.

(a) Time bar rules which are procedural in nature

Some statutory rules which impose time bars are considered to be procedural in nature, because they do not say that after so many years the right and duty (which would have underpinned the claim) cease to bind the parties, but because they say that there is no longer access to a court – that proceedings may not be brought – in respect of the claim. The time bar rules of Myanmar are drafted in this form. The Limitation Act states that:

> **3. Dismissal of suits, &c, instituted &c, after period of limitation**. Subject to the provisions contained in Sections 4 to 25 inclusive, every suit instituted, appeal preferred, and application made after the period of limitation prescribed therefore by the First Schedule, shall be dismissed although limitation has not been set up as a defence.

This is in line with the common law in general, in which suits are dismissed because it is too late to bring them into court. The law of Myanmar, with very few exceptions,[124] does not provide that the rights of the parties are altered or affected, but that the door of the court is no longer open. Time bar rules of this type are usually known as limitation provisions.

(b) Time bar rules which are substantive in nature

In other legal systems, particularly those of the civil law tradition, the effect of a time bar is that the rights and duties are annulled, are cancelled, cease to exist, all of which means that although the door of the court is still open, the defendant has a substantive defence to the claim. Time bar rules of this type are usually referred to as prescriptive, or as rules which prescribe the right. Such a rule will typically say that rights 'prescribe themselves' after a period of years.

(c) Operation of time bar rules in a Myanmar court

Because the provisions of the Limitation Act are procedural in nature, in that they define the time period after which a suit may not be instituted, a plaint may not be issued, et cetera, the time periods set out in long and detailed list set out in Schedule 1 to the Act will apply to all proceedings brought before a court in Myanmar, even though the claim is, according to the private international law of Myanmar, governed by a foreign law.

If, however, the foreign law which governs the rights has a time bar provision which is prescriptive in nature, this will *also* apply, as part of the law which a Myanmar court applies to the rights of the parties. This is clear enough, but it is partially illustrated and

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123 *Syndicate Bank v Prabha D Naik* [2001] 4 SCC 713.

124 Limitation Act, Section 27, dealing with suits for possession, may be a substantive rule, for if possession may no longer be recovered it may be argued that the right to property is extinguished.

specifically provided for in the case of claims based on contracts governed by a foreign law, by Section 11 of the Limitation Act, which provides as follows:

> **11. Suits on foreign contracts**. **(1)** Suits instituted in the Union of Myanmar on contracts entered into in a foreign country are subject to the rules of limitation contained in this Act.
> **(2)** No foreign rule of limitation shall be a defence to a suit instituted in the Union of Myanmar on a contract entered into in a foreign country, unless the rule has extinguished the contract and the parties were domiciled in such country during the period prescribed by such rule.

There are two things to say about the detail of this provision, but the general point is clear: if the law which governs the substantive rights created by the contract contains a rule which extinguishes the contract and the rights which it generated, that law shall be applied; but otherwise provisions of the *lex contractus* (the law which governs the contract) which would be seen as procedural limitations of the time for instituting proceedings will not be applied by a Myanmar court: on that issue the Myanmar court will apply its own time bar periods as set out in Schedule 1 to the Limitation Act. That is because the Myanmar limitation provision is a procedural rule which applies to all cases before a court in Myanmar, even where the suit is based on a contract made outside Myanmar.

So far as the detail of Section 11(2) is concerned, however, the position is less happy. The reference to the contract as having been entered into in a foreign country should, in a perfect world, now be read and understood to say 'governed a foreign law'. When the Limitation Act was drafted, it was still arguable that a contract was governed by the law of the place where it was made. On that basis, Section 11(2) would make sense; but the idea that a contract is governed by the law of the place where it is made is, as will be shown below, no longer considered to be the law.[125] It is not so much the place of making, but the law governing, the contract which is the law whose rule should be applicable. In addition, the requirement that the parties have been domiciled in the country in which the contract was made reflects the fact that the place of making rule for contracts was beginning to break down, and it was possible – it turned out not to be – that a domiciliary rule would replace it. The best solution, if a court is bold enough to see the sense of it, is therefore to interpret Section 11(2) as though it made reference to the proper law of the contract, or to the law by which the contract is governed. If not, the private international law of Myanmar will need, as the law of India has needed, its lawmakers to see the need for law reform.[126]

The effect of all this is that if both sets of time bar apply, the plaintiff gets the worst of both worlds: he must bring his proceedings before Schedule 1 says it is too late to come into court, no matter what law governs the substance of the claim, *and also* before the law which, according to Myanmar private international law, governs the substance of the claim says that the right has prescribed itself, been extinguished, and so on. Few will think that this is a sensible outcome, and in some jurisdictions, legislation has been enacted to alter and simplify the rule. But in Myanmar, the common law rules of private international law work in the way set out above.

[125] See Chapter 5, point (43), below.
[126] In India, see the Report of the Law Commission (2005) on Transnational Litigation, Conflict of Laws and Law of Limitation.

(34) The application of foreign law by a Myanmar court

Having dealt with the two main categories of issue on which a Myanmar court applies its own domestic law in preference to the rules of a foreign law, we return to the questions which arise when it is argued by one or more of the parties to the litigation that the Myanmar court should apply a rule or rules of law taken from a foreign system.

There are four stages in the process which leads (or may lead) to the application of foreign law by a court in Myanmar.

First, the court's rules of private international law must tell it that the issue before the court is one on which a foreign law may be applied. This means that the issue before the court is not a procedural one, but is one of those substantive ones on which the private international law of Myanmar authorises a court to apply foreign law. We examine in Chapters 5 to 9 many of the cases and circumstances in which a Myanmar court may be asked to apply foreign law. But if these rules for choice of law actually tell the court to apply the law of Myanmar (perhaps, for example, because the parties chose the law of Myanmar to govern their contract), the enquiry stops there.

Second, if the private international law rules of Myanmar provides that, on the issue before it, the court must apply the law of Myanmar and may not apply the law of a foreign country, then that foreign law must not be applied. We examine under points (39) and (40) in this Chapter a number of areas and issues on which a rule of foreign law will not be applied even though it might appear that the substance of the issue before the court should be dealt with by the application of foreign law.

Third, as explained above, the party or parties seeking to rely on foreign law must plead that foreign law is applicable. It follows, as was explained above, that if neither party pleads that foreign law is applicable, does so, the judge will apply the domestic law of Myanmar to the issues in dispute. The judge has neither the power nor the duty to apply foreign law *ex officio*. So in the example of personal injury or damage to property taking place overseas, a plaintiff may consider that the law of the place where he was injured affords him a cause of action, whereas Myanmar domestic law would not: it will be up to him to plead the applicability of foreign law to the claim (and, in due course, to produce expert opinion evidence on the content of that foreign law). Again, a defendant may consider that the law of the place where the alleged tort happened furnishes her with a defence which would not be available as a matter of Myanmar law: it will be for her to plead the applicability of foreign law to the issue raised by way of defence. But neither party is obliged to do this, and a judge will therefore be left to apply Myanmar domestic law when the parties do not invoke foreign law.

In international cases in common law jurisdictions, cases based on international contracts and torts are frequently decided without any reference to foreign law, even though the rules of private international law might have indicated that a foreign law should be applied. This may reflect the practical truth that the basics of the law of obligations are all very similar, meaning that there is often little point in proving foreign law; and it may also be driven by the practical problem, and expense, of actually proving foreign law, as will be seen below. It means that courts in common law jurisdictions take a pragmatic, rather than a dogmatic, view of their role: the parties are free to establish a common position on the inapplicability of foreign law, and once they have done that, it is not for a judge to think he knows better.

Fourth, the content of the foreign law which has been argued to be applicable has to be pleaded, and its content has to be established by expert evidence. The existence, content, and meaning of a rule of foreign law is a matter of fact, to be pleaded and proved as such by the parties. According to the Civil Procedure Rules, Order 6, rule 2:

> **2**. Every pleading shall contain, and contain only, a statement in concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved…

The common law has always regarded foreign law as a fact, which therefore needs to be pleaded and proved. So does the written law of Myanmar, if the wording of the Contract Act, Section 21, is any indication:

> **21. Effect of mistakes as to law**. A contract is not voidable because it was caused by a mistake as to any law in force in Myanmar; but a mistake as to a law not in force in Myanmar has the same effect as a mistake of fact.

Every proposition or statement of foreign law relied on needs to be pleaded, and must then be admitted or proved in accordance with Myanmar procedural law, to the satisfaction of the court.[127] Once it is pleaded, evidence about that foreign law will be given as opinion evidence by experts and evaluated by the judge, as was shown by the reference to Section 45 of the Evidence Act. It is also permitted for evidence of foreign law to be taken from certain official publications produced in the foreign state,[128] but such material is more commonly tabled and accepted as part of (and justification for) the opinion evidence of the expert witness.

Expertise in foreign law is, however, easier to describe than it is to define. There is no register of individuals who are qualified or authorized, to give such evidence. There is no reliable way to evaluate the expert or his evidence. It may not be clear whether an expert's knowledge is practical and up to date. A professor who has taught courses and written books may have had little or no practical experience of how the law he has described would be understood and applied in a court; a lawyer in legal practice may give his opinion with absolute certainty and confidence yet be talking complete nonsense; the fact that a lawyer is in private practice or judicial office may nevertheless leave him wholly unsuitable to give evidence in an area of law of which he has no direct experience.

These are not trivial points, for as the common law has committed itself to this approach, it is legitimate to question whether the approach is fit for its purpose. In other countries of the common law world there are many cases in which the judge has had to pick his way through baffling and contradictory expert evidence of foreign law, with the result that one may applaud the effort which was shown, yet still lack confidence in the outcome; and in any case, the financial cost to the parties can be quite disproportionate to the substance of the claim. On the other hand, a judge has no training in foreign laws, and probably does not have the resources which the litigants and their legal advisers have. In Myanmar, there is no a fund of knowledge to which the court may refer if it were to try to research foreign law for itself. So a judge cannot take judicial notice of

[127] If the court is prepared to be satisfied by less formal means of evidence and proof, and there is no objection from the parties, a less formal procedure may be adopted.

[128] Evidence Act, Section 38. The rule extends to laws and law reports, but will not extend to textbooks, no matter how distinguished.

foreign law, and although the common law system is far from perfect, in Myanmar, and probably elsewhere, it is less bad than the alternatives.

Of course, if the party who is seeking to rely on foreign law fails to satisfy the judge as to its content, the judge will apply the domestic law of Myanmar, for in default of proof of the content of foreign law, a judge still has to adjudicate. But on rare occasions this will not be possible. If for example a case concerns a matter of foreign company law, and the content of that foreign law is not proved to the satisfaction of the judge, it may not be possible to apply the Myanmar Companies Act, as this mostly applies only to companies formed under the law of Myanmar. In such a case there may be no alternative but to rule against the party who has failed to make his case.

(35) The way a court in Myanmar determines whether to apply foreign law

The basic structure of the common law conflict of laws is built from propositions which link 'issues' to a particular law or legal system whose rules are, in principle, liable to be applied. So for example, we say that the material validity of a contract is governed by its proper law. Liability in tort is governed in part by the law of the place where the person was when injured and in part by the law of the forum court. The effect of a disposition of moveable property on title to that property is governed by the law of the place where the thing was when it was transferred. Although we will not examine it in this book, the common rule for determining the capacity of an individual to marry another is to look to the law of his or her domicile at the time of the marriage. The ranking of claims and distribution of assets in an insolvency is governed by the law of the court administering the insolvency; and so on. The tools of the legal trade are, at this point, a list of legal categories, and for each legal category, a rule which links that legal category to a law whose relevant rule may be applied.

(a) Available categories of legal issue

The technique for identifying the law which should be applied depends, first, on compiling a list of the legal categories for which a link to a law is made. If one asks where these categories come from, the answer is that they come from the long tradition of the common law. It is not impossible for new ones to be developed, but on the whole, these are the legal categories which have served the common law, pretty well, for the last 150 or more years. A number of them will be encountered in Chapters 5 to 9. To take the private international law of contract as an example, which we examine in Chapter 5, there may be five categories of legal issue which might arise, and for which a rule which links the category to a law will be needed. These are: (i) the essential validity of a contract; (ii) the formal validity of a contract; (iii) the legality of the contract; (iv) the capacity to enter into a contract; (v) the manner of performance of a contract. For each of these, the rules of private international law link the issue in question to a law or to more than one law from which the answer may be taken.

(b) Identifying the legal issue presented by the facts: characterisation

It is next necessary for the court to decide, for example, whether to frame the question before it in terms, say, of the essential validity of a contract as opposed to its formal validity, or just its validity. In another context, the court may have to decide whether to frame the question before it in terms of the capacity of persons to marry as opposed to the validity of the marriage. When the court does this, it is 'characterizing' an issue, or

issues, as arising for decision. Characterisation is a legal technique which we examine in a little more detail under point (36) below; but when the court has characterised the issue, and fitted it into one of the legal categories for which there is a rule linking the issue to the law, it will say that the issue before it is governed by the law of a particular state or legal system.

(c) Thinking about the meaning of 'law': renvoi

If the court has followed this methodology and has decided that the issue before it is governed by the law of state X, there may still be a question as to the meaning of 'the law of' state X. The reference will, in most cases, be understood to be to the ordinary domestic law of that state, in which case the expert witnesses will be expected to give their opinion on the ordinary domestic law of state X.

But in a small number of legal areas, which means to say in relation to a small number of the legal categories which we have mentioned and will examine in due course, we understand 'the law of state X' to mean 'the rule of law which a judge in state X would apply if the issue were before him in his court and he were to apply his rules of private international law to the issue, which might mean that he would apply - and that we would therefore apply - the domestic law of state Y'. This cumbersome expression raises the tricky problem of the application, or the non-application, of the principle of renvoi. It can be difficult, though there is little reason to suppose that it is a significant part of the private international law of Myanmar, and we will deal with it in very abbreviated detail under point (37) below.

(d) The linking rule, or the 'connecting factor'

The linking rule, or the 'connecting factor', as it is sometimes called, points the Myanmar court to the legal system whose rule may be applied. These linking rules are often encountered in Latin or Latinate forms, which may not be particularly helpful in Myanmar in 2015. On the other hand, they are used in this sense in Indian cases and Indian scholarly writing, and in the wider world, and it is useful to know what they mean. They number somewhere between twenty and thirty, of which only some will be used in this book. They are mentioned here; they will be examined in greater detail in the Chapters in which they have a role to play.

In general, there are four linking rules which apply across the various areas of private international law. The *lex fori* is the ordinary, domestic, law of the court in which the proceedings are taking place. It applies in particular to issues of procedure, but also has a part to play in liability in tort as well as a significant role in the private international law of insolvency. The *lex domicilii* is the law of the domicile, which is, in a very simplified sense, the law of the state which is the permanent home of an individual, or the law of the state under which a company was created and formed. It applies to issues of personal and legal capacity, and has a significant part to play in family law and the law of succession which are not studied here. The *lex patriae* is the law of the nationality, but this plays only a very minor part in the common law rules of private international law. And finally, the *lex causae* can be used as a non-specific reference to the law – whichever law it is – which is applicable to the issue.

With particular reference to Chapter 5 of this book, the *lex contractus* is the law which governs a contract. It is also known as the proper law of the contract. It may be chosen

by the parties, but will be ascertained by the court if the parties have not made the choice. The *lex loci contractus* is the law of the place where the contract was made, which was formerly important, but which is not now of any real importance.[129]

With reference to Chapter 6, the *lex delicti* is the law, or maybe the combination of laws (the *leges delicti*) governing and determining liability in tort. The *lex loci delicti commissi* is the law of the place where the tort was committed.

With reference to Chapter 7, the *lex situs* is the law of the place where land, or other thing, is situated. It has a very prominent role in the private international law of property. The *lex loci actus* is the law of the place at which a transaction was carried out, which will be seen to have a rather minor role in the private international law of property. The *lex protectionis* is the law which grants protection to an intellectual property right, and the *lex registri* is the law of the place where the registration of title (for example, of an aircraft, ship, or shares) or of some other right or entitlement takes place.

And with regard to Chapter 8, the *lex incorporationis* is the law under which a body is incorporated or created. The *lex concursus* is the law of the court which is administering an insolvent estate. It is the usual rule in the private international law of insolvency; and if a court is administering an insolvent estate itself, the *lex concursus* will coincide with the *lex fori*.

Once the issue has been identified and allocated to a legal category; and once the link which connects that legal category has been identified, it will known whether the issue is one on which a court in Myanmar may be asked to apply a rule of foreign law. If it is, and if one of the parties wishes the court to do it, it is his task to plead the foreign law and to establish, by expert evidence, what that law actually provides. The court will then be in a position to apply it.

(36) Characterising the issues which the court has to decide

Suppose A had made a contract with B, but A claims that his agreement to the contract was brought about by misrepresentation or fraud. Suppose A wishes to sue B (i) for a declaration that he has lawfully rescinded the contract and is not bound by it, or (ii) for an order that he is entitled to be put into the position he would have been in if the matter misrepresented had been true, or (iii) for damages for fraud or deceit. Which of these raises an issue of the essential validity of a contract, governed by the *lex contractus* ? Which of these raises an issue of tort, governed by the choice of law rule for torts ? Does the claimant have a choice of laws on which to found his claim ?

Or suppose that C had made a contract with D, and that D now owes money to C. Suppose that C assigns the benefit of the contract to E, and that E now sues D for payment, and D refuses to pay. When E sues D, is the issue to be seen as a contractual one, governed by the *lex contractus* ? If it is contractual, which of the two contracts is the one whose proper law will be applied: the proper law of the contract between C and D, on the basis that the question is who D has to pay to be discharged, or the proper law of the contract between C and E, because the question is whether the transaction between C and E was effective to transfer the right to receive payment from D ? Or is the issue perhaps not a contractual one at all, but one concerned with property, intangible

[129] Unless Limitation Act, Section 11(2) is read literally: see above, point (33).

property, and governed by the choice of law rules for intangible property in the form of debts,[130] which we will examine later ?

Or suppose that F made a contract with G, according to which F would repair G's Rolex watch. Because the watch is so striking, G decides to wear it himself when he goes to Bangkok for the weekend; and while he is there, he loses. When G sues F, is his claim a contractual one, governed by the *lex contractus*, or is a claim in tort, liable to be governed by the *lex delicti* ?

The principle of characterisation tries to answer these questions. Private international law has a linking rule for issues which are contractual, and a linking rule for issues which relate to a tort, but if these are going to work, the court must first be able to decide which category, or categories, of issue it is faced with. The answer appears to be that, for the purposes of private international law, the categories of legal issue are defined by Myanmar domestic law, albeit with a little flexibility for difficult cases at the margins. If in any of these cases the domestic law of Myanmar would say that the issue was contractual, or was not contractual but something else, it is likely that the private international law of Myanmar will proceed on the same basis. If in any of these cases the domestic law of Myanmar would say that the issue was one of the transfer of property rather than one concerning the substitution of parties to a contract, it is likely that the private international law of Myanmar will proceed on the same basis.

This is not to say that the approach of the court will be rigid. A court should be prepared to see an issue as a contractual one even though the Contract Act might have said that there was no contract because there was not, for example, an effective communication of acceptance: an issue may still be contractual for the purposes of private international law, even though the Contract Act would say there was no contract, because other legal systems have their own, sometimes different, rules for the making of contracts. The categories are therefore interpreted – because they have been designed to be interpreted – with a degree of flexibility and common sense.

And perhaps the most striking thing about cases decided on this point is that there are practically no cases which discuss it in any detail: there are few in England, and none at all in India. It appears that the court knows how to characterise issues, to allow a link to be made to a law, and that any attempt to explain or make rules to regulate something which happens almost automatically is really pointless.

(37) The meaning of 'law', and the principle of renvoi

We can deal with this question shortly, because we do not need to say much about it. No Indian case has ever dealt with it; and it would be very surprising if it were to arise before a court in Myanmar. It follows that the material considered at this point is not of great practical importance. But it is still necessary to be able to recognise the issue.

Suppose H made a contract with J to sell and convey to J land which is situated in India. Suppose J refuses to sign the documents by which transfer would be transferred to him, and which would trigger the obligation to pay the price, because, as he says, H is not the owner of the land, with the result that any purported transfer of the land by H would be ineffective. Suppose a court in Myanmar is asked to deal with the claim to enforce the

[130] Chapter 7, point (67), below.

contract, and it needs to know whether H did own the land. It is obvious that it will look to Indian law, as the *lex situs* of the land, for the answer.

But what, precisely, does that mean ? Does it mean that the Myanmar court must look to the domestic law of India ? Perhaps is does. But suppose the evidence to be that if an Indian court were to be asked to answer the question of H's title to the land it would have applied the law of England, on the basis that the land had belonged to H's father, who had been English, and that the question whether H or his brother had inherited the land from their father would, in an Indian court, be answered by reference to English law. Will the court in Myanmar still limit its attention to domestic Indian law, or would it follow the path of reasoning which would be followed by the Indian judge, and look on to English law ?

The answer is that it will look to English law. The reason for the answer is that it will look in the first instance to Indian law, but if it is informed that an Indian judge would in fact apply the law of a different country, the Myanmar judge will follow the links from India to England. It will, to put the matter another way, follow the reasoning as the issue is sent on (*envoyer* is French for 'to send', and *renvoyer* is French for 'to send again'; and a *renvoi* is what has taken place when this has been done) to the rules which would be applied by the judge in India.

Now suppose that K was sent by his employer to work on a project in China and that L, his wife, accompanied him. Suppose that the accommodation which was provided for them was dangerous, and that L was injured. If L sues K's employer for damages for personal injury, the usual choice of law rule for tort claims will look, in part at least, to Chinese law as the law of the place where the tort was committed. But suppose that a Chinese judge, looking at this case, would have applied the law of the country from which K, and L and the employer all came. What should a judge in Myanmar then do ? Should he, when he links the issue to China, apply the domestic law of China, or the rules of the legal system to which a Chinese judge would look for the answer ? Once again, the answer requires us to think about the principle of *renvoi*, and about what it means to apply foreign law to an issue;[131] but the answer is that the Myanmar judge will link the case to and apply the domestic law of China, and will not be interested in how a Chinese judge would have dealt with the case.

When a judge is applying the law which governs a contract, or the law which applies to a tort, the link is made to the domestic law of that country. If the contract is governed by the law of Indonesia, it is governed by the domestic law of Indonesia, even though an Indonesian court might have come to a different conclusion. Where he is applying the law which governs a tort, if he links the case to a foreign law, the Myanmar judge will apply the domestic law of that foreign country, even if a judge in that country would have done something different. With contracts and torts, the judge is concerned with the law of obligations, and with rights and duties of individuals to each other, with no third party being concerned by the outcome of the case. The reasoning can therefore be kept simple.

But where a Myanmar court applies rules of private international law to determine the ownership of a thing, especially of land, it is determining an issue which may operate *in*

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[131] The example is also taken from a decision of the High Court of Australia, *Neilson v Overseas Projects Corporation of Victoria* (2005) 233 CLR 331.

rem: that is, it is answering a question which may affect persons not involved in the litigation. In such cases it probably makes more sense to try to answer the question as it would be answered in the place where it really belongs. It is most obvious in the case of land: the only sensible way to answer the question of who is entitled to land situated in India is to give the answer that an Indian court would give, and that may not be the answer which the domestic law of India would have given. So also with the ownership of other property: the *lex situs* is taken to mean the *lex* which would be applied by a judge at the *situs*.

It follows that no reference to renvoi is made in Chapters 5 and 6. But at various points in Chapter 7, when we mention the rule which links an issue concerning title to property to the *lex situs*, we will ask whether this means the domestic law of the place where the thing is, or the law which would be applied by a judge in the courts of the place where the thing is. The greater complexities of the doctrine of renvoi need not be gone into. And anyway, even in a case in which the Myanmar judge would be willing to apply the principle of renvoi, if the parties do not put in evidence which suggests that a judge in the foreign court would apply a law other than his own domestic law, the Myanmar judge will simply apply the ordinary domestic law of that foreign country.

We now move to consider three areas in which a Myanmar court must apply the law of Myanmar, even though the issue before the court is one which is linked, as a matter of private international law, to the law of a foreign country.

(38) Circumstances in which a Myanmar court must apply a rule of Myanmar law

The general approach of a court in Myanmar to the question of whether to apply a rule of foreign law is liable to be displaced if there is a rule of Myanmar statute law which has been worded in such a way that is must be applied by the court even though the issue before the court for decision would be liable to be governed by a foreign law. Such laws, where they can be identified, are sometimes called 'mandatory' or 'overriding' rules of law, though the terminology is really just a label.

The difficulty with such a rule is that although it makes perfect sense in principle, it is much harder to operate in practice. It is not easy to see, from the terms of a statute, whether a rule has been made so as to apply when (but only when) the issue before the court for decision is to be determined by applying the domestic law of Myanmar, or is to be applied even though the rules of Myanmar private international law link the issue to, and direct the court to apply, the law of a foreign country. One may take a familiar provision as an example. Contract Act, Section 27, reads as follows:

> **27. Agreement in restraint of trade void**. Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Suppose that the parties to the contract have chosen a foreign law to govern it, and that this choice of law by the parties would be accepted as effective according to the rules we will look at in Chapter 5. Suppose that the rules of that foreign law, which differ from the approach taken by Myanmar law to the restraint of trade, would not render the contract in question void. If the issue of the validity of the contract were to come before a court in Myanmar, would the court decline to apply Section 27, on the ground that

Section 27 applies only if the contract is governed by the law of Myanmar ? Or would the court consider that Section 27 was to be applied to the case, even though the contract was not otherwise governed by the law of Myanmar, on the ground that the intention of the lawmaker, as deduced from the language of the Act, was that Section 27 should apply to all contracts, and not just to Myanmar contracts, which come before a Myanmar court ?

The answer is, alas, that there is no answer: there are only questions. It is the same all across the common law world: statutes are not drafted in a way which means that this question is easy to answer. Lawyers have sometimes fallen back on a number of presumptions: that a rule which prohibits conduct is presumed not to be applicable to conduct taking place overseas; a rule which applies to agreements is presumed not to be applicable to agreements governed by a foreign law, and so on. But these presumptions add little clarity to the law, and in the end a court simply has to ask this question: assuming that the rules of Myanmar private international law would point to the conclusion that Myanmar law was not to be applied to the matter before the court, is the particular provision of the written law of Myanmar one which the court has been directed to apply in any event and therefore in this event ?

It may be helpful to ask whether there would be an adverse effect on Myanmar if the particular provision of the written law were not to be applied; but in the end, the answer will involve rather more guesswork than adjudication really should. But if the lawmakers have not made their intentions clear, it is not reasonable to blame a court which has arrived at an answer which is not particularly welcome.

(39) Rules of foreign law which a Myanmar court will not apply

The previous point (38) was concerned with the case in which there is a rule of the written laws of Myanmar which, as the court sees it, has to be applied to the case, even though the rules of private international law would link the issue to the law of a foreign country. We now move on to consider a related question, which may be seen as the other side of the coin. At this point we are not concerned with a rule of Myanmar law which may be superimposed on a case not otherwise governed by Myanmar law, but with cases in which a Myanmar court will simply refuse to apply a rule of foreign law of a particular sort. For there are certain circumstances in which a court in Myanmar will not apply a particular rule of foreign law, which is to say that although the private international law rules of Myanmar might direct the court to apply a foreign law, there are some foreign laws which it will not give effect to.

(a) Penal laws and revenue laws

Assuming that it will follow the private international law of Indian, English, and other common law systems, a court in Myanmar will not enforce a foreign penal law, and will not enforce a claim for taxes due under a foreign law. Accordingly, proceedings brought by or on behalf of a foreign state to collect a sum imposed as a fine, or to obtain delivery up of property ordered to be confiscated because of the commission of a crime, or to collect a sum due in lawful taxes, will be not be allowed in a Myanmar court. There is no private international law of crime or of tax.

When it is used in this context the term 'penal' means 'criminal', and almost always involves an order having been made in favour of the state. This rule will, therefore,

probably not prevent a court in Myanmar enforcing a foreign judgment for exemplary damages, even if the court which ordered them to be paid did so with a view to punishing a defendant for having committed a wrong in a particularly disreputable way. A payment ordered to be made to a private individual cannot easily be seen as penal in nature.

A penal law is easy enough to identify: it is one designed to punish by requiring a payment to be made to the state, or other unwelcome thing to be done, as a consequence of criminal wrongdoing. A revenue law may also be easily identified in cases in which an individual or a company is required to pay taxes. But suppose that a person or a company is required to pay for a licence to engage in certain commercial activity: is the payment which it is required to pay to acquire or to renew its licence a revenue payment, demanded and made under a revenue law ? Or suppose that a motorist has to pay the state for a licence to use a car or commercial vehicle on the road: is the payment which the law requires made under a revenue law ? Suppose a person who receives hospital treatment is required to make a payment to the Ministry of Health: is the payment made under a revenue law ?

It may appear that in these cases the sum paid is paid under a revenue law: the payment goes to the state or to a part of it; and payments which have to be made to the state, or to some part of the apparatus of the state, do tend to look like taxes. After all, some states raise money by imposing direct taxes on income, profit, spending or wealth. Others, which pretend to have low tax rates, raise money by other means: for example, by requiring all manner of activities to need a licence, certificate,[132] or other document, which may be costly. Would it be right to regard the fee which the individual or company is liable to pay as being imposed under a revenue law ?

On one view, the answer may be that these charges are not made and paid (or not paid) under a revenue law. If the payment is a voluntary one - no-one required the applicant to apply for a licence, and he obtained a licence in return for his payment - it may not be made pursuant to a revenue law. If something is given or conferred in return for the payment - even if there was no bargaining and no negotiation of the price - the relationship between the parties is voluntary, not based on the one-sided duty to pay taxes. But if the payment is just a demand for a proportion of income or earnings or property value, it is a tax, and if it is demanded it is demanded under a revenue law. Even so, there are certainly cases where the payment looks from one viewpoint like a revenue law, and from another viewpoint as a rather one-sided contract, but a contract all the same.

(b) Enforcement distinguished from recognition

The prohibition on the enforcement of a foreign penal or a foreign revenue law extends to cases of indirect enforcement: it would otherwise be too easy to evade the rule. Obviously a foreign state cannot come to Myanmar and institute a suit against a defendant who has not paid foreign taxes.[133] But if the foreign state tries to get round

[132] Such as Singapore, where car ownership requires the purchase of a 'Certificate of Entitlement' which may cost many tens of thousands of dollars.

[133] It would be different if Myanmar has made a treaty with the foreign state which would allow the foreign state, in defined circumstances, to sue in the Myanmar courts. A Myanmar court would then simply give effect to the domestic legislation made in consequence of the treaty. But such arrangements are rare.

this rule, by first getting a judgment from its courts, and then coming to Myanmar to enforce its judgment,[134] the suit will also be dismissed on the ground that it is an attempt to enforce the foreign revenue law in a Myanmar court by indirect means; the suit will fail as being an indirect attempt to collect foreign taxes by judicial means.

But there is no rule which requires the non-*recognition* of such laws. If, for example, parties make a contract to evade foreign taxes by agreeing to smuggle goods into a foreign state, a court in Myanmar would certainly *recognise* the existence of the foreign law, and to conclude that an agreement to breach such a law - which the foreign state is not trying to enforce in a Myanmar court - would be illegal as a matter of Myanmar private international law. If the Myanmar court is not being asked to enforce the revenue law, it should have no problem with the suit.

There is, therefore, a distinction to be drawn between the enforcement of a foreign penal or revenue law, which a court will not do, and its recognition, which a court will not normally object to. But the line which separates indirect enforcement from recognition may be fine. For example, a trader who sues on a foreign invoice which includes an element of sales tax should be entitled to recover a decree ordering payment of the whole sum due, including the sales tax component; but it has to be admitted that part of the claim appears to be being brought by him in his (unwanted) capacity as involuntary collector of taxes for the foreign state, and this looks much like indirect enforcement of a foreign revenue law. Sometimes a court simply has to look for the sensible answer, and not worry too much about the objections. This may be one of those occasions.

(c) Analogous laws

Most authority maintains that there is a third category, of 'other public laws', to which the same principle applies. Laws analogous to penal and revenue laws (confiscation and nationalization, exchange control, laws regulating the security services, and so forth) should probably be dealt with in the same way as penal and revenue laws, but whether it is beneficial to call these 'other public laws' is doubtful. It may be better to consider them as laws serving an analogous purpose, and to leave it at that.

(40) The impact of Myanmar public policy

It remains to say something of the rule of private international law which exists to protect a court from being led to a conclusion which it finds to be legally valid, but intolerable or offensive. The court is protected from having to do this by the power to avoid an answer which would be contrary to Myanmar public policy.

Accordingly, a rule of foreign law, to which the issue before the court for decision has been linked, will not be applied if the rule itself is repugnant to the public policy of Myanmar, or if the result of the application of the rule would be contrary to the public policy of Myanmar. 'Public policy' in this sense refers to the fundamental values of Myanmar and Myanmar law,[135] and though the doctrine of public policy is generally understood to be a narrow one - if it applies too freely or casually, it undermines the

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134 See Chapter 3, point (23).

135 Including the protection of the state in time of war: *Ramaswamy Iyengar v Velayudhan Chettiar* BLR (1952) SC 25.

rules of Myanmar's private international law - it does make a distinctive contribution to the rules of private international law.[136]

There are a few examples which may be given to illustrate the technique. A law depriving a racial group of its property or of its nationality will usually be considered to be so uncivilised that no effect will be given to it, in a court in another common law country: the case will proceed as though such a wicked law simply did not exist. Suppose for example a law were to be passed in Barbaria,[137] confiscating all the property of persons whose presence in Barbaria was considered to be illegal. Suppose the Barbarian state were to seize the property of Myanmar nationals in Barbaria who did not have documents, and to sell or transfer that property to other people in Barbaria. Although the private international law of Myanmar would normally look to the law of the place where the property was to determine whether the transfer of title to the property was legally effective,[138] the rule of Barbarian law which would have to be taken into consideration and applied in this case would, one may imagine, be considered to be so offensive and uncivilised that it will be completely ignored in a court in Myanmar.

An understanding of public policy, as it is seen in a particular country, is not always easy for an outside observer to obtain. It will be informed in particular by local circumstances, but also by local cultural values; and although some of these are universal, others are much more individual. Ideas of equality of sex, race, religion, and so forth, are, one observes, not universal. For this reason, the decisions of English courts, which explain the content and values of English public policy, may not be directly applicable in countries far from England in which local conditions are very different.

Perhaps all that may properly be said is that common lawyers are agreed that just because a foreign law is different from a local one, it cannot possibly be said that this is enough to establish that the foreign law is contrary to public policy. Only in rare and extreme cases is it proper to find that the law of a foreign country, to which our rules of private international law have directed us, is so offensive that we will simply refuse to listen to it, never mind give it an effect in our courts.[139]

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[136] *Ramaswamy Iyengar v Velayudhan Chettiar* BLR (1952) SC 25.
[137] An imaginary state, used for the purpose of illustration to avoid causing offence.
[138] See Chapter 8, point (70), below.
[139] For the view that a court should not freely or casually invent new grounds of public policy, see *Gillespie v Maung Maung* (1911-12) 6 LBR 1 (a case on the Contract Act rather than private international law, but the point is a general one).

CHAPTER 5

CONTRACTS, AND RELATIONS WHICH RESEMBLE CONTRACTS

In this Chapter we consider the process by which a court in Myanmar would consider whether to apply its own domestic law, or the domestic law of a foreign country,[140] to an issue before it which is contractual in nature. We do not reconsider the rules on jurisdiction: at this point it is being assumed that the court has jurisdiction and will exercise it.

We are here concerned with the principles of the common law, as these were understood generally. There is no statute law in Myanmar which deals with the rules for identifying the law to apply to contract issues: neither is there any in India. There are no obvious reported cases from the courts of Myanmar which deal with the rules for identifying the law to apply to contract issues: there are, for all practical purposes, none from the Indian courts, either. This obviously does not mean that Myanmar does not have rules of private international law applicable to contract issues. It is just that these have not yet been spelled out by Myanmar courts or by writers in Myanmar. This Chapter therefore draws on the general principles of common law reasoning which will, inevitably, form the basis for the private international law of Myanmar.

(41) The meaning of 'contract' for the purpose of private international law

The rules which are examined in this Chapter will be applied to issues which are regarded as 'contractual' for the purpose of Myanmar's private international law. We explained in Chapter 4 that the rules of private international are based on the existence of certain legal categories for which a linking rule will direct the Myanmar court to the legal system - which may be a foreign legal system - which will provide the rule which gives the answer to the question which has arisen. So far as the private international law of contract is concerned, we need to define the legal category of 'contract' to which this particular linking rule will be applied.

The reader's first instinct may be to think that the word 'contract', when used as a term in Myanmar private international law, must mean the same as 'contract' in the Contract Act 1872, and that the rules in this Chapter apply where the Contract Act would consider there to be a contract, and that they do not apply where the Contract Act would not consider there to be a contract.

But it does not take long to see that this would not be helpful, and cannot be correct. It seems safe to say that every legal system in the world has a sense of what a contract is (and of what is not a contract), and that while these definitions will overlap, they will not all be identical. For example, according to the 1872 Act there are rules which determine the parties have made an agreement, and whether that agreement has become a contract. According to Section 10 of the Contract Act:

[140] The principle of renvoi has no part to play in the private international law of contract: see above, Chapter 4, point (37).

> **10. What agreements are contracts**. **(1)** All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

However, there are many legal systems which do not incorporate a requirement of consideration as part of the definition of a contract. In civilian systems - French and Italian law, for example - there is no requirement that there be consideration in order that there be a contract. In an old, but useful, English case, the court had to deal with proceedings brought to enforce a written agreement which, as a matter of English law, would not have been contractually binding because there was no consideration for the written promise which had been made. The parties to the agreement had stated that it was to be governed by Italian law. If the issue before the court were considered to be a contractual one, or if it had fallen within the private international law category marked 'contract' it would, for reasons we will examine below, have been governed by the law which the parties had chosen. But if it had not been seen as a contractual issue, it would not have been linked to the law chosen by the parties. The English court took the view – and it was right to do so – that the issue before the court was contractual, and the validity of the agreement as a contract was therefore governed by the law chosen by the parties.

This old case shows that the private international law category marked 'contract' may be larger, or wider, or looser, than the definition of contract in the Contract Act 1872. The 1872 Act contains rules which operate in the domestic law of Myanmar, but it does not claim to, does not try to, and does not define the category of 'contract' for the purposes of the private international law of Myanmar. It is understood that every domestic legal system has its own definition of what amounts to a contract. These definitions have much in common: maybe 80% or more of the cases in which Myanmar domestic law would be cases in which the domestic laws of all other states would agree. But though at the edges these domestic laws differ, we can still say that they are sufficiently like a contract to be seen as contractual for the purposes of our private international law. This is because our private international law has purposes which are distinct from those of our domestic law. The purpose of our rules of private international law are, in the main, to direct the Myanmar court to apply its own domestic law (which, in this context, will mean the Contract Act 1872, with relevant amendment), or to apply the contract law of another country. For that purpose we need a neutral, or more general, sense of what a contract is.

We therefore say that a matter may be contractual, and the rules applying to it will be those discussed in this Chapter, if it is 'sufficiently contractual', or 'so contractual that we ought to apply our private international laws of contract, rather than our private international law of something else, to it'. It cannot be denied that this can make the law a little uncertain, but it is better to admit that where it is true, and work to make it less uncertain. For example, it seems unlikely that the rules in this Chapter apply to gifts: the common law has never regarded a gift as a contract, and the linking rule for gifts is probably a property rule of the kind examined in Chapter 7. Gifts do not sufficiently resemble contracts, at least in the eyes of a common lawyer.

But the rules in this Chapter must, in principle, apply to contracts and to situations which are sufficiently like contracts for them to be dealt with in the same way. In litigation between two parties who agree that there was a contract between them, but who disagree on whether it was performed, not performed for reasons which the law regards as a

proper excuse, not performed in circumstances in which the law says that the contract was breached, the rules in this Chapter will apply. If the parties agree that there is a contract, there is no reason to question whether the matter falls within this Chapter: it will do so.

If the parties do not agree that there was a contract, however, the rules in this Chapter are still likely to be applicable. Let us take some examples. Suppose that (i) A contends that the parties made a contract while B contends that they did not reach agreement; or (ii) C contends that the contract was formed but D denies that there was an agreement with C because he actually thought that C was someone else; or (iii) E contends that the contract was formed with F, but F denies that there was a contract because at the time of the alleged contract the subject matter of it did not exist; or (iv) G contends that a contract was validly formed, but H says that his consent to the contract was obtained by misrepresentation or fraud, and that there is therefore no binding contract; or (v) J contends that a contract was validly formed but K denies this on the basis that he had been coerced by coercion or undue influence to enter into the contract; or (vi) L contends that a contract was validly formed but M denies that there was a contract on the basis that the contract was made for an illegal purpose and was therefore no contract at all; or (vii) N contends that a contract was validly formed but that because O had failed to perform his side of the agreement, N was released from the obligation to perform; or (viii) P contends that there was a contract but Q argues that because of legislation enacted by the government of the country in which he was required to perform, the contract has ceased to be legally binding; or (ix) R contends that there was a contract with S, but S argues that he was not the person with whom R agreed, and that he is not therefore bound by the contract; or (x) T contends that he never made a contract with U and that he is therefore free to sell his goods to another person, but U claims that T made a contract with him and that T is not free to act as though there were no contract; or (xi) V contends that he made a contract with W, but W says that V lacked capacity to make a contract and that W is therefore not bound; or (xii) X contends that he made a contract with Y Co, and that the person who acted on behalf of Y Co was Z, but Y Co argues that Z did not have authority to act on Y Co's behalf.

What these cases have in common is that a court, called upon to determine the rights and duties of the parties, will need to decide whether they are bound by a contract, and if they are, what the obligations of that contract are. The allegation of a contract lies at the heart of the dispute. But an allegation of contract is not the existence of a contract. The rules of private international law have to be sensitive to the fact that where the parties are in disagreement as to whether there is a contract. The rules of private international law cannot say 'suppose that there is a contract; now apply the rule which would apply if there were a contract', for that would, in some sense, be to pre-judge the case. On the other hand, in a case in which there may be a contract between the parties, and where the answer to the question whether there is a contract will be central to the litigation, it makes sense for the rules of private international law to treat the broad issue as a contractual – meaning that it is sufficiently close to a contract for these to be the rules to be applied – and to proceed on that basis. A number of such relations are, at least for the purpose of domestic law, set out in the Contract Act 1872, in Sections 68 to 72. It seems very likely that for the purposes of private international law, these relations are linked to the proper law of the contract, or to a law identified on a similar basis: we return to these specifically under point (50) of this Chapter.

(42) Some problems which may be encountered in the private international law of contracts

This point may be skipped over by those who wish to avoid some of the complexity of the law. But it is useful to explain, before examining the rules of private international law as they apply to contractual issues, some of the problems which the law must either face up to or ignore.

As will be seen below, the first rule of law in this area is that a contract is governed by the law which the parties chose to govern it. This makes perfect sense if one accepts, as the common law does, that the parties may decide for themselves the terms on which they will make a contract. If they may choose the terms of their contract, it seems to follow that they should be able to choose, as a term of the contract, the legal system which will provide the rules by which it will be interpreted and understood. Although their freedom may not be absolute, it is generally agreed that there are few limits.

This works excellently well if the parties who have come before the court agree, more or less, that they are parties to a contract. It is possible to start with the contract which the parties agree that they made, identify the law which governs it generally, which we will call its proper law, and then ask whether the precise issue before the court is one which is linked to that proper law (as most issues related to contracts are) or is linked (as a small number of issues related to contracts are) to a different law. It is hard to see how anyone could disagree with that approach.

But what if the parties do not agree that they made a contract ? Take a case in which the plaintiff contends that they did, while the defendant denies that they did agree to a contract. The answer to this question will be the one on which practically the whole of the case will turn; and this may very well depend on which legal system's rules are used to provide the answer to our question. The answer which most common lawyers would give would be that the court should look to the law which would have governed the contract if the contract were agreed to be valid. There is some sense in doing so. First, the law which governs the contract has the privilege of confirming that the contract is valid and binding as well as the task of deciding that it is not valid. It makes sense to look to the law which would govern the contract to decide whether there really was a contract by which the parties were bound. Second, where parties have allowed themselves to get into such close proximity that a law might consider them to be contractually bound, it may be said that each has taken the risk of having his legal position assessed and determined by reference to the law which would have governed that contract if the contract had been made. Third, if one were to ask the parties which law should be applied to answer this threshold question, the answer may very well be the law of the supposed contract.

On the other hand, suppose that there have been negotiations between a Myanmar and a Thai person, and that when the negotiations come to an end, they disagree about whether the negotiations resulted in a contract. Suppose that if this disagreement were resolved by the application of Myanmar law, as set out in the Contract Act, the answer would be that there was a valid contract; but if one were to apply the corresponding rules of Thai law, the answer would be that there was no contract. What should a court do ? If it applies Myanmar law, it appears to be taking sides, in the claimant's favour, when there is no obvious reason to do so: why should it not take the defendant's side, and apply Thai law ? There are two sides to the dispute, and either one may be right. If the plaintiff argues that any contract which they made or make would be governed by Myanmar law,

the defendant may counter by arguing that one cannot justify the application of Myanmar law, on the basis that it is the law which governs the contract, if there actually is no contract; the defendant may say that because there was no contract there is no basis for applying Myanmar law to answer the question whether there was a contract. If we apply the law which would govern the contract to decide whether it is valid in the first place, we are putting the cart before the horse, and it is hard to see why that would be a principled thing to do.

It gets even worse if we assume, in the example just mentioned, that the reason the plaintiff argues that Myanmar law would govern, or would have governed, the contract if there had been a contract, is that there was an express 'choice' of law by the Myanmar party. Suppose that, in his communications with the defendant, he had proposed that there should be a contract between them, and that it would be governed by Myanmar law. As we shall see, an express agreement on the law which will govern a contract will be respected and given effect under the private international law rules of Myanmar. But if it were to be argued by the plaintiff that the law which would govern, or would have governed, the contract will be the law of Myanmar, pointing to his choice of Myanmar law (and to the absence of contrary words in correspondence with the defendant), then that really does seem to go too far. The law is really tricky at this point.

We will return to the tricky issues of disputes as to the formation and very existence of the contract in due course, under point (48) of this Chapter. As we shall see, the law is not very clear, and the approach which a Myanmar court would be expected to take is not very easy to indicate. But it is important, at this point, to appreciate why the problem exists. The rules of the common law, as these apply in Myanmar and in India, will respect and will give effect to exercises of autonomy or contractual freedom, at least by those who have capacity to exercise that freedom. But the autonomy which is respected, and given effect to, is the joint autonomy of the parties, not the autonomy of one, but not the other, of the parties. It therefore makes no sense - because it undermines the true principle of respect for joint autonomy - to make reference to a 'choice of law' made by one of the parties. It has no status, no right to be taken seriously, unless the court is satisfied that it is the choice of both parties, acting jointly.

It is fair to say that the English common law was not very successful in explaining this point; that there is no Indian authority which deals with it, and nothing in the written or unwritten laws of Myanmar which faces up to the challenges posed by cases in which one side argues that there was a contract by which they were bound but the other side denies it. There is little doubt that cases of this sort should be dealt with by the rules which we will endeavour to set out in this Chapter. What is less straightforward is to explain what those rules should be.

The problem of the common law is that there is no superior, or external, rule to which a court may refer for an answer: the common law has to generate the answer for and by itself. In Europe, in recent years, a statute has been adopted - it applies as part of the private international laws of all the Member States of the European Union - to provide an external point of reference for tricky questions like this. It is, perhaps, disappointing that the common law of England has been displaced by a statutory rule. But one should admit that the problems of autonomy are not easily soluble by applying the principle of autonomy. Sometimes an answer to intractable questions has to be supplied by an outside source; and in the private international law of contract this may be the way ahead. Accordingly, we will note this statutory rule when we reach point (48) of this Chapter.

We will do so not because a court in Myanmar has any duty to apply[141] a rule of European law, but because it may help a court in Myanmar to take a clear approach to a problem which has puzzled courts, and bewildered writers, in many other common law jurisdictions.

We proceed to deal with the identification of the law which will apply to most issues considered to be contractual in those cases in which the very existence of the contract is not in dispute. We will have to return to the more problematic cases later.

(43) The 'proper law of the contract'

A contract is governed by its 'proper law'.

For over a century, the common law rules of private international law have accepted that this means the law by which the parties to the contract intended it to be governed.[142] As we will see below, the manner in which the proper law of a contract is identified depends on whether the parties have formed and expressed their intention as to the proper law: if they have done so, the proper law will not be difficult to identify, but where they have not been so obliging, the task facing a court is a more difficult one. We examine the law which applies where the parties have made and expressed their intention as to governing or proper law under point (44) of this Chapter, and the task which faces the court where they have not done so under point (45).

It seems likely that the 'proper law', with its focus on the intentions of the parties, replaced an earlier understanding, that a contract was governed by the law of the place at which it was made. In a world in which there was little international travel, and very little in the way of international communications, this may have made sense. Contracts were, in most cases, made in one place - they were not made by letter, or telephone, or fax, or computer - with the persons who made the contract both being present in that place. The idea that a contract should be governed by the law of the place in which it was made was a sensible one. But by the middle of the 19th century, international trade, travel, and commerce was much more common, and the idea that a contract should be governed by the law of the place at which it was made was less appealing. The point arose sharply in a case in which a Scottish lawyer was sent to Mauritius where he was to serve as Chief Justice. His journey was to be undertaken by ship to Suez, by land across Suez, and then by ship to Mauritius. While he was at Suez, he made a contract with an English company for the transport of his luggage to his port of embarkation. The luggage disappeared and was never seen again; and the question which arose was as to the law which governed the contract for transport of the luggage. The idea that this individual's contract with an English company might have been governed by whatever law was in force at Suez does not appear to have been attractive to the court. Instead, it decided that the parties to the contract must have intended their contract to be governed by English[143] law, and that was that: the idea that a contract was governed by the law of the place at which it was made was not really heard of again.

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[141] Presumably under Myanmar Laws Act, section 13(3), on the basis that the taking up of this rule would be justified by justice, equity and good conscience.

[142] See *State Aided Bank of Travancore Ltd v Dhrit Ram* (1942) LR 69 IA 1, in which the Privy Council accepted, in an Indian appeal, that a contract was governed by the law chosen by the parties expressly or by implication.

[143] The idea that a Scotsman might have intended that his contract be governed by the law of Scotland, rather than the law of England, does not appear to have occurred to the court.

It seems likely that a court in Myanmar would agree with this, and would not consider that a contract was governed by the law of the place at which the contract was made. In any event, such a rule would today be extremely inconvenient. In international trade and commerce, contracts are frequently negotiated between and concluded by persons who are not in the same country, but who deal with each other by communication of one sort or another. If a contract is made between a Myanmar company and a Japanese company, and the negotiation and settling of terms is all done by telephone or computer, where is the contract made ? Although the Contract Act has rules by which to decide when a contract is concluded,[144] these are rules which determine *when* a contract is made, not *where* a contract is made, and in any event were not designed to serve as rules of Myanmar private international law. And anyway, if a contract is made between two persons, one in Myanmar and one in Japan, it seems natural to say that the contract was made in Myanmar and Japan, because the contract was made by things done in Myanmar and in Japan. For these, and probably for other reasons, the idea that a contract is governed by the law of the place at which it was made would be a very inconvenient rule in the 21st century.

Having said that, it is necessary to mention again that Section 11 of the Limitation Act appears to regard the place where the contract was made as being the law which governs the substance of the contract.[145] That provision seems to say that if the time bar provisions of the law of the place where the contract was made - rather than the time bar provisions of the legal system which is the proper law of the contract - have extinguished the right on which the suit would have been based, then the Myanmar court will give effect to that time bar. It seems likely that this provision was worded by a draftsman who still believed that a contract was governed by the law of the place where it was made, and who had not really grasped that the common law rules of private international law were undergoing a change in favour of the proper law. If it cannot be overlooked in its entirety, Section 11 of the Limitation Act should be confined to questions of time bars, and should not be taken to have any wider effect.

If a contract is governed by its proper law, that proper law has several functions. But the first and most important will be to provide the rules by which arguments about the legal validity of the contract are governed. If, according to the rules which we are about to examine, it is decided that the proper law of the contract is the law of Myanmar, it will be the Contract Act 1872 (or any other relevant laws of Myanmar) which will decide whether the contract is valid and binding as a source of legal obligations, or is not so binding. If, according to the rules which we are about to examine, it is decided that the proper law of the contract is the law of Thailand, the Civil and Commercial Code 1925 of Thailand (or any other relevant laws of Thailand) will decide whether the contract is valid and binding as a source of legal obligations. It follows that the proper law of the contract may tell the court that there is no contract after all. This may appear strange: how can the law which governs a contract lead to the conclusion that there is no contract ? Does that not contradict the reason for looking to the proper law in the first place, for if there is no contract, there is nothing to produce a proper law ? But it is the law, for no other approach makes any sense. If the parties can be seen to have chosen a law, they will have chosen the law which will tell them whether they are or are not bound to each

[144] Section 4(2) defines when the communication of an acceptance is complete; Section 8 defines acceptance by the performance of the conditions of a proposal.
[145] See above, Chapter 4, point (33).

other. If it feels more natural to refer to the 'provisional' proper law, or something like that, this would not be a big problem. But it is not really necessary to do so.

The law which governs a contract must be determined at the date on which the contract was made. The proper law must be the law of a country, such as the law of Myanmar or the law of England. It is not possible for a contract to be governed by the laws of two countries: a contract cannot be governed by 'the laws of Myanmar and India'. Nor can a contract be governed by the rules or texts of a religion, for these are not laws in the sense used here. A contract, therefore, cannot be governed by 'Moslem law',[146] or by Jewish law.[147] A contract cannot be governed by abstract principles of good faith or commercial morality, or by 'international law'.[148] A contract cannot be governed by no law at all: every contract is governed by a law, even if the parties have agreed that that law may be changed at a later date. The proper law cannot be left 'floating', or as a vacuum to be dealt with by the parties a later date:[149] if the parties have tried to make such an agreement, it will be ignored. This is because, as a matter of principle but also of common sense, all contracts have to have a proper law from the instant of their creation. For if there is no governing law, there is no standard by which to assess, for example, what the contract permits or requires, or whether the contract has been performed or breached, and so forth. It is very unlikely that a contract can be governed by two proper laws, for this would be bound to give rise to clashes of rule and interpretation which could not then be resolved. It is entirely possible for related contracts to be governed by different laws, though. Suppose a Myanmar distributor agrees with a Chinese company to distribute the Chinese company's goods in Myanmar. It is perfectly possible for the overall distribution contract to be governed by Chinese law, but for the individual contracts of sale or supply of goods to the distributor to be governed by Myanmar law, or *vice versa*.

(44) The 'proper law of the contract' when it is chosen or agreed by the parties

Subject to the points made in point (43) above, which explain the laws which can and cannot be held to govern a contract, and hence to be the proper law of the contract, the common law accepts that if the parties had a common intention that a particular law should govern the contract, the law which they intended will, in principle govern it, and will, in most cases, resolve issues which are contractual in nature. The parties may assist the court by expressing their common intention, in which case the court will be able to proceed to the proof and application of that law as the proper law; but it may instead be argued that the parties had a common intention but which they did not express. The common law rules probably accept that an unexpressed, but proven, intention as to governing law will be as effective as an expressed choice of law would be. It will, however, be more likely to provoke disagreement, and the cost and trouble of trying to decide whether the parties did have a common intention, but which they did not communicate, means that this is always a very unsatisfactory state of affairs. To put the matter in simple terms: the private international law rules of Myanmar allow the parties to choose the law to govern their contract, and gives the parties every encouragement,

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146 Although a contract may be governed by the law of a country which has incorporated principles drawn from a religious code into its civil law.
147 If this is what the parties really want, they are free to agree to arbitration before a tribunal which has power and competence to apply these bodies of rules which are not laws.
148 If this is what the parties really want, they are free to agree to arbitration before a tribunal which has power and competence to apply these principles which are not laws.
149 *National Thermal Power Corp v Singer Co* [1992] 3 SCC 551.

where they do actually agree upon the law to govern the contract, to express that choice in terms which will make it easy for a court to give effect to it as the proper law of the contract.

(a) Proper law of the contract chosen and expressed

The parties may choose any law to govern their contract. Occasionally someone will question whether parties may choose the law of a country which has no objective connection with the contract, but the answer almost always is that they may.[150] There are many reasons for this, but two will suffice. First, if the freedom of the parties in this respect was limited, perhaps by a rule that the law chosen had to have some kind of connection with the contract, it would be necessary to explain what counted (and what did not count) as a sufficient connection. To most lawyers this would appear to be a completely useless exercise. If it is suspected that the parties have chosen a law in order to avoid or evade the provisions of a legal system which would otherwise have applied to the contract, so what ? The whole point of freedom to make contracts in general, and to choose the law in particular, is to allow the parties commercial freedom. It would be a very limited freedom if it were to be withdrawn in any case in which there was a real reason for exercising it. Second, the choice of a law unconnected with either party may reflect the fact that neither party was prepared to trust the other party's law. If a contract is made between a Myanmar company and a Thai company, each party may be unwilling to trust the other party's law: a choice of (say) English law, or of Indian law, may be a choice of a neutral law,[151] whose rules are clear and predictable and which contain no traps into which an unwary foreigner may fall. It has never really been doubted that the parties may choose any law they like.

It follows that the parties may choose a law to govern their contract in circumstances in which it appears that they have done so in order to avoid the application of a law which would otherwise have applied: they may have chosen one law to avoid the application of another law. If parties choose a law other than Myanmar law, a Myanmar court may still hold that certain rules of Myanmar law apply to the contract, as 'overriding ' or as 'mandatory' rules.[152] But if they choose a law in order to avoid the application of a foreign law, a court in Myanmar will neither object nor complain.

Given that the parties may choose the law to govern their contract, it is rather unfortunate when they do so in a careless manner. For example, it is helpful if the parties express their choice in conventional form: 'this contract is governed by the law of X', for example. Sometimes a less clear form of words may be used: 'this contract shall be construed in accordance with the law of X' will be taken as a choice of the law of X to govern the contract, because a contract is construed in accordance with its proper law.

But sometimes the parties choose a law which does not actually exist. An agreement which stated: 'this contract shall be governed by British law' would be a good example, because there is no such thing as British law (there is English law, and Scottish law, and the law of Northern Ireland), though most people will interpret this as though it had said

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[150] See *Vita Foods Inc v Unus Shipping Co Ltd* [1939] AC 277; *National Thermal Power Corp v Singer Co* [1992] 3 SCC 551. *Vita Foods Inc v Unus Shipping Co Ltd* was followed in *China-Siam Line v Nay Yi Yi Stores* BLR (1954) HC 270.

[151] If it is possible to choose a neutral *court* (see, for example, *Modi Entertainment Network Ltd v WSG Cricket Pte Ltd* [2003] 4 SCC 341, it must be possible to choose a neutral *law*.

[152] See further, point (47) below.

'English law'. Likewise, if the contract states that it shall be governed by 'Korean law': there is no country called Korea, but two Korean states with very different laws. Unless one of the parties to the contract is from North Korea, it seems certain that this will be understood as a choice of the laws of South Korea. If a Myanmar company makes a contract with an entity from the island of Taiwan, and the contract states that it is governed by 'Chinese law', it might be awkward to have to decide whether this was a reference to the law of the People's Republic of China or of the Republic of China, as the Taiwanese state styles itself. Usually the court can solve these questions with a bit of common sense, but it should not be necessary, and it would not be necessary if contracting parties did their jobs properly.

Occasionally in maritime cases one will encounter a really troublesome choice of law: 'this contract shall be governed by the law of the carrier's principal place of business', as is used in one standard form of contract. There is a real risk that this will not make sense, and will not work: is the 'principal place of business' the place of the day-to-day running of the business, or the place where senior management, which directs the running of the business, has its meeting place ? Is the carrier the owner of the vessel on which the goods are carried, or the company which has undertaken the carriage (and which has discharged its duties by sub-contracting the carriage to another company) ? Such choices of law are worse than useless unless the parties to the contract can agree in advance what they really mean.

(b) Proper law of the contract chosen or agreed, but not expressed

It is possible, at least in theory, that parties to a contract may have agreed upon the law which they wish to have govern it, but not have made that common intention obvious or express. The common law accepts that an implied, or inferred, or unexpressed common intention may identify the law which will govern a contract, but naturally, the exercise of exploring whether there really was such a common intention is liable to lead to difficulty. For the question is what the parties did intend, or did choose (even though they have not said what they intended or had chosen). It is not 'what would the parties have intended or have chosen if they had put their minds to it?'. On some occasions, the fact that the parties did not express a choice of law may mean that they gave the issue plenty of thought but, in the end, could not agree and decided to leave it to the court to find the governing law by other means. The question for the court, therefore, is whether it feels sufficiently sure that the parties did form a common intention on the law which would govern the contract.

If the parties do not express a choice of law, but do instead choose and identify the court or tribunal before which all disputes will be resolved, it is sometimes argued that this conveys an implied choice that the contract will be governed by the law which applies at the place of the court, or at the place of the arbitration.[153] The High Court has held, for example, that the wording 'all claims must be made at the port of delivery' in a bill of lading is to be read as a choice of law for the law in force at that place.[154] Even though some courts and lawyers have been attracted by this reasoning, it really is not convincing, and it should not be adopted. If the parties went to the trouble of choosing, and expressing a choice, of *court*, but did not express a choice of the *law* which would apply to the contract, it is easy to conclude that they could agree on the court but did not agree on

[153] See above, Chapter 2, point (17)(a).
[154] *China-Siam Line v Nay Yi Yi Stores* BLR (1954) HC 270.

the law. Especially where they have chosen a court which is experienced in the application of (what is to it) foreign law, they may well have been happy to agree to the court and to leave it to the court to apply its own rules on private international law to decide what law to apply to the contract. Having said that, it must be admitted that if parties to a contract choose the courts for any disputes which may arise, it may be inferred that they intended Myanmar law to govern the contract, on the basis that a Myanmar court is not experienced in the application of foreign laws.

However, where the parties have chosen an arbitral tribunal for the resolution of their disputes, they will have expressed a choice that their dispute, and the identification of the law which is to be applied, should be kept away from the courts altogether. As arbitrators are not usually selected on the basis of their experience as lawyers, the idea that an express choice of arbitral tribunal is an implied choice of law to govern the contract is untenable (even though it is sometimes said).

The fact that a contract is written a particular language is no indication that the parties intended the law of the country whose language it is to be applied. If the contract is written in the English language, or uses English terminology, will this indicate that the parties intended it to be governed by English law ? Why not American law, or Australian law, or the law of New Zealand, or even the law of Singapore ? The language and form of the contract is not a reliable guide to anything. The fact that there are two possible systems of law which may have been chosen, and that under one of them the contract would be valid while under the other it would not be, is sometimes taken as a reason to lean in favour of the former and against the latter. But although validity or invalidity may be a consequence of the choice of the parties, it seems unlikely that it was a reason for the choice, for if so much importance turned on it, one would expect the parties to have expressed the agreement to which they had come.

(45) The 'proper law of the contract' when it is not chosen or agreed by the parties

Where the parties do not take advantage of the freedom which Myanmar private international law gives them to choose or to agree upon the law which will govern their contract, the proper law must be identified by the court by other means. A court will therefore ask: 'with which law or legal system does the transaction have its closest and most real connection?'[155]

A test which is expressed in such a form is almost bound, if it works well, to produce the most desirable answer: of course a contract should be governed by the law with which it has its closest connection. The trouble is that the operation of this test is rather less straightforward, for there may not be as much guidance as the court may really need to allow it to operate the test in a smooth and predictable fashion.

In principle, the approach demanded by this test is that the court - no doubt with the assistance of the parties - identify all the material facts and matters associated with the contract, and in the light of this information identify the law with which there is the closest connection. That connection may not be very close: in a contractual situation with elements in many countries, the idea of 'closest' connection may really only mean 'least far away'. In other cases the factors pointing to the possible laws may be very finely

[155] *Delhi Cloth & General Mills Co Ltd v Harnam Singh* [1955] 2 SCR 402.

balanced: in a contract in which a Myanmar buyer is to buy machinery from a Chinese seller, taking delivery in Myanmar but paying by bank transfer to an account in China, it may be that the contract is as closely connected with Myanmar law as it is with Chinese law. In such a case it may be difficult to predict the answer which a court will reach, but if the parties have failed to exercise the freedom which the rules of private international law extend to them, by failing to choose a law to govern their contract, they can hardly complain if the answer given by a court in these circumstances is one with which they are unhappy.

Not all factors have the same weight in this exercise. The task of the court is not to assemble and count up the factors which point to one law and another, and conclude that the contract is most closely connected to the law which has the greatest number of pointers. Each of the factors has a certain weight, this probably based on how likely it would be that this factor would play a part in the decision which is the closer law. For example, the place of performance of the contract may have a significant weight in this exercise, at least if the whole of the performance called for by the contract is located in a single state; by contrast, the place of contracting (which may, of course, be more than one place) may have rather less weight. The reason for this is that the place of performance is usually fixed and deliberate, whereas the contract could have been made anywhere. The places of residence of the contracting parties may have some weight; and in the case of carriage by sea, the flag of the ship may be significant. But in the end the analysis is one which the court has to make for itself. It has to ask where the transaction or contract had its centre of gravity. This will be easy to answer in some cases, less easy in others.

If the contract with which the court is concerned is closely connected with another contract, it will often make sense if they are governed by the same law. For example, if a contract of insurance is governed by the law of country X, it would be convenient if a contract of reinsurance in respect of the same risk were to be governed by the same law. But this cannot be pressed too far: if services provided to a customer under a contract governed by the law of state Y, and the service-provider takes out insurance to cover any liability which he may incur, there is no particular reason for supposing that the insurance should be governed by the same law.

It will be apparent that a substantial measure of unpredictability when a court is called upon to determine the law with which a contract has its closest and most real connection. If this is inconvenient for the parties, they really have only themselves to blame, because if they had chosen and expressed a choice of the law which they wished to govern their contract, all the difficulty would have been avoided. Contracting parties sometimes do foolish things. Not choosing, and expressing their choice of law to govern the contract is one of them.

(46) The issues which are referred to (and answered by) the proper law of the contract

Many of the issues which may arise in contractual litigation are liable to be referred to the proper law of the contract for that law to supply the answer. At this point we will examine issues on which the proper law of the contract is the law, and the only law, to which the issue is linked and the court will look. In contrast with these, under point (47) below we will deal with those issues on which a court in Myanmar may look to the proper law of the contract, but may also (or instead) make reference to a law other than

this which is the proper law of the contract: for reference, these issues are those of formation of the contract, the capacity of parties to bind themselves by contract, the need for compliance with formal requirements, the effect of illegality under various laws, the quantification of damages, and the availability of other remedies, including specific relief.

The principal function of the proper law, ascertained in accordance with the rules which we have just examined, is to provide the answers to questions concerning the material or essential validity of the contract; the interpretation of the terms used in the contract; the effect of the contract, including any effect on persons who are not party to it; the nature of the rights and obligations created by the contract, the discharge of the contract by performance and by things other than performance; and the consequences of breach.

The proper law of the contract will decide whether a mistake by one or both of the parties to the contract affects its validity and enforceability (and if it may affect it, it will also determine what the consequence is). It will, in principle, determine the effect of fraud, or misrepresentation, or duress, or undue influence, on the obligations created by the contract: whether or not this makes perfect sense, it is impossible to see any better alternative. The proper law of the contract will determine whether there was any need for (and if there was, whether there was) any consideration.

The proper law of the contract will decide what the terms of a contract actually mean. For example, the contract may have provided for payment in 'dollars' without making it clear whether this means US dollars or Singapore dollars: the proper law of the contract will interpret the wording used and give the answer. For another, legal systems may take different approaches to the question whether a contractual term is to be interpreted as one which requires the obliged party to perform, or obliges him only to use his best endeavours to perform. The proper law of the contract will determine whether any terms are to be implied, or not to be implied, into the contract; and it will determine whether there is an overriding duty to act in good faith.

The proper law of the contract will decide who is bound by the obligations created by the contract, and who is able to claim the right to enforce the contract. For example, many common law systems have a strict rule according to which only the parties to the contract may sue and be sued on it; other systems are more flexible, and allow someone who was not a party to the contract, but who was intended to derive a benefit from its performance, to sue on it. All such questions are referred to the proper law of the contract for their answer.

The proper law of the contract will decide what has to be done to perform the obligations of the contract. It will decide – if the parties have not specified it – where contractual obligations are required to be performed. It will decide whether the party who is obliged to perform an act has any choice over where that act is to be performed. The proper law of the contract will decide whether the non-performance by one of the parties allows the other to bring the contract to an end, or to take any other steps.

The proper law of the contract will decide whether the contract has been broken, and if it has been broken, which are the kinds of loss for which the plaintiff is entitled to sue. The proper law of the contract will determine what counts as loss, and whether the loss which the plaintiff claims is in principle recoverable.

In short, the proper law of the contract serves as the book of instructions which a court will use when seeking to interpret and give effect to the contract. The fact that it answers so many of the questions which may arise underlines how important it is that the parties to a contract apply their minds to, and choose, and express their choice, of the law to govern the contract. Life is so much easier, and litigation is so much less trouble, when they do.

(47) The issues which are not referred to the proper law of the contract alone, or not referred to the proper law at all

Although the proper law of the contract will provide the answer to most questions which may arise in litigation concerning a contractual relationship, there are some for which it does not. At this point we are concerned with those issues on which the proper law of the contract may operate alongside another law. Under the following point (48) we return to some problems which we raised at the outset, principally concerned with the formation of the agreement, for which recourse to the proper law of the contract is fundamentally difficult to justify. Here, however, we are concerned with formalities, capacity, remedies, illegality, and public policy. For these, the sense that the proper law, and only the proper law, has a claim to be applied is not as compelling as it was when considering the issues dealt with under point (46) above.

(a) Formal requirements

Whether a contract needs to be made in writing, or made orally but evidenced in writing, or notarised, or witnessed, or sealed, or any other similar requirement, is regarded as a matter of formal validity, or of formality. It is generally understood that if the contract satisfied the formal requirements of the proper law (if, indeed, it has any requirements), it will be formally valid. If it does not comply with these, but complies with the formal requirements of the place where the contract was made, it will be considered to be formally valid. It is unlikely that a contract which was not made in Myanmar, and which does not have Myanmar law as its proper law, will need to comply with the formality requirements of Myanmar law, but if any of these requirements – there are not many of them – is considered to be a procedural or evidentiary requirement,[156] that rule of Myanmar law may need to be complied with as well.

(b) Capacity of parties to contract

In a commercial contract, if the parties would be regarded as having capacity by the rules of the proper law – for example, the proper law considers that a person is of the age of majority and is not otherwise debarred from contracting – it would be inconvenient if a rule taken from another legal system should be applied to invalidate the contract.[157] The same would be true if a contract were governed by Myanmar law but one of the parties to it were a married woman from a country under the law of which she had no personal capacity to contract without the consent of her husband.

On the other hand, it would be strange if a person who lacked capacity under his or her personal law could 'give himself capacity' by purporting to make a contract with a proper

[156] See above, Chapter 4, point (32).

[157] An Indian case (*TNS Firm v Muhammad Hussain* (1933) 65 Mad LJ 458) suggested that in a commercial case, capacity should be governed by the law of the place where the contract was made, but which may make the answer depend on factors which have little real significance.

law under which he would not be under any incapacity. It may therefore be that the rule in Section 11 of the Contract Act

> **11. Who are competent to contract**. Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and who is not disqualified from contracting by any law to which he is subject.

should be taken as a rule of private international law. A person would therefore need to have capacity according to his or her personal law;[158] and a company would be required to have capacity according to the law under which it was organised or incorporated. Certainly where a party does not have capacity by reference to this law it will be difficult to persuade a court to enforce the contract.

(c) Remedies for breach of contract

The law on remedies for breach of contract is governed in the first part by the proper law and in the second part by the domestic law of Myanmar.

It is the function of the proper law of the contract to define and clarify the obligations of the contract. It will decide whether the contract has been breached; and it will decide, in principle at least, the consequences of that breach. It will determine whether the loss or damage of which the plaintiff complains can justify a claim for compensation, for the obligation to compensate is an obligation which is part of the contract: to put it crudely: if you make a contract governed by US law you assume an obligation, if you breach the contract, to compensate the claimant for those losses which US law says you are liable for. The proper law – here US law – will determine whether the fact that the loss is remote or indirect, for example,[159] is a barrier to the recovery of damages.

But if the proper law of the contract provides that a particular form of loss or damage may be compensated for, the quantification of the loss – the calculation of how much damages should be awarded – is done by the application of Myanmar law, not US law. If for example the contract governed by US law is breached, and as a matter of US law it is possible to obtain damages for loss of business opportunity, the quantification of the sum of damages which a Myanmar court will award will be done by applying Myanmar laws and values, not US ones. This means that a court in Myanmar will not have to award damages which are at the extraordinarily high level which a US court would award. In technical terms, this result comes about because the quantification of damages is a matter of procedure, as we saw under point (32) above.

The same reasoning explains why the Myanmar court will apply the Specific Relief Act to decide whether to make an order of the type which falls within that Act. Even though the contract is governed by foreign law, the question whether to grant one or another remedy by way of specific relief, is a matter of the law of remedies, a matter governed by Myanmar law and not by the proper law of the contract.

(d) Illegality in making or in performing the contract

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[158] *Technip SA v SMS Holding (P) Ltd* [2005] 5 SCC 465; see also *Rohilkhand and Kamaun Bank Ltd v Row* (1884) ILR 7 All 490; *Kahiba bin Narsapa Nikhade v Shripat Narshiv* (1894) ILR 19 Bom 697; *Shrinivas Abaja Desai v Damodar Appaji* AIR (1946) Bom 452.

[159] See Section 73(2) of the Contract Act 1872, for use of these terms.

One should start with the proper law of the contract. If the contract is illegal according to the proper law of the contract – that is to say, either the making of the contract is a criminal wrong under the proper law, or the performance of the contract would involve the commission of a criminal wrong according to the proper law – there will no obligation to enforce in a Myanmar court. No doubt the proper law will also decide whether any money or other property has to be returned.

But the proper law is not the only law which is entitled to have a view about the legality or illegality of the contract or its performance. If a contract is illegal as a matter of Myanmar law – that is to say, either the making of the contract is a criminal wrong under Myanmar law, or the performance of the contract would involve the commission of a criminal wrong under Myanmar law – the Myanmar court cannot enforce the contract. It would be an astonishing thing if, for example, a court in Myanmar were to enforce a contract for the export of goods which may not be exported from Myanmar, simply because the proper law of the contract did not regard the contract as an illegal one.

If the contract is legal according to its proper law, and involves no infringement of the criminal law of Myanmar, it may still be one which the Myanmar court will refuse to enforce if the performance of the contract would be illegal according to the law of the place where performance was required to take place. It may be that this rule is not triggered if the illegality in the place of performance is of a very minor or technical kind, but the courts of Myanmar cannot be expected to order a person to pay compensation for refusing to commit what would be a crime in the place where it was to be performed.

(e) Public policy

Related to the previous point is the proposition that a Myanmar court cannot be expected to enforce a contract which it considers to be contrary to its public policy. Examples of this kind of thing are rare, but a contract may be contrary to public policy if it involves conduct which would be unlawful if it were to take place in Myanmar. As Myanmar criminal law does not, generally, apply to conduct outside Myanmar, a contract which involves doing something which would be unlawful if done in Myanmar will probably not be enforceable in Myanmar, on the ground that the conduct is contrary to public policy. A contract to smuggle goods from Malaysia to Thailand, for example, could not be enforced in Myanmar on this ground; it would not matter whether the conduct in question was illegal under Thai or Malaysian law.

(f) Cases to which Myanmar statutory law applies in a mandatory way

For the sake of completeness, we should remind ourselves that there will be some issues on which a rule of Myanmar statute law applies even though the contract in question is governed by a foreign law. The examples of this are relatively few, but they are not confined to the cases in which the law of Myanmar makes the contract or its performance illegal. But suppose that the law of Myanmar were to provide that all transactions of a certain kind required the approval of a Minister, or required registration on a certain public register, and that if the approval or registration did not take place the transaction was void (if it were also criminally illegal, it would fall under the provision for illegality, discussed above). In such a case, a court in Myanmar would accept that the contract was governed by its proper law, but would also accept that the statutory instruction, made by the Myanmar legislators and communicated directly to the Myanmar

judge, would have to be applied, and would therefore override or displace the answer which the proper law of the contract would have given.

For this result to happen, we need to be sure that the rule of Myanmar statute law was intended to have this mandatory effect, of overriding and pushing aside the answer which the proper law would have given. Not all statutes do this: many, perhaps most, apply only when Myanmar law is the proper law of the contract. It would be ridiculous to argue, for example, that the Contract Act 1872 applied to every contract litigated before the Myanmar court even though the rules of Myanmar private international law considered it to be governed by a foreign law. But statutes which deal with regulatory matters, foreign exchange, and protection of the economy and of the essential interests of the state, may be found to have this rather special effect.

(48) Problems which arise where there is disagreement as to the validity of the contract, or the original creation of the contract

The situations which we have examined have been those in which the parties agree that there was a contract between them, or at any rate accept that there was a contract but which one of the parties may be entitled to escape from. In such cases, it is defensible to use the proper law of the contract, because the parties agree, or accept, that there was a contract, they must concede that it will have a proper law, for every contract must. If they do that, using the proper law to answer questions arising from the contract seems appropriate.

But if one party simply says that there never was an agreement – and that there therefore never was a contract – it is not obvious that the proper law of the contract should be used. If there really was no agreement and no contract, there can be no proper law of the contract to use for any purpose; and if the court genuinely does not know – because it still has to decide – whether there was an agreement and a contract, it does not seem right to proceed by assuming that there was a contract and applying what would be its proper law if it were to exist to decide whether it existed in the first place. We noted the difficulty which this poses under point (42) above; it is now time to propose a solution.

The first thing to say is that the common law systems of the world have never found this an easy problem to solve. It is not possible to look to the common law rules of private international law as found in India, England, or Australia, for example, and to find a good solution there: there is none. The second thing to say is, therefore, that a court in Myanmar would be free to adopt any sensible solution which appeared to be right in principle.

The third thing to say is that there is a good solution to be found in legislation adopted across the European Union: a solution to this problem which is, therefore, acceptable to common law systems as well as civil law systems; and it is therefore proposed that a court in Myanmar could adopt it in order to clarify and improve its common law rules of private international law: at least, there is no rule of Myanmar law which would prevent a court declaring its common law in these terms. The rule is made in two parts. The existence and validity of a contract should be determined by the proper law of the contract, or by the law which would be the proper law if the contract were valid. But if the party who says he did not agree to be bound is able to show the court that (i) according to the law of the place in which he is resident or established he would not be held to have made an agreement, and (ii) it would be reasonable for him to rely on the

law of the place where he is resident, then he will not be bound and the court will determine that there is no contract. The purpose of the second of these little points is that what may be reasonable for a person who has no experience of making international contracts, and who may have no reason to suspect that the law of a foreign country may be different from what he was expecting, may not be reasonable for an experienced trader or for a corporation which knows or ought to know of the existence and difference of foreign laws.

It cannot be said that the solution described above is part of the private international law of Myanmar; but equally, it cannot be said that there is any other answer to the particular question. The solution described above tries to take a pragmatic, fair, and even-handed approach to a practical problem, and in this sense it is ideally suited for adoption into the common law rules of private international law as they apply in Myanmar.

(49) Particular kinds of contract with special rules

In a general book of this kind, there is no room to deal with the rules of private international law as they apply to certain specialist kinds of contract. But indemnity and guarantee, and agency, are species of contract which are, to a certain extent, separate from the ordinary rules applicable to contracts as a whole. In the Contract Act 1872, guarantee and indemnity, and agency, are made subject to detailed and precise rules of domestic law, no doubt because of their commercial importance at the time the Contract Act was made. Parts VIII and X of the Contract Act do not contain any rules of private international law; but it can be seen that the two kinds of contract are liable to give rise to particular problems. There are several reasons for this, but the most important is that in each case there are at least two, interlinked or associated, contracts (actually, in the case of agency there are three relationships in the triangle of principal, agent, and third party). This is bound to mean that the rules by which the proper law of the contract is ascertained will work in a somewhat different way: the rules are basically the same, but the manner and outcome of their application may be distinct.[160]

Other parts of the common law world have developed, with increasing emphasis, distinct rules and approaches for certain and particular types of contract. For example, contracts for the sale or other dealing with land are almost invariably governed by the *lex situs*, the place where the land is. More complex provision tends to be made for contracts of employment, for contracts made by consumers with professionals, for banking contracts (and in particular, for letters of credit), for insurance contracts, for wagering contracts, and so on. There does not appear to be any similar development in the domestic law of Myanmar, and no development of its rules of private international law by courts in Myanmar for cases of this kind. It is therefore premature to embark on a detailed treatment of this kind of contract, though it is important to be aware that in other parts of the common law world, principles of private international law, applicable to these specialist contracts, have increasingly been developed.

Contracts concerned with the international carriage of goods and persons, in particular, are often regulated by international conventions; similar international agreements exist to harmonise rules for the international sale of goods. Myanmar may be expected to adopt

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[160] In *Ramaswamy Iyengar v Velayudhan Chettiar* BLR (1952) SC 25, the Supreme Court accepted the English view that a contract of agency was not necessarily governed by the law of the place where the principal was established (and if it was, the application of Indian law could be displaced on grounds of Myanmar public policy on the facts of the case).

more and more of these; and where these conventions contain rules of private international law – as some do – they will, when adopted and given effect in the law of Myanmar, displace the ordinary rules of private international law which would otherwise have applied.

(50) Cases concerned with relationships resembling contract

The rules which we have set out in this Chapter apply not only to contracts, but also to claims in respect of 'certain relations resembling those created by contract'. This language comes from Part V of the Contract Act 1872, but it is necessary for the rules which we have examined to apply to relationships which resemble contractual relations so closely that it would make no sense to subject them to any other rules of private international law.

The common law rules in other jurisdictions tended to come to the same general conclusion, though many now prefer to view the issue as one in which the obligation is not so much contractual, or resembling contractual, but concerned with 'unjust enrichment'. But these other common law systems all accept that where the relationship between the parties resembles a contractual one, the rules of private international law which apply to it, and to the parties to it, and to the existence, content, and consequences of it, are the contractual ones. For no other solution would make any sense.

As a result, claims in respect of a contract which failed because one party lacked capacity,[161] claims by a person who has discharged another person's debt,[162] the claim for compensation against a person who received a benefit for which he was expected to pay but who has not paid for it,[163] the claim against a person who finds another's goods but who allowed them to come to harm,[164] the claim against a person who received money or other property as a result of coercion or mistake,[165] and claims which are analogous to these, will be governed by the principles examined in this Chapter. If they arise in the context of a relationship for which the parties chose the law which was to govern it, that law will apply here as well; if they arise in the context of a relationship in which the parties did not choose the law to govern it, the rights and obligations of the parties will be governed by the law with which the relationship has its closest and most real connection.

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[161] See Section 68 of the Contract Act 1872.
[162] See Section 69 of the Contract Act 1872.
[163] See Section 70 of the Contract Act 1872.
[164] See Section 71 of the Contract Act 1872.
[165] See Section 72 of the Contract Act 1872, though not every mistaken payment is paid on the basis of a mistake about the existence of a contract (think of a gift, for example).

CHAPTER 6

TORTS, AND SITUATIONS WHICH RESEMBLE TORTS

In this chapter we set out the rules of private international law applicable to torts.

(51) The meaning of 'tort' for the purpose of Myanmar private international law

The rules of private international for contracts and for relations which resemble contracts were dealt with above. What those contracts and associated relationships have in common is that it in most (if not in all) cases, the parties will be known to each other, will have realised that they were coming into a relationship with each other, and will have had an opportunity to choose the law which will apply to that relationship. A contract is an agreement, and if the law to be applied is not one which the parties chose, it will still be deduced from points of connection which the parties knew or should have known about from the start: choice of law for contract is easy and uncontroversial, with only the detail requiring analysis and debate.

Torts, by contrast, are the law's accidents, messy and unplanned, and covering a more diverse set of interests and duties. A single or uniform choice of law rule may struggle to encompass and deal in a satisfactory way with trespass to the person, battery, negligence causing personal injury, negligence causing other kinds of loss, economic torts and conspiracies, unfair competition, liability for fires and animals, defamation, nuisance, false imprisonment and interference with another's property. But when causes of action arising under foreign laws of tort and delict are added to the category for which a rule must be found, a single and reliable choice of law rule, whether very flexible or very inflexible, will be difficult to devise. Whereas the parties to a contract know of each other, and the range of persons with a potential claim will be limited and predictable, the parties to a tort claim, often flung together or strewn about by the tort, may well be strangers to each other. In devising choice of law rules this has to be borne in mind; and it tends to mean that choice of law for tort issues is very different from the approach taken to contractual issues. They may all be part of the law of obligations, but they are obligations of a very different kind. The result is that the choice of law rules for issues in tort are very different from those which apply to contracts.

In seeking to state the private international law of Myanmar applicable to torts, we have not been able to locate any Myanmar authority on the broad question, never mind any on individual points of detail. English common law underwent substantial changes over the 150 years in which it was developed. One Indian decision took the view that the 'justice, equity and good conscience' provision, which is replicated in the Myanmar Laws Act, section 13(3), provided the basis for the English common law rule of double actionability[166] to be applied to torts committed outside India;[167] and in the absence of other authority, section 13(3) has to serve as the legal foundation for the modern law which we seek to describe here.[168] This chapter therefore approaches the question on the basis of English common law authority, but also on the basis of common sense.

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[166] Examined below, point (54).

[167] *Govindan Nair v Achutha Menon* (1915) 2 LW 290 (Mad), at 295-6.

[168] And for the view that section 13(3) provides the basis for much of the domestic tort law of Myanmar, see *Kovtunenko v U Law Yone* BLR (1960) SC 51.

A tort, for the purposes of the private international law of Myanmar, must be taken to mean an obligation which is not contractual, whether the obligation arises under Myanmar law or foreign law. There is no sense in attempting to find a more precise definition, for the only effect of doing so would be to leave some obligations out of the law altogether, on the ground that they are neither tortious nor contractual in nature. There would be no sense in that. That is not to say, of course, that every such obligation arising under a foreign system of law will be recognised and enforced in a Myanmar court in the same way that a tort (as understood in Myanmar domestic law) would be. But we have to define the outer edges of the material which will be examined in this Chapter, and this is probably the way to do it. If the issue or claim before the court is based on an obligation but is not contractual in nature, it will fall within the scope of this Chapter and be treated, for the purposes of private international law, as a tort, or as though it were a tort.

It will follow that certain sorts of wrong or liability, not naturally thought of as torts in domestic law, will fall within this Chapter. Claims based on insult or injury to self-esteem, which are probably not recognised as tortious in Myanmar law, will be dealt with within this Chapter. Claims based on misuse of confidential information, if recognised at all under Myanmar law as wrongs, will be dealt with within this Chapter. Claims based on deliberate economic infliction of harm, or on conspiracy to injure another, or based on unfair competition – all of which are significant and important causes of action in the developed world – will, whether or not reflected in the domestic tort law of Myanmar, be dealt with by the rules set out in this Chapter. Claims based on statutory rights and duties, including claims based on foreign statutory rights and duties, will be dealt with (and if the claim arises under a foreign statute, dealt with rather unsympathetically) by the rules in this Chapter. So also claims brought against a defendant which would require the defendant to pay sums of money (otherwise than by way of criminal sanction) for the environmental clean-up of land or waterways which it has polluted: all of these kinds of claim will be dealt with by the rules of private international law examined in this Chapter, because all will be treated as torts for the purposes of private international law.

A significant complication for any attempt to explain the private international law of Myanmar as it applies to torts is that the domestic law of Myanmar on torts is not well developed. Lacking any real statutory basis – there is nothing to compare with the Contract Act 1872, for example – the domestic law of Myanmar on torts appears to consist of a single statute concerning torts to the person – the Fatal Accidents Act – and nothing else.[169] There are very few reported cases, and the consequence is that one has to suppose that the English common law would be a guide to the development of the domestic law of Myanmar on tort. While this is not a complete barrier to an understanding of the private international law of torts, it does mean that the confidence with which a writer can seek to explain the law is rather less. What we describe in this Chapter is the law as we consider a Myanmar court would understand it.

(52) The place where a tort was committed

The basis of the private international law of tort, in Myanmar as in most other countries, will be to identify the place where the tort was committed. Whereas where contract is concerned the starting point is to see whether the parties chose the law to govern their

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[169] See *Kovtunenko v U Law Yone* BLR (1960) SC 51 for the comment that tort law in Myanmar has based on Section 13(3) of the Myanmar Laws Act 1898: Chapter 1, point (7) above.

relationship, the point of departure for torts is to identify the place where the tort, or the alleged tort, occurred. If the law is going to apply a rule which links the claim to the law of the place where a tort was committed, as indeed it does, it must be able to decide where a tort was committed. And this is where the difficulties begin.

Some torts are easy to locate. If a person is knocked down and injured by a recklessly driven bus when crossing Sule Pagoda Road, the tort – by which, at this point, we mean the alleged tort – was committed in Myanmar. But not all torts are so easy to pin down. Take the example of a medicine, made to prevent travel sickness, which causes sickness in the person who uses it. Suppose the scientific research work was done in country A, the medicine manufactured in country B, the medicine sold to a chain of shops in country C where it is bought by a customer, who uses it while he is in country D and who comes down with symptoms of illness when he arrives in country E. If the customer wishes to sue the manufacturer for compensation for personal injury, and assuming the court has jurisdiction, where will the tort be held to have been committed ?

Of course, there is no naturally right answer to this question: the tort was made up from components which were spread across five countries. To say that the tort was committed in any one of them is, surely artificial; but the answer that it was not committed in a single country means that a choice of law rule which depends on locating the tort in a single country simply will not work. As a result, private international law has to ascribe a location to a tort which, really, does not have one. It is far from perfect, but it makes sense, because in most cases (such as the reckless bus driver case) there is no difficulty, and a rule which works well in 95% of cases is not such a bad rule. The private international law of tort can be untidy in unusual cases, but that is because torts themselves are untidy, and the rules of private international law reflect that.

So how does the law answer the question of where the tort was committed ? The answer is that it looks at all the elements which go to make up the tort – the conduct of the defendant, the acts of the victim, and the consequences of each – and it asks: 'where in substance did the cause of action arise?'. The technique is to try and identify the heart, or the centre, of the tort, and to ask where that happened. For example, in the case of the travel sickness medicine which causes illness, it may be that the heart of the tort is the sale to the customer: that is the point at which the dangerous article is transferred to a person who will suffer from taking it. It would be possible to see everything which happened after the purchase as being just the consequence of something which was bound to case damage (the only question being when and where it would do it), and the transfer of the thing to the customer the heart of the tort. Of course, there are other answers which could be given: that the manufacture or the testing were obviously done without proper care, and that everything which happened after that was just a consequence of that wrongful behaviour; and it is hard to give a truly convincing reason why the first answer is better than the second. It could also be argued, perfectly sensibly, that there is no tort until there is damage done to the victim, and that the cause of action arose, in the sense of its being complete, only when and where the damage was done.

The best answer which can be given is that a court has to try and locate the heart of a tort, even though the tort will have limbs which stretch out to other places. The fact that the question may be hard to answer in a few cases is not good enough as a reason to reject a test which works perfectly well in all but a handful of cases.

The rules by which a court in Myanmar decides which law to apply to a claim or to an issue which it regards as a tort depends on where the tort takes place.

(53) The law which applies when an alleged tort was committed in Myanmar: the general rule

If a tort is committed in Myanmar, the question of liability will be answered by the domestic law of Myanmar. This will be true when plaintiff and defendant are Myanmar residents; it will be true where one of the parties is a foreigner; it will be true even if both parties are foreigners; and it will still be true – which may seem surprising – even if both parties are foreigners who are only temporarily in Myanmar.

This, at any rate, was the answer given by English courts. It is not clear how widely this approach is shared; and there will be cases – for example, where the plaintiff and defendant have travelled together for a holiday, and returned to their home after a few days – in which it might be thought that the tort is really more closely connected with a country overseas. But the English rule, for good or ill, was that if the tort was committed (in the sense that the cause of action arose) within the jurisdiction of the court, it would apply its own domestic law. In a recent decision the Singapore courts, who had inherited the same rule from English law which we assume to have been inherited by Myanmar as well, decided that where a tort took place in Singapore it might be possible to apply something other than Singapore law to it: it seems strange to think that a tort, involving two foreigners who were in Singapore only in order to change planes at Changi airport, should be governed by the law of Singapore simply because it took place within the territorial jurisdiction of the court, but an English court would have rejected any suggestion that there should be any flexibility in such atypical cases. The Singapore court disagreed, and there is much to be said in support of their more flexible, sensible, view. We consider the issue again, under point (55).

Having said that, and as we shall see below, where a tort is committed overseas, the rules of private international law look to the law of the place where the tort takes place, and to the law of the forum. Where both these signposts point in the same direction, where both linking rules come to the same country, and that country is Myanmar, there is a very strong reason for saying that the court in Myanmar should simply apply the domestic law of Myanmar, as though there were no international element, and leave it at that.

(54) The laws which apply when an alleged tort was committed overseas: the general rule

If a court in Myanmar has jurisdiction, and is going to exercise that jurisdiction, over a defendant to a claim in tort, when that tort has, in substance, taken place overseas, it will be dealing with a case in which two legal systems have a claim to provide the answer to the question before the court. If a tort has taken place overseas, it is consistent with the answer given above for the court to look to the law of the place where the tort was committed. But there is a risk that if the court does this, and if that is all it does, it will be applying a law which is significantly different, and perhaps not in a good way, from its own domestic law. As a result, it will also look to and apply its own domestic law; and the result of all this will be that the plaintiff will win if, but will win only if, he can make his claim good by reference to the law of the place of the commission of the tort *and* by reference to the law of the forum court. The rule is therefore one of 'double actionability'. As a matter of simple arithmetic, it means that the plaintiff, if he is going to

prevail, has to show that he wins under each of two laws; it means that the defendant wins if the plaintiff can show that he wins under only one of these two laws. This, at any rate, was the rule of the common law as developed by the English courts and adopted by the laws of almost all other common law jurisdictions. Though in more recent years, courts in some other common law jurisdictions have modified (or rejected) it, the Indian courts have not done so; and if the question for a court in Myanmar is to ask what was the content of the common law rule when it was inherited by the Myanmar legal system, it will be this rule of 'double actionability'.

In fact, in many cases concerned with an overseas tort, a court will simply apply its own law, and will not be asked to look to the law of the place where the tort occurred. This is because, as was said above,[170] there is no duty on either of the parties, or on the court, to invoke the law of a foreign country. If the parties are content that the Myanmar court resolve the case on the basis of Myanmar domestic law, without reference (through its rules of private international law) to foreign law, they are free to do so. It follows that any reference to the law of a foreign country will be made by the defendant: the plaintiff has nothing to gain, but everything to lose, by asking the court to look, in addition to applying its own law, to the law of a foreign country.[171] It will, in practice at least, be the defendant who asks the court to conclude that the tort, in substance, was committed in a country outside Myanmar, and then to conclude that according to the law of that foreign country, the defendant is not liable to the plaintiff. If this all happens, the plaintiff's claim will be dismissed.

Many people have argued that the rule of double actionability is unprincipled and unnecessary. They say it is unprincipled because it makes life much easier for the defendant than for the plaintiff: if two laws are involved, and the plaintiff has to satisfy the requirements of both of them, he is at a clear, structural, disadvantage when his position is compared to that of the defendant. They say it is unnecessary because there is nothing similar in the private international law of contract. A Myanmar court will be willing to apply the proper law the contract, all by itself. A court in Myanmar, dealing with a claim for compensation for breach of contract, will not say that the plaintiff has to show that his claim could be sustained under the terms of the Contract Act 1872 as well as under the law which governs the contract. Why, they ask, should the law be any different when dealing with a foreign tort ? Why is it so different from a foreign contract ?

It is a good question, and it is hard to answer in a convincing fashion. Certainly, in Australia and Canada, mature common law systems, the requirement that the claim be actionable by the law of the forum has been dropped, leaving the rule one which simply looks to the law of the place of the tort. The best answer which can be given is, probably, that there are, in some foreign legal systems, some really rather strange torts, and that for its rules of private international law to require a Myanmar court to apply the tort laws of these systems would sometimes be unacceptable. The advantage of a rule of double actionability is that a plaintiff can only succeed if his claim is one of a kind which Myanmar domestic law would also allow. Whether that is enough of a justification is not easy to say; not everyone accepts that it is sufficient.

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170 Chapter 4, point (31), above.

171 One possible and slight exception to this is given under the following point (55).

However, the courts of Myanmar have rather little experience of applying the tort rules of foreign legal systems. Until this changes, it is reasonable to suppose the Myanmar courts will favour a rule of double actionability, and not give judgment in a tort case in favour of a plaintiff unless the conduct complained of gives rise to civil liability as a matter of Myanmar law.

On the footing, therefore, that the double actionability rule for torts committed outside Myanmar is part of the private international law of Myanmar, it is necessary to explain exactly what it requires the plaintiff to do. It means that the plaintiff will be required to show that he has a good claim against this defendant, under the laws of each system, for the same head or heads of damages. Suppose he sustained a personal injury on the streets of Bangkok when he was knocked down by a carelessly-driven bus; suppose also that he suffers financial loss (when he has to pay for medical treatment in Thailand), and sustains pain and suffering, and suffers from a loss of earnings when he is unable to work for the next six months, and has to pay for nursing care at home in Yangon while he is recovering. If he sues the driver of the bus for compensation he will have to prove (i) as a matter of Myanmar law and as a matter of Thai law, that the bus driver committed a trespass against him, (ii) as a matter of Myanmar law and as a matter of Thai law, that he is entitled to be compensated for medical expenses; (iii) as a matter of Myanmar law and as a matter of Thai law, that he is entitled to compensation in respect of pain and suffering; (iv) as a matter of Myanmar law and as a matter of Thai law, that he is entitled to be compensated for loss of earnings; (v) as a matter of Myanmar law, and as a matter of Thai law that the cost of nursing care can be claimed as compensation. If he wishes to sue the bus driver's employer, on the basis that the employer is responsible in law for the wrongs committed by his employee when he is acting in the course of his employment,[172] he will need to show, as a matter of Myanmar law and as a matter of Thai law, that the employer is liable for the wrong committed by his employee.

It is as thought the plaintiff was required to set out his claim, and the basis for and extent of it, by reference to Myanmar domestic law, and show that it is sustainable; and the delete 'Myanmar' and replace it with the name of the foreign legal system within which jurisdiction the tort was committed, and show, once again, that the claim is sustainable. That is what double actionability means. If we return to the example of the traffic accident in Bangkok, suppose that the domestic law of Myanmar allows a plaintiff to recover compensation in respect of pain and suffering and for the nursing care after the discharge from hospital, but that Thai law would not award compensation for either of these. In those circumstances the Myanmar court would not award such damages, for the plaintiff would have failed the test of double actionability in respect of compensation for pain and suffering and in respect of compensation for nursing care.

Or take an even more awkward case. Suppose that as a matter of Myanmar law, the claim for compensation could be brought against the bus driver but not against the employer, because the driver was acting outside his contract of employment, but that as a matter of Thai law, the employer could be sued (because it owned the bus which did the damage) but the driver could not be, because Thai law provided, in such circumstances, that the claim could not be brought against an individual employee. In such a case, the rule of double actionability will mean that the plaintiff completely fails: the facts and matter

[172] This liability is generally known as 'vicarious liability'. The reason for suing the employer is usually that the employer is more likely to have the money to honour any order that compensation be paid.

which give him a claim under the law of Myanmar do not give rise to a claim under Thai law; and the facts and matters which give rise to a claim under Thai law would not, on these facts, give rise to a claim under the law of Myanmar. Even though both systems agree that the plaintiff has been the victim of a tort, and should be compensated, the effect of the double actionability rule will be that the claim is dismissed in its entirety.

The possibility that the double actionability rule produces an effect like this leads some to suppose, and may lead a Myanmar court to agree, that there should be some flexibility in the operation of the rule, or that in a case like the one just discussed, for example, the law should be able to produce a result in favour of the injured plaintiff. If this is not to be done by rejecting the double actionability rule in its entirety, it is necessary to allow for some flexibility in the way that it works. That, at any rate, was the conclusion to which the English courts came, and the reasoning which led to this conclusion was itself perfectly sensible.

(55) A more flexible approach for dealing with awkward cases

(a) Torts committed overseas

It can be seen that the strict application of a rule of double actionability for overseas torts can produce unexpected, and rather unsatisfactory, results in some cases. This has led courts in some common law jurisdictions, notably in England but also in Singapore, to modify the rule so that, in an appropriate case, it is not necessary for the plaintiff to satisfy both parts of the double actionability rule. For example, suppose that two Myanmar nationals are sent by their employer to work in Qatar, and one causes injury to the other, and proceedings are brought before the Myanmar court. It would be open to the Myanmar court to say that the dispute was overwhelmingly connected to Myanmar and to Myanmar law, and that it had no real connection to Qatar or Qatar law, and that the court should just apply the law of Myanmar, even though the cause of action arose in a foreign country, and even though the defendant asks the court to apply the law of that foreign country. It is, to put the matter a little simply, a Myanmar dispute which just happened to take place in a foreign country.

Similarly, if two English employees of a NGO who are working in Myanmar, go to Thailand for the weekend, where they are involved in a driving accident: suppose that they are in a car which one is driving with the other as passenger, and the driver crashes the car and injures the other. A court in Myanmar might consider that is a matter which really has nothing to do with Myanmar and its legal system, and that as a result it would not be necessary for the plaintiff to be able to show that he would be able to succeed against the defendant under Myanmar law.

It may be asked what makes a case an exceptional one for the purpose of this exceptional rule. It is a good question, and the answer is not completely easy to give. But if the plaintiff and defendant were known to each other, or had a relationship with each other, and the tort took place within that relationship in such a way that it may be said that the tort is more concerned with their relationship than it is with the place where it took place, the case will be an exceptional one, and there may be no need to satisfy the requirements of the law of the place of the tort. Similarly, if the plaintiff and defendant were known to each other, or had a relationship with each other, and the tort took place within that relationship in such a way that it may be said that the tort is more concerned with their relationship than it is with Myanmar, where the litigation is taking place, the

case may also be seen as an exceptional one, and there may be no need to comply with the requirements of Myanmar domestic law.

So also if the case is one in which the connection to the place where the tort occurred is a relatively weak one for the very reason that the place of the tort was difficult to identify in the first place. In the case of the pharmaceutical product, discussed under point (51) above, it was rather difficult, perhaps even artificial, to argue that the tort was committed in a particular place. In a case like that, where the place of the tort is not so obvious, it will be easier to see that a court may conclude that the connection to the place of the tort is relatively weak, and that the connection to another country is stronger.

But where the plaintiff and defendant are not known to each other, but are just strangers to each other in the way that plaintiff and defendant in a tort case frequently are, it will be very much more difficult to argue that there is so strong a connection to another country or to another legal system that an exception to the rule of double actionability may be made.

It is difficult to be any more precise than this, however, because if a rule is intended to be flexible in the manner in which it operates, it will inevitably be imprecise in the way it is defined. This has certainly been seen by some courts - Australia is the clearest example - to say that the very idea of a 'flexible exception' is misguided. The Australian view is that flexibility simply means uncertainty, and that uncertainty is a bad thing. After all, the law presumably wishes parties, where possible, to settle their disputes without going to court. Parties to a dispute are much more likely to settle their disputes if they think they know what will happen if they go to court to fight the case; by contrast, if the law is uncertain, each party may consider that it is worth trying to fight the case in court in the hope of a better outcome than his opponent expects to happen.

(b) Torts committed in Myanmar

The view expressed above was that a Myanmar court would be likely to adopt a rule of double actionability for torts which were, in substance, committed overseas. It was also suggested that where the tort was committed in Myanmar, the court would apply Myanmar law, and would not look to foreign law at all. But there will be torts committed in Myanmar which really have little or nothing to do with Myanmar (such as two NGO employees driving a car in Myanmar, which goes out of control and injures the passenger but does no harm to anyone else), just as there will be torts committed overseas which have just as little to do with the place in which they undoubtedly take place (in the transit lounge at Bangkok or Changi airport, for example).

In any such case,[173] if it came before a Myanmar court, it would be proper for the court to say that the case is sufficiently exceptional that the general rule of private international law for tort claims does not apply. The wide and untidy territory which is regulated by the private international law of tort really requires this to be the answer.

(56) Torts committed between the parties to a contractual relationship

[173] If an exception is made in the case in which the tort is committed in Myanmar, it will mean that the Myanmar court is following the lead of the Singapore courts, and not following the contradictory advice of the English court.

We have seen that where the plaintiff and defendant are linked to each other much more obviously than they are connected to the place where the tort arose, the case may be an exceptional one which does not need to be fitted within the general rule of double actionability for tort claims. If there is a relationship between the parties, which can be seen to point to a country or a law, more powerfully that the commission of the tort points to the law of the place where the tort occurred or to the law of Myanmar, an exception may be made to the general rule which would ordinarily apply.

But suppose the plaintiff and defendant are also party to a contract. Suppose, for example, that they are employer and employee, and that the employee sustains injury as a result of the employer failing to maintain a safe system of work. If the employee decides to sue the employer, he could do so by framing his claim as one by which the employer breached his contractual duty to take care of the health and safety of the employee. He could also do so by framing the claim as a tort: that the employer, in breach of the common duty of care which everyone owes to another who may be injured by our carelessness, caused the injury as a result of tortious negligence. Is the employee free to choose between these possibilities ? Is he free to advance both of them, taking ultimate advantage of the one which appears to be most beneficial to him ? Or is this a case in which he has to advance the claim as one for breach of contract ?

The reason it matters is that the linking rules are different, according to whether the claim is contractual (it will be governed by its proper law) or is tortious (it is governed by the rules, or by the rules and flexible exceptions, which have been discussed above). The answer is very unclear, even in those mature systems of the common law which have had a long time to think about it. But if a defendant commits a tort against me - suppose he assaults me, or injures me by his careless driving - the fact that he also has a contract with me does not mean that his wrongful conduct is somehow no longer a tort. It is a tort, and if the plaintiff wishes to proceed on that basis, the rules of private international law which will apply to his claim are those in this Chapter. However, if a person with whom I have made a contract injures me by failing to behave in accordance with his responsibilities under the contract, the fact that he may have (also) committed a tort, by the very same act, does not mean that he has not committed a breach of his contract.

It would follow from this analysis - and it is probably correct - that the plaintiff can advance his case as a contractual one if he wishes, and as one in tort if he wishes. If he succeeds on either way of looking at the case, he will win. If he succeeds on the contract claim by reference to the rules examined in Chapter 5, he will obtain compensation for breach of contract. If he succeeds on the tort claim by reference to the rules examined in this Chapter, he will obtain compensation for the tort committed against him. However, the flexible approach to choice of law for tort claims, examined under point (55) above, may well mean that the claim in tort will be governed by the proper law of the contract; and if that is correct, it will not matter whether the plaintiff can bring only one claim, or two claims which will be governed by the same law.

A variation of the problem arises where, for example, an employee has signed a contract with the employer, by which he promises not to sue the employer in respect of any tort for which the employer may be responsible, but agrees instead to accept a payment from the employer as a full settlement of any claim. If the employee, considering that a claim founded on the contract would be likely to be dismissed (on the ground that the contract says it will not be brought), sues in tort, what is the effect of the contractual promise not to sue ? The answer may appear complex, but it will be as follows. If the tort was

committed outside Myanmar, the plaintiff will need to satisfy the requirements of the rule of double actionability. He will need to show that under Myanmar law, and under the law of the place where the tort occurred, the defendant is liable to him. The defendant will argue, however, that the plaintiff's claim will fail because he has promised not to sue to enforce it. If a defence of that kind would be permitted or allowed by the law of Myanmar, or by the law of the place where the tort occurred, the plaintiff will have failed to satisfy the requirements of double actionability, and unless there is any more to be said on the matter,[174] the claim will fail. That may seem harsh, but if a person signs a contract the validity of which he cannot call into question, it may have the effect of barring a claim in tort which would otherwise have been open to him.

(57) Remedies when an actionable tort has been committed

We observed in relation to contracts, in Chapter 5, that there was a distinction to be drawn between the kinds of loss for which the defendant was liable, and the quantification of, or other remedies for, that loss which the court would order the defendant to pay or perform. The question of the kinds of loss for which recovery was permissible were issues of substance, governed by the proper law of the contract, but the assessment of that loss, or the availability of specific relief, was a matter for the domestic law of Myanmar, because it would be seen as a procedural issue.

It is no different in a tort case. Let us take as our example the case of the plaintiff injured by a badly-driven bus on the streets of Bangkok examined under point (54) above. We saw that he may seek to recover compensation for medical expenses, pain and suffering, loss of earnings, and the cost of nursing care. In each case, and unless the case is treated as an exceptional one in accordance with the approach examined in point (55) above, the plaintiff will recover each of these only if they are available to him under the laws of Myanmar and of Thailand: if they are not doubly available, the rule of double actionability will mean that they are not recoverable at all.

If the particular head of damages is recoverable, or (as one might say) doubly recoverable, the final question of what it awarded in respect of it is governed by the law of Myanmar and by nothing else. If the law of Myanmar says that the proper award for medical expenses is for basic care in a public ward, whereas Thai law would assess damages at a higher level if the plaintiff had checked into a private hospital, a Myanmar court will award damages at the level considered appropriate by Myanmar law. If the law of Myanmar says that damages for pain and suffering, which cannot be directly computed in money terms, are at a very modest or token level, the fact that Thai law would have awarded a much higher figure is irrelevant: the assessment or quantification of damages is a procedural matter on which the Myanmar court applies its own rules.[175]

If this were not so, there would be a danger (particularly in the exceptional case in which the court applies a flexible rule and looks only to the law of the place of the tort) of a Myanmar court being asked to award damages at the astronomic levels encountered in some foreign legal systems. Some will know the story of the customer who was scalded by a cup of hot coffee, purchased from a well-known US restaurant chain, when she drove away from the restaurant with the coffee cup held between her knees. The

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[174] See the material under point (60) below.
[175] Chapter 4, point (32), above.

American court awarded damages of almost $3 million.[176] It would not be satisfactory for a court in Myanmar to be invited to assess damages in accordance with US law. And it gets worse. In 2014, a court in Florida awarded damages to the widow of a man who had died as a result of smoking: the widow blamed the tobacco company which had manufactured the cigarettes to which her husband had been addicted. She sued them in tort, and was awarded the sum of approximately $23 billion.[177] No doubt she had a claim in tort under US law; but if the litigation had been before a Myanmar court (assuming that negligence on the part of the defendant could be shown), any damages awarded would be assessed by reference to Myanmar law, not US law.

(58) Claims arising under foreign statutes

One consequence of the double actionability rule is that as foreign legal systems make adjustments to their laws, and in particular to the their tort laws, by legislation, there is an increasing chance that the rules of double actionability will mean that a claim fails as Myanmar law does not precisely correspond to the law of the foreign system. Whether this is an indication that the rules of double actionability are themselves objectionable is not clear, but it certainly allows one to see that the rules produce a consequence which may not be entirely beneficial.

A good example may be taken from the law of consumer protection. The laws of many countries have been altered to provide that a manufacturer or an importer of goods provided (by sale or otherwise) to a consumer will be under a strict liability to compensate for loss or damage done to the consumer, and that it will not be necessary to prove any negligence, recklessness, or suchlike. It can be extremely difficult for a consumer to establish that a manufacturer or importer - which will have sufficient economic power to crush a consumer - was negligent, so the law gives the consumer a strict right to recover which does not depend on proof of fault.

Myanmar law, so far as we can discover, has not been altered in a similar fashion. The result would be that if a consumer were injured overseas in one of those countries which had adopted legislation of this kind, and were to sue the manufacturer for compensation, relying on the foreign statute to do so, the fact that the consumer would have a clear case for recovery under the legislation in force in the place where the tort was committed would be irrelevant if, under the law of Myanmar, the consumer-plaintiff would be required to prove that the defendant was negligent. Unless the case could be dealt with by means of the flexible exception outlined under point (55) above, the fact that the plaintiff would be able to recover under the modernised law of the place where the tort occurred would be irrelevant if he would be unable to recover under the unmodernised law of Myanmar.

The point may also be illustrated by foreign laws which allow civil claims against defendants who have caused environmental damage: foreign laws may allow compensation claims to be brought by or on behalf of a National Park, for example, or

[176] That is to say, around 3 billion kyats. The sum, awarded by a jury, was reduced on appeal, but was still left at a very high figure. The case was *Liebeck v McDonald's Restaurants* (18 August 1994; New Mexico District Court).

[177] Or 23 trillion kyats. To look at the figure another way, the widow was awarded a sum of damages which equated to approximately 40% of the Gross Domestic Product of the Union of Myanmar in 2012. No doubt the damages were very substantially reduced on appeal, but even after that they would be liable to be very high.

by a community whose lands have been damaged or ruined by an oil company or some other large industrial concern. As far as we know, Myanmar law does not have provision for such civil claims for environmental damage. It would follow that if proceedings were to be brought before a Myanmar court by a plaintiff who sought to base his claim on such foreign legislation, the plaintiff would fail unless the case could be seen as an exceptional one to which the flexible rule, discussed at point (55) above, might apply.

Of course, these are not new points. They simply involve, or illustrate, the operation of the principles of double actionability. Moreover, some people may consider that the idea of imposing strict liability on a defendant who may not have behaved at all irresponsibly wrong in principle; some people may question whether the proper response to environmental pollution is to allow civil compensatory claims by those whose land is said to have been affected. It may be argued that foreign laws, in this sense, have not been modernised but have been distorted or deformed. However that may be, it simply goes to show that where the law of the foreign state and of Myanmar have got out of alignment, the double actionability rule will make it more difficult for the plaintiff. While this may sometimes be a good thing, in that it prevents the Myanmar court having to give effect to a cause of action which does not exist under the domestic law of Myanmar, it may also be a bad thing if it prevents the Myanmar court being able to give effect to a perfectly sensible cause of action which is not replicated under the domestic law of Myanmar.

(59) The role of Myanmar public policy and claims made in respect of a tort

As we have noted before, where its rules of private international law would link the issue before the Myanmar court to a foreign legal system, a Myanmar court will not apply a rule of the foreign legal system, or if the effect of its being applied, would be contrary to the public policy of Myanmar. In a contractual case, a rule of the proper law of the contract will not be applied if it would offend the public policy of Myanmar: we considered the possibility – it was no more than a possibility – that a Myanmar court would refuse to give effect to a term in a contract, governed by a foreign law which considered it to be a valid restriction, which operated in restraint of trade. It must, in principle at least, be open to a Myanmar court to refuse to apply a rule of foreign tort law which was, in its own way, contrary to public policy.

But this is unlikely to arise as an issue all the while the private international law of Myanmar applies a rule of double actionability. Even if a tort is committed overseas, and the law of the place where the tort occurs contains a rule which the Myanmar court would find to be shocking or offensive, that rule will not be applied unless there is a rule of Myanmar law to the same effect: the rule of double actionability will prevent the application of any rule of foreign law which does not correspond to a rule of Myanmar law. The need to fall back on rules of public policy is, in tort cases, much less than it is in, say, contract cases, in which a Myanmar court may be invited to apply the law of a foreign country with no reference to Myanmar domestic law.

This also explains why the rule which prevents a court enforcing a foreign rule of a penal or a revenue kind is not needed in this context. In some recent cases in western countries, a state which considers a company to have behaved unlawfully in evading taxes and charges for which it was liable, may bring civil proceedings against it in tort: for a civil conspiracy to deprive the plaintiff state of money if it has acted with another (and in these cases, there is almost always another with whom or with which the company has

acted). But if the plaintiff state comes to Myanmar, and seeks to sue the defendant company in tort, for compensation, the question will be whether a conspiracy to evade the taxes of a foreign country would be a tort under the domestic law of Myanmar. The answer will obviously be that is it not a tort, and the claim will therefore fail.

If Myanmar were to abolish the requirement, which we take to be part of its current rules of private international law, that the conduct complained of be a tort under the domestic law of Myanmar, there would be a much greater need (or opportunity) for the application of public policy as a way of keeping objectionable foreign laws out of a Myanmar court. It is far from clear that this would be a change for the better.

(60) Non-contractual obligations which resemble torts

There are certain other forms of civil liability are probably liable to be seen as torts for the purpose of private international law in Myanmar, and which are therefore governed by the rules described in this Chapter. But they tend to show, again, that the rules of private international law which we have described here do not always work in a wholly satisfactory way.

(a) Infringement of rights of intellectual property

Consider first a case involving the infringement of intellectual property rights. It is well understood that intellectual property rights, such as patents or copyright, are strictly and territorially limited to the country in which or for which they have been granted or protected; when this fact collides with the rule of double actionability it produces some very odd results. Suppose a Myanmar company is said to have infringed a Thai patent by selling products which would, if they had been sold in Thailand would have infringed the Thai patent. If it is sued in respect of sales in Myanmar, it will not be liable, because infringement of a Thai patent is not a tort in Myanmar where a Thai patent has no status. But if the company is sued in Myanmar in respect of sales in Thailand, it will not be liable for that, either: its conduct may well be wrongful, even tortious, under the law of Thailand, but again, it is not a tort under the law of Myanmar because if it was done in Myanmar, no tort would be committed, as the Thai patent has no status in Myanmar.

Or suppose that an author has copyright under Myanmar law, but that a Myanmar person starts selling pirated copies of the work in Thailand. If the author sues the defendant in Myanmar, he will fail: although the conduct of the defendant would have been a tort if committed in Myanmar, it is not tortious under Thai law, because a Myanmar copyright has no effect, and does not make unlawful, acts carried on in Thailand.

It is hard to know whether the blame for this set of outcomes, which seem to offer less protection than the law should to persons who have intellectual property rights, lies with the strictly territorial nature of intellectual property rights, or with the rule of double actionability as it applies to issues characterised as torts. But it is hard to see that the answers given by the combination of these rules are very satisfactory.

(b) Equitable wrongs

Common law systems generally draw a distinction between torts, which were developed by the courts exercising a common law jurisdiction, and 'equitable wrongs' which were

analogous, but which were developed in a separate court system. Leaving aside the law of trusts, to which the Trusts Act applies, it is not clear that Myanmar law has inherited a separate set of equitable principles, for it did not have separate courts of common law and equity. But sometimes a claim will come before a court which is not precisely a tort. The allegation or complaint may be that there has been a breach of fiduciary duty, which means a failure to comply with the obligations which arise from certain kinds of relationship which were developed in equity.[178] In other cases it may be alleged that a wrong which in (say) England or Australia would be regarded as an 'equitable wrong', such as the misuse of confidential information, has been committed, and if the allegation were to come before a Myanmar court and raise a question of private international law, the question is what the Myanmar court should do.

The answer is that it should pay little or no attention to the label of 'equitable duty' or 'equitable wrong'. These terms may not be part of the domestic law of Myanmar; they are certainly not part of its private international law. If the obligation arises between parties to a contract, such as a contract of employment, it will be governed by the proper law of the contract. If it arises between parties to a relationship which is similar to a contract - between a company and its directors, for example - it will be governed by the law which created that relationship, such as the *lex incorporationis*. If it arises between strangers, such as may happen when someone comes across information which he knows to be confidential, which he then misuses, the wrong resembles a tort, and should be governed by the rules set out in this Chapter.

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[178] The relations between a director and the company which he serves are, where not expressly statutory, fiduciary in nature: see for the position in Myanmar, the doctoral dissertation of Dr Ma Ma Thant (Nagoya University, 2011).

CHAPTER 7

PROPERTY, AND RIGHTS WHICH RESEMBLE PROPERTY

In this Chapter we examine the rules of private international law which apply to the most important forms of property. Our principal concern is the issue of title to property of various kinds, but in doing so we need to understand the various categories and kinds of property to which these rules apply.

(61) The distinction between immoveable and moveable property

The private international law of property, in all legal systems, whether they are derived from the common law or not, draws a fundamental distinction between immoveable and moveable property. The reasons for this are obvious, but they may be stated shortly. Immoveable property is in practical terms, subject the law and to the courts of the place where the immoveable property is. This reality is reflected in special rules of jurisdiction and of choice of law. As to jurisdiction, if the immoveable is outside Myanmar, there may be little real point in a court in Myanmar adjudicating disputes as to its title, for the only court which can, for example, order and direct the Land Registry to amend the recorded title is the court where the Register is kept. Of course, not all legal systems have registers of land titles, but a significant and growing number do, and where the land is in such a country, the sense in adjudicating disputes title in Myanmar is far from obvious. However, if the court does adjudicate, it would make sense for the court to try to apply the law which is in force at the place where the immoveable property is, in the way in which a court at that place would itself apply it. At this point, the principle of renvoi, which we mentioned under point (37) above, may be relevant. For if a court in Myanmar really does seek to apply foreign law as it would be applied by the foreign court if it were trying the case itself, it may have to understand and then apply the rules of private international law of that court.

The thing about moveable property - its defining characteristic - is that it moves. That is not to say that all moveable property moves all the time, but it may move, at any time. As a result, the rules on jurisdiction are not as firmly fixed and exclusively restricted to the place at which the property is located; and if a court in Myanmar exercises jurisdiction and applies the law of the place where the thing was, there is no particular need for it to do so in complete conformity with what would be done by a judge holding court at that place. To put the point another way, the connection between a moveable and its location, its *situs*, is less rigid than in the case of immoveables.

The distinction is reflected in the Civil Procedure Code which, as we have mentioned in passing but shall here examine in greater detail, has precise rules for claims which concern land in Myanmar, and which do not apply to other property (no matter how valuable) which is in Myanmar. It is therefore no real surprise that the private international law rules, as we understand them, should reflect this basic distinction between immoveable and moveable property.

The question whether property is immoveable or moveable is, in some legal systems, left to be answered by the law of the place where the property is. However, Myanmar law has a statutory definition of 'immoveable property' for the purposes of any enactment.

Where the property is in Myanmar, the general definition of immoveable property is given by the Section 2(29) of the Myanmar General Clauses Act, 1898, which states that

> **2. Definitions**. In all Acts, unless there is something repugnant in the subject or context…
> **(29)** 'Immoveable property' shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth.

Although this definition is enacted to apply to property in Myanmar and not outside it (there do not appear to be any Acts which deal with property outside Myanmar), there is no reason why this perfectly sensible definition should not also be used for the purposes of Myanmar private international law.[179] All property which is not immoveable property is, by necessity, moveable property.

There may be cases in which the distinction between immoveable and moveable property is hard to draw: an oil drilling rig, or a pontoon bridge, for example, may appear to be partly immoveable and partly moveable, because it is not easy to say whether their being fastened to the land is permanent. But the number of cases in which issues relating to title to such property will need to be examined are likely to be very few, and there is no need to devote more space to the question.[180]

(62) Suits concerning immoveable property situated in Myanmar

We are, at this point, dealing with immoveable property situated in Myanmar, and we need to mention jurisdiction, choice of law, and the effect of foreign judgments. Much of the material here deals with the domestic law, and not with the private international law, of Myanmar, but as the rules of private international law will reflect those of domestic law, this is the place to start.

(a) Jurisdiction over disputes concerning land in Myanmar

As was said above, this is not a matter of private international law, but the domestic law of Myanmar will provide the basis for an explanation of the private international law of Myanmar. Section 16 of the Civil Procedure Code states as follows:

> **16. Suits to be instituted where subject matter situate**. Subject to the pecuniary or other limitations prescribed by any law, suits -
> (a) for the recovery of immoveable property with or without rent or profits,
> (b) for the partition of immoveable property,
> (c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immoveable property,

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179 The Registration Act 1909, Section 2(6) has a slightly different definition, but the divergences are of no significance. It provides that: 'Immoveable property' includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries of any other benefit to arise out of land and things attached to the earth, or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops, nor grass.

180 A mortgage of land is immovable property: *VERMNCT Chettyar v ARARRM Chettyar* (1934) ILR 12 Ran 178; an interest under a settlement of land was held to be an interest in an immoveable: *Official Assignee v ME Moolla & Sons Ltd* (1934) ILR 12 Ran 589.

(d) for the determination of any other right to or interest in immoveable property.
(e) for compensation for wrong to immoveable property,
(f) for the recovery of moveable property actually under distraint or attachment,
shall be instituted in the court within the local limits of whose jurisdiction the property is situate:
Provided that a suit to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.
Explanation. - In this section 'property' means property situate in the Union of Myanmar.

It follows that the kinds of suit set out in Section 16 must be brought at the place where the land is.[181] So far as they concern immoveable property,[182] what these suits have in common is that they seek the adjudication of title to the land, recovery of the land or of its rents and profits, and so forth. It reflects the fundamental reality that only the courts at the *situs* of the land can make an effective adjudication of the rights of property which relate to that land; and if this is considered to be correct in the domestic law of Myanmar, it is all the more so as a matter of private international law.[183]

The proviso to Section 16 is, however, important, as it allows a Myanmar court to take jurisdiction, by reference to the other rules of the Civil Procedure Code, if the compensation sought, or the relief in respect of the property, may be 'entirely obtained through [the defendant's] personal obedience'. That means that if the order for the payment of damages, or the order for specific relief, is one which the defendant is liable to be made to perform (this condition will not be met, for example, if he no longer has the land whose conveyance is sought) the jurisdictional limitations set out in Section 16 do not apply, but Section 20(a) does apply. If the suit is for damages for trespass, for example, it may be brought where the property is or where the defendant actually and voluntarily resides, or carries on business, or personally works for gain.[184] It also means that if the suit is brought to obtain a decree of specific performance of a contract to sell land, of which the defendant is in breach, the suit may be brought where the defendant actually and voluntarily resides, or carries on business, or personally works for gain. In essence, proceedings which seek to enforce personal obligations owed to a plaintiff may be brought in the court which has personal jurisdiction over the defendant, and are not confined to the court at the *situs* of the land to which these obligations relate.[185]

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181 Sections 17 and 18 of the Civil Procedure Code make provision for cases in which the land is within the jurisdiction of two courts in Myanmar, or where the court is uncertain where in Myanmar the land actually is. This does not appear to be a problem for private international law, and the Sections are not reproduced here.
182 That is, excluding Section 16(f).
183 *State Bank of India v Collector of Rangoon* BLR (1961) HC 336.
184 Which is the jurisdictional rule set out in Civil Procedure Code, Section 20(a). See *Ayesha Bee v Gulam Husein Suleman Aboo* (1921-22) 11 LBR 188.
185 However, a claim to enforce a mortgage by sale, but in which the borrower is given an opportunity to pay up and redeem, is not within this principle, because the right enforced is that of the mortgagee to sell the land, not that of the mortgagee to be repaid by the borrower, even if

(b) Choice of law

Almost all questions of the kind set out in the first paragraph of Section 16 will be answered by the domestic law of Myanmar. It is very hard to see how any other law could ever be applied. But insofar as the claim is one with the Proviso to Section 16, such a suit to enforce a contract for the sale of land, it is possible that, if the parties had chosen a law other than Myanmar law to govern their contract, the contractual claim would be governed by that law. However, any provisions of Myanmar law which are of mandatory application in the circumstances would, to the extent that they apply, override any contradictory rule of the proper law of the contract. For example, Section 3 of the Transfer of Immoveable Property (Restriction) Act 1947 places limits on the effect of certain dispositions[186] of land in Myanmar:

> **3. Prohibition of transfer of immoveable property to foreigners**. Notwithstanding anything contained in any other law for the time being in force, no person shall transfer any immoveable property by way of sale, gift, mortgage or otherwise, or grant a lease for a term exceeding one year, of any immoveable property in favour of a foreigner or any person on his behalf, and no foreigner shall acquire any immoveable property by way of purchase, gift, mortgage or otherwise, or accept any lease of immoveable property for a term exceeding one year.

This will obviously mean that a purported transfer of land in Myanmar to a foreigner will be void.[187] It also means that if parties to a contract, which they have chosen to be governed by a foreign law, agree to make a transfer of land in Myanmar contrary to the Act, the contract will one which requires performance of an act which is illegal in Myanmar,[188] and as a result, and no matter what the proper law of the contract may be or may say, the contract will be unenforceable in a Myanmar court.[189]

(c) Effect of foreign judgments concerning land in Myanmar

Although Section 13 of the Civil Procedure Code does not say so in express terms, in any case in which Section 16(a) to 16(e) would give jurisdiction to a Myanmar court, it will be open to a court in Myanmar to hold that a decree pronounced by a foreign court was a judgment given by a Court which was not of competent jurisdiction, and that Section 13(a) will treat the judgment to be treated as not entitled to recognition or enforcement in Myanmar.[190] No doubt other arguments may be possible, but this one seems correct.

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this is in some sense ancillary to the claim: *VERMNCT Chettyar v ARARRM Chettyar* (1934) ILR 12 Ran 178.

[186] Though the prohibition does not apply to the acquisition of title by adverse possession by a squatter: *U Saw v Loke Mani* BLR (1957) HC 221.

[187] See for example *Sabir Hussein v Ramanatha Chettiar* BLR (1957) HC 172. The Foreign Investment Law of 2012 makes some modification to this law (and a proposed Condominium Law may make further modification), but the reliability of basic principle is not affected.

[188] The Transfer of Immoveable Property (Restriction) Act 1947 creates several criminal offences, and prescribes punishment for those who commit them.

[189] See Chapter 5, point (47), above.

[190] *Chokkappa Chetty v Raman Chetty* (1917-18) 9 LBR 103. A clearer approval of this principle is to be found in *State Bank of India v Collector of Rangoon* BLR (1961) HC 336, where Indian legislation

However, a foreign judgment based on a claim of the kind which falls within the Proviso to Section 16, that is, one based on personal obligations of a defendant to the claimant, probably can be recognised in Myanmar in accordance with Section 13 of the Civil Procedure Code. So if a foreign judgment orders a defendant to pay damages for trespass to the plaintiff's land in Myanmar, or if it orders him to pay damages for breach of his contractual obligation to convey land in Myanmar, there is no obvious reason of principle or law why the foreign judgment against him which merely requires his personal obedience, should not be recognised as *res judicata*, or enforced.

(63) Suits concerning immoveable property outside Myanmar

It is next necessary to consider the jurisdiction of a Myanmar court when the suit relates to land outside Myanmar, and in the cases in which a court does have jurisdiction, the rules of choice of law.

(a) Jurisdiction

As is made apparent by the Explanation,[191] Section 16 of the Civil Procedure Code does not lay down the law in respect of suits concerned with land outside Myanmar. But the principle must be the same: a court in Myanmar should consider that if the land in question is outside Myanmar, the court has no jurisdiction over a suit of the kind set out in Section 16(a) to 16(e). In coming to this conclusion on the basis, or on the application by analogy, of Section 16, a court in Myanmar would be reaching the same answer as would be reached by courts in other common law jurisdictions which do not have a statutory rule of the kind in Section 16, but which follow an ancient rule of the common law that a court had no jurisdiction in a suit which depended on title to foreign land.

However, if the first paragraph of Section 16 applies by analogy to explain why the court has no jurisdiction over certain kinds of suit relating to foreign land, the proviso to that Section must also mean that where the suit is based on a personal obligation which can be enforced by the obedience of the defendant, the court will have jurisdiction even though the obligation in question relates to foreign land.[192] So for example, the court will not be deprived of jurisdiction to entertain a suit against a defendant who has failed to perform his contractual duty to convey land which he agreed to sell to the purchaser: although a Myanmar court will not order specific performance of a contract which it would be illegal for the defendant to perform, there is no reason why it cannot order damages for breach; likewise, a suit for damages for trespass to foreign land would not be one which the court had no jurisdiction to hear by reason of the land being outside Myanmar. A Myanmar court would be able to order a trustee to perform his duties even though the trust property was land outside Myanmar: in all these cases, the obedience of the defendant is all that is required to complete the legal process instituted by the suit.

(b) Choice of law

The distinction which applies to the jurisdiction of the Myanmar court, based on the first paragraph of Section 16, and the proviso, is reflected in the approach a court should take

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which confiscated the shares in an Indian bank which owned property in Yangon was held not to alter title to a commercial building situated in Sule Pagoda Road.

[191] Point (62) above sets out Section 16 and the Explanation.

[192] *Ayesha Bee v Gulam Husein Suleman Aboo* (1921-22) 11 LBR 188.

to the issue of choice of law. All questions concerning title to land in a foreign country, including the capacity of transferor and of transferee to deal with that land (whether generally or in a particular way)[193] will be referred to and answered by the application of the law of the *situs* of the land. It could hardly be otherwise: only the law at the place where the land is can say whether a transaction was effective or not.

The need to apply the law of the *situs* of the land as closely as possible to the way in which it would be applied by the courts of that *situs* leads to the conclusion that the principle of renvoi should be applied,[194] and that the whole of the law of the *situs* should be applied, including those of its rules of private international law which would lead a judge in that court to look to a domestic law other than his own. For example, suppose that the land is in Ruritania,[195] and that A has purported to transfer the land to B by way of gift. If the validity of the transfer were to be challenged before a court in Myanmar, the Myanmar judge would ask himself how a judge in Ruritania would approach the case. If the judge in Ruritania would apply the domestic law of Ruritania to answer this question, a Myanmar court should do likewise. But if the Ruritanian judge would look instead to the law of another country - suppose for example that A and B were married, and came from the same country whose law provided that transfers between husband and wife were void - to answer the question which he has to decide, then the Myanmar judge should follow and go where the Ruritanian judge is pointing. Having said that, the cases in which a judge, dealing with the effect of a dealing with land which is within his jurisdiction, will look to a law other than his own domestic law will be rare, and the opportunity to apply the principle of renvoi will be rarer still.

A contract concerning land in a foreign country will be, like any other contract, governed by its proper law. The parties may choose the law to govern their contract: there is nothing to prevent two Myanmar parties agreeing that a contract, by which one agrees to sell to the other an apartment which the seller owns in Singapore, will be governed by Myanmar law. If a suit is brought on the contract, if there should be some problem with its performance, the Myanmar court, having jurisdiction under the proviso to Section 16, will apply Myanmar law to the rights and obligations of the parties. Of course, if the contract is one which it would be illegal to perform in Singapore - suppose that a rule of Singapore law makes it unlawful to transfer this particular land in Singapore to someone who does not have entitlement to reside in Singapore and prescribes a penal sanction for anyone who contravenes this law - the contract will be unenforceable in a Myanmar court.[196] And a court in Myanmar cannot properly order specific relief in circumstances in which the defendant would be unable to comply with the order of the court.

If the parties do not choose the law to govern a contract which has foreign land as its main subject, it is inevitable that it will be governed by the law of the *situs* of the land, which will be the law with which it is most closely connected.

(64) The range of property which counts as moveable property

We turn to consider the private international law of moveable property. All property that is not immoveable is, by definition, moveable. The consequence of this is that although

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[193] An Indian court so held in *Nachiappa Chettiar v MYAA Muthu Karuppan Chettiar* AIR (1946) Mad 398, but the answer does not depend on this authority.
[194] See Chapter 4, point (37) above.
[195] An imaginary country, used for illustration only.
[196] See Chapter 5, point (47) above.

the property which the law considers immoveable is coherent, the range of property which the law considers moveable is very diverse.

It is usual to divide moveable property into tangible and intangible property: in effect, property which can be touched, and property which cannot be touched. Property which can be touched will include all goods. It will also include merchant ships and aircraft, even though their ownership is subject to procedures for registration which do not extend to other tangible property. Intangible property is exemplified by debts: obligations owed to another. Although it may seem strange, at first sight, to consider a debt to be a thing, it becomes less strange if one focuses on the credit, on the right or advantage which the debt represents. It is well known - though it has to be explained to students at the beginning of their legal education - that the expression 'I have $1000 in the Bank' is misleading and inaccurate. I do not own $1000 if by this we mean particular banknotes. Even if the Bank would allow me to, I cannot go into the vault of the Bank, point to ten $100 notes, and say that those banknotes are mine: they all belong to the bank, every one of them. I do not 'have $1000' in the Bank, if by this is meant that there are banknotes, belonging to me, in the Bank. What I do have is a credit balance: I have an account with the bank according to which the Bank owes me $1000 and I 'have' a debt of $1000 which the Bank owes to me. This debt is an article of property, and that article of property is intangible. I cannot touch the debt, though if the debt is converted into cash, as it is when the Bank hands over ten of its banknotes to me, my intangible property has been turned into tangible property.

What is true for debts is true for all manner of other contractual rights. Rights under a policy of insurance are intangible property: intangible property which may one day give rise to or be converted into tangible property, but intangible property all the same. A letter of credit creates intangible property in the obligation of the debtor (though the paper letter is tangible property). A judgment debt is intangible property. So also are shares in a company: no-one would question that they are property, and as a share in (or a share of) a company cannot be touched, the share is intangible property. The share certificate may be tangible property (as is the paper copy of the policy of insurance) but the right to which it bears witness is an intangible article of property.

Rights under a contract may be the commonest form of intangible property, but rights under a trust are also intangible property. The Trusts Act regulates the rights and duties of the participants in a trust; the rights of a beneficiary of the trust against the trustee, or against another beneficiary, are intangible property. The trust may be established over moveable or immoveable property. Chapter VI of the Trusts Act sets out the rights of a beneficiary. According to Section 55 of the Trusts Act, a beneficiary has…a right to the rents and profits of the trust property. When paid to him, the rents and profits in cash form are, no doubt, tangible property, but his right to receive these from the trustee is a right, an article of intangible property.

Intellectual property is certainly intangible: although a book or a work of art may be tangible, the copyright which protects the author's intellectual property is intangible. However, the possibility that these are intangible *im*moveables is a reason to deal with them separately, which we do below.

It is more debatable whether a reputation is property. There is a sense in which it can be damaged, but the notion of 'damaged' is itself rather artificial, even if legal proceedings can be brought when it has been 'damaged'. It cannot be sold or given away, obtained,

pledged, mortgaged or assigned, and for this reason it probably is not to be seen as property.

(65) Questions of title to tangible moveable property (things)

It is universally accepted that the question of whether an act done in relation to a thing has any effect on the title to the thing is governed by the law of the place where the thing was when the act or event took place. The reason for this is obvious. If I buy a painting in a market in Yangon, the question whether I become owner of the painting is answered by Myanmar law: it has to be that way, for a buyer, or someone to whom something is given, loaned or bailed would not know whether he has become owner, or bailee or neither. All parties to the transaction would expect this answer to be given by the law of the place where the thing was when something happened to it. If the painting had been stolen, or was being sold by someone to whom it had only been bailed, or if the seller genuinely thought he had the owner's permission to sell it when he did not have that permission, of if the painting is an antique which cannot be sold without the permission of the relevant Minister, a question may arise as to whether the buyer obtained ownership of the thing. The buyer would expect Myanmar law to answer that question. So would the seller, and so (probably) would the owner if he were to discover that his thing had been sold without his permission.

A person who buys a watch in a market in Thailand may be aware that many of the things offered for sale are fake or stolen. But he would also expect that if there was any question about the proprietary consequences of the transaction, it would be for Thai law to provide the answer. The same principle will apply if I 'lose' my camera when I am on holiday in China: I expect that if it is sold to someone else by the person who 'found' it, it will be for Chinese law to explain whether the buyer becomes owner of the camera.

This can produce some harsh results, or some results which certainly look harsh. In one famous case, a painting was stolen from its owner in England, and taken to Italy by the thief, where it was put up for auction and sold to a purchaser. The original owner claimed that the painting was originally his – which it certainly was – and that he could not lose ownership of it as a result of theft – which would certainly be the answer given by English domestic law. But when the painting was sold in Italy, it was Italian law which determined the effect of the sale by public auction on behalf of a person who was not the owner of a thing to a purchaser who had no reason to suspect that there was any defect in the seller's title. Italian law said that the purchaser got good title, and that the original owner's title was extinguished.

On reflection, though, this may not be such a harsh outcome. Where a thief or other fraudster has got involved in the affairs of innocent people, and has then vanished without trace, as they tend to, one innocent person is going to win, and one innocent person is going to lose. There is, therefore, nothing harsh in the outcome which our rules produce. One person will win; one will lose. That being so, and there being no other relevant factor to exercise influence, the rules of private international law refer to the law which is most convenient, predictable and rational, which is the law of the place of the act or event which is supposed to have affected the earlier title.

The *situs* rule applies to cases in which one person acquires property from another: as is sometimes said, to the acquisition of derivative (that is to say, derived from another's) title. But it also applies to cases in which a person claims to have acquired an original,

independent, title. For example, if I find a ring which appears to have been lost, and I take it, intending to keep it, the question whether I become owner is answered by the law of the place where the ring was when I found it. If I take another person's cloth and use it to make a suit, the question of who the suit belongs to – whether to me, because I made it, or to the owner of the cloth because it was his material – will be answered by the law of the place where the cloth was made into a suit.

This can be important in cases of industrial manufacture. An owner of raw materials, who sells them to a person who is planning to use them to manufacture goods for sale, may be concerned that the buyer will not be able to pay for the goods supplied. The seller and buyer may therefore agree, in a contract, that the ownership of the materials will not pass to the buyer until the buyer has paid for the materials, even if the buyer has already used them in the manufacture of goods. This can have very important consequences if the buyer becomes insolvent: if the goods still belong to the person who sold the materials, he can take them back. But the question whether this works to prevent title to the materials passing in the way in which it would if there were no such agreement is answered by the law of the place where the materials were when they were manufactured into goods. If the law of that place accepts and gives effect to the terms of the contract, the contract will have the effect it was intended to have. If the law of that place does not allow the parties, by contract, to alter the point at which ownership passes, then the contract will have no effect.

As can then be seen, the rules of private international law place great emphasis on the law of the place where the thing was, or the goods were, when the event which is said to have affected ownership took place. The only real exception to this is made for the case where the rule cannot be applied and would make no sense. If goods are dealt with at a point in time at which they are in transit, and their location is unclear or unknown – suppose they are being carried by air across the airspace of a number of countries, or carried by sea and are in international waters – the idea that the law of the *situs* may be applied does not make any sense. In that case the rules of private international law may instead look to the proper law of the contract by which the goods were to be dealt with, but the case is one which had hardly ever arisen in practice.

(66) Recovering tangible moveable property from another

We should make a brief note to explain the meaning and effect, but also the limited meaning and effect of the matters discussed under point (65). The rules under point (65) tell the court in Myanmar how to decide the effect of a dealing with tangible moveable property, but that is all it does. It does not mean that if a person is able to demonstrate that a thing belongs to him he may demand it back from another person who has it. The owner may have bailed or hired the thing to the other person, and for him to take the thing back when the bailor has done nothing wrong may amount to a breach of his contract of bailment or hire.

The person who wishes to obtain property which he says belongs to him, and who brings a suit for this purpose, will normally have to prove two things: that the property in question is his, *and* that the defendant has no right to keep the owner out of possession of the property. The rules which examined under Point (65) are helpful on the first of these points, but they do not have any further role to play when it is necessary for the plaintiff to show, for example, that the defendant was a bailee whose bailment may be

lawfully terminated (according to Myanmar law,[197] this is to be seen as a contractual question, governed by the proper law of the contract of bailment), or that the defendant was a trespasser who had excluded the plaintiff from possession of his goods without legal justification. In English law such a claim would be seen as a claim in tort, and it may be that Myanmar law would take the same view and would apply the law or laws which governed the tort, as examined in Chapter 6. But the important point is that the rules in this Chapter show the Myanmar court how to decide the ownership of things. It does not, by itself, establish that a plaintiff has any right to take or to re-take the goods from the defendant who has possession of them.

(67) Title to intangible moveable property (debts and other obligations)

In order to understand the private international law rules of intangible property, it is helpful to look first at debts, and then at other forms of intangible property.

(a) Debts

The issues examined under this point may seem obscure, but they are big business. Debts, under which a debtor owes money to a creditor, are property. Maybe it would have been more helpful to call them 'credits', so as to focus on the fact that they are rights to receive rather than obligations to pay, but the terminology of 'debts' is well established and it is, alas, too late to change it.

Once upon a time it might have been argued that voluntary transactions concerning debts were governed, like transactions concerning tangible property, by the law at the place of the debt. But really, debts do not have places in the way that tangible things do, and this approach has generally been abandoned. In the cases in which it is necessary to do so to give a location to a debt (for example, if it is argued that a debt may be attached, or has otherwise has been confiscated by a state, on which see further below), one may say that it is located where the debtor is. But this would not be a convenient rule in commercial law, where a corporate debtor may be in several places at once. The proposition that transactions concerning debts are governed by the law of the *situs* of the debt has no real use in the context of voluntary transactions concerning debts.

If B owes $100 to A, A has a debt, or owns a debt (it is the same thing) of $100. He may try to enforce this debt, by demanding and collecting $100 from B. This is what happens, after all, when a customer of a bank, who has a credit balance in his account, goes to the bank and asks for payment to be made to him. He enforces the debt, and the intangible debt is converted into tangible cash. The basic picture is the same is C is owed money by D, with whom he does business: let us suppose that D owes C $50,000. C has a debt of $50,000 owed to him by D. Perhaps D is willing and able to pay the sum today, in which case C may wish to enforce the debt and convert it into case. But D may not be willing and able to pay the sum today. One possible reason is that D is currently rather short of funds. Another reason may be that the debt is not yet due for payment: D may have contracted to pay $50,000, but not until the last day of the year. C, however, may have an urgent need for money. C may therefore sell his 'debt' to E. C will not be able to do so for $50,000 – that would bring no advantage to E, who would not make a profit – but he may be able to sell it for $40,000. That will mean that C has money today, which he

[197] Bailment is dealt with in detail in Chapter IX of the Contract Act 1872.

needs, and that E had paid $40,000 for a right to recover $50,000 from D. Everyone is happy.

The example we have just given represents the basic model upon which the financial systems of the developed world is based. Dealing with debts – selling, pledging, discounting debts – is how much of the world does its business. The manner in which the rules of law, including private international law, deal with transactions of this kind is obviously important, for if there is any doubt about the way the law works, confidence in the markets will be shaken. It follows that the rules which we examine here will apply to ordinary customers of local banks as well as to the big financial organisations which trade in debts.

The rules of private international law draw a distinction between whether the debt is capable of being transferred or assigned at all, and the separate question whether the transaction between assignor and assignee is binding on and effective between the parties to it. Let us take a case in which B owes money to A, and A intends to assign or transfer the rights to this debt to C. The question whether the debt which B owes to A is assignable at all is answered by the proper law of the contract between A and B, under which the debt arose. The question whether the transaction between A and C was valid and legally binding on them is governed by the law which governs the contract (or other relationship, such as gift) between A and C. As a result of this, if the debt is assignable according to its proper law, and if the assignment is effective by reference to its proper law, the right to the debt will have bee assigned. If the debt is not assignable according to its proper law, that is, if the law governing the contract between A and B provides that the benefit of that contract cannot be assigned, then the contract between A and C may be valid, but will not transfer the right to the debt. C may then sue A for breach of contract, for failing to bring about the result which he promised, but the debt will not be assigned, because according to the law which created it, it is not capable of being assigned.

In the even that the party who has the right to the debt assigns it twice - which is almost bound to cause trouble - the question of who has the prior claim to the debt against the debtor will be governed by the law which created the debt in the first place. Whichever of the assignees who considers that he has a claim against the assignor will be able to sue him for compensation for breach of contract.

(b) Shares in companies

Debts arising from contracts are by far the most important articles of intangible property. But shares in companies are also intangible property, and where there is some sort of dealing with company shares, the rule just described applies by analogy. The question whether (or in what circumstances, or to whom) the shares are assignable is governed by the law of the company's incorporation, for it would be absurd to refer the question to any other law. The question whether an assignment is itself valid will be referred to the law which governs the transaction between assignor and assignee. Of course, if it is alleged that the shares in a company have been confiscated by state action, it will be necessary to look instead to the place at which the shares are situated, which will be the place of the company's incorporation.

(c) Attachment and garnishment of debts and shares

A common form of enforcement for judgments and decrees is the attachment of the debtor's property. Among the forms of property which may be attached by way of execution, Section 60 of the Civil Procedure Code identifies 'debts, shares in a corporation'. That means that the property described is liable to be attached and sold (or otherwise liquidated for the benefit of the judgment creditor). Such measures can only be applied to property which is within the territorial jurisdiction of the Myanmar court.

The process is further explained by Order 21 of the Civil Procedure Rules. In particular, the attachment of debts which are due to the judgment debtor, with the aim of having the court direct the sums due to the judgment debtor be paid to the judgment creditor in satisfaction of the judgment in his favour is provided for by Order 21 rule 46 of the Civil Procedure Rules, which allows the court to make a prohibitory order[198] (because debts not secured by a negotiable instrument[199] cannot be seized by the taking of possession). It follows that the order can only be made by a court if the debtor, who is to be directed to pay the sums to the judgment creditor, is within the jurisdiction of the court. Here, therefore, the state is, in effect, taking control of the debt. It is therefore necessary to show that the debt is situated - which means that the debtor is situated - within the jurisdiction of the Myanmar court.

When a debt has been attached under Order 21 rule 46, and the debtor has been ordered not to pay the money without the order of the court, the further procedure by which the judgment creditor completes the process and obtains an order that the sums in question be paid to him instead is known as 'garnishment'.[200] The judgment creditor applies for an order that the debtor, who owes money to the judgment debtor, be ordered to pay those sums over to the judgment creditor, and once these have been paid, the debtor be deemed to be released from the original debt. The mechanism of this garnishment is set out in Order 21 rules 63A-63G; and because of the way that it works, garnishment must be confined in its operation to debts - and therefore to debtors - within the territorial jurisdiction of the Myanmar court. The process of garnishment is a form of compulsory acquisition of the debt, and it must therefore be confined to property which is within the territorial jurisdiction of the court.

(d) Intellectual property rights

At various points in the chapters above, we have made reference to the private international law of intellectual property: patents, copyright and trade marks. It is mentioned here only to make the point that the rules of private international law relating to such rights are complex, and their detail is outside the scope of a general textbook of this sort. It is sufficient to say that such intangible property is, in many ways, immoveable: it is certainly territorial in the way that the rights of the right-holder are protected. Patents, copyrights and trademarks are governed by the law which given them their existence, and they are regarded as located where they are granted, issued, or protected. This tends to mean that a Myanmar court may be asked to adjudicate a Myanmar patent, copyright or trademark, but will not be asked (or able) to adjudicate a foreign equivalent. The Myanmar Copyright Act 1914 deals only with Myanmar copyright as a matter of domestic law; the Myanmar Patents and Designs Act 1945 is

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198 See for illustration, *Burma Railways Co Ltd v Hira Lall* (1915-16) 8 LBR 62.

199 As to which, see point (68) below.

200 For illustration, see *Singer Sewing Machine Co v Surath Singh* (1941) RLR 177.

likewise limited to rights granted under Myanmar law.[201] International coordination of rights which are naturally limited in territorial scope requires treaties or conventions, and progress in this respect has been slow.

(68) Negotiable instruments

It is convenient to say something brief about negotiable instruments, which in Myanmar are regulated by statute in the Negotiable Instruments Act 1882. The basic approach of the law is that an instrument is negotiable if it is negotiable by mercantile custom or by Myanmar law. What makes an instrument a negotiable instrument is that it can be transferred by endorsement or delivery, or by simple delivery, and that if the instrument is in the hands of the holder, his rights are not affected by any defect in the title of a prior holder. The law is, as the 1882 Act shows, really very complex, but in effect the negotiable instrument is treated much more as a tangible moveable than an intangible moveable.

A promissory note, bill, or cheque made in Myanmar and payable in Myanmar or drawn on a person in Myanmar, is an 'inland instrument', and all other instruments are 'foreign instruments'.[202] A foreign bill must be protested for dishonour if such protest is required by the law of the place where the bill was drawn.[203]

Chapter XVI of the Negotiable Instruments Act 1882 sets out a small number of rules of private international law. According to these, unless a contract provides otherwise, the liability of the maker or drawer of a foreign promissory note, bill of exchange or cheque is governed by the law of the place where it was made or drawn, and the liability of the acceptor or endorser is governed by the law of the place where it is payable.[204] Where a bill is payable at a place different from that at which it was made or endorsed, the law of the place where it is payable determines what counts as dishonour.[205]

If an instrument is made, drawn, accepted or endorsed outside Myanmar but in accordance with the laws of Myanmar, it is to be regarded as valid in Myanmar even though the agreement evidenced by the instrument is invalid according to the law of the country where it was entered into;[206] and in the absence of evidence, the law of a foreign country regarding negotiable instruments is presumed to be the same as Myanmar law.[207] This is the only example of the rule of the common law, that foreign law is presumed to be the same as that of the forum court unless the contrary is proved, which is to be found in legislative form.

(69) Trusts of property

The private international law of trusts is not well developed. Insofar as it is affected by the laws of family, succession and inheritance, it lies outside the scope of this book. The

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201 Although Section 93 of the Act makes provision for reciprocal rights in relation to Britain and India (it is not known whether this Section has ever been applied or is still considered to be in force).
202 Negotiable Instruments Act 1882, Sections 11 and 12.
203 Negotiable Instruments Act 1882, Section 104.
204 Negotiable Instruments Act 1882, Section 134.
205 Negotiable Instruments Act 1882, Section 135.
206 Negotiable Instruments Act 1882, Section 136.
207 Negotiable Instruments Act 1882, Section 137.

law which governs a trust may be chosen by the author of the trust,[208] for if the trust property is his, it is his to dispose of as he wishes, and there is no real reason to restrict the freedom he has to choose the law which governs the trust he chooses to create. If the law is not chosen by the author of the trust, the trust will be governed by the system of law with which it has its closest connection. That law will govern the rights and duties of the trustee and the beneficiaries, the day-to-day administration of the trust, the alteration and the extinction of the trust.

Where a trust is governed by Myanmar law, the detailed regulations which apply to the trust, and to those involved in it, answer is liable to be found in the Trusts Act 1882. The one provision of the Trusts Act 1882 which makes a reference to foreign law is Section 4, which deals with the lawful purpose for which a trust governed by Myanmar law may be created. It provides as follows:

> **4. Lawful purpose**. A trust may be created for any lawful purpose. The purpose of a trust is lawful unless it is (a) forbidden by law…
> *Explanation* – in this section the expression 'law' includes, where the trust-property is immoveable and situate in a foreign country, the law of such country.

Apart from that, the general rule, that a trust which is created and operates *inter vivos* is governed by its proper law appears to be wholly reliable.

(70) The seizure of property by governments and states

It is not uncommon that states and governments seize, with or without compensation, property which until that moment had been held in private hands. When a court is called upon to deal with a case in which such an event has taken place, the answers can be mostly derived from the application of the rules which we have set out above. To illustrate the law, it is convenient to distinguish seizure by the government of Myanmar, and seizure by foreign governments. The principles of territoriality and comity, and the role of the law of the *situs* of property, provide most of the answers.

(a) Seizure of property by the government of Myanmar

If the government of Myanmar seizes, confiscates, or nationalises property situated within the territory of Myanmar, a court in Myanmar will obviously give effect to the title acquired by the Union in accordance with Union law. No real question of private international law arises, at least where the question of title to the property arises for decision before the Myanmar court. The only circumstance in which this conclusion may be questioned is where the seizure is contrary to the international obligations of the Union of Myanmar as set out by or established in a treaty, though this will not usually call into question the effectiveness of the seizure as a matter of private international law.[209]

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[208] This is the terminology used in Trusts Act 1882, Section 3. In other common law legal system, the author of the trust is called the 'settlor'.

[209] A bilateral investment treaty may contain provisions which guarantee the freedom from state seizure of certain property. If the state acts in breach of the provisions of such a treaty, it breaches a rule of *public* international law, and the matter may proceed to a form of international arbitration, but it is most unlikely that the alleged (or admitted) breach of such a treaty has any effect in *private* international law.

The question whether the seizure of property situated within the territory of Myanmar will be recognised and given effect by the courts of a state outside Myanmar is, obviously, a matter for the rules of private international law of that foreign state. But the general approach of states to confiscations of property taking place outside their territory can be seen under the next heading.

(b) Seizure of property by foreign states and governments

If property is within the territorial jurisdiction of a foreign state, and the government of that state confiscates it, whether by legislative decree or by seizure pursuant to existing legal powers, the change in title will be recognised in Myanmar as effective, and if necessary the rights of the person with the new title will be enforced, if the property is brought to Myanmar. This rule applies to tangible and to intangible property. For example, if a company is incorporated under Indian law, and the Indian government nationalises the shares in the company, for whatever reason, the courts of Myanmar will accept that title to the shares has passed to the Indian state, or to the new company into which Indian law has passed them.[210] If the Indian company now pursues different policies, under the direction of its new owners, there is nothing surprising in that, as it was not a company in some abstract sense, but was an Indian company. As will be seen in the next Chapter, that means that its fate is dependent on Indian law and on powers exercised in accordance with Indian law. Likewise, if a debt (which for these purposes means a debtor) is within the territorial jurisdiction of the foreign state, and under the law of that state the debtor is ordered to pay to the state the sum by which he was indebted to a creditor, the confiscation of the debt will be recognised as effective to annul the former creditor's rights.[211]

And if the Thai government were to nationalise and confiscate property located in Thailand but belonging to a political enemy, a court in Myanmar will still recognise the effect of the confiscation. If the Thai government then sells the property in Thailand to a purchaser, who gets good title under Thai law, and who then brings the property to Myanmar, the former owner will have no claim against the new owner. He may seek to say that he has title to the property, and that he has a claim for relief as a result; but the short answer will be that he does not have title: the new owner acquired good title according to Thai law and (therefore) according to the private international law of Myanmar. That will be enough to defeat any claim by the former owner against the new owner.

The only possible circumstance in which the effect of a foreign seizure of property within the territory of the foreign state will not be recognised as conclusive is if the grounds on which the seizure was made are offensive to Myanmar public policy. For example, if the government of a state were to seize the property within that state of all Myanmar nationals,[212] it would be contrary to the public policy of Myanmar law to give

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210 *State Bank of India v Collector of Rangoon* BLR (1961) HC 336. This confirms that the new company will be recognised as a matter of Myanmar law, but that as the Indian legislation cannot affect title to land in Myanmar (in the actual case, it did not purport to do so), a stampable conveyance will be needed to bring legal title to the Myanmar land into line with the new company ownership.

211 *Chaturbhuj Piramal v Chunilal Oomkarmal* (1933) LR 60 IA 211.

212 It should be noted, though, that nationality generally has no relevance to this question. A state may, as a matter of private international law, acquire title to all property within its territorial jurisdiction, whether this belongs to its own nationals or to aliens generally (or to enemy aliens).

any effect at all to the foreign governmental act, even if it related to property within the territory of the foreign government. In England, it had been suggested that laws enacted by the Nazi German state to confiscate the property and other rights of Jews were so wicked that they would be completely ignored; in more recent times, the English courts refused to recognise the legislative confiscation of Kuwaiti property after the government of Iraq had taken it from Kuwait to Iraq and had given it to Iraqi companies. But these are really extreme cases, and when they arise, the ordinary rules of private international law are bound to come under some strain.

It naturally follows that if a foreign government purports to confiscate or seize property in Myanmar, the act of the foreign state will be wholly ignored.[213] If property is within the territory of Myanmar, the acts of a foreign state are not part of the *lex situs*, and are therefore irrelevant to the ownership of the property.

The only problem arises when a particular ethnic group, religious group, or nationality, is singled out for such treatment, for an acceptance of this would appear to impair the general expectations of the rule of law.

[213] *State Bank of India v Collector of Rangoon* BLR (1961) HC 336 (though in that case, the Indian legislation did not purport to do that).

CHAPTER 8

CORPORATIONS AND INSOLVENCY

In this Chapter we examine the private international law of companies and corporations; and the insolvency and winding up of companies. It is convenient to make a brief mention of personal (that is to say, non-company) insolvency at the end of the Chapter, though it does not really belong in a chapter principally concerned with companies and corporations.

(71) The definition and identification of a corporation

A company or corporation – the terms are usually interchangeable – is an artificial thing, or an artificial person. A company cannot be born, or form itself: it must be created by someone, acting in accordance with, and under, a law. Once it has been created, it does not acquire an independent existence: it remains governed by the rules of the legal system under which it was created.[214]

The private international law of corporations places much of its emphasis on the law under which the corporation was formed, the *lex incorporationis*. The rules of private international law take the view that the law under which the corporation was created can create, alter, dissolve, and abolish, the corporation. It is important to understand that because the corporation is an artificial creation, it depends entirely on the law which created it. It means that persons who hold shares in a company do not hold shares in *a* company but in a Myanmar company, or in a Thai company, or in an English company; and this corporate 'nationality' is important. It means that the person who has shares in a Russian company can lose them, or can lose some or all of the rights associated with them, if Russian law changes in a particular way. There is nothing surprising or unfair about any of this: a person who becomes a member of a company knows that the rules which define his relationship with the company are to be found in the constitutional documents of the company, but also in the rules of company law in that country. A person who takes shares in a Myanmar company knows that his rights are given and defined, and may be altered or annulled, by Myanmar law. It also means that a person who makes a contract with a company knows or ought to know that the law which created the company could always un-create it again, at which point his contractual counter-party will have disappeared. These things happen only rarely, of course, but when they do, the disappointed party can hardly claim to have been taken by surprise. Whoever takes shares in, or deals with, a company formed under a particular law, takes a risk with that law; and some laws are, in this sense, more risky than others.

As a result of this, the Myanmar Companies Act 1914, as amended in 1955,[215] states the law by which a company may be established under Myanmar law, and provides the rules which set out the powers and responsibilities of the various organs of a company formed under Myanmar law.[216] Most of the Act does not, and perhaps cannot, be applied to a

[214] To use another image, it retains its domicile of origin (as to which, see below, Chapter 9, point (82)).
[215] Myanmar Companies (Amendment) Act 1955.
[216] Although it is expected that the Companies Act 1914 will be further amended, the nature of the alterations is not yet known. But the main purpose of any Companies Act will be to regulate

company created under the law of a foreign country. The only real effect of the Companies Act on companies created under the law of a foreign country is to regulate certain aspects of their activity in Myanmar.[217] There are, for example, provisions which require an overseas company which carries on business in Myanmar to obtain licences, and to register certain particulars with the Registrar of Companies. But in the same way that the Contract Act applies principally to contracts governed by Myanmar law, the Companies Act applies principally to companies formed under and therefore governed by Myanmar law. Its treatment of companies formed under foreign laws is, mostly, limited to setting out the conditions in which they may carry on business in Myanmar, which will (or should) include provision for service summonses on them.

It is well understood that the Companies Act, now over 100 years old, needs to be reformed. A project to bring about this reform is now underway; but at the time of writing is did not appear that the changes proposed to be made would substantially alter the rules of private international law, although they would make the law clearer and easier to understand.

For present purposes, even if it is not completely accurate, it is convenient to refer to a company formed under the Act as a 'Myanmar company', and a company formed under the laws of another country as an 'overseas company'.[218]

(72) Jurisdiction over companies

The first practical question is the one which arises a plaintiff wishes to assert jurisdiction over a company for the purpose of a suit in Myanmar. It is necessary to draw a distinction between Myanmar companies and overseas companies.

(a) Myanmar companies

A company formed under the Companies Act is by definition subject to the jurisdiction of the Myanmar courts, by submission, but also because its registered office is to be seen as the company's place of residence. The question of how and where it may be served with process is answered by Section 148 of the Companies Act 1914, which states as follows:

> **148. Service of documents on company**. A document may be served on a company by leaving it at, or by sending it by post to, the registered office of the company.

Service in accordance with Section 148 will give the court jurisdiction over the company in respect of the suit. But in addition to this rule – and having a somewhat uncertain

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in detail companies created under it, and to make only piecemeal provision for companies formed under a foreign law.

217 Part X of the Myanmar Companies Act 1914 is of particular application to companies formed under the laws of a foreign country, though Part IX, which deals with the winding up of unregistered companies will apply, in principle at least, to overseas companies.

218 The term 'foreign company' is, in this context, not a helpful one, for it extends to all companies whose share capital is not wholly owned by citizens of the Union of Myanmar: Companies Act, Section 2B. It appears to follow that some companies formed under Myanmar law are 'foreign companies', as well as companies formed under foreign laws, which is rather confusing.

relationship to it – is the rule contained in Order 29 of the Civil Procedure Rules, which allows service to be made on any company which is present in Myanmar. This appears to offer an alternative method of service, and therefore of establishing jurisdiction, which is analogous to that available in the case of individual defendants. Order 29 rule 2 provides as follows:

> **Order 29 rule 2.** Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served -
> (a) on the secretary, or on any director, or other principal officer of the corporation, or
> (b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carried on business.

This provision appears to apply to all companies which are present in Myanmar: at least, there is no indication that it is confined to companies created under the law of Myanmar; we will therefore refer to it again.

These options appear to provide a sufficient basis for the assertion of jurisdiction and for the making of service on the defendant company.

(b) Overseas companies doing business (with a place of business) in Myanmar

Before it was deleted in 1955, Section 277 of the Companies Act made specific provision for service on an overseas company which had, when establishing a place of business in Myanmar, notified the Registrar of Companies of the names of persons authorised to accept service of process. Most common law systems have something similar in their laws, but in Myanmar this provision was repealed in 1955.[219]

An overseas company which establishes a place of business in Myanmar is required to obtain a licence,[220] and if it does so, it seems reasonable to argue that it becomes resident within, or otherwise submits to, the jurisdiction of the Myanmar court. Once this is done, there is no reason to doubt that Order 29 rule 2 applies to overseas companies which have a place of business in Myanmar. This means that on overseas company may be served at the place at which it carries on business in Myanmar. It follows that the real question, from which everything follows, is whether the activities of the overseas company constitute the doing of business in Myanmar.

There are, in outline, two ways to address that question. In some common law systems, the approach is to look for a place of business, in the sense of somewhere fixed and definite, at or from which the business of the company is carried on; and business will be regarded as being carried on there if (and, according to some, only if) contracts are made there.[221] As said above, where there is such a place of business, jurisdictional competence

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219 Myanmar Companies Amendment Act 1955, Sections 15 and 16. It seems likely that a provision to this effect will be reintroduced into a new Companies Act when one is made in or after 2015.

220 See Sections 2B(b) and 27A(3) Companies Act 1914 (the amendment was made by Myanmar Companies Amendment Act 1955, Sections 2 and 5).

221 It is expected that the new Companies Act will also contain a more thorough definition of 'doing business', which will be very welcome, for a company may do all manner of things which maybe should not count as the doing of business.

over the company is not limited to claims arising from the activities of the place of business, but any claim against the company may be brought there. It will certainly follow that if the Managing Director or Chief Executive Officer is in Myanmar for a meeting or for a golfing holiday, it will not be possible to effect service on the company by serving such officers, for even if they are the directing minds of the company, and even if they are in Myanmar for purposes related to the business of the company, their presence does not give their company a place of business within Myanmar.

But the making of contract by a company is, in many cases, only the culmination of the business which it does. What of the activities which are carried on before a contract is successfully concluded? An alternative approach would be for the definition to be spelled out, in detail, in legislation. One possibility would be to list the activities which a company might undertake in Myanmar, but which do not amount to 'doing business' in Myanmar. At the time of writing, the first draft of a new Companies Act proposed, in Section 269C, examples of activity in Myanmar which would be insufficient to amount to the doing of business in Myanmar.[222] These were given as: becoming party to legal proceedings in Myanmar, holding meetings of directors or shareholders in Myanmar, maintaining a bank account in Myanmar, effecting a sale of property through an independent contractor in Myanmar, soliciting orders in Myanmar but which will only become a contract if the offer is accepted and the contract made outside Myanmar, lending money or creating a charge on property in Myanmar, collecting debts due to it in Myanmar, conducting a one-time transaction in Myanmar which is completed within 30 days and which is not part of a series of such transactions, and investing funds or holding property in Myanmar. It seems reasonable to say that some of these are easier to accept than others; and that the enacted legislation may well cut down the contents of this list. That, however, is not the important point. What is important is to understand the difficulty and complexity which surrounds the simple-looking question whether a company, not formed under Myanmar law, does business in Myanmar. It all depends on what is meant by 'doing business', and the clearer the legislation is, the easier the answer is to give.

It may be asked whether the fact that a company can be served also means that the court has jurisdiction over claim in the document which has been served. For in the case of suits against individuals, the rules of jurisdiction in Sections 16 to 20 of the Civil Procedure Code define, but also limit, the jurisdiction of the court over a defendant who may still be served within Myanmar. The best practical answer to a question which is a little awkward[223] is that if a company has a place of business in Myanmar, it is resident there, and jurisdiction over it is consistent with, or justified by, Section 20 of the Civil Procedure Code.

(c) Overseas companies which do not have a place of business in Myanmar

A company incorporated under a foreign law which does not have a place of business in Myanmar in the sense just described, cannot be served in Myanmar. Any service on it will have to be made out of the jurisdiction.[224] In such a case, the jurisdiction of the court in

[222] A first draft of the proposed Law on the website of the Directorate of Investment and Company Administration in February 2015.

[223] The problem recurs in many common law systems in Asia which inherited from England a law which did not blend civil procedure law and company law as carefully as it should have.

[224] See Chapter 2, point (13) above.

relation to the company will need to be justified by Sections 16 to 20 of the Civil Procedure Code.

(73) The recognition of corporations formed under foreign laws

If a body has legal personality under the law under which it was created, its personality will be recognised under the private international law of Myanmar.[225] Whether a body has been created with legal personality under the law of a foreign country can only be answered by referring the question to the law of that country.

This will obviously apply to entities formed under foreign laws analogous to the Companies Act. But the point is actually wider than the law of companies: if a foreign legal system regards another kind of artificial person as having legal personality, Myanmar private international law will accept this. So for example, if a Hindu temple has legal personality under Indian law, there is no reason in principle why its legal personality will not be recognised in Myanmar.

Recognition is not a single issue, but involves a number of issues; and the recognition of a corporation can arise in a number of contexts. It will certainly involve recognition of the legal personality as something separate from the personality of the shareholders or members of the company. It will mean that the question of who is entitled to act on behalf of the company is answered in accordance with the *lex incorporationis*: if that law says that an officer may not act on behalf of the company, its conclusion cannot be challenged. If under the law of the place of incorporation a liquidator is appointed to act on the company's behalf, or as the competent officer of the company, the appointment should be recognised.

If the law of the place of incorporation provides that in the event of a judgment being given against a company, or other liability being incurred by a company, the liability cannot be enforced against anyone other than the company, that will normally be treated as conclusive. But there are occasions on which a court may suspect that the use of the corporate form – the creation of a body with separate legal personality – has been done for improper purposes, or even to allow fraudulent trading. In such cases, a court may be tempted to 'lift the corporate veil' and to fix the liability to meet the obligations on the individuals who formed the company. Of course, if the *lex incorporationis* allows this to be done, there is no problem of principle. But if it does not, the Myanmar court may still decide, in an appropriate and extreme case, to lift the veil itself. This would be justifiable on the basis that it should not be permitted to use the corporate form to justify a fraud, or perhaps because a Myanmar court, in giving judgment, is entitled (because the matter of remedies is a procedural one)[226] to determine the persons against whom its order is to be enforceable.

If a group of companies in common ownership or control is organised in such a way that the company which undertakes obligations has few assets with which to meet those obligations, while the real wealth is held in other, separate, companies which are part of the greater organisation, a court may be tempted to treat all these technically-separate entities as forming a 'single economic unit', with the consequence that it is all treated as a

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[225] *Leong Ah Foon v The Italian Colonial Trading Co* (1905-6) 3 LBR 261; *State Bank of India v Collector of Rangoon* BLR (1961) HC 336.
[226] See above, Chapter 4, point (32).

single organisation, present as a whole where any part is present, liable as a whole when any part is liable, and so forth. Such reasoning is more commonly accepted in the United States than in other parts of the common law world. It is probably not to be understood as a part of the private international law of Myanmar.

In other words, the recognition of a foreign company includes accepting the legal conclusions which the foreign law applies to the existence of the company as a separate legal person. But it is still possible to recognise the separate legal personality of a company as this is created and conferred by a foreign law, and still apply rules of Myanmar law as to (what is meant by) presence, and remedies, to produce an answer which would not be entirely consistent with the *lex incorporationis*.

(74) The dissolution of corporations formed under foreign laws

If a foreign law creates a company, it can also un-create it. If a company was formed under the law of a foreign country which then acts, or authorises an act, to dissolve that company, the rules of Myanmar private international law must accept that the company has ceased to exist. Neither the Companies Act, nor any other rule of Myanmar law, can provide that a company exists under the law of a foreign country if the law of that foreign country says that it does not. In Europe a century ago, a large number of companies formed under the laws of the Russian Empire were dissolved by the acts of the Soviet regime which replaced it: even though the government of the United Kingdom strongly disapproved of the acts of the new Russian powers, the English courts never doubted that if a Russian company had been dissolved under and in accordance with what now appeared to be Russian law, that was the end of the company.

Of course, it also follows that a company formed under Myanmar law may be wound up and dissolved in accordance with Myanmar law. As the most usual reason for doing so is on the insolvency of the company, we will examine it under point (76) below.

If the *lex incorporationis* can create and can dissolve a company, it must follow that it can amalgamate two companies and create a new body from the amalgamation. If the law under which the amalgamation and dissolution takes place provides, as it usually will, for the new company to succeed to the old, which means to succeed to the rights and liabilities of the original-and-now-dissolved companies, this succession will be recognised and accepted by the private international law rules of the Myanmar court.[227] If, however, the foreign legislator provides that the new company succeeds to the assets, but to none of the liabilities, of the old company, it seems probable, but is less certain, that a Myanmar court would accept that this could not be questioned.

As we shall see, if a company is dissolved in accordance with the *lex incorporationis*, this does not necessarily affect a contract made by that company if that contract is governed by a different law. The contract may still be valid, though the question of who it may be enforced against is undoubtedly more difficult. We turn to that general issue next.

(75) Problems associated with contracts made by or on behalf of corporations

Companies and other corporations make contracts, and those contracts will be governed by their proper law, which may be chosen, or which will otherwise be identified by the

[227] *State Bank of India v Collector of Rangoon* BLR (1961) HC 336.

rules we examined in Chapter 5. But two particular issues arise when a contract has been made by a corporation, and both are, in some sense, issues of capacity.

The first problem which may arise does so if a company makes a contract which, according to the company's documents, or the *lex incorporationis*, the company or corporation does not have legal power or capacity to enter into. In such a case, if the company really does lack capacity under the law which created it, any purported contract with that company or corporation must be void of legal effect, in just the same way as a contract with a child or with a person who is out of his mind will be void. It may be awkward for a person who makes a contract with a company, for it may not be easy for him to discover whether there are any limits on the capacity of the company to contract, and what those limits might be; but in principle he should check before entering into the contract. And in any event, there is always a risk in contracting with a company, that the company may not have assets to meet its obligations, that it may be dissolved by or in accordance with the law under which it was formed; that the law under which it was formed may even allow its controllers to dissolve the company for the very purpose of preventing its obligations from being performed. Those who deal with companies need to be aware of the risks, and to adjust accordingly the terms on which they are prepared to deal with a company.

The second problem arises from the fact that a company cannot just act; it must act through a natural person. If that person has authority to bind the company to the contract in question – this will be a matter on which the *lex incorporationis* provides the answer – there will be no difficulty. But suppose that it is said that the individual had no authority to bind the company, or that the individual had power to bind the company only if he secured the approval of the board of the company in advance, and that this did not happen. The position is then that a contract has been concluded, but in circumstances in which the person who acted on behalf of the company should not have done as he did: the contract is one which the company had legal power to make, but in circumstances which were irregular. Faced with this, the rules of private international law have a choice. They may see the issue as one of company law, and refer to the *lex incorporationis* to see what consequences follow from the irregularity; or they may say that it is a contractual matter, and look to the proper law of the contract to determine whether the contract is binding on the company. It is very difficult to say which approach should be taken to represent the private international law of Myanmar. On balance, the better analysis appears to be that if a contract has been made by an agent acting on behalf of another, and the contract is one which such a person would appear to have authority to make, the contract should be binding. Chapter X of the Contract Act 1872 sets out the rules of agency as they apply in the domestic law of Myanmar law. They refer to situations in which a person with authority in relation to a principal's business makes contracts for that principal, or may go beyond the power which he has been given; it also deals with the case in which the principal gives the impression to the world that the person has authority.[228] These rules regulate the issues which arise in circumstances of the kind we have described here; and it may therefore be correct to view the question set out above as a contractual one, governed by the proper law of the contract, rather than as one governed by the law of companies.

(76) Dealing with a Myanmar company close to or in insolvency

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[228] Contract Act 1872, Section 237.

If a Myanmar company is in financial trouble, there are several steps which may be taken. These do not appear to raise issues of private international law, but they need to be mentioned for the sake of the completeness of the picture.

(a) Schemes of arrangement

A compromise between a Myanmar company and its creditors may be arranged, and sanctioned by the court, in accordance with Companies Act 1914, Sections 153, 153A and 153B. If the court sanctions the scheme of arrangement, the rights of the creditors and members are dealt with by the scheme, and have the effect provided for by the Act. The purpose of the scheme of arrangement is to try and keep the company afloat as a going concern in circumstances in which the members or creditors realise that the company is in such difficulty that one false move might lead to its insolvency and therefore to a winding up. The procedures in Section 153 are confined in their scope to companies created under the Act; they have no relevance to overseas companies.

Of course, if a Myanmar court approves a scheme of arrangement, and decrees an alteration of the rights of creditors, it may have this effect on a contract which was governed by a law other than Myanmar law. Although a court in Myanmar will regard this as valid, effective and binding, it does not follow that a court in another country will necessarily agree: it may take the view that if a contract is governed by a law other than Myanmar law, it is not open to Myanmar law, or for a Myanmar court, to determine or decide whether it is still valid. This possibility of difference in view is one of many reasons why efforts are made to bring greater international harmony to insolvency and to procedures related to it.

(b) Winding up of Myanmar companies

Part V of the Companies Act 1914 makes provision for a company to be wound up, as Section 155 Companies Act explains, in three ways: by the court, or voluntarily, or under the supervision of the court. By far the most important of these is the provision which is made in the Act for a company to be wound up by the court if it is unable to pay its debts;[229] and Part V of the Act sets out in detail the powers of the court and the procedures which it will follow in the course of the winding up. The Act also provides for voluntary winding up, at the behest of members or of creditors; and it allows such a voluntary winding up to be undertaken under the supervision of the court.

The detailed law of corporate insolvency, which is contained in Part V of the Act, is not within the proper scope of a book on private international law. Insofar as the Act provides for the winding up of a Myanmar company, it raises no particular issues of private international law. Those claims to payment which are to have priority are set out in Section 230 of the Act. By Section 231 the court has power to set aside a fraudulent preference.

> **231. Fraudulent preferences. (1)** Any transfer, delivery of goods, payment, execution, or other act relating to property which would, if made or done by or against an individual, be deemed in his insolvency a fraudulent preference, shall, if made or done by or against a company, be deemed., in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly.

[229] Companies Act, Section 162(5).

It is to be observed that Section 231 appears to give the court a power to act which is without any obvious limitation. It appears that it may be applied to payments or transfers which were and are wholly valid according to the law by reference to which they were originally made, and to persons who are not, and who never were, within the territorial jurisdiction of the Myanmar court. This does give rise to a question of private international law. It is obvious that Section 231 may be applied to a transaction which was connected to Myanmar and to the law of Myanmar and to nothing else, but otherwise, what is its international reach ? Does it really allow the court to declare invalid a transfer of goods in China, to an individual in China, under a transaction governed by Chinese law and according to which law there is no problem with the transaction ? On the face of it, Section 231 does do that; and that is a surprising state of affairs. It is sometimes said that power such as those in Section 231 only apply if there is a 'sufficient connection' to Myanmar or to its law, but the moment one asks what that actually means, the answer is a blank. It is a good question, and it has no obvious answer.

(77) Winding up an overseas (foreign) company

The previous point dealt, in the barest outline, with the procedure for winding up a Myanmar company created under the Companies Act. But the Act also makes provision for the winding up of an unregistered company. For as those foreign or overseas companies which are formed under foreign laws are not created and registered under the Companies Act, and as Part IX of the Act provides for the winding up of an unregistered company, it follows that a Myanmar court can wind up an overseas company.[230]

> **271. Winding up of unregistered foreign companies**. **(1)** Subject to the provisions of this Part, any unregistered company may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to an unregistered company, with the following exceptions and additions:
> (i) the principal place of business of the company in the Union of Myanmar shall be deemed to be the registered office of the company;
> (ii) no unregistered company shall be wound up under this Act voluntarily or under supervision;
> (iii) the circumstances in which an unregistered company may be wound up are as follows (that is to say): (a) if the company is dissolved, or has ceased to carry on business or is carrying on its business only for the purpose of winding up its affairs; (b) if the company is unable to pay its debts; (c) if the court is of opinion that it is just and equitable that the company should be wound up…
> **(3)** Where a company incorporated outside the Union of Myanmar which had been carrying on business in the Union of Myanmar ceases to carry on business in the Union of Myanmar it may be wound up as an unregistered company under this Part, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated.

This may take some people by surprise, but it makes practical sense. A company formed under a foreign law may have a place of business in Myanmar, and if it does, the power of the court over the company and its local affairs is necessary and proper. It may mean

[230] Indian law was (and still is) to the same effect: *Re Calcutta Jute Mills Ltd* (1880) ILR 5 Cal 888; *Re Strauss & Co Ltd* AIR (1937) Bom 15; *Re Travancore & Quilon Bank Ltd* AIR (1939) Mad 318.

that a company is being wound up in two countries at the same time, and in a rather uncoordinated way, but the idea that a Myanmar court would not have such a degree of control over an entity which had a place of business within its territorial jurisdiction would not make a lot of sense. It may be thought to follow from Section 271(1)(a) that if the foreign company does not have a place of business in Myanmar, the court will not be empowered to wind it up, but this may not always be correct. If the foreign company had assets or liabilities in Myanmar, it is, in the final analysis, for the Myanmar court to order the proper arrangement of these. It may therefore sometimes be appropriate to wind up a foreign company which did not have a place of business in Myanmar.

The power in Section 271(3), to wind up a company which had been dissolved under the law which created it, is a practical solution to an untidy problem. If the company has ceased to exist under the law which created it, it may be thought that there no company, and therefore nothing for the Myanmar court to wind up. But there may be assets or liabilities in Myanmar, and there has to be a way for the court to deal with them. The solution is therefore to allow a winding up proceeding in Myanmar, even though there is no company to wind up. It may not be logical, but logic is not always a guide to what common sense requires.

(78) The effect of foreign insolvency proceedings

Foreign proceedings will be recognised if a company is being wound up in the place in which it is incorporated. As was said above, the law which created the company in the first place can un-create it again. As was said above, the law which created the company in the first place can determine who (such as a liquidator) is empowered to act on the company's behalf; and it follows from all of this that winding up proceedings which are being carried on in the courts where the company was created will be regarded in Myanmar as having been conducted in the proper place. As a result, the consequences of that winding up will be recognised and given effect in Myanmar; the authority of a liquidator appointed in accordance with the law under which the company was incorporated will, as a matter of principle, be recognised in Myanmar.

There is a tendency in some developed jurisdictions to question whether deference to the law and courts of the place of incorporation is completely satisfactory. It is open to abuse if companies can incorporate (or, more precisely, be incorporated) in places in which the rules of corporate insolvency are generous, when things go wrong, to those who incorporate the company in the first place, but ungenerous to creditors who may wish to call the company, or those who have caused it to become insolvent, to account. For this reason, a preference for the place of incorporation to be superseded by the 'centre of main interests' of the company is noticeable, increasingly discussed, and even adopted in some laws which we will mention briefly below. But it does not appear to be part of the private international law of Myanmar, which continues to accept that the law of the place of incorporation is the relevant law.

(79) International co-operation in relation to cross-border insolvency

If a Myanmar company, with assets and liabilities only in Myanmar, is wound up, there is no problem of private international law. But, in a way which was rare when the Companies Act was drafted, there are now companies whose activities are in many countries and which, when they are unable to pay their debts, give rise to real problems. There are also corporate groups, with separate companies in different countries, which

collapse and have adverse financial consequences in many countries at once; and as international and cross-border corporate activity becomes greater and greater, the possibility of there being an enormous cross-border mess when insolvency overwhelms the company or the group of companies, is all the greater.

One possible answer to the problem is that each jurisdiction in which the company had a place of business, or had assets or liabilities, should act for itself in sorting out the consequences. But one immediately sees why this is not a good solution. When an international conglomerate collapses, as banks and insurance companies, as well as trading companies, are prone to do, there may be parallel winding up proceedings in ten or more jurisdictions. As the individual transactions and liabilities will have crossed borders, it is not ideal if each national court behaves as if it were an island.

Another answer is that all countries in which there is a reason to conduct a winding up should stand back and allow the courts of the place of incorporation to take the lead, regarding their own proceedings as in some sense secondary or supportive, and being prepared to exercise any discretion which they may have in line with, or in support of, the proceedings in the place of incorporation. But where the place of incorporation was a tax haven or other offshore centre with which the company had no genuine connection, this is neither attractive nor sensible.

As a result, a number of international agreements, of uneven coverage, have been made (i) to allow insolvency courts in one jurisdiction to cooperate with insolvency courts in another jurisdiction to a far greater extent than the laws of the individual countries would ever have allowed; and (ii) to regard the company's 'centre of main interests' as the principal jurisdiction, in which the main proceedings will take place, and in relation to which other proceedings will be regarded as secondary or supplementary.[231] This certainly increases the prospect of a coordinated approach to a cross-border insolvency, but it does not appear that Myanmar is ready to participate in any such schemes. The result is that Myanmar courts will conduct a winding up without obvious regard for proceedings in other jurisdictions. While this may have been acceptable during and shortly after Myanmar had closed its door to the outside world, it will not be long before the practical problems reveal themselves. As soon as a substantial Myanmar corporation gets into financial trouble and has to be wound up, the intervention and interference of foreign courts in which the corporation was also present, or had assets or liabilities, will be a problem. When that happens, only proper and well-written international conventions and other schemes can avoid the problems.

(80) Personal insolvency

In the interests of completeness, it is necessary to say that the main principles of corporate insolvency apply to personal insolvency. The original Rangoon Insolvency Act 1910 and the subsequent Myanmar Insolvency Act 1920 apply to, and regulate the procedure of domestic insolvency: if the court has jurisdiction to act it pays little or no regard to the presence of any foreign connections. Although the later Act has wider territorial scope, it does not affect the earlier Act.[232]

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[231] By far the most important is the UNCITRAL Model Law on Cross-Border Insolvency (1997).

[232] Myanmar Insolvency Act 1920, Section 82. Indian law had the same structure: the Presidency Towns Insolvency Act 1909 and the Provincial Insolvency Act 1920 are the direct counterparts of the two Myanmar statutes.

(a) Jurisdiction and choice of law

The manner in which jurisdiction is dealt with is conveniently illustrated by the Myanmar Insolvency Act 1920. It does not matter where the act of insolvency was committed, but the Act confines the jurisdiction of the court to those who reside, &c, in Myanmar. It states that:

> **11. Court to which petition shall be presented**. Every insolvency petition shall be presented to a court having jurisdiction under this Act in any local area in which the debtor ordinarily resides or carries on business, or works for gain, or if he has been arrested or imprisoned, where he is in custody.
> Provided that no objection as to the place of presentment shall be allowed by any Court in the exercise of appellate or revisional jurisdiction unless such objection was taken in the Court by which the petition was heard at the earliest opportunity, and unless there has been a consequent failure of justice.

Section 11 of the Rangoon Insolvency Act 1910 was in substantially[233] similar terms. As a court in Myanmar has insolvency jurisdiction only in these cases,[234] in which there is a proper connection to Myanmar, it is right and proper that Myanmar law be applied to the conduct of the proceedings. All creditors, whether inside or outside Myanmar, can claim in a Myanmar insolvency.[235]

(b) Effect of concurrent proceedings

As the 1910 Act was limited to Rangoon, the only concurrent proceedings of which notice might be taken would be concurrent proceedings overseas. According to the Rangoon Insolvency Act 1910, if there were insolvency proceedings in another British court, the Rangoon court had power to annul the Myanmar adjudication, and defer to that other British court.[236] The Rangoon Insolvency Act 1910 provides as follows:

> **22. Concurrent proceedings in British courts**. Where it is proved to the satisfaction of the court that insolvency proceedings are pending in any other British court whether within or without the Union of Myanmar against the same debtor, and that property of the debtor can be more conveniently distributed by such other court the Court may annul the adjudication or may stay all proceedings thereon.

The Myanmar Insolvency Act 1920 has national jurisdiction, and its provision for concurrent proceedings is concerned only with concurrent proceedings elsewhere in Myanmar. According to Myanmar Insolvency Act 1920, Section 36:

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233 But not identical.

234 For the general meaning of 'resides', see *Re Ramnira Jan Lhila v Daw Than* BLR (1966) CC 763 (appeal dismissed: BLR (1968) CC 67). It has even been held that a person detained in jail in Yangon resides in Yangon, because he intends to reside there (any intention of his to escape from jail being an illegal and inadmissible intention): *Re MVR Veluswamy Thevar* (1935) ILR 13 Ran 192: this seems rather strained. It has been held that if the court has jurisdiction, it must exercise it, and may not transfer the matter to another Myanmar court which would also have jurisdiction: *Re Oomer Ahmed Bros* (1926) ILR 4 Ran 554.

235 *Re Naoroji Sorabji Talati* (1908) ILR 33 Bom 462; *Re Mogi & Co* AIR (1926) Cal 898.

236 The test is one of convenience: *Re Motilal Premsukhdas* (1938) RLR 166.

> **36. Power to cancel one of concurrent orders of adjudication**. If, in any case in which an order of adjudication has been made, it shall be proved to the Court by which such adjudication was made that insolvency proceedings are pending in another court against the same debtor, and that property of the debtor can be more conveniently distributed by such other Court the Court may annul the adjudication or may stay all proceedings thereon.

This therefore only looks to concurrent proceedings in Myanmar, and makes no provision for concurrent proceedings before a court outside Myanmar.

(c) Effect of foreign adjudications

Neither Act makes any express provision for the effect which is to be given in Myanmar to adjudications of insolvency made in any country outside Myanmar. In principle, it is to be expected that if an adjudication is made by a court which appears to have a proper or equivalent connection to the debtor, it would be proper to recognise at least some of the effects of the foreign adjudication, but authority in Myanmar on this issue is slight. If the bankrupt submitted to the jurisdiction of the foreign insolvency court, or if was actually resident within the jurisdiction of that court, it would be possible to recognise the effect of the bankruptcy, in principle at least.

Two in particular of those effects might be considered. First, if under the law of the insolvency the effect is that all the property of the bankrupt passes (by assignment or otherwise) to his representative in bankruptcy, that will alter title to property in that foreign country. The extent to which it would affect title to property in Myanmar depends in the property. So far as moveable property is concerned, English and Indian[237] law accept that it had this result. In an ordinary case of voluntary dealing with property, an order made under the law of a foreign country would not have any effect on title to property whose situs is in Myanmar; but it may well be that where there is an insolvency in the place which is regarded as proper for it to be brought, an exception is made. A Myanmar court might hope a foreign court would recognise a Myanmar adjudication as transferring title to the debtor's moveable property, wherever it was; it should be prepared to accept this conclusion for a foreign adjudication. But a foreign adjudication will not affect title to land in Myanmar:[238] it is not, therefore, necessary to consider whether Myanmar domestic law on (foreign) ownership of land needs to be taken into account.

Second, if the law of the insolvency is *also* the law governing any debt – say under a contract governed by that law – the making of an order in accordance with that law which has the effect of cancelling the debt will be recognised in accordance with general principle: if the law which governs a contract undergoes a material alteration, the rights of the parties will be altered as well. An adjudication of bankruptcy counts as such an act or alteration. But if the law of the insolvency is not also the law governing the debt, the adjudication will not affect the legal status of the debt, though it may well affect the prospects of recovering it.

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[237] *Re Mogi & Co* AIR (1926) Cal 898.

[238] *Re Motilal Premsukhdas* (1938) RLR 166. To the same effect: *Jayantilal Keshavlal Gajjar v Kantilal Jesingbhai Dada* AIR (1955) Bom 170. The English common law would reach the same conclusion.

CHAPTER 9

OTHER AREAS OF PRIVATE INTERNATIONAL LAW

We have not covered the whole of private international law in this book, for otherwise it would be excessively large and much more complicated. We say a little more about what we have not covered, and why, in this Chapter.

(81) The reason for excluding certain topics from this book

It remains to say something brief about the topics which certainly form a part of private international law but which, for one reason or another, are not dealt with in this book. This is not because they unimportant: the very opposite is true. It is because they are so important that they need to be dealt with in full and proper detail, but also by writers who have a special interest in the material which would need to be dealt with.

The private international law of the family of personal status and family property requires knowledge, for example, of the organisation of the various communities which make up the Union of Myanmar. One can see from legislation in Volume XI, Part XXII, of the Myanmar Code that statutory framework of personal laws in Myanmar is organised, in part at least, to reflect religious and cultural values by which various communities in Myanmar identify themselves. This makes it difficult to explain 'the law of Myanmar' on, for example, capacity to enter into marriage; it is no easier to explain the law on inheritance. There is also an excellent book on these issues already in print;[239] and for all these reasons we have taken the view that these topics will not be addressed in any detail in this book. Points (82) to (85) give only an abbreviated account of the principles of private international law as generally understood in the common law, and as they may be understood in Myanmar.

Private international law is increasingly made, or harmonised across states, by international convention. Myanmar has acceded to very few of these, but in order to complete the picture of private international law in the 21st century, it is necessary to say something of these, which we do under Point (86). One international agreement to which Myanmar has acceded concerns international commercial arbitration. We have made occasional reference to that, but we say a final word under Point (87).

Also too specialist for the space available for it is the relationship between public international law and private international law. But an outline needs to be given to explain the relationship, as well as the lack of relationship, between these two forms of international law. We consider this under Point (88).

We finally consider the issue of possible reform of and to Myanmar's rules on private international law under Point (89); and under Point (90) give our assessment of the current state of private international law in Myanmar.

(82) Family law and the law of adult status

[239] Maung Maung, *Law and Custom in Burma and the Burmese Family* (Springer, Dordrecht, 1963).

The statutes in the Myanmar Code make it plain that the personal status of adults (and children) in the domestic law of Myanmar is substantially affected by their religious identification. That does not necessarily make it difficult to explain the private international law of adults, for these detailed provisions of Myanmar domestic law only arise if the rules of private international law direct the court to apply the (rather complicated) domestic law of Myanmar. Certainly, if the rules of private international law applied by the Myanmar court direct it to apply Myanmar law, these will be among the detailed rules of Myanmar domestic law which may apply. What it less certain however, is whether any (and if so, which) of these rules of domestic Myanmar law apply as mandatory rules, or as overriding rules, or by reason of the public policy of Myanmar, in cases in which the issue before the court for decision is not otherwise governed by the domestic law of Myanmar. Given the absence of case-law, and of scholarly writing, on this precise point, it seemed most appropriate to admit that there is a large question, which we did not feel able to answer, and to confine ourselves to a brief summary of the general common law approach to adult status. It is not known whether a court in Myanmar would follow these principles, for there is no reported case-law, and no other material from which a conclusion may be taken.

(a) Domicile

The common law uses the concept of the 'domicile' for a significant part of the law of status. Every individual has a domicile, from birth, through life, to death. At a very general level domicile connotes a person's permanent home, but the detailed rules which determine domicile often yield an answer which is distant from the reality of the individual's life. For the purpose of Myanmar law, a definition of domicile for the purpose of the law of succession - and, one supposes, for any other purpose for which the private international law of Myanmar may contain a rule formulated in terms of domicile - is given in Part II of the Succession Act 1930. The starting point is that for the purpose of succession, Section 6 provides that a person can have only domicile at any given time.

According to Sections 7 and 8, the *domicile of origin* is the domicile of one's father (or of the child's mother, if the child is born out of wedlock or after the father's death) at the date of one's birth. According to Section 9, this domicile prevails until a new one has been acquired. According to Section 10, a *new domicile* is acquired by taking up a fixed habitation in a country which is not that of the domicile of origin; and according to Section 13, this domicile continues until the former domicile has been resumed or another has been acquired. Section 14 provides that the domicile of a minor follows that of the parent from which he acquired his domicile of origin. Section 15 provides that a married woman acquires the domicile of her husband if she did not herself have that domicile before marriage, and Section 16 provides that her domicile then follows that of her husband.

(b) Creation of marriage

The rules of private international law usually draw a distinction between the formal requirements of a valid marriage, and the capacity of spouses to enter into it. Formal validity is concerned with the nature of the ceremony, the presence of particular celebrants or witnesses, and so on: it is almost always linked to the law of the place of celebration, and the *lex loci celebrationis* will determine the formal validity of the marriage. By contrast, the capacity of a person to marry, and to marry the other spouse, is linked to

his or her domiciliary law. This law will apply its rules on the age or marital capacity, on the closeness of the relationship which is a bar to marriage, on the ability to enter into a polygamous marriage, and to the question of consent.[240] If each spouse has capacity under his or her domiciliary law to marry the other, the requirements of capacity will be satisfied. But if one party lacks capacity in this sense, the marriage will be invalid unless some exceptional rule – of which there are some, but which vary from system to system – will validate it.[241]

(c) Termination and annulment of marriage

Most states which provide for divorces to be obtained by judicial decree apply their own domestic law to the grounds on which a divorce may be obtained or ordered. They will usually recognise divorces obtained from courts overseas if the court was one with which the marriage, or perhaps one of the parties, had a sufficient connection, but what counts as a sufficient connection varies from country to country. Divorces obtained by processes[242] which do not involve a judicial authority give rise to rather more difficulty, and there is no consistency of treatment. In the end, though, if a marriage is terminated by a court at the place which represents the domicile of the parties, the termination will probably be recognised as an effective divorce; in other cases the answer will be less certain. Annulment of marriage, on grounds that it was defective from the start, is based on the laws which regulate form and capacity in the first place.

(d) Public policy

There is a significant role for public policy to affect the recognition of marriages and divorces. In some systems of law, a person may marry at a very young age, or may marry a close relative, or may be forced to marry without consent; and in such cases, a law may consider that its own public policy would be offended by regarding the marriage as valid (or, perhaps, as invalid). In the case of divorce, it is possible that a court would refuse, also on grounds of public policy, to recognise a divorce or dissolution obtained or ordered on grounds which discriminate in a way which is fundamentally opposed to human rights and equality in the court called upon to recognise it.

(83) Family law and the law of children

The personal laws of adults also play a large part in the laws of parental responsibility for and legal power over children. Once again the domestic law of Myanmar in relation to children and their position in a family (and in relation to inheritance) is complex, and is well outside the scope of this book. Once again, the complexity is caused in part by the question whether the provisions of Myanmar domestic law on these issues are applicable in a Myanmar court only when the rules of Myanmar private international law direct the court to apply Myanmar law. For it is possible that some of these provisions are of mandatory or overriding effect, or apply as a matter of Myanmar public policy. Once

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240 And it will also determine the capacity of a person to marry another of the same sex.

241 The Majority Act 1875 establishes 18 as the age of majority in Myanmar law, but Section 2 of the Act provides that it does not extend to capacity in relation to marriage, dower, divorce or adoption. But the Child Marriage Restraint Act 1930 appears to impose an age of 18 for males and 14 for females as the ages below which a marriage is a 'child marriage', which is void and punishable.

242 Including religious and purely administrative processes.

again, we confined our account to a brief mention of the rules of private international law as they are understood in common law jurisdictions generally.

In most common law systems, the law allows the courts to make orders in respect of children within their jurisdiction which are in the best interests of the child. The Guardians and Wards Act 1890 is a good example of this. The rules of private international law by which courts take account of, or give effect to, such orders made by foreign courts are very muddled: some writers even question whether there actually is any private international law in this area, the matter being treated instead as entirely a matter of domestic law. Perhaps for this reason, there has been significant international agreement in the form of conventions, for it is sometimes very hard for a court in one country to allow the critical decision concerning the welfare of a child to be taken by a court in another jurisdiction. Moreover, the problem of child abduction – of children being removed from one country to another as part of a dispute between their parents – is so depressing and common that many states have entered into international conventions to try and deal with the legal issues which arise from it.

So far as concerns[243] any question of the 'legitimacy' of a child, the common law rules of private international law are concerned, the legitimacy of a child is determined simply by asking whether he was born to parents to were lawfully married: there is no conflicts rule as such, just a consequence drawn from the private international law of marriage.

Adoption in private international law is complicated, because different systems of national law have their individual views of the purpose adoption should serve, the methods by which it is effected, the requirements which are to be satisfied, especially on the part of the adopter, and the effects of adoption, in particular in relation to succession. The law reports in Myanmar – at least those available in the English language – suggest that there is much litigation of the domestic law of children and adoption of formal and informal kinds; its complication places it far beyond the scope of this book. So far as private international law is concerned, the law will not usually provide for the adoption of a child who is not within its jurisdiction, and will not usually recognise a foreign adoption unless the parents were domiciled, and the child resident, in the country of the adoption. But the practice of adoption of foreign children is now so common that it tends to be regulated by statute. The rules of the common law are, therefore, hard to discern.

(84) Family law and the law of property: dealings *inter vivos*

Different legal systems have rules of their own about the ownership of property. The particular issue mentioned here is the approach of private international law to the question whether marriage has any effect on the property rights of spouses prior to the marriage. In some systems spouses who owned property before they married continue to own that property during marriage, as the fact of marriage has no effect on the property of spouses: English law takes this approach. In other systems, the effect of marriage is to impose a regime of shared ownership, or 'community', on their assets. In order to decide whether this has happened, the rules of private international law generally allow the parties to choose whether to adopt one or the other of these forms of post-matrimonial property ownership, but if they do not make any such choice, the law under which they

[243] In many common law jurisdictions, the status of 'legitimate' or 'illegitimate' child has been completely removed from the law, as serving no useful or proper purpose.

marry – which may well be the law of the husband's domicile – will determine whether the marriage has any effect on their property rights, and if so, what effect.

The Married Women's Property Act 1874, which is in this respect re-enacted in Succession Act 1930, Section 20, enacts the English rule, that no person acquires, simply by marriage, any interest in the property of his or her spouse; and that no person becomes incapable of holding property in a way which was possible for them prior to marriage: in short, it enacts the principle of separation of property rights. But Section 2 exempts the Act from any marriage in which either the husband or the wife, at the date of marriage 'professed the Hindu, Muhammadan, Buddhist, Sikh or Jaina religions', and the exclusion is replicated by Succession Act 1930, Section 20(2)(b).. The 1874 Act must therefore have been, and must now be, of very limited personal scope.

If the personal law denies a spouse the capacity to own property, or to own property in her own name, or if the law under which they marry provides that all the woman's property passes into the ownership of the husband, the rules of private international law may respect this. But the possibility that the outcome will be considered to offend the public policy of the court called upon to recognise this effect on the ownership of property is a real one. The rules of private international law are designed to respect legal and social traditions which are very different from those of the state in which the question of recognition has arisen, but every legal system is free to refuse to draw the consequences which would otherwise follow where it would otherwise have to give effect to an outcome which it regards as simply intolerable.

(85) The law of succession to property

As with the rest of property law as it relates in particular to family relations, the law on succession varies very widely from one country to another. A very detailed statement of Myanmar domestic law is contained in the Succession Act 1930, but substantial parts of the Act do not apply 'if the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina'.[244]

So far as the rules of private international law are concerned – so far as concerns the question of which system's rules on succession to the property of a deceased will apply – the common law, and the Succession Act 1930, draw a distinction based on whether or not the deceased left a will. In the case of a deceased person who died without making a valid will, the succession to his estate is governed by the law of his domicile at the date of death,[245] except in the case of immoveable property which devolves in accordance with the law of the *situs* of the land.[246] In the case of a person who died having left a will, the terms of the will govern the inheritance if the will is valid according to the law of the domicile of the person at either the date of making the will or at death. This law will also resolve any question of capacity to make a will. But where the effectiveness of a bequest of immoveable property is concerned, it will not be possible to regard as valid a bequest regarded by the *lex situs* as invalid or ineffective.

If the will of a deceased is proved and deposited in a country outside Myanmar, the representatives appointed under that law do not have any standing to act in Myanmar

[244] For example, Succession Act 1930, Section 4.
[245] Succession Act 1930, Section 5(2).
[246] For succession to land in Myanmar, Section 5(1) Succession Act 1930 applies Myanmar law if the deceased was domiciled in Myanmar at the date of his death.

unless and until letters of administration, with the will attached, are granted by the Myanmar court to the foreign representative.

(86) International conventions on particular subjects

One of the general ambitions of private international law is to evolve a set of rules which produces a result which fits harmoniously with the answers which would be given by other laws which might be concerned to answer the particular question. It is often said that the goal of the common law rules is to ensure that the same substantive answer is arrived at regardless of which court actually tries the suit and determines the issue. It would be unsatisfactory if differences in rules in private international law were to mean, for example, that if A sued B in State 1, A would win, but if B sued A in State 2, B would win: these things do happen, but it is not desirable as an outcome. It would be much worse if the courts of State 1 were to regard H and W as lawfully married, but the courts of State 2 were to regard the marriage as having been terminated by divorce: it will make the position of A and B as individuals[247] much more difficult than it would be if the laws of State 1 and State 2 agreed on whether they were married.

And in international trade and commerce, uniform rules of private international law are widely considered essential to build the confidence of those who participate in the market. To put it a little simply, those who take part in the international sale or carriage of goods, and those who provide and take the benefit of financial guarantees give to assist such trade, will be much more willing to take part in international trade if they know that, no matter which court they come before, the answer will be the same. This reduces the risk, and therefore reduces the cost, of commerce; and it appears to be a thoroughly good thing.

But it cannot be achieved by individual countries adapting their own rules of private international law. States and legal systems have their own views about the rights and duties of parties in these relationships, and their views do not necessarily coincide. And not only that. It may be that the rules of private international law need to draw a distinction between, say contracts for the carriage of goods by sea, contracts for the carriage of goods by road, contracts of insurance, contracts of reinsurance, contracts of employment, contracts for the sale of goods, contracts made by consumers, and so on. That suggests that we may not need clear and uniform rules of private international law for contracts as a group, but need instead clear and distinct rules of private international law for different kinds of contract. The idea that Myanmar – or, indeed, any country – can invent rules of private international law for each of these sub-categories, and that the rules developed for these sub-categories will be consistent with the views taken in other countries, is absurd. It can never happen.

The only way to bring harmony across states is by international agreement: by multilateral convention or treaty. If a number of countries agree to a framework for rules of private international law, and adopt that framework and legislate it into their law, a uniform rule will have been imposed. There are many – maybe as many as 100 – of these conventions. Few of them have been widely adopted, but some have obtained a very large number of adherents. Where the states party to the conventions adopt them, and enact legislation to give effect to them, a small step towards the harmonisation of private

[247] And any other person, who may wish to marry either of them.

international law will have been taken, and a small step towards making the law more predictable and rational will have been taken as well.

Progress is not always quick, but in a number of areas – arbitration[248] and cross-border insolvency[249] being two such areas – the international agreements prepared by the United Nations have secured very broad acceptance, not least because they are not considered to have been drafted one-sidedly, or in favour of certain interests and to the disadvantage of other interests. These may take the form of Conventions to which states choose to adhere, or the form of Model Laws which provide an agreed template for a state which is considering the reform of its law, including its rules of private international law.

For a developing country, the attraction of these international instruments is that they appear to have been tested and found to be agreeable; their adoption, more or less precisely, is an easy way to bring up to date national laws which have become rather ancient.

(87) The law of commercial arbitration

As was said in Chapter 1, we do not examine the law of commercial arbitration in any detail in this book. There are several reasons, but the principal one is that we are concerned to explain the rules of private international law – the rules of jurisdiction, of choice of law, and of foreign judgments – as these apply to proceedings in a court in Myanmar. Arbitration is different.

The Arbitration Act 1944 has its focus on the arbitration of domestic disputes. It therefore says nothing to indicate whether, in an international case, a tribunal to which the Act applies is required to apply the rules of private international law which would apply in proceedings before a court in Myanmar. It does not say whether they are required to apply Myanmar domestic law, or the law of another country, or to apply principles different and distinct from the law of a country, or none of the above. Section 37 of the Arbitration Act 1944 provides that the Limitation Act applies to arbitration as it applies to proceedings in court, but there is no equivalent provision to explain what approach the arbitrators must or may take to any issue of private international law which arises in the course of the arbitration: the issue is just not addressed. The point is made if one compares the silence of the Arbitration Act 1944 with the provision in the UNCITRAL Model Law, which says:

> **(UNCITRAL Model Law) Article 28: Rules applicable to substance of dispute**. **(1)** The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules. **(2)** Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. **(3)** The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

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248 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958); and the UNCITRAL Model Law on International Commercial Arbitration (1985; amended 2006).

249 UNCITRAL Model Law on Cross-Border Insolvency (1997).

For states which have adopted the Model Law into their legal systems, as Myanmar will soon do, it will have been made plain that the arbitral tribunal is not bound, unless the parties so choose, to follow and apply the rules of private international law which would be applied by a court hearing a suit in respect of the same matter as that which has been referred to arbitration. But because the Arbitration Act 1944 contains no instruction on this point, it is not at all clear what a tribunal would be required, or permitted, to do.

At the time of writing, a proposed Arbitration Law was under consideration by the Myanmar legislators and those who advise them. This will deal with the establishment of an arbitral tribunal, its supervision and control (and defence from being undermined), the enforcement of its awards, the enforcement of foreign awards, and (for example) the power or duty of a court to refer a dispute to arbitration if that is what the parties had agreed that they would do. It is therefore sensible to say rather little about the current law on arbitration. In any event, international arbitration is widely understood to deserve a course in its own right, dedicated to it. Those who are interested in it will need to pursue that interest elsewhere.

(88) The relationship of private international law to public international law

The relationship between private and public international law is not close. They are not to be understood as two forms of international law. The subject matter examined in this book is private law, but in a context in which there is some non-Myanmar element. Public international law, by contrast, is the law which governs relations between states. We therefore repeat what we said in Chapter 1:[250]

'Some readers may assume that 'international' in the expression 'private international law' refers to what is usually described as 'public international law', or the law or laws which regulate relations between states, the laws of war and of peace, the international laws of the sea and of the environment, the laws which deal with the sovereigns, governments, and diplomats.[251] They would be wrong. It is rarely necessary to deal with any issues of public international law when analysing issues of private international law, and vice versa, and the instances in which rules of public international law have an impact on a private law dispute can be dealt with where they arise.'

If, for example, a state were to confiscate property within its territorial jurisdiction in a manner which, according to some, was a violation of the rules of public international law, it is difficult to see how this could be relevant to a Myanmar court which, in applying the ordinary choice of law rules concerning title to property, would otherwise regard the change of title to the property effective. Of course, if the Union of Myanmar enters into bilateral treaty relations with other states, and the treaty provides its own mechanism for the arbitration of disputes, the treaty, and the mechanism for settling disputes, will be binding on the State as a matter of public international law. But matters such as this will not come before the ordinary courts.

In the immediate aftermath of the Japanese occupation of 1942-45 the courts accepted, cautiously, that some of the principles of public international law may be considered as part of the law of Myanmar, in the absence of express incorporation of these by statute,

[250] Chapter 1, point (2).
[251] *Ramaswamy Iyengar v Velayudhan Chettiar* BLR (1952) SC 25.

where the particular rule of public international law invoked was consistent with Myanmar law.[252] In the aftermath of Japanese occupation, and when called upon to assess the effect of certain acts of the Japanese military administration, it was necessary – in a way in which it had never been in England – to allow a court in Myanmar to adopt and apply some of the principles of public international law,[253] particularly those which dealt with the acts of an occupying power.

It is not clear that this cautious openness to rules of public international law survived. In 1960, the Supreme Court said that, in effect, public international law is not naturally a part of the law of Myanmar as applied by its courts.[254] Article 214 of the 1948 Constitution provided that an international treaty, such as one providing for the immunity of sovereigns and diplomats, did not become part of Myanmar law as applied by its courts until legislation was passed to amend the domestic law of Myanmar. This was consistent with the view in many common law jurisdictions that international treaties are not 'self-executing'; it meant that such treaties have to be incorporated into domestic legislation before they pass into and become part of the domestic law of Myanmar. However, Article 211 of the 1948 Constitution had also provided that 'the State accepts the generally recognised principle of international law as its rule of conduct in its relation with foreign States'. This might have been understood to reflect the view of the courts in the immediate aftermath of the war, which we have mentioned. But Article 211, according to the Court in 1960, had *no* effect on or in the domestic law of Myanmar as applied in the courts.

The case in question concerned the alleged immunity of a Soviet citizen, claimed by the Soviet Union to be diplomat,[255] and to have immunity from legal proceedings as a result. However, no legislation of the kind to which Article 214 referred had been made. And when the individual argued that such immunity was 'generally recognised' as part of international law, as many would have accepted that it was, the Court held that Article 211 of the Constitution did not assist the Soviet citizen in his argument. The Court understood the point which was being made entirely. It said that the argument advanced on behalf of the individual was an attractive proposition,

'but in our judgment, a rule of conduct that the Union Government should follow in its relation to foreign states is not necessarily the procedure that a Burmese court is to observe in the absence of specific enactment which would make such observance legal. We interpret [Article 211] to mean that it is a declaration of policy which provides guidance to Government in its international relations and makes it incumbent upon it to take such legislative measures as may be necessary to bring it into line with other States'.

Moreover, it is not clear whether the law as laid down in 1960 on the basis of the 1948 Constitution has changed,[256] or whether the Supreme Court would today agree with the

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[252] The particular provisions were the Hague Conventions on the laws of war of 1899 and 1907.
[253] See for example *The King v Maung Hmin* (1946) RLR 1; *Dr T Chan Taik v Ariff Moosajee Dooply* (1948) BLR 454.
[254] *Kovtunenko v U Law Yone* BLR (1960) SC 51 (a case on sovereign or diplomatic immunity).
[255] Working for the TASS news agency. One assumes that this means that he was a spy.
[256] Article 73(h) of the 1974 Constitution provided that the Council of State made decisions on the ratification of international treaties 'with the approval of the Pyithu Hluttaw. That suggests that Section 214 of the 1948 Constitution was carried across into the 1974 Constitution; Article 211 of the 1948 Convention is not reproduced, in any recognisable form, in the 1974 Constitution.

view of its predecessor expressed over fifty years ago. Article 108 of the Constitution of 2008 provides that:

> **108**. The Pyidaungsu Hluttaw: (a) shall give the resolution on matters relating to ratifying, annulling and revoking from international, regional or bilateral treaties, agreement submitted by the President…

That appears to mean that a treaty will not enter into the domestic law of Myanmar unless and until approved (in one form or another) by legislative act, and that in this respect, the substance of Article 214 of the 1948 Constitution has been re-adopted. As the 2008 Constitution does not contain any provision corresponding to Article 211 of the 1948 Constitution, there appears to be no real basis for arguing that public international law has any part, as such, to play in the law applied by a Myanmar court exercising jurisdiction in a private matter. For this reason, issues of public international law, properly so called, are not applicable to the issues covered in this book.

(89) Reform of private international law in Myanmar

As Myanmar re-enters the world of international commerce and much freer personal mobility, and as its courts take up the challenge of providing a reliable service to its citizens (and to those who engage with them) in accordance with the general principles of the rule of law, one of the priorities must be the promulgation of new laws which are fit for the purpose for which they are made. No doubt it would be possible to draw up a new statute on private international law. There are many templates which might be used. If the law as applied in a court in Myanmar remains uncertain, it will discourage people and companies from using the courts of Myanmar as a forum for the resolution of their disputes. We offer the opinion that, if this were to happen, it would be a matter of deep regret. Citizens of Myanmar, and those who enter into relations with them, should be able to use the courts of Myanmar to determine their rights. Judicial reform is obviously an urgent need, but so is the clarification of law, so that everyone knows the rules by which they are to abide, be governed, and be judged.

If this does not happen, there will be a tendency for commercial parties, in particular, to insist that the resolution of disputes takes place outside Myanmar, in countries in which the control of Myanmar matters is taken over by foreigners. Quite apart from everything else, these overseas countries see in Myanmar an opportunity to make great profit at the expense of Myanmar, its citizens, and its resources. No doubt the lawyers in these foreign centres offer a service which is neutral, and possibly one which is good, but it is absurdly expensive, and is designed for the sole benefit of the foreign country or those who pursue professional activity in it. The existence of these overseas arrangements for the resolution of legal disputes involving Myanmar persons and other entities is a sure sign that Myanmar needs to make improvements to its law and legal system. Once that happens, there will be no reason to spend money overseas to resolve disputes which belong in a Myanmar court or before a Myanmar arbitral tribunal.

The reform of private international law will be an important part of that process.

(90) The rules of private international law in Myanmar: a partial (re)statement

We have set out the principal rules of Myanmar law on issues of private international law as we understand them. Some of the answers come directly from written laws. Other

answers have been found by thinking about the gaps in the written laws, and analysing the solution which best fills the gaps. Myanmar is, still, a common law jurisdiction, as everyone knows and as the Union Attorney General has clearly explained. We have therefore drawn on our understanding of the principles of the common law to provide answers to questions which naturally arise when civil and commercial disputes contain international elements. The 'rules' which we set out in summary form in Chapter 10 do not precisely follow the pattern of the analysis in this book. This is because we have allowed the discussion in the text to lead to this summary of the law, and not the other way round: the 'rules' are the consequence of our analysis, but our analysis is not a commentary on these 'rules'.

We have not assumed the task of seeking to say what the private international law of Myanmar should be. But we have made an attempt to put into organised form a statement of Myanmar private international law based on the written laws, the reported judicial decisions to which we have had access, and the more general principles of the common law as we understand them, for all of this makes up the existing law of Myanmar on private international law. It is this that appears in Chapter 10 of this book.

We repeat: Chapter 10 is not a statement of what the law should be, but it represents our best effort to state what the current law actually is. We hope that this may help those who wish to gain an overall understanding of the shape and principles of private international law in Myanmar. But we also hope that if work is to be undertaken to improve the existing rules of private international law in Myanmar, this will prove to be a useful starting point.

CHAPTER 10

PRIVATE INTERNATIONAL LAW:

A PARTIAL (RE)STATEMENT OF MYANMAR LAW

General principles

1. The rules set out below represent the private international law of Myanmar law. They are derived from the written laws of Myanmar and from the general principles of the common law. Those which are derived from the written laws of Myanmar are binding on the court according to the letter of the written law. Those which are derived from the general principles of the common law provide the court with guidance, but are not binding on it.

The jurisdiction of a court in Myanmar

2 The international jurisdiction of the courts of Myanmar shall be determined in accordance with the following rules. These rules do not determine the particular court or courts within Myanmar which has or have jurisdiction over the defendant in relation to the suit.

3 The plaintiff, whether a Myanmar citizen or an alien, may call upon the court to exercise jurisdiction over the defendant in accordance with Rules 4 to 8.

4 In the case of suits concerned with immoveable property in Myanmar the court has jurisdiction if the suit is for the recovery or partition of the property, or for foreclosure, sale or redemption in the case of a mortgage on the property, or for compensation for a wrong to the property. This jurisdiction does not depend on the nationality, residence, presence, or submission of the defendant.

5. In the case of suits concerned with immoveable property outside Myanmar, the court does not have jurisdiction in the suit unless
(a) the suit is for relief respecting, or compensation for wrong to, that property, and
(b) the relief sought can be obtained entirely by the personal obedience of the defendant, and
(c) the defendant has submitted or will submit to the jurisdiction of the court, or resides, carries on business, or works for gain in Myanmar.

6. In cases not concerned with immoveable property, and without regard to whether the defendant is present in Myanmar, the court has jurisdiction over the defendant if
(a) the defendant has submitted or submits to the jurisdiction of the court, or
(b) the defendant actually and voluntarily resides, or carries on business, or works for gain in Myanmar, or
(c) the cause of action arose, in whole or in part, in Myanmar, or

(d) the suit is for compensation for a wrong to the person or to moveable property, and the wrong was done in Myanmar.

7. The plaintiff may apply for leave to commence proceedings against a defendant, who is not otherwise subject to the jurisdiction of the court if a co-defendant to the suit actually and voluntarily resides, or carries on business, or works for gain in Myanmar.

8. Apart from Rules 4 to 7, a court also has jurisdiction over a company or corporation:
(a) if it was formed under the laws of Myanmar, or
(b) if it was not formed under the laws of Myanmar but has a place of business in Myanmar.

Service of process on a defendant

9. A defendant who is in Myanmar
(a) may be served with the document which institutes the proceedings in accordance with Order 5 of the Civil Procedure Rules, or
(b) may accept service of process by consent.

10. A defendant who is not in Myanmar
(a) may be served with the document which institutes the proceedings in accordance with Order 5 rule 25 of the Civil Procedure Rules, which is to say, by registered post, with acknowledgment paid, to an address outside Myanmar, or
(b) may accept service of process by consent.

Applications to contest the jurisdiction of the court or its exercise

11. A defendant who has been served with the summons, whether within the territory of Myanmar or in a foreign country may, before he files his defence, apply to the court for an order that the proceedings be dismissed on the ground that the court does not have jurisdiction over him in relation to the claim; and upon the applicant satisfying the court of the grounds on which the application is based, the court shall set aside the summons and return the plaint, and grant such other relief as may be appropriate in the circumstances.

12. A defendant who has been served with the summons, whether within the territory of Myanmar or in a foreign country may, before he files his defence, apply to the court for an order
(a) pursuant to Section 34 of the Arbitration Act 1944, that the proceedings be stayed, on the ground that the parties had agreed that the matter be referred to arbitration, and/or
(b) that the court not proceed further and that the proceedings be stayed, on the ground that the parties agreed that the matter in dispute would be brought before the courts of another country and not before the courts of Myanmar, and/or
(c) that the court not proceed further and that the proceedings be stayed on the ground that the courts of another State are in all the circumstances of the case clearly more appropriate for the trial of the suit and that the interests of justice would be served by a stay of the proceedings,

and upon the applicant satisfying the court of the grounds on which the application is based, the court may grant the relief applied for if it considers that it is in the interests of justice to do so.

Restraint of person within jurisdiction from suing outside Myanmar

13. Where proceedings have been or may be brought before the courts of a foreign country contrary to an agreement between the parties, and the court considers that the agreement should be enforced by specific relief, or in any other case, where the court considers the case to be an exceptional one in which the interests of justice require the respondent to be ordered to be restrained, the court, having established jurisdiction over a natural person or a corporation, may order that person to discontinue or, as the case may be, refrain from instituting proceedings before the courts of a foreign country.

***Res judicata* and foreign judgments**

14. No foreign judgment has any effect in Myanmar unless that judgment is recognised as *res judicata* in accordance with Rules 15 to 21. A judgment which is recognised as *res judicata* may, on certain conditions, be enforced by suit in the courts of Myanmar.

15. A foreign judgment which satisfies the requirements of *res judicata* binds the party against whom it was given, and those who claim under or through him, to abide by and accept as conclusive the decision of the foreign court.

16. Subject to Rule 21, a judgment given against a plaintiff is binding on the plaintiff as *res judicata*.

17. (1) Subject to Rule 21, a judgment given against a defendant is binding on a defendant as *res judicata*
(a) if the defendant was present within the jurisdiction of the foreign court when proceedings were instituted, or
(b) if the defendant submitted to the jurisdiction of the foreign court prior to service of the summons, by contract or by the appointment of an agent with authority to accept service of the summons on his behalf, or
(c) if the defendant submitted to the jurisdiction of the foreign court after service of the summons, by voluntary appearance in response to the summons.

(2) But a defendant who appears before the foreign court for the purpose, and only for the purpose, of contending
(a) that the foreign court had no jurisdiction under its own law, or
(b) that the foreign court should exercise a power or discretion to refer the parties to arbitration, or
(c) that the foreign court should not exercise its jurisdiction on the ground that the proceedings should be brought before the courts of another country,

does not thereby submit to the jurisdiction of the foreign court.

18. Subject to Rule 21, a foreign judgment which determines title to property is *res judicata* if the property was within the territorial jurisdiction of the foreign court when the proceedings were commenced.

19. (1) A foreign judgment may be *res judicata* in Myanmar even though the foreign court was in error in considering that it had jurisdiction according to its own law, unless and until the foreign judgment is set aside by the foreign court.

(2) A foreign judgment will not be *res judicata* in Myanmar, even though the foreign court had jurisdiction according to its own rules of jurisdiction, if the judgment does not satisfy Rule 17 above.

(3) A foreign judgment may be *res judicata* in Myanmar even though the foreign court may have made an error of fact or of law or both in giving the judgment.

20. A foreign judgment may be *res judicata* in Myanmar even though it is subject to appeal to or revision by a higher court in the country in which it was given.

21. A foreign judgment is not *res judicata* in Myanmar, in any case in which
(a) the foreign court gave judgment, or allowed judgment to be entered, without any consideration by it of the merits of the case, or
(b) the judgment was obtained by the fraud of the party in whose favour it was given, or as a result of fraud by the court, or
(c) the judgment was given in breach of the rules of natural justice, or
(d) the foreign court refused to apply law of Myanmar when should be been applied by that court, or
(e) the claim was founded on breach of a rule of Myanmar law, or
(f) the judgment purported to determine title to, or the right to possession of, land in Myanmar, or
(g) the foreign judgment was given to enforce a penal liability or a liability to pay foreign taxes or charges of a like nature, or
(h) recognition of the judgment would be contrary to the public policy of Myanmar.

22. (1) A foreign judgment which is *res judicata* in Myanmar, and which orders a party to the proceedings to pay a sum of money which is fixed and has been determined, may to that extent be enforced in Myanmar by suit, and the court may order that the sum adjudged to be payable by the foreign court by paid.

(2) A foreign judgment which is *res judicata* in Myanmar but which does not order a party to the proceedings to pay a sum of money which is fixed and has been determined may be relied on in proceedings brought in Myanmar on the original cause of action.

Application of Myanmar law and foreign law in Myanmar court

23. 'Foreign law' means the rules of law which would be applied by a foreign court in a domestic case, and save where the contrary is expressly stated, shall not include the rules of private international law which would be applicable by a judge in a court in the country whose law is to be applied.

24. Judicial notice shall not be taken of any rule of foreign law. A rule of foreign law which a party asks the court to apply shall be proved by expert testimony unless the parties, with the consent of the court, agree that it may be proved by other means.

25. A court may apply a rule of foreign law if
(a) one or both of the parties to the suit ask the court to do so, and
(b) the rules of private international set out herein provide that the issue is one on which the court may apply foreign law, and
(c) the party who asks the court to apply foreign law satisfies the court as to the meaning and effect of that foreign law.

26. No rule of foreign law shall be applied
(a) to the determination of any issue which is considered by the court to be one of procedural rather than substantive law, or
(b) to determine the period of time from the accrual of the cause of action to the date on which proceedings are commenced; provided that a rule of foreign law which provides that the right of the plaintiff is extinguished after a certain period of time may be applied as part of the law which governs the substance of the issue before the court, or
(c) if, in the opinion of the court, the foreign law is penal in character, or a law which provides for the payment or collection of foreign taxes, duties, or charges of a like nature, or a law whose content is contrary to the public policy of Myanmar, or a law whose application would, in the circumstances of the case, be contrary to the public policy of Myanmar.

27. A rule of Myanmar law shall be applied, and a contradictory rule of foreign law shall not be applied, when on a proper construction, a judge is directed to apply a provision of the written law of Myanmar even though the rules of private international law would otherwise authorise the application by the court of a rule of foreign law.

Contracts and issues which are contractual in nature

28. Rules 29 to 38 apply to claims which are contractual, or which are in the nature of contracts.

29. The parties to a contract may choose the law of any country to govern their contract. They may express their choice of law, but if they do not express it, a court may be satisfied that the contract is governed by the law which the parties actually chose but which they did not express.

30. The parties to a contract may refrain from choosing the law by which their contract is to be governed. The court will identify the law with which the agreement has its closest and most real connection, and that the contract will be governed by that law.

31. The law which governs the contract shall apply, in particular, to
(a) the construction and interpretation of the terms of the contract,
(b) the validity of any of the terms of the contract,
(c) the implication of terms into a contract,

(d) the steps which are to be taken for the performance of the contract,
(e) the question whether the contract has been discharged by breach or by other cause, and the consequences of the discharge of the contract;
(f) the question whether a contract may be avoided or rescinded for fraud, misrepresentation, non-disclosure, duress, undue influence or any other vitiating factor,
(g) the legality of the making of the contract.

32. (1) If the issue is disputed, the law which governs the contract shall determine whether the parties formed a contract or failed to conclude an agreement *ab initio*.

(2) But if one of the parties is resident in a country according to the law of which he would not be held to have entered into a contract, the court may conclude that there is no binding contract if the court considers that it is in the circumstances reasonable to come to that conclusion.

33. (1) If the issue is disputed, the law which governs the contract shall determine whether the contract is valid in respect of form.

(2) But if that law would consider that the contract was invalid in point of form, it may be regarded as valid in point of form if it satisfies the formality requirements, if any, of the law of the place where it was made.

34. (1) If the issue is disputed and the contract is a mercantile one, the law which governs the contract shall determine whether a natural person had personal capacity to conclude it.

(2) But if the contract is not a mercantile one, and if a natural person lacked capacity to contract by his or her personal law, the court may, if it is reasonable to do so, hold that the party in question lacked capacity to contract.

(3) The capacity of a company or corporation to conclude a contract is governed by the law under which the company or corporation is formed.

35. (1) The question whether a natural person has legal authority to act, or to make contracts, on behalf of a company is determined by the law under which the company was formed.

(2) The legal effect of a contract made or purported to be made by a person who did not have authority to make the contract on behalf of the company shall be determined by the law which governs the contract.

36. (1) The law which governs the contract shall determine whether the performance of the contract is illegal, and if it is illegal, the consequences of that illegality.

(2) But though the law which governs the contract would consider the performance of the contract legal, if the law of the place at which performance of the contract is required would consider that performance to be illegal, the performance of the contract shall be regarded as illegal.

37. In any case in which the contract is governed by a foreign law, that law shall not apply, and the law of Myanmar shall apply, to
(a) the quantification of recoverable loss or damage which is recoverable or compensable according to the law which governs the contract,
(b) the determination of other remedies which a court may order or impose,
(c) the limitation of time since the accrual of the cause of action within which the proceedings must be instituted, provided that if the law which governs the contract provides that the right of the plaintiff is extinguished after a certain period of time, that rule of the governing law may be applied as part of the law which governs the substance of the issue before the court.

38. Rules 28 to 37 apply by analogy to identify the law which applies to those relationships which are equivalent to contract.

Torts and issues which are tortious in nature

39. Rules 40 to 47 apply to claims which are, or which are in the nature of, torts. That is to say, they apply to obligations which are not contractual, or equivalent to contractual in nature.

40. The place at which a tort is committed is identified by asking where in substance the cause of action arose. If the act or omission complained of, and the damage said to have resulted from it, are located in the same country, that country is the place at which the tort is committed. If the act or omission complained of, and the damage said to have resulted from it, are located in different countries, the tort is committed in the country which has the closer connection to the facts of the dispute.

41. (1) If a tort is committed in Myanmar, it is governed by the law of Myanmar to the exclusion of all other laws.

(2) But if the case is an exceptional one which has no substantial connection to Myanmar but has a very close connection to the law of another country, the law of that other country shall, subject to Rule 46, apply in place of the law of Myanmar.

42. If a tort is committed in a country outside Myanmar, the defendant will not be liable unless both
(a) the complaint would give rise to civil liability under the law of the country in which, in substance, the cause of action arose, and
(b) the complaint would give rise to civil liability under the law of Myanmar.

43. If the case of a tort committed outside Myanmar is an exceptional one
(a) if the tort has no real connection to Myanmar but has a very close connection to the law of the place where the tort occurred, the law of that foreign country, but not the law of Myanmar, shall be applied,
(b) if the case is an exceptional one which has no real connection to the place where the tort occurred, but had a very close connection to the law of a third country, the law of that third country, but not the law of the place where the tort was committed, shall be applied.

44. If the claimant and defendant are parties to a contract or to a prior relationship equivalent to a contract, and if the cause of action arises in connection with that contract or prior relationship, the claim in tort shall be governed by the law which governs the contract between them and not by the rules otherwise applicable to claims in tort.

45. The law which applies to a tort (or the laws which apply to a tort, as the case may be) shall apply, in particular, to determine
(a) the basis and extent of liability,
(b) the question whether a person may be liable for acts committed by another,
(c) the grounds for exemption from liability, any limitation of liability and any division of liability,
(d) the heads or types of loss or damage for which a party is liable (but not the quantification of the loss or damage liable to be awarded in respect of those heads of damage),
(e) the identification of the persons entitled to compensation for damage sustained personally.

46. Myanmar law shall always be applied, and foreign law shall not apply, to
(a) the quantification of recoverable loss or damage which is recoverable or compensable according to the law or laws which apply to the tort,
(b) the availability and grant of other remedies which a court may order,
(c) the limitation of time since the accrual of the cause of action within which the proceedings must be instituted, provided that if the law which governs the contract provides that the right of the plaintiff is extinguished after a certain period of time, that rule of the governing law may be applied as part of the law which governs the substance of the issue before the court.

47. Rules 39 to 46 apply to causes of action regarded as founded on tort as this expression is understood in the domestic law of Myanmar, and also to claims arising under foreign laws which create or impose obligations equivalent to liability in tort.

The Law of Property

48. For the purposes of these rules, property is divided into immoveable and moveable. Moveable property is divided into tangible and intangible property. Intangible moveable property is divided into debts and other intangibles.

49. (1) In the case of immoveable property in Myanmar the court has jurisdiction if the suit is for the recovery or partition of the property, or for foreclosure, sale or redemption in the case of a mortgage on the property, or for compensation for a wrong to the property.

(2) The court shall apply the law of Myanmar to all such claims.

(3) No foreign judgment shall be recognised as *res judicata* insofar as it purports to determine title to, or the right to recovery or partition of, or the foreclosure, sale or redemption in the case of a mortgage of immoveable property in Myanmar.

50. (1) In the case of immoveable property outside Myanmar, the court has jurisdiction in a claim for personal relief if, but only if
(a) the suit is for relief respecting, or compensation for wrong to, that property, and
(b) the relief sought can be obtained entirely by the personal obedience of the defendant, and
(c) the defendant has submitted or will submit to the jurisdiction of the court, or actually and voluntarily resides, or carries on business, or works for gain in Myanmar.

(2) In dealing with such a claim, the court shall apply
(a) to any question of title, and notwithstanding Rule 23, the law which would be applied by a court sitting at the *situs* of the land,
(b) to any question concerned with the existence or extent of an obligation, the law which governs the right or obligation in question determined in accordance with Rule, 28 to 47.
(c) to the issue of the relief which may be ordered, Myanmar law.

(3) A foreign judgment in respect of such a claim may be recognised as *res judicata* in Myanmar even though the suit related to immoveable property in Myanmar.

51. (1) The effect of a finding of, using of, dealing with, disposal of, or other transaction concerning tangible moveable property upon title to that moveable property shall in general, be determined by the law of the *situs* of the property at the time of the event said to have affected its title.

(2) A transfer of or other dealing with a tangible moveable which is effective by the law of the country where the moveable is at the time of the transfer is valid and effective in Myanmar.

(3) A transfer of or other dealing with a tangible moveable which is not effective by the law of the country where the moveable is at the time of transfer is not valid and effective in Myanmar; but if the moveable was in transit and its situs was not known, a transfer which is valid and effective by the proper law of the transfer will be effective in Myanmar.

52. The effect of a dealing with a negotiable instrument is governed by the law of the country in which the instrument was when it the dealing took place.

53. (1) The question whether an intangible moveable has been assigned by the person to whom it is owed (the assignor) to another (the assignee) is answered in part by the law under which the moveable was created, and in part the law which governs the assignment, as follows.

(2) The question whether the right to an obligation owed by another (the debtor) is capable of being assigned to another is answered by the law under or by reference to which the debt was created.

(3) The question whether a purported assignment to the assignee of the right to an obligation owed by the debtor to the assignor is valid is answered by the law which governs the agreement between the assignor and the assignee.

54. The priority of competing assignments of a debt is governed by the law under which the debt was created. The question whether a debtor is discharged by making payment to the assignor, or to any assignee, is answered by the law under which the debt was created.

55. However,
(a) the validity and effect of all dealings with registered shares in a company is governed by the law under which the company was created,
(b) all questions concerning the validity of a patent, a copyright, a registered design, or a trade mark are answered by the law under which the right was created or is protected.

56. The effect upon its title of seizure or confiscation of property by judicial authority is determined by the law of *situs* of the property seized or confiscated at the date of the act in question.

57. The effect upon its title of seizure or confiscation of property by the government of a foreign state is, subject in particular to Rule 26, determined by the law of *situs* of the property seized or confiscated at the seizure or confiscation in question.

Companies and winding up

58. A company formed under the laws of a foreign state and having legal personality under the law of that state shall be recognised in Myanmar as an overseas company.

59. An overseas company which enjoys legal personality under the law under which it was created may sue in Myanmar. An overseas company may be sued in Myanmar if the court has jurisdiction over it in respect of the suit.

60. A company which is dissolved in accordance with law of country under which it was created shall be treated as dissolved and without legal personality in Myanmar, save that it may be wound up in Myanmar if it is necessary or convenient to do so.

61. A court may wind up a company
(a) formed under the laws of Myanmar,
(b) formed under the laws of a foreign country which has or had a place of business in Myanmar.

62. (1) The winding up of a company under the law under which it was created shall be recognised as effective.

(2) A liquidator appointed by a court in the state under the law of which the company was created will be recognised as having authority to represent the company in Myanmar.

Personal Insolvency

63. An insolvency petition in respect of a natural person may be presented if the debtor ordinarily resides, or carries on business, or works for gain, in Myanmar, or if he has been arrested or imprisoned, if he is in custody in Myanmar.

64. (1) A foreign adjudication will be recognised if made by a court with which the debtor has a proper and sufficient connection.

(2) If under the foreign adjudication the moveable property of the debtor passes to his representative, moveable property, but no immoveable property, in Myanmar shall vest in the representative.

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