

ADVANCED PRIVATE LAW



Private Law

It is concerned with the regulation of the relationship between individuals, between corporations, and between individuals and corporations.

- Contractual: Exchange of promises backed by consideration.
- Torts: Harm
- Corporate
- Real estate
- Family
- Labor
- Commercial
- Trusts and estates
- Property
- Intellectual property
- Banking and Securities Law
- Private International

Principles:

- Equality of parties:
 - Legal subjects are free to enter into legal relations of their choice.
 - Legal subjects have the power to mutually influence the content of their legal relations: rights and obligations.
- Good faith and fair dealing.

- Freedom of contract.
- Party autonomy.

PRIVATE VS. PUBLIC LAW



Public law is concerned with matters that affect society as a whole, such as the structure of government, the duties and powers of officials, and the relationship between the individual and the state.

Public law is focused on public, state interests. Examples include:

- Constitutional Law
- Criminal Law
- Administrative Law
- Immigration and Refugee Law
- Tax law.
- Public International law

Role of the state in Private Law:

- Regulator:
 - Compulsory norms, i.e., the general legal framework under which private individuals may act (direct regulator).
 - Non-compulsory norms, i.e., those that apply unless the parties set them aside (indirect regulator).
- Enforcer of regulations (courts)

Influence of Public Law in traditional private law matters

- Family law
- Children

Roles of individuals

- Regulators (when permitted by the state)
- Enforcer of regulations (when permitted by the state)

Differences between Private Law and Public Law

	Private Law	Public Law
Goal	Social order	
Object	To regulate conduct, rights, obligations of individuals to each other.	To regulate matters that affect society as a whole.
Initiating party	The individual or company	The state
Substantive rules	Specific	Specific
Procedural rules	Specific	Specific
Sanctions	Compensation	Punishment
Sources	Case-law, parties' regulation, and legislation.	Legislation (mostly)
Canadian Legal tradition	Common law in English provinces and Civil Law in Quebec	Common law across Canada
Charter protections, e.g., defendant's testimony or defendant's right to counsel	NOT APPLICABLE may be compelled No defendant's right to	APPLY, e.g., may not be compelled (privilege against self-incrimination) YES defendant's right to counsel

	counsel	
Primary lawmaker	Court	Legislature
Role of precedent	For substance	Only for interpreting statutes
Availability, prior notice, promulgation of law	unwritten except as cases after the fact	always written; clarity and prior notice important
Retroactivity of law	May be <i>ex post facto</i>	No <i>ex post facto</i> ; usually no "common law crimes"
Interpretation always in favour of one party.	N/A	Interpretation that most favours the accused.
Vague and overbroad laws.	Permitted	Laws that are excessively vague or overbroad are not considered constitutional.
Blank laws	Permitted	Not permitted.
Oakes test	N/A	Applies.

Similarities between Private Law and Public Law

<ul style="list-style-type: none"> • may apply to the very same act (both kinds of legal action may proceed simultaneously)
<ul style="list-style-type: none"> • may use the same legal concepts (battery is both a crime and tort; punitive damages resemble criminal fines; contempt of court can be criminal or civil).
<ul style="list-style-type: none"> • must be consistent with the Constitution.
<ul style="list-style-type: none"> • are applied and interpreted by courts
<ul style="list-style-type: none"> • have procedural and substantive dimensions

Terminology

- Branches vs. subdivisions
- Civil law: private law and civil law tradition

Legal traditions

Civil Law

Quebec has been allowed to retain Private Law only.

Public Law applies in all Canada

In Civil Law, in public law relations, the state is above the individual, whereas in common law the state and the individual are on an equal footing.

Civil Code regulates most aspects of private law in Quebec.

In common law, private law is generally the result of the work of courts through case law, but there is increasingly considerable legislation.

States have long tried to unify their private law, particularly in Europe and to a lesser extent in the USA. Canada is behind these efforts, particularly because Quebec sees this as a new invasion over their Law; and English Canada does not want to change its norms and adapt or adopt those from Quebec.

At the international level, there are many examples of unification or harmonization, such as the UN Convention for the Sale of Goods.

- Unification:
 - unification contemplates the substitution of two or more legal systems with one single system.
 - Unification focuses upon substituting or combining two or more legal systems and replacing them with a single system.
- Harmonization:
 - Cooperation between governments to make laws more uniform and coherent.
 - Harmonization is usually not comprehensive but is relatively partial. That is, harmonization of law doesn't seek to create a sole authority of law on a particular

subject. This is because measures to harmonize law cannot go further than that which is necessary.

- Harmonization seeks to co-ordinate different legal systems by “eliminating major differences and creating minimum requirements or standards”. Harmonization can be seen as a step towards unification and, in a way, harmonization aims or strives towards unification.
- Convergence:
 - When two legal systems or some of their aspects or branches tend to be similar of the same without any specific and intentional governmental action.

TORTS



A tort is a civil wrong or wrongful act which results in loss or harm (for example, an injury) to another, and can be classified as either unintentional (negligent) or intentional. Tort law is a branch of private law that is concerned with civil wrongs and provides compensation to those who have been harmed by the wrongdoing of others. Compensation most commonly takes the form of monetary rewards for damages.

The elements of Canadian Tort Law

- 1) Defendant’s conduct
- 2) The nature of the defendant’s conduct
 - a. Intention: the defendant desires its consequences (a centuries old tort)
 - i. Narrow in scope.

- b. Negligence: defendant creates a reasonably foreseeable and substantial risk of its consequences (a modern tort, a product of the 20th century).
 - i. Broad in scope.
 - c. Accident (strict liability): when the defendant neither desires its consequences nor creates a reasonably foreseeable and substantial risk of its consequences.
- 3) The nature of the plaintiff's loss: not all losses may be compensated.
- 4) The lack of full defense or the existence of a partial defence.

THE NEGLIGENT TORTS



Negligence Lawsuits

Incidents can happen. A common incident becomes an action for negligence when there is a duty of care, the related standard of care is breached, and causation is established. Negligence is context specific, and most cases will depend on their individual circumstances. Negligence lawsuits are governed by a four-step legal test, including:

- **Duty of care:** Does the defendant owe the plaintiff a duty to take reasonable care to avoid causing an unreasonable risk of harm?
- **Breached standard of care:** Did the defendant breach their standard of care? The plaintiff must prove that the defendant did not live up to the standard of care of a reasonable person in preventing the harm the plaintiff suffered.
- **Causality:** Did the defendant's actions contribute towards the plaintiff's injury, both factually and legally?
- **Loss:** Did the plaintiff suffer compensable harm and to what severity?

The core elements:

- The negligent act
 - Defendant creates a reasonably foreseeable and substantial risk of its consequences.
 - The negligent act is determined by identifying the appropriate standard of care and applying it to the facts of the case. The standard of care is that of a reasonable –careful- person. It is an objective standard focused on the defendant's conduct with reference to that of a reasonable person.
 - The central element in applying the standard of reasonable care is the concept of a reasonably foreseeable risk.
 - Other issues that a reasonable person must take into account: likelihood of damage (reasonable person takes greater care where there is a strong likelihood of

damage and takes lesser care when the chance of damage is minimal), the seriousness of the threatened harm, the cost of preventive measures, the utility of the defendant's conduct, emergency situations, custom and approved practices, etc.

- Special standards of care: mental disability
 - Children (mixed objective/subjective test of liability, that of a child of a similar age, intelligence, and experience), except when children are carrying out activities normally undertaken by adults.
 - No fixed age below which a finding of negligence cannot be made, but children under 5 have little capacity to appreciate danger.
 - Parents are not vicariously liable, but they are under a personal duty to take reasonable care to supervise and control their minor children and they may be liable for loss caused by a failure to discharge that obligation.

- Causation: a link between the defendant's negligent act and the plaintiff's damage.
 - Cause-in-fact: the plaintiff must prove that the defendant's negligence caused her loss. Determined by the but-for-test.
 - Legal causation: Proximate cause . Was the connection between the act and an injury strong enough to justify imposing liability?

- Damage: no liability can arise in negligence unless the plaintiff suffers damages as a result of defendant's wrongful act, but not all losses may be compensated. Remote damages are NOT compensated.
 - Defendant is liable only for the REASONABLY FORESEEABLE CONSEQUENCES OF ITS NEGLIGENCE.
 - Special remoteness issues: The Thin-Skull rule: as long as some physical injury to the plaintiff was foreseeable, the defendant is liable for all the consequences of the injury arising from the plaintiff's unique physical or psychological make-up whether or not those consequences were foreseeable.

Defences:

- **Contributory negligence:** partial defence leading to a reduction in the quantity of damages.
- **Voluntary assumption of risk:** complete defence where the plaintiff consents to the defendant's negligence and its consequences.
- **Illegality:** it denies the claim.
- **Inevitable accident:** a complete defence.
- **Superseding Cause.** A superseding cause is an unforeseeable intervening event that breaks the connection between a wrongful act and an injury to another.

THE INTENTIONAL TORTS



Intentional torts tend to be static, and are characterized by orthodoxy, convention, and conservatism. The courts have been slow to discard historical technicalities, and there has been a reluctance to recognize new interests deserving protection from intentional interference.

As a rule, liability insurance does not cover intentional torts. So, victims of intentional wrongdoings are forced to place much more reliance on their own first-party insurance.

The intentional torts operate more as a conventional loss-shifting system emphasizing corrective justice and allocating responsibility between the individual litigants.

This enhances the punitive, deterrent, and educational functions of the intentional torts and encourages a greater emphasis on the accountability of individual defendants for culpable wrongdoing.

Intention:

- The defendant desires the consequences of her actions.
- If the consequences, while not desired, are substantially certain to result from the defendant's conduct, eg. bomb in an airplane.
- Transferred intent

A defendant may be incapacitated from forming the requisite intent by mental disability of infancy. This happens if she did not understand the nature and quality of her act. But she will be liable if she knew what she was doing but did not know it was wrong.

TYPES OF INTENTIONAL TORTS

A. Intentional interference with the person (protects the plaintiff from the intentional interference of a personal interest)

- Battery (bodily security)
 - A direct, intentional, and physical interference with the person of another that is either harmful or offensive to a reasonable person.
 - Intentional interference that is harmful: to punch, stab, shoot.
 - Deliberate physical interference that is neither harmful nor offensive is not battery, e.g., to tap on the shoulder to get attention. Borderline: unsolicited hug or uninvited social kiss.
 - Actual bodily contact is not essential to establish battery, e.g., to grab a person by her clothing or to grab something from the plaintiff's hand.
- Assault (threats of violence)
 - The threat of an immediate battery

- False imprisonment (liberty)
 - There must be a complete restriction of plaintiff's freedom (eg. blockage of bridge is not false imprisonment).
 - Imprisonment can also be psychological (e.g., a person may be intimidated or threatened to go somewhere).

- Intentional infliction of nervous shock (psychological security)
 - 1) There must be outrageous or extreme conduct coupled with an actual or constructive intent to cause a severe impact on the plaintiff's psychological well being.
 - 2) Plaintiff must prove nervous shock, i.e., a recognizable psychiatric illness or physical harm. So, eg, anguish, worry, and emotional distress are insufficient to support an action. In recent years, there has been some relaxation of this requirement, and cases of extreme emotional distress are supported.
 - 3) The plaintiff must not have a particular predisposition or susceptibility to shock. In recent years, there has also been some relaxation of this requirement.

- Invasion of privacy (privacy)
 - Not well defined in common law, 4 provinces (BC, MB, SK, and NF) adopted a statutory tort.
 - Statutory tort: To violate willfully and without claim of right, the privacy of another. The tort is actionable without proof of damage.
 - Examples: surveillance of others, listening to or recording private conversations, using another's name or likeness for commercial purposes, and making use of personal documents, such as diaries and letters.
 - A person is entitled to the degree of privacy that is reasonable in the circumstances.

Defences:

- Consent
- Self-defence
- Defence of a third party
- Defence of property
- Necessity
- Legal authority

B. Intentional interference with land**Trespass to land**

It provides a remedy for the direct, intentional (or negligent), and physical interference with land in the possession of the plaintiff. It is actionable without proof of damage.

Three ways to commit it:

- To enter personally onto land without permission
- To place objects on the plaintiff's property (effective possession doctrine for aircrafts)
- When the possessor revokes a visitor's permission or licence to be on the property (must leave within a reasonable time).

Defences:

- Consent
- Necessity
- Legal authority

C. Intentional interference with chattel

- Trespass to chattels:
 - The intentional damage to a chattel in the physical control of the plaintiff.
- Detinue
 - Defendant refuses to return the plaintiff's chattel
- Conversion
 - Defendant has taken plaintiff's chattel, eg. theft, shoplifting, etc.
- Protection of owner's reversionary interest
 - Permanent damage to the plaintiff's chattel which occurred in the possession of someone else, eg., unexpired bailment for a fixed term.

Defences

- Consent
- Public necessity.
 - You take someone else's gun to protect the public.
- Private necessity
 - Only to protect against death or serious bodily harm.
- Privileged invasion to reclaim personal property.
 - Your own personal property which the defendant took or has in his/her possession.

D. Intentional interference with economic interests

There are a number of business torts. They may be divided into (i) those that deal with deceptive market practices, such as deceit, injurious falsehoods, and misappropriation of personality, and (ii) a more amorphous group that deals with improper market practices, such as conspiracy,

intimidation, inducement to breach a contract, and intentional interference with economic interests by unlawful means.

STRICT LIABILITY



No need to prove that defendant was guilty of any wrongful (intentional or negligent) conduct. In the absence of defences, proof that the defendant caused the plaintiff's loss is sufficient to impose liability. Strict liability does not play a significant formal role in modern Canadian tort law. But, this has been matched by a rise in a de facto strict liability under the guise of strict standards of care within the tort negligence. This is particularly evident in the fields of motor-vehicle accidents, product accidents, and accidents arising from dangerous activities.

CONTRACTS

A contract is a legally enforceable agreement between two or more parties that creates an obligation to do or not do particular things.

At its most basic level, a contract is:

- An agreement
- That is legally enforceable

Laws that Govern Contracts

Provincial

Creation of a Contract

- An offer:
- An acceptance: must be unqualified (must match the offer, in all of its terms). Otherwise: counteroffer.
- Consideration: mutual benefit and detriment.

Means and moment of acceptance: The general rule is that an acceptance must be communicated to the offeror according to the terms of the offer or other reasonable terms

(The offeror cannot impose a contract on the offeree against his wishes by deeming that his silence should amount to an acceptance).

Moment: Where an instantaneous method of communication is used, e.g. email, it will take effect when and where it is received.

Exceptions

- In unilateral contracts the normal rule for communication of acceptance to the offeror does not apply. Carrying out the stipulated task is enough to constitute acceptance of the offer.
- The Mailbox Rule - Where acceptance by mail has been requested, or where it is an appropriate and reasonable means of communication between the parties, then acceptance is complete as soon as the letter of acceptance is mailed out, even if the letter is delayed, destroyed, or lost in the post so that it never reaches the offeror.

End of offer

- It ends by passage of time:
 - the term of the offer

- reasonable time has passed
- By Failing to Comply with a Condition Precedent.
- Because of the Death of Either Party.
- By revocation

Revocation of offer:

- A revocation is valid at any time until the offeree has made an effective acceptance.
- Unilateral offers may not be revoked if the offeree began performing.
- Mailbox rule: The revocation of the offer may not be done once the offeree has mailed out his/her acceptance.

Defences to contract formation

- **Duress:** when consent is induced by physical force, threats of force, or even wrongful acts.
- **Unconscionability:**
 - Procedural Unconscionability: fault or unfairness in the bargaining process.
 - Substantive Unconscionability: fault or unfairness in the bargaining outcome.
- **Undue Influence:**
 - The promisor must be vulnerable to the influence and the promisee must use excessive pressure (Hidden clauses; Fine print; Adhesion contract; intimidation; take it or leave it). Undue influence may also exist when the promisor dominates the promisee or is in a fiduciary or confidential relationship with him.
- **Misrepresentation of fact:** fraudulent (knowingly or recklessly made with the intent to deceive) or material (likely to induce reliance). In some cases, silence may be equivalent to misrepresentation, such as in case of fiduciary relationships.
- **Illegality:**
- **Incapacity:**
 - Voidable at the minor's option but are enforced against adults. Affirmation occurs upon majority by express or implied terms.

- **Statute of Frauds/Statute of limitations:** marriage, one-year, land, estates, goods over \$ 5000, surety (guarantor).

Interpretation of the contract

- **Plain and ordinary meaning.**
- A “**practical, common-sense approach** not dominated by technical rules of construction”. The ultimate goal is to determine the intent of the parties. To accomplish that goal, a contract must be read as a whole, in light of the surrounding circumstances known to the parties at the time the contract was formed (Creston Moly Corp. v. Sattva Capital Corp, SCC).
- **Intent of the parties** (against the contract’s objective contextual scheme; the analysis should not be framed in terms of the parties' subjective intention at the time they entered into the contract. In interpreting a contract, the court should consider the contract as a whole, the factual matrix underlying it, and the need to avoid commercial absurdity, among other factors (RBC Dominion Securities Inc. v. Crew Gold Corporation, 2017 ONCA).

Types of Contracts

- Bilateral contract: a mutual exchange of promises among the parties.
- Unilateral contract: the offer requests performance rather than a promise from the person accepting the offer. A unilateral contract is **formed when the requested act is complete.**

Breach

A party's failure to fulfill any term of the contract.

Only material breaches give rise to contractual remedies.

Remedies for a Breach of Contract

- **Damages:**

Compensatory damage: aim to put the non-breaching party in the position that they had been if the breach had not occurred.

Punitive damages: meant to punish a wrongful party for particularly wrongful acts, and are rarely awarded in the Canadian business contracts setting.

Nominal damages: when a breach occurred, but no actual money loss to the non-breaching party was proven.

Liquidated damages: damages identified by the parties in the contract itself. Liquidated damages should be a reasonable estimate of actual damages that might result from a breach.

- **Specific Performance.** If damages are inadequate as a legal remedy, the non-breaching party may seek an alternative remedy called *specific performance*. Specific performance is best described as the breaching party's court-ordered performance of duty under the contract.
- **Cancellation and Restitution.** A non-breaching party may *cancel* the contract and sue for *restitution* if the non-breaching party has given a benefit to the breaching party. "Restitution" as a contract remedy means that the non-breaching party is put back in the position it was in prior to the breach, while "cancellation" of the contract voids the contract and relieves all parties of any obligation under the agreement.

Expectation

A court, enforcing a contract, attempts to put the non-breaching party where he or she would have been had the contract been performed (benefit of the bargain).

- Expectation: Lost benefits to plaintiff.
- Reliance: Cost to plaintiff.

- Restitution: Benefit to defendant.

The court calculates damages by taking the value of the contract (actual damages) and subtracting costs avoided, but adding the consequential damages and incidental damages.

- Actual damages: Profits lost, or the additional cost to replace the subject of the contract.
- Costs avoided: Any cost the breach allowed the non-breaching party to avoid.
- Consequential damages: Damages that are not part of the contract, but occur because of the breach.
- Incidental damages: Costs that the non-breaching party incurs while trying to mitigate damages or secure the value of the contract. Often this includes transaction costs (costs of completing the transaction).

Example of an expectation calculation

Elizabeth agrees to rent a car from Carlye for two days at \$30/day plus \$10 insurance so that Elizabeth can visit clients at \$100/hour. But Carlye cannot deliver a car, so Carlye has breached the contract. After an hour, making one phone call from a pay phone to other rental agencies, Elizabeth rents a car from Emily for \$45/day, but Emily does not require Elizabeth to buy insurance.

- Actual damages = The additional cost to rent the car (\$30 for two days)
- Costs avoided = The insurance premium that Emily did not charge (\$10)
- Consequential damages = The fees Elizabeth could not collect while waiting an hour for another car (\$100)
- Incidental damages = The cost of the phone call (\$0.50)
- $\$30 - \$10 + \$100 + \$0.50 = \$120.50$

TORTS VS. CONTRACTS

Differences

	Torts	Contracts
Duties	Determined by the law	Determined by the parties.
Goal	Compensation of harm to victim	Enforcement of exchanged promises and to deter contractual breaches
Subject of duty	Duties in tort are commonly owed to persons generally	Duties in contract are owed towards a specific person or persons.
Damages	Unliquidated. Damages are determined by the court Concerned with restoring the status quo of the victim.	Liquidated Fixed: are determined by the contract Concerned with the loss of expectation.
Measure of loss recoverable		The usual method of enforcement of contractual obligations is by compensation for the losses caused by their breach. Contract distinguishes between expectation interest and reliance interest. The former is the measure of what it might take to restore the

		<p>claimant to the position that he would have enjoyed had the contract been performed.</p> <p>Reliance damages seeks to place the claimant in the position that he would have occupied if the contract had never been entered into and as such does not include compensation for the loss of any anticipated gain. Therefore, damages on the reliance basis represent the same test as applies in tort.</p> <p>Damages on the expectation basis are fundamentally different.</p>
Assignment	Not permitted	Permitted
Capacity of the parties	a minor is liable for their torts	A minor has only limited capacity in relation to contract
Limitation of damages	Legal certainty	Reasonably foreseeable damages.
Limitation of actions although both contract and tort claims basically have the same limitation period	Tort since the damage occurs	Since the breach of contract occurs

Consideration	Not applicable	Required
Relation between parties	No privity	Privity
Mental element of breach	Relevant (intention, negligence, etc.)	Irrelevant
Nature of duties	Tortious obligations arise independently of the will of those involved, and derive from standards of behaviour imposed by law	Contractual obligations are voluntarily assumed, in that they derive from agreements which individuals are free to make or refrain from making.
Sources	Court cases	Contracts

Similarities

	Torts	Contracts
Branch	Private law	
Primary lawmaker	Court	Parties
Legal tradition	Provincial: common law in English provinces and civil law in Quebec	
Compensation	Money	
Initiating party	The person wronged	The non-breaching party
Burden of proof	Balance of probabilities	
Charter	Does NOT apply	
Fate of defendant	Pays compensatory damages, sometimes punitive damages;	Pays compensation for breach of contract

	sometimes is enjoined	
standard of proof	By a preponderance of the evidence	

PRIVATE INTERNATIONAL LAW



Three main issues:

- Jurisdiction, i.e., what court can hear the claim?
- Rules, i.e., what rules will the court apply?
- Recognition and enforcement, i.e., will a judgment of a foreign court be recognized and enforced in another country, where, for example, the defendant's assets are.

GENERAL JURISDICTION

Each state determines when it will hear a lawsuit.

If both parties agree to take a case to a jurisdiction, that jurisdiction is competent. But there are many exceptions. Some countries choose to close their courts' doors when the case has no more substantial connection than the parties' consent. For example, New York courts tend to admit contracts cases when both parties consent to New York jurisdiction but not torts. France allows lawsuits filed by French nationals against a foreigner in France.

Individuals

Common Law: Traditionally, the lawsuit may be brought where the defendant is served with process. But in modern states, an individual may be sued in his state of residence.

Civil Law: the general jurisdiction to sue a person is that of his or her domicile or residence.

Corporations

- **Common Law:** A corporation may be sued in its state of incorporation. In the US, a corporation may also be sued in any state where it conducts business.
- **Civil Law:** The place of administration or management (siege or sede), which may be different from the place of incorporation.

RULES OF PRIVATE INTERNATIONAL LAW

TORTS

- **Common Law:** generally, lex loci, i.e., where the tort was committed.
- **Civil Law:** where the tort was committed.

CONTRACTS

- **Common Law:** Express choice: The chosen law will govern the contract, provided the choice is bona fide (there are some connecting points), legal, and it does not contradict public policy. No express choice: the law with which the transaction has its closest and most real connection. Connecting factors include: place of contracting, place of performance (very important), place of residence, place of business, etc. In online consumer contracts, the applicable law is the law of the consumer's residence.

- In Canada: (i) express choice; (ii) implied choice; (iii) no express or implied law: the proper law is objectively determined by looking for connections to foreign legal jurisdictions. There may be different foreign laws to govern different aspects of the contract, e.g., contract formation and contract performance.
- **Civil Law:** Express choice: The chosen law will govern the contract, except for consumer contracts and individual employment. No express choice: the law of the country with which it has the closest connection (a severable part of a contract with which another country has a closer connection may govern by way of exception). Connecting factors: habitual residence –individuals- or central place of administration –legal entities- of the performing party, and location of immovable property.

MARRIAGE

- **Common Law:** Lex loci celebrationis (place of celebration of marriage) for the formal validity of marriage and the law of each party's anteprenuptial domicile for capacity (age, subsisting marriage, etc.) but in some cases courts take into consideration the intended matrimonial home.
- **Civil Law:** Capacity for marriage: law of nationality or habitual residence. Formalities: Lex loci celebrationis. Divorces may be brought in the state of the plaintiff's domicile.

JUDGEMENTS IN REM

- **Common Law:** Lawsuits involving land may be brought where the land is located.
- **Civil Law:** Lawsuits involving land may be brought where the land is located.

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

Recognition: the recognition of the validity of a foreign judgment.

Enforcement: an order for an action arising from a foreign judgment, e.g., sale of property, foreclosure, freezing an account, etc.

Some countries require the transformation of a foreign judgment into a domestic one. Some states demand that a new procedure be initiated again, and others simply inquire about the regularity of the foreign proceedings.

Requirements for enforcement and recognition in both common law and civil law states. All foreign judgments are enforced and recognized, except when:

- (i) Foreign state lacked jurisdiction, according to the laws of the state where recognition is sought.
- (ii) Fraudulent proceedings.
- (iii) Public Policy.
- (iv) Reciprocity (some civil law countries only).

SUCCESSIONS



INTESTATE SUCCESSION

When a person dies without a will, the deceased's assets are distributed as follows:

- The first \$ 200,000 goes to the surviving spouse, who has the right to accept the \$ 200,000 or half of the total estate as if they had divorced immediately before their spouse's death.
- Any amount greater than \$ 200,000 is shared between the spouse and the children in equal parts (biological children, children born out of wedlock, adopted children). For example, if the deceased had \$ 1,200,000 and a spouse and three children, the spouse receives the first \$ 200,000 plus another \$ 250,000 and each of the children receives \$ 250,000.
- If there is no spouse, the children of the deceased will inherit the estate in equal parts. If any of them have died, the descendants of that child will inherit their part.
- If there is no spouse, children or grandchildren, the parents of the deceased inherit the estate equally.
- If there are no surviving parents, the deceased person's siblings inherit the estate. The concept of siblings includes half siblings.
- If any of the brothers and sisters has died, their children (the deceased's nieces and nephews) inherit their share.
- If there are no surviving siblings, the deceased's nieces and nephews inherit the estate equally. However, if a niece or nephew has died, his or her part does not pass to their children.

TESTAMENTARY SUCCESSION

The general principle is testamentary freedom. When a person dies and left a will, once funeral expenses and debts have been paid, the estate is normally distributed according to the instructions of the will, except in the following circumstances:

- The surviving spouse has the right to choose: (i) to receive from the estate in accordance with the will, or (ii) to receive from the estate as if they had been divorced immediately prior to the spouse's death.
- If the deceased person has a surviving spouse or dependent (someone they supported financially while living, for example, minor children), their money and property go to

those people first to allow them to continue to be supported and what is left will go the person/s named in the will. Note that in order for someone to qualify for support, they must have been dependent on the deceased financially prior to his or her death (this includes a dependent spouse (married or common law)).

- If the deceased person has money and assets in joint ownership with another person or have a designated beneficiary (for example, an insurance policy or a joint bank account), these assets and benefits go directly to the surviving co-owner or beneficiary. This does not affect the rule on the right of dependents.
- If the person who died made a will when they were single and then married, that will is invalid, unless it was done in contemplation of marriage.
- If the person who died got divorced after they wrote the will, parts of the will may become invalid (e.g. the parts leaving property to the former spouse may become invalid and the former spouse can no longer be the estate trustee, even if they were named in the will).

INTERNATIONAL CONTRACTS



Contract: the legal instrument by which private parties enter and govern a business relationship between them A contract is a voluntary, deliberate, legally binding and enforceable agreement creating mutual obligations between two or more parties. The term party is very broad, for its notion embraces any natural or legal person, including individuals, companies, foundations, unincorporated bodies, partnerships and publicly owned entities.

Contracts are usually written but, unless the applicable law requires them to be in writing, contracts may be verbal or implied. Each contracting party undertakes the obligation to do something for the other or others in exchange for a benefit. However, whilst all parties may expect a fair benefit from the contract (since otherwise the courts may set it aside as inequitable), it does not follow that they are entitled to benefit to an equal extent. A contractual relationship is evidenced by an offer, the acceptance of the offer, and valid (legal and valuable) consideration (i.e., each party must agree to give up something of value in order to obtain a benefit). Consideration frequently implies that one party pays a sum of money to the other party, typically in exchange for goods or provision of services. In order for a contract to be valid, the parties to it must be competent, i.e. they must have the legal capacity to enter the contract. This means that they must be of legal age, of sound mind and not under the influence of drugs or alcohol. All parties must enter into the agreement freely. A contract may prove unenforceable if certain mistakes are committed by one or more parties in its making. Likewise, a contract may be declared void if one party has committed fraud against or exerted undue influence over another. If one party fails to fulfil his or her obligations, that party will be liable at law for breach of the contract. In this case the other party may seek compensation for the economic loss suffered as a consequence by suing either for damages or for performance of the obligations assumed under the contract.

1.2. International contract A contract is international when it has certain links with more than one State. Internationality concerns all cases involving a choice between the laws of at least two distinct States. Hence the notion of conflict of laws (otherwise referred to in terms of private international law, especially in Civil law countries), used to identify the set of rules and criteria, amongst the two or more theoretically applicable “conflicting” national laws, the application of which is the most suitable for governing the parties’ relations. The above will obviously be the case when parties from different countries have entered into a contract, but it is also the case when a contract contains, irrespective of the parties’ citizenship or nationality, one or more foreign elements, putting it in contact with one or more legal systems. For instance, such may be the case when parties are based in different countries, or when a contract is to be executed abroad. Conversely, a contract cannot be classified as international, and is therefore to be deemed purely domestic, when all of its significant

elements are connected with one State only. In this regard, it must also be noted that when one or more significant elements of a contract are connected with different territorial units within the same national State (e.g. Quebec and Labrador in Canada, or Massachusetts and California in the United States, or Queensland and Victoria in Australia), such fact does not constitute internationality of the contract. Additionally, the mere circumstance of the parties' having chosen a foreign State's law to govern their contractual relationship is not per se an element sufficient to classify a contract as international. The ascertainment of internationality is thus an exercise that always implies careful case-by-case analysis.

1.3. International trade contract

An international trade contract is a contract for a commercial transaction, or a contract made by a trader for the purpose of his business. International trade contracts are those in which each party intends to act in the exercise of its trade or profession. The question whether a party is acting in the exercise of its trade or profession depends on the circumstances of the contract, not on the mere status of the parties. The same person may act as a trader or professional in relation to certain transactions and as a consumer in relation to others. The definition comprises both the commercial activities of merchants, manufacturers or craftsmen (trade transactions) and the commercial activities of professionals, such as lawyers or architects (professional services). Insurance contracts and contracts transferring or licensing intellectual property rights between professionals also fall within the compass of trade contracts, as do agency or franchise contracts. For example, a contract between a German entrepreneur and a Pakistani commercial agent constitutes an international trade contract. Such may also be the case when a joint venture agreement is made between a French fashion garment manufacturer and a Thai supplier of textiles.

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