

## PART V

### JURISDICTION AND VENUE OF THE COURT

#### CHAPTER 6

#### JURISDICTIONAL AND VENUE TRANSFER BETWEEN DOMESTIC COURTS

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#### TABLE OF CONTENTS

1	Introduction.....	1
2	Australia .....	3
2.1	New South Wales.....	3
2.2	Queensland.....	6
3	China.....	9
3.1	Art 36 .....	10
3.2	Art 37 .....	10
3.3	Art 38 .....	12
3.4	Comment .....	12
4	Germany, France, Italy .....	14
5	Ghana .....	15
6	India.....	18
7	Japan.....	22
7.1	Art 18 .....	23
7.2	Art 17 .....	23
7.3	Art 19 .....	24
7.4	Art 20 .....	24
7.5	Art 21 .....	25
7.6	Art 22 .....	25
7.7	Comment .....	26
8	South Africa .....	26
8.1	Transfer between High Courts.....	27

8.2	Transfer from the High Court to the Magistrate's Court.....	30
8.3	Transfer from the Magistrate's Court to the High Court.....	32
8.4	Transfer between Magistrates' Courts.....	32
8.5	Comment .....	34
9	United Kingdom: England and Wales.....	35
10	United States Of America .....	39
10.1	Title 28 USC § 1404 .....	40
10.2	Title 28 USC § 1406.....	43
10.3	Title 28 USC § 1407 .....	44
10.4	Comment .....	45
11	Analysis and Conclusion .....	45
	Abbreviations and Acronyms .....	49
	Legislation .....	50
	National.....	50
	Cases .....	52
	National.....	52
	Bibliography .....	56

## 1 INTRODUCTION

- 1 The term *jurisdictional transfer* broadly refers to the process of moving a legal case from one court to another without affecting its validity. This can happen either between courts at the same level (horizontal) or between higher and lower courts (vertical).
- 2 There are two main reasons for transfer:
- 3 to change the court venue in response to changed circumstances, which can help improve access to justice, efficiency, and convenience (ie, venue transfer); or
- 4 to move the case from a court that lacks jurisdiction to hear a matter to one that has jurisdiction (ie, jurisdictional transfer).
- 5 Changed circumstances might occur because people who were crucial witnesses at the beginning of litigation may no longer be relevant, while new witnesses may emerge, necessitating a trial to be held closer to where they reside. It may be impractical or prohibitively expensive for witnesses to travel to the court where the case was initially filed. Additionally, certain cases may require the court to hold hearings in the same location where the incident occurred, such as when physical evidence needs to be examined on-site.
- 6 Venue transfer and jurisdictional transfer are often considered in the literature as two sides of the same coin, and it is quite common for procedural legislation and courts to collapse the two concepts and to treat both as instances of jurisdictional transfer. However, in some legal systems, a distinction is made between venue transfer and the *removal* of a case from one court to another, because a removal can be different from jurisdictional transfer.
- 7 The effect of a removal varies between jurisdictions and situations. In some instances, the removal requires the case to be reinstituted in the court of correct jurisdiction; in others, the removal results in curing a jurisdictional defect by transferring the case to the court of correct jurisdiction.<sup>1</sup> In the latter instance (which one might term *jurisdictional transfer*), removing the case does not result in the plaintiff having to reinstitute proceedings. With the procedural defect cured, the case continues. The latter instance can be treated as a transfer case, but as regards the former, where there is no transfer per se, the situation is most appropriately considered to give rise to a situation of *removal*. This chapter is concerned with transfer in the broad sense (ie, jurisdictional and venue transfer) and not removal when it entails reinstituting a matter in another court.

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<sup>1</sup> For an example of the former, see discussion on United States, and for the latter, see the discussion on South Africa.

- 8 A further aspect of transfer that emerges from the literature pertains to situations where a claim is filed in the appropriate court but must be moved to another court due to an amendment of the original claim or a counterclaim that falls outside the initial court's subject matter or monetary jurisdiction. In most jurisdictions, this is considered a jurisdictional transfer, not a removal. The matter will be stayed in the first court so that the matter can be dealt with by the transferee court.
- 9 Although some laws may specifically address venue transfer, determining whether jurisdictional transfer is permitted can be difficult. A legal system might explicitly make provision for venue transfer but might be silent about jurisdictional transfer. In that instance, one can assume that jurisdictional transfer is not allowed. This is because jurisdiction is not a mere procedural issue but a substantive one. Private International Law requires a plaintiff to sue in a court of correct jurisdiction, and failure to do so results in nullity unless the laws of a country provide a way to remedy any defects. Therefore, in this chapter, the laws have been strictly construed to identify clear instances of venue transfer, jurisdictional transfer, or both.
- 10 To discuss this rather technical area, a comparative approach was taken drawing on a combination of experiences in common law as well as civil law countries. The approach is rather descriptive so that commonalities and divergences could be teased out. It was easier to navigate the common law countries because laws tended to be more expansive, whereas in the civil law countries, with codified legal systems, jurisdictional and venue transfer rules were harder to extrapolate.
- 11 In writing this chapter, China presented a unique challenge since it is hard to classify it as a common law, civil law or mixed system. Its *sui generis* nature prioritizes functional expediency over theoretical correctness.<sup>2</sup> South Africa, on the other hand, is a mixed legal system that combines both common law and civil law traditions due to its colonial history.<sup>3</sup>
- 12 The purpose of this chapter is to analyse various systems and compare their similarities and differences in regard to transfer. Rather than drawing major conclusions, the focus is on identifying different forms of transfer and understanding how different countries handle this procedural issue. This will allow researchers to compare and contrast the laws of their own country to find similarities and divergences.

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<sup>2</sup> H Chen, 'Doing Justice: Chinese Civil Procedure and Its Reform (2019) 10(3) Civil Procedure Review 153; P CH Chan, *Mediation in Contemporary Chinese civil justice: a proceduralist diachronic perspective* (Brill Nijhoff 2017).

<sup>3</sup> Other *mixed* jurisdictions are Mauritius, Scotland, Quebec, Sri Lanka, Botswana, Lesotho, Swaziland, Namibia and Zimbabwe: R Zimmerman and D Visser, 'South African Law as a Mixed Legal System' in R Zimmerman and D Visser (ed) *Southern Cross: Civil Law and Common Law in South Africa* (Juta and Co Ltd 1996) 2–3.

- 13 For the purposes of this chapter, the following jurisdictions were investigated: Australia (New South Wales and Queensland), China, Germany, France, Italy, Ghana, India, Japan, South Africa, United Kingdom (England and Wales), United States of America (federal procedure).

## 2 AUSTRALIA

- 14 When it comes to transferring cases, federalist states are particularly interesting because it is not always possible to do a horizontal transfer of a case from a court in one state/semi-autonomous region to a court in another state or region.<sup>4</sup> It is, however, possible to transfer cases from a state court to a federal court and vice versa, or from state court to another state court in the same state.
- 15 Australia is a federal country made up of six states and two territories. According to the Constitution<sup>5</sup>, the states have the authority to legislate on any topic, while the Commonwealth (federal) Parliament can only legislate within the subject areas specified in Sec 51 of the Constitution.
- 16 Australia's court system is composed of several tiers. The highest tier is the High Court, which interprets the Constitution and serves as the final court of appeal for constitutional matters. It also hears appeals related to federal law and makes decisions on cases involving state laws. The Federal Court has the authority to handle legal disputes based on national law created by the Commonwealth Parliament and can also hear appeals from the Federal Magistrates' Court. Each State and Territory has its own Supreme Court, which applies state law. They also have Magistrates' Courts, which serve as the first point of access, and Local and District Courts, which act as intermediary courts.<sup>6</sup>
- 17 This study examined the procedural laws of New South Wales and Queensland as examples of how Australian courts handle venue and jurisdictional transfers.

### 2.1 New South Wales

- 18 Transfer of Proceedings is governed by the Civil Procedure Act 2005 (CPA). As regards jurisdictional transfer, proceedings (including any cross-claims) pending in the District Court or the Local Court may be transferred to the Supreme Court by the Supreme Court acting of its own motion or on application by a party to the proceedings.<sup>7</sup>

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<sup>4</sup> See discussion on the United States below.

<sup>5</sup> [https://www.apf.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/Constitution](https://www.apf.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution) accessed 1 May 2023.

<sup>6</sup> See B Cairns, *Australian Civil Procedure* (12 ed Thomson Reuters 2020) 24-34.

<sup>7</sup> CPA, Sec 140(1).

- 19 Similarly, proceedings pending in a Local Court (including any cross-claims) may be transferred to the District Court by order of the District Court acting of its own motion or on an application by a party to the proceedings.<sup>8</sup>
- 20 Jurisdictional transfer applications from a lower court to a higher court are usually underpinned by concerns that a successful judgment will exceed the jurisdictional limit of the lower court, whether monetary or in terms of the relief sought. However, the court's discretionary power<sup>9</sup> to permit transfer is wider than that, as jurisdictional transfer is also possible if the matter gives rise to 'complex legal issues or issues of general public importance' or 'if there is other sufficient reason for hearing a matter in the Supreme Court'.<sup>10</sup> While Sec 140 does not clearly distinguish between jurisdictional and venue transfer (based on convenience), clearly, the section allows for both.
- 21 The case of *State of New South Wales v Plum*<sup>11</sup> is instructive for a better understanding of Sec 140. In this case, the plaintiff instituted a tort claim in the District Court for nervous shock following her son's death while in police custody. The plaintiff's son fatally shot himself with a concealed weapon while being transported to the police station. The plaintiff alleged that the police had breached their duty of care to take reasonable care to prevent the deceased from injuring himself. In particular, she alleged that the police had *inter alia* failed to conduct a proper search of the deceased, identify a weapon, observe the deceased, and prevent access to a firearm.<sup>12</sup> The State of New South Wales raised several defences to the claim, arguing that it did not owe the plaintiff or the victim a duty of care and, as such, had not breached any duty of care. It also *pleaded novus actus interveniens* and contributory negligence; relied on the maxim of *ex turpi causa non oritur actio*; and relied on several provisions of the Civil Liability Act<sup>13</sup> concerning limitation of damages for pure mental harm, special provisions for offenders in custody, intoxication and self-defence and recovery by criminals.<sup>14</sup>
- 22 The State of New South Wales relied on Sec 140 and applied for a jurisdictional transfer to the Supreme Court. It argued that the case raised complex legal questions that required careful analysis and that the Supreme Court was the appropriate court to make a decision. It also argued that it was in the public interest for the matter to be heard in the Supreme Court. The plaintiff disagreed, stating that the lower court was regularly responsible for determining blameworthy conduct and duty of care issues. The plaintiff

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<sup>8</sup> CPA, Sec 140(2). The transfer order takes effect when it is made (Sec 147) and the order does not invalidate any order or 'thing done' in the proceedings before the transfer order was made (Sec 148).

<sup>9</sup> *Ryner Pty Ltd v Roller* (Supreme Court, New South Wales), Judgment 20 April 2007 [NSWSC 372 (2007)] para 7.

<sup>10</sup> CPA, Sec 140(3)(b)(ii).

<sup>11</sup> *New South Wales v Plum* (Supreme Court, New South Wales), Judgment 27 October 2015 [NSWSC 1566 (2015)].

<sup>12</sup> *New South Wales v Plum* (n 11) para 11.

<sup>13</sup> Civil Liability Act 2002 No. 22 (New South Wales, Australia).

<sup>14</sup> *New South Wales v Plum* (n 11) para 14.

also argued that the lower court was bound by the principle of stare decisis and that there was already a body of Supreme Court precedent on the issue of duty of care to which the District Court was obligated to abide. So, the claim was not complex as it involved the application of existing precedent. Moreover, the value of the claim fell within the jurisdiction of the District Court.

- 23 The court agreed with the plaintiff's submissions and held that the matter was not complex. The court also noted that a trial date had been arranged in the District Court, and the attendance of witnesses had been secured. Transferring the matter would have also resulted in the plaintiff incurring more legal costs as she would have had to comply with the procedures of the Supreme Court.<sup>15</sup> In the result, the court held that the matter should not be transferred. The court did not deal with the public interest aspect of the State's argument because this aspect was abandoned during argument.
- 24 In *Ryner Pty Ltd v Roller*,<sup>16</sup> the court held that the party seeking transfer bears the onus of proving that in the particular circumstances of a case, the interests of justice will be best served by transferring a matter. In that case, the plaintiff instituted two separate actions, one in the Supreme Court seeking a possession order and the other in the District Court based on a liquidated claim sounding in money.<sup>17</sup> The defendant argued that because the actions were based on similar questions of law and fact with the result that a legal defence raised in the High Court, based on estoppel, might have impacted the litigation in the lower court, it was appropriate to transfer the District Court matter to the Supreme Court so that the two cases could be consolidated into one action.<sup>18</sup> The court agreed.<sup>19</sup> The plaintiff tried to argue that the defendant should bear all the plaintiff's costs incurred in the District Court. The court disagreed and held that the plaintiff was responsible for the decision to sue in two courts.<sup>20</sup>
- 25 Aside from jurisdictional transfer, New South Wales has clear rules and procedures in place for venue transfer. Although the plaintiff initially selects the venue, either the plaintiff or defendant<sup>21</sup> can request<sup>22</sup> a transfer to a different court. The decision to allow the transfer is at the discretion of the court, which uses the criteria established in *Church*

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<sup>15</sup> *New South Wales v Plum* (Supreme Court, New South Wales) (n 11) para 41.

<sup>16</sup> *Ryner Pty Ltd v Roller* (n 9) para 8.

<sup>17</sup> Because the issues were different, the principle of *lis alibi pendens* did not apply.

<sup>18</sup> *Ryner Pty Ltd v Roller* (n 9) para 5.

<sup>19</sup> *Ibid* para 13.

<sup>20</sup> *Ibid* para 27.

<sup>21</sup> A Local Court may, of its own motion or upon application by a party, transfer proceedings to another Local Court: Pt 9, Div 3 of the CPA and Uniform Civil Procedure Rules 2005 (UCPR), para 44.1.

<sup>22</sup> The request takes the form of an application made on motion and supported by an affidavit.

*v Barnett*<sup>23</sup>, and confirmed in *National Mutual Holdings (Pty) Ltd v Sentry Corporation*.<sup>24</sup> The court will only grant venue transfer if it is more convenient to try the case in the requested location.<sup>25</sup>

- 26 The courts have provided specific examples of when they may transfer a case to a different venue. These include the residence of the parties<sup>26</sup>, the locale of the majority of the witnesses<sup>27</sup>, the place of the cause of action, and the possibility of intense local feeling or pretrial publicity, which might negatively affect litigation.<sup>28</sup> Other factors, such as undue delay or expense<sup>29</sup> and hardship for parties or witnesses of having to travel to the seat of the court<sup>30</sup>, may also be considered. However, the speed of resolution in a different venue is typically not a consideration in the decision-making process.<sup>31</sup>
- 27 Sec 140 is consistent with many jurisdictions in that for vertical transfer, a higher-level court must always hear the transfer application to determine whether it will assume jurisdiction over the matter. However, when a higher court transfers a case to a lower court, the higher court must also hear the application and order the transfer. Once a matter is transferred from a higher court to a lower court, the lower court may exercise ‘all of the jurisdiction’ of the higher court in relation to any proceedings to which a ‘transfer order relates,’ and this includes the jurisdiction to determine any question arising from such proceedings.<sup>32</sup> When proceedings are transferred to the District or a Local Court, the order of the transferring court usually specifies the place of the court to which the matter is transferred.

## 2.2 Queensland

- 28 Sec 25 of the Queensland Civil Proceedings Act 2011, Part 4, creates a jurisdictional transfer provision. It allows the Supreme Court to assume jurisdiction over matters

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<sup>23</sup> *Church v Barnett* (Australia) [L R 6 116 (1871)].

<sup>24</sup> *National Mutual Holdings (Pty) Ltd v Sentry Corporation* (Federal Court, Australia), Judgment 06 June 1989 [19 FCR 155 (1988)] at [5] where the court stated the test as follows: if ‘manifest preponderance of convenience in trying the cause in the place to which [a party] seeks to remove the venue can be shown.’ It is interesting that the court uses the word ‘remove’ instead of ‘transfer.’

<sup>25</sup> See also *Hodder v The Australian Worker’s Union* (Federal Court, Australia), Judgment 02 April 1985 [4 FCR 541(1985)].

<sup>26</sup> *Lehtonen v Australian Iron & Steel Pty Ltd* (Supreme Court, New South Wales), Judgment 07 August 1962 [NSWR 323 (1963)]; *Hansen v Border Morning Mail Pty Ltd* (Supreme Court, New South Wales), Judgment 27 May 1987 [9 NSWLR 44 (1987)].

<sup>27</sup> *Lehtonen v Australian Iron & Steel Pty Ltd* (n 26) at 324.

<sup>28</sup> *Cording v Trembath* (Supreme Court, Victoria), Judgment 01 March 1921 [VLR 163 (1921)]; *Mowle v Elliott* (New South Wales, Australia) [54 WN (NSW) 104 (1937)]; *Kings Cross Whisper Pty Ltd v O’Neil* (Supreme Court, New South Wales), Judgment 26 August 1968 [2 NSWLR 289 (1968)].

<sup>29</sup> *Lehtonen v Australian Iron & Steel Pty Ltd* (n 26) para 324; *Central West Equipment v Gardem Investments* (Supreme Court, New South Wales), Judgment 27 June 2003 [NSWSC 607 (2002)].

<sup>30</sup> The hardship is not limited to financial but may also pertain to medical: *Central West Equipment v Gardem Investments* (n 29) para 18.

<sup>31</sup> See *Lehtonen v Australian Iron & Steel Pty Ltd* (n 26) para 324.

<sup>32</sup> CPA, Sec 149.



pending in the lower courts, such as the District Court or Magistrate's Court, and at the same time to transfer matters to the lower courts if they have the subject matter jurisdiction to hear the issue in dispute.<sup>33</sup>

- 29 In the past<sup>34</sup>, the Supreme Court would have only transferred a case to itself if it was believed that the lower court could not provide the desired remedy or relief or if there was an important question of law or fact that required the deliberation of the Supreme Court.<sup>35</sup> Furthermore, it could transfer matters to a lower court on application by any of the parties or on the court's own motion if the court determined that the matter could have been heard by the lower court in terms of subject matter and monetary jurisdiction. However, according to the 2011 Act, the Supreme Court has unfettered discretion to transfer a matter. Such a wide discretion is unique in the countries surveyed for this chapter.
- 30 Despite this wide discretion, it has been stated that if a matter falls within the jurisdiction of a lower court, there would have to be a good reason for transferring to the Supreme Court, and if a matter is pending in the Supreme Court which could have been brought in a lower court, there would have to be a good reason why it should not be transferred to a lower court.<sup>36</sup> Furthermore, a matter can only be transferred to a lower court if the latter has jurisdiction to hear the claim in terms of subject matter and monetary amount unless the parties consent to the lower court exceeding its monetary jurisdiction.<sup>37</sup>
- 31 Aside from the Supreme Court, the District Court may also order that a proceeding pending in a Magistrate's Court be transferred to the District Court,<sup>38</sup> and the District Court may order that a proceeding pending in the District Court for which a Magistrate's Court has jurisdiction be transferred to a Magistrate's Court.<sup>39</sup> The District Court can thus transfer matters vertically and horizontally. As the upper court, the District Court must hear the transfer application.
- 32 A plaintiff or applicant can amend its claim within the jurisdiction of a lower court to bring it within the jurisdiction of another court. If a party institutes a lawsuit in court A but wishes to amend its claim, which falls within the jurisdiction of court B, the party seeking the amendment and the consequent transfer must make application to court B

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<sup>33</sup> Queensland Civil Proceedings Act 2011, Sec 25(1).

<sup>34</sup> See District of Queensland Act 1967, Sec 82.

<sup>35</sup> See *Shannon v Australia and New Zealand Banking Group Ltd (No 1)* (Supreme Court, Queensland) [2 Qd R 560 (1994)].

<sup>36</sup> Bond (ed), S Gibson, M J Hafeez-Baig, D J McGill and D Skennar, *Civil Procedure Queensland* (LexisNexis, 1999) 65, 751 (Service 105).

<sup>37</sup> See District Court of Queensland Act 1972, Sec 72; and see *Bartolo v Sunshine Coast Hospital and Health Service* (Supreme Court, Queensland), Judgment 16 July 2020 [QSC 213 (2020)].

<sup>38</sup> Queensland Civil Proceedings Act 2011, Sec 26(1).

<sup>39</sup> Queensland Civil Proceedings Act 2011, Sec 26(2).

requesting leave to amend and for an order to transfer.<sup>40</sup> Evidently, the amendment of a claim and the pursuant application can result in horizontal and vertical jurisdictional transfer.

- 33 During court proceedings, if it is determined that the lower court does not have the jurisdiction to hear a claim, it can transfer the matter to the court of correct jurisdiction.<sup>41</sup> The court will likely only use its discretion in certain situations, such as if the party who started the legal proceedings had not acted recklessly in instituting the claim in the court of incorrect jurisdiction.<sup>42</sup> If a transfer of jurisdiction is not ordered, Sec 28(3) of the Civil Proceedings Act mandates that the court dismiss the case<sup>43</sup> and may require the party who initiated the proceedings to pay the costs of other parties involved.<sup>44</sup>
- 34 Where a counterclaim exceeds the jurisdiction of the court in which proceedings were initiated, the court that has jurisdiction over the counterclaim can order that all proceedings be transferred to it<sup>45</sup> or that it will only hear the counterclaim<sup>46</sup> and that the balance of the matter must be heard by the other court<sup>47</sup>, or that the court in which proceedings were initiated determine the entire matter.<sup>48</sup> The conclusion drawn from the Act is that the proper court can imbue the court that lacks jurisdiction in respect of the counterclaim with the competence to hear both the main claim and the counterclaim.
- 35 According to Sec 29(5)(a), if a counterclaim is served on the other party and they do not object to the court's jurisdiction within 14 days, the court where the counterclaim was raised will have jurisdiction over all proceedings on the basis of tacit consent. Presumably, for the consent to apply, the counterclaim cannot be inconsistent with the court's subject matter jurisdiction.
- 36 When a proceeding is transferred for jurisdictional purposes, the transferee court 'may hear and decide the proceeding as if it had been started in that court.'<sup>49</sup> Thus, the law applicable to the matter will be the law of the transferee court.

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<sup>40</sup> Queensland Civil Proceedings Act 2011, Sec 27(1) read with s 27(2).

<sup>41</sup> Queensland Civil Proceedings Act 2011, Sec 28(1) read with s 28(2).

<sup>42</sup> See in this regard the *dicta* in *Tereblanche v Jewell* (Supreme Court, Queensland) [QCA 205 820139] para 18.

<sup>43</sup> Queensland Civil Proceedings Act 2011, Sec 28(3)(a).

<sup>44</sup> Queensland Civil Proceedings Act 2011, Sec 28(3)(b).

<sup>45</sup> Queensland Civil Proceedings Act 2011, Sec 29(2)(a).

<sup>46</sup> Queensland Civil Proceedings Act 2011, Sec 29(2)(b).

<sup>47</sup> Queensland Civil Proceedings Act 2011, Sec 29(4)(a).

<sup>48</sup> Queensland Civil Proceedings Act 2011, Sec 29(2)(c).

<sup>49</sup> Queensland Civil Proceedings Act 2011, Sec 31.

- 37 As regards when the litigation is deemed to have commenced, the legislation contains a deeming provision to 'remove in any doubt' and provides that when a proceeding is transferred, it is taken to have commenced when it originally started.<sup>50</sup> As regards transferred counterclaims, these are deemed to have been started 'when the counterclaim was originally started'.<sup>51</sup> The effect is that the transfer does not result in an interruption of proceedings.
- 38 The law relating to the transfer of jurisdiction in Queensland is clearly articulated in the legislation and is comprehensive in dealing with different practical problems that might arise. It is thus a model piece of legislation.

In addition to jurisdictional transfer, Rule 39 of the Uniform Civil Procedure Rules 1999 also allows for venue transfer. This means that if a court believes that a case can be 'more conveniently or fairly heard' by another court, it can transfer the case to that court. A court will have regard to the balance of convenience between the parties and whether the transfer will cause prejudice. In explicating the factors that would motivate a court to transfer a matter, the court in *Clark v Ernest Henry Mining Pty Ltd*<sup>52</sup> held:

As the Full Federal Court pointed out, in exercising the discretion to transfer, it is necessary for an applicant to satisfy the Court that the proceeding may be more conveniently or fairly heard or dealt with in another place and that often requires consideration of the residence of the parties, the residence of witnesses, the expense to the parties, the place where the cause of action arose, and the convenience of the Court itself.

- 39 The list of reasons for ordering a venue transfer is not exhaustive. The factors mentioned in New South Wales will be applicable in Queensland because the test of balancing convenience and interests of justice is essentially the same.

### 3 CHINA

- 40 The transfer of jurisdiction in China is governed by Art 36–38 of the Civil Procedure Law of the People's Republic of China (CPL), which was revised in 2017.<sup>53</sup> These articles are further explained by several articles in the Interpretations of the Supreme People's Court on Applicability of the Civil Procedure Law, published in 2015.<sup>54</sup>

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<sup>50</sup> Queensland Civil Proceedings Act 2011, Sec 32(a).

<sup>51</sup> Queensland Civil Proceedings Act 2011, Sec 32(b).

<sup>52</sup> *Clark v Ernest Henry Mining Pty Ltd* (Supreme Court, Queensland), Judgment 6 November 2018 [3 Qd R 136 (2019)] para 139.

<sup>53</sup> <https://cicc.court.gov.cn/html/1/219/199/200/644.html> accessed on 1 May 2023.

<sup>54</sup> <https://ipkey.eu/sites/default/files/legacy-ipkey-docs/interpretations-of-the-spc-on-applicability-of-the-civil-procedure-law-of-the-prc-2.pdf> accessed 1 May 2023.

### 3.1 Art 36

- 41 Art 36 of the CPL states that if a People's Court realizes that a case they have accepted is outside its jurisdiction, it must transfer it to the appropriate court. The receiving court is required to accept the case. However, if the receiving court also finds that the case is not within its jurisdiction, it must seek guidance from the Superior People's Court and cannot transfer the case on its own. This article ensures that no case is dismissed because the court lacks jurisdiction. It is worth noting that, unlike Queensland or New South Wales, the transferring court handles the transfer request, and the receiving court must accept the case.
- 42 The corresponding interpretation to Art 36 clarifies that where two or more courts have concurrent jurisdiction over a lawsuit, the court that initially accepts the case 'may not refer the [case] to the other People's Court with jurisdiction.' It would thus appear that a court cannot do a horizontal venue transfer and can do a jurisdictional transfer.

### 3.2 Art 37

- 43 Art 37 of the CPL states: if a People's Court with jurisdiction over a case cannot exercise jurisdiction due to 'special reasons', the Superior People's Court shall designate jurisdiction. Since the nature of the 'special reasons' is not specified, one can infer that the reasons might not be limited to the usual factors for transfer and could include factors unrelated to the question of convenience or, for that matter, jurisdiction. The point at which and who may raise these 'special reasons' is also not stipulated.
- 44 According to Art 37, once a People's Court accepts a case, the change of domicile or habitual residence of any party involved will not affect the court's jurisdiction. This means that transferring the case to another venue is not allowed. Art 38 clarifies further: 'Upon acceptance of any case, the people's court with jurisdiction may not refer the case to other people's court with jurisdiction after such change on grounds of change of administrative region[...]'.
- 45 Interestingly Art 41 of the Interpretation states:

A people's court shall render a ruling on designation of jurisdiction in accordance with Paragraph 2 of Article 37 of the Civil Procedure Law. The subordinate people's court shall suspend hearing any case for which the request for designation of jurisdiction is filed with its superior people's court. Where the subordinate people's court has made any judgment or ruling for any case prior to the ruling on designation of jurisdiction, its superior people's court shall revoke such judgment or ruling while making the ruling on designation of jurisdiction.

- 46 This would suggest that a designation relating to jurisdictional transfer can be made *ex post facto*, presumably for particular reasons. Further, once a case is reassigned (transferred) by the Superior People's Court, the effect negates previous proceedings, requiring the transferee court to hear the matter afresh. Through the mechanism of jurisdictional transfer, all the proceedings in the court of the first instance are effectively undone, and the transferee court may proceed based on a blank slate. The idea of the retrial surfaces again in the latter part of Art 38 of the Interpretation, where it is stated:

Appeal cases and cases taken over for review in accordance with the procedure for trial supervision shall be heard by the superior people's court of the people's court that originally heard the cases; cases ordered to retrial or remanded for trial anew by the superior people's court shall be retried or tried anew by the people's court that originally heard the cases.

- 47 Art 37 states that if there is a dispute over jurisdiction between different People's Courts, they must try to resolve it through consultation. If consultation does not work, the case must be sent to the mutual Superior People's Court for jurisdiction determination. However, this seems to contradict Art 36, which uses the word 'shall' to suggest that the transferee court must accept the case even if it believes it lacks jurisdiction. It's also unclear how and when the consultation process happens. Does the court that lacks jurisdiction confer with the court that it deems to have jurisdiction before referring the case? Art 40 of the Interpretation does not do much to clarify the position and states:

Subject to Paragraph 2 of Article 37 of the Civil Procedure Law, where two people's courts file a request with their common superior people's court for designation of jurisdiction after the failure of negotiation on the dispute over their jurisdiction, the jurisdiction shall be immediately designated by the intermediate people's court of the prefecture or city, if both people's courts are basic people's courts within the same prefecture or city; or by the higher people's court of the province, autonomous region, or municipality directly under the Central Government, if both people's courts are within the same province, autonomous region, or municipality directly under the Central Government; or by the Supreme People's Court, if both people's courts are within different provinces, autonomous regions, or municipalities directly under the Central Government, and the relevant higher people's courts failed to settle such dispute after negotiation.

Request for designation of jurisdiction referred to in the immediately preceding paragraph shall be made level by level.

- 48 In New South Wales and Queensland, a case could be transferred if the defendant made a counterclaim or if amending the claim caused it to exceed the court's jurisdiction. However, Article 39 of the Interpretation is somewhat unclear. It suggests that once a People's Court has established its jurisdiction and considered any objections to it, it

cannot be changed due to a counterclaim or amended claim, except in cases where the determination goes against hierarchy-based or exclusive jurisdiction. When discussing jurisdiction, hierarchy-based or exclusive jurisdiction pertains to subject matter jurisdiction.

### 3.3 Art 38

- 49 Art 38 provides that where it is necessary for a People's Court as a court of first instance to transfer a civil case to an inferior court, the People's Court must apply to its Superior People's Court for approval. Art 42 of the Interpretation goes on to state that before a court hearing, a people's court has the option to refer certain civil cases to its subordinate court for first instance trial. This is done in accordance with Paragraph 1 of Article 38 of the Civil Procedure Law. The types of cases that may be referred include lawsuits related to debtors in bankruptcy proceedings, lawsuits with a large number of parties involved that are inconvenient, and other cases as determined by the Supreme People's Court. The people's court must request approval from its superior court before referring any case to its subordinate court. Once approval is received, the people's court may make a ruling to refer the case to its subordinate court for trial. It may seem odd that a court that has no connection to a case would be involved in approving a transfer. However, it is not unusual for an institution or individual to make transfer decisions as an administrative matter. In China, the Superior People's Court takes on this responsibility.<sup>55</sup>

### 3.4 Comment

- 50 Chinese Civil Procedure does not seem to allow for venue transfer; it clearly only allows jurisdictional transfer.
- 51 It appears that parties can object to the court's jurisdiction but that the ultimate responsibility lies with the relevant People's Court to take up the issue of transfer in some administrative process rather than a formal judicial process.
- 52 The *special reasons* test for transferring a matter is broad and allows the court to consider factors that exceed the usual considerations in transfer applications. Unlike in other jurisdictions, there is no mechanism for reviewing or appealing the transfer of jurisdiction; thus, whatever decision is made becomes final. However, this position is not inconsistent, as in Ghana and South Africa one cannot appeal an interlocutory procedural order.

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<sup>55</sup> See discussion regarding Ghana and England and Wales, where the Chief Justice and the Chancellor, respectively, have the authority to make decisions regarding transfer.

- 53 In none of the other jurisdictions surveyed was the transferee court obliged to start proceedings *de novo* upon transfer. Even though India<sup>56</sup> (discussed below), makes provision for the recommencement of proceedings in its transfer legislation, it is the exception rather than the norm. Starting proceedings all over again is usually a characteristic of 'removal'<sup>57</sup> and not transfer. However, in the Chinese procedure, because the lack of jurisdiction does not affect the initial validity of the proceedings, the referral to a new court is treated as a jurisdictional transfer and not a *removal*, but with the concomitant requirement that the matter must start all over again.
- 54 One can appreciate the value of commencing a matter again in the case of venue transfer where the court might have already commenced trial proceedings and it becomes necessary to change venue. However, for jurisdictional transfer, lack of jurisdiction is raised at the inception of proceedings, and so the transferee court would usually hear the entire matter. What the Chinese procedure suggests is that an objection to the jurisdiction of the court can be raised at any time, and accordingly, the court can transfer a matter at any stage of the proceedings and commence proceedings from scratch. This rather generous approach runs the risk of increasing costs, delaying finality, and preventing a matter from an expeditious conclusion.
- 55 When compared, for example, to the clarity of the law in New South Wales or Queensland, the Chinese rules on transfer are not a model of clarity. The law is ambiguous and contradictory. Their objectives and consequences are also not readily discernible. To an outsider, the rules lack logic and are thus hard to fathom. However, the rules are consistent with Chang's general criticism of the Chinese legal system. He argues that the Chinese civil justice system does not take finality seriously. Cases are routinely re-opened and retried to achieve results that foster public harmony over the vindication of legal rights.<sup>58</sup> It would seem that jurisdictional transfer is another tool available to achieve the re-opening of cases.
- 56 Of significance, though, a party will not be non-suited for suing in a court of incorrect jurisdiction; the court transfers the matter to the court of correct jurisdiction as it deems fit. Valuing the merits of a case over form is a positive feature.
- 57 Lower courts generally lack the autonomy to decide matters of transfer. The Superior People's Court exercises an oversight function in all transfer cases, as its consent is

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<sup>56</sup> In India, if the venue is transferred, legal proceedings may need to begin again. However, if there is a jurisdictional transfer, it is unlikely that the case will be reheard because the parties are expected to object to the venue as soon as possible. If a party does not object, it is considered that they have agreed to the venue. It is possible for a party to successfully argue for a venue transfer after the trial has started, but this is a rare occurrence. If it does happen, the court would need to consider the convenience of the parties and the cost implications for the non-petitioning party. See discussion of India below.

<sup>57</sup> See Introduction above.

<sup>58</sup> Chan P CH, *Mediation in Contemporary Chinese civil justice: a proceduralist diachronic perspective* (Brill Nijhoff 2017).



usually required. This allows the transfer of jurisdiction, and ultimately the question of jurisdiction, to be centrally controlled, impacting the courts' independence to assume jurisdiction over a case.

- 58 In comparison to common law systems, the Chinese Civil Procedure does not allow for venue transfer based on convenience. This aligns with civil law systems, which also lack rules regarding venue transfer, as explained in the next discussion.

#### 4 GERMANY, FRANCE, ITALY

- 59 In the German legal system, the Code of Civil Procedure (GCCP) does not provide a provision for courts to transfer a case based on convenience.<sup>59</sup> This is because the GCCP follows a strict procedural system that limits the court's discretion. This approach is aimed at promoting stability and predictability in the legal system.
- 60 As the *dominus litis*, the plaintiff is typically free to choose the court of jurisdiction by selecting a venue from several bases of jurisdiction. German civil procedure favours this choice and is hesitant to displace it.<sup>60</sup> It is worth noting that recent amendments to the GCCP have limited instances of transfer, suggesting a general aversion to venue transfer based on judicial convenience.<sup>61</sup>
- 61 Germans view their civil procedure system as inherently efficient and do not see the need for general provisions related to venue transfer. However, there are some provisions that allow for flexibility in certain circumstances, such as trials involving multiple defendants with multiple claims. Sec 36(3) of the GCCP allows the next higher court to choose a venue with the most appropriate relationship to the case. This provision is similar to 28 US § 1404(a).<sup>62</sup> Sec 36(3) must be read in conjunction with Sec 33 of the GCCP, which deals with counterclaims. A multiple claim can arise due to one or more counterclaims being raised.
- 62 Unlike in other legal systems, the GCCP regards transfer of jurisdiction as an exceptional situation to serve individual justice in a particular case. This approach eliminates the need for judges to use their discretion, which could lead to inconsistent interpretations

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<sup>59</sup> Code of Civil Procedure (5 December 2005): [https://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.html](https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html) accessed 1 May 2023. See also Murray Peter L and Stürner R, *German Civil Justice* (Carolina Academic Press 2004) 147.

<sup>60</sup> Sec 23, 35 GCCP.

<sup>61</sup> One such instance is Sec s 650(1) and 651 of the GCCP. According to these now repealed provisions, in proceedings for the appointment of a guardian for a person lacking legal capacity, the initiating court could transfer the matter to the *Amtsgericht* (District Court) where the person resided, if this was in the interests of the parties. This allowed a court to disregard domicile as the ground of jurisdiction and to transfer the matter having regard to interest of the person subject to guardianship and the immediacy of taking the relevant evidence: B Wieszorek, G F Roessler, 3 *ZPO Kommentar* (2 ed 1980) § 650(A)(1).

<sup>62</sup> See discussion of the position in the United States below.



of terms like ‘convenience’, ‘reasonableness’, and ‘fairness’. Instead, the German procedural system prioritizes the stability and predictability of the law.<sup>63</sup> The way that Germany handles jurisdiction transfers aligns with the purpose of the GCCP, which is to establish a clear and definitive code for regulating procedures without requiring judicial reinterpretation.

- 63 According to Art 96 of the French Code of Civil Procedure 2009 (FCCP), a judge who deems that they lack jurisdiction to hear a matter ‘designates the court that he deems to have jurisdiction.’ The Judge transfers the case, and the transferee court is obliged to accept the matter. However, if the lack of jurisdiction ‘comes within the jurisdiction of a criminal, administrative, arbitral or foreign court’, the court will dismiss the matter and ‘instructs the parties to take the proceedings to the proper court’. Art 97 deals with the administrative procedure for effecting the transfer. The Code does not seem to have provisions dealing with transfer based on convenience. In essence, Art 96 allows for jurisdictional transfer.<sup>64</sup>
- 64 Like the position in Germany, the French system limits the discretionary powers of judicial officers, consistent with the ethos of a strong civil law codified legal system.
- 65 A cursory assessment of the Italian Code of Civil Procedure reveals a similar stance to that of Germany and Italy.<sup>65</sup>

## 5 GHANA

- 66 Order 3, Rule 1 of the High Court and Civil Procedure Rules, 2004 (C.I 47), as amended<sup>66</sup>, sets out the grounds on which a Ghanaian High court can exercise jurisdiction over a matter. But, Order 3, Rule 2 regulates jurisdictional and venue transfers.
- 67 Rule 2 states that if a civil action is started in the wrong region or location within the same region, it does not affect the court’s jurisdiction. However, if a party objects to the court’s jurisdiction, they must file an application before the defendant submits their defence to the claim. The application must be made to the court where the case was started, and it will be referred to the Chief Justice for an order to transfer the case to the appropriate court.<sup>67</sup> If the court finds that the case ought to be transferred, it will deliver

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<sup>63</sup> See A Reus, ‘Judicial Discretion: A Comparative View of the Doctrine of *Forum Non-Coveniens* in the United States, the United Kingdom, and Germany’ (1994) 16 Loy. L.A. Int’l & Comp. L.J 455, 503.

<sup>64</sup> See N Brooke, *The French Code of Civil Procedure in English, 2009 Le Code de Procedure Civile Francais Traduit en Anglais, 2009 Bilingual Edition* (2009 Oxford University Press).

<sup>65</sup> To this extent, see S Grossi and M C Pagni, *Commentary on the Italian Code of Civil Procedure* (Oxford University Press 2010), and see M C Lupoi, *Civil Procedure in Italy* (Wolters Kluwer 2012).

<sup>66</sup> These Rules govern all proceedings in the higher and circuit courts.

<sup>67</sup> Order 3, Rule 2(1)(a) High Court and Civil Procedure Rules (Ghana).

an opinion to this effect to the Chief Justice, who may make an order as they consider appropriate.<sup>68</sup>

68 If a party does not object to the court's jurisdiction, a court can, of its own accord, make a report to the Chief Justice that the suit ought to be transferred to another jurisdiction.<sup>69</sup>

69 A transfer does not affect proceedings taken before the transfer<sup>70</sup>, and the case continues in the transferee court.

70 Rule 2 above must be read with Sec 104 (1) of the Courts Act 1993 (Act 459), which provides:

[...] Chief Justice may by order under his hand transfer a case at any stage of the proceedings from any Judge or Magistrate to any other Judge or Magistrate and from one court to another court of competent jurisdiction at any time or stage of the proceedings and either with or without an application from any of the parties to the proceedings.

71 Only the Chief Justice can affect a transfer – judges, magistrates and other administrative officials cannot do so.<sup>71</sup> Consequently, the Chief Justice has the sole authority to reverse transfer for whatever reason.<sup>72</sup> It also appears that the Chief Justice considers the matter in his administrative capacity as the judicial head.

72 It is interesting to note that the test for judicial discretion is not stated under the Rules. In most jurisdictions, the test is one of 'convenience' or 'in the interest of justice'. However, Sec 105 of the Courts Act provides that the Chief Justice must be satisfied that it is 'desirable' to transfer a case. However, from case law (discussed below), it is clear that desirability is broad enough to encompass not only substantive law considerations but also convenience based on the facts and circumstances of a case.

73 In *Volden & Others v. Ghana Goldfields Ltd*<sup>73</sup>, the defendant mining company had its corporate residence at Tarkwa. It was sued in the Sekondi High Court by its employees,

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<sup>68</sup> Order 3, Rule 2(2) High Court and Civil Procedure Rules (Ghana).

<sup>69</sup> Order 3, Rule 2(1)(b) High Court and Civil Procedure Rules (Ghana). See also Sec 105(1) of the Courts Act 1993 (Act 459).

<sup>70</sup> Order 3, Rule 2(2) High Court and Civil Procedure Rules (Ghana).

<sup>71</sup> *The Republic v High Court Accra Ex Parte Yalley, Gyane & Attor Interested Parties* (Supreme Court, Ghana), Judgment 21 May 2008 [[2007-2008] SCGLR 512]; *The Republic v High Court (Fast Track Division) Ex Parte Ghana Lotto Operators (National Lottery Authority Interested Party)* (Supreme Court, Ghana), Judgment 11 February 2009 [[2009] SCGLR 372].

<sup>72</sup> *Soro v. Frans* (Supreme Court, Ghana), Judgment 11 May 2005 [[2005-2006] SCGLR 1003].

<sup>73</sup> *Volden & Others v. Ghana Goldfields Ltd* (High Court, Ghana), Judgment 15 February 1999 [[1999-2001] 1 GLR 462].

the plaintiffs, for harm suffered during their employment. The defendant applied to transfer the matter to Tarkwa, arguing that all the parties, their witnesses, and legal representatives resided at Tarkwa. The court established that only the plaintiff's representative resided in Sekondi. In granting the application, the court held:

The rationale for the creation of multiple High Courts within one region was to let the parties litigate in the High Court nearest to them and thereby save them time, energy and expenses. Accordingly, although no provision in the High Court (Civil Procedure) (Amendment) Rules, 1977 (LI 1107) governed the situation where there was more than one High Court in a region with jurisdiction to hear a matter, and a defendant against whom an action had been brought in one High Court applied to that court to transfer the suit to the other, it was within the discretion of that High Court to determine the application. The test to be applied in each case was whether the defendant would suffer injustice if the action was heard in the court where he did not reside or carry on business. On the facts, it would be more expeditious, proper and convenient to have the suit heard at the High Court, Tarkwa since on the balance of hardship more hardship would be caused to the defendant than the plaintiffs, if the suit was heard in the High Court, Sekondi. Accordingly, a report would be made to the Chief Justice to exercise his power of transfer accordingly.

- 74 It is not clear whether the time restriction for objecting to jurisdiction before the defendant files their defence applies to both jurisdictional and venue transfer. The time limit for jurisdictional transfer makes sense as not objecting to substantive jurisdiction would be seen as giving consent, which is in line with the laws of several other countries mentioned in this chapter.
- 75 However, if the rationale for venue transfer is to 'reduce the costs and expenses of litigation, especially travelling and transport of clients and counsel and to ease the congestion and backlog of cases in the courts', then the time constraint would limit the objective of the transfer.<sup>74</sup> The circumstances giving rise to a venue transfer could occur after the defendant has pleaded. Surely, in that case, the parties will ask the court to transfer the matter on the same basis as if it were exercising its *suo motu* power to petition the Chief Justice to transfer the case.
- 76 There also does not seem to be a requirement for the transferring court to have personal jurisdiction over the defendant in order to affect a venue transfer, as is the case in South Africa, for example.

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<sup>74</sup> See *General Portfolio Ltd. And Others v. Ghana National Petroleum Corporation* (High Court, Ghana), Judgment 28 May 1992 [[1992] 2 GLR 138-145].

## 6 INDIA

- 77 Indian Civil Procedure does not distinguish clearly between jurisdictional transfer and venue transfer. According to Sec 15 of the Code of Civil Procedure 1908, every case must be filed in the ‘appropriate court’. However, Sec 18 permits a court to consider a claim related to immovable property that is outside of its territorial jurisdiction if there is uncertainty about which court has the authority. The court’s verdict is binding unless a higher court decides that there was no reasonable cause for the uncertainty.
- 78 According to Sec 21, a party wishing to challenge the court’s venue must do so in the first instance court and at the earliest possibility. It cannot do so on appeal.<sup>75</sup> A similar position can be found in other jurisdictions where the issue of venue must be raised in the first instance court, and a failure to do results in acquiescence to the jurisdiction of the court to hear a matter at that venue. However, subject matter jurisdiction can be taken on appeal. A litigant is expected to object to the venue as soon as possible, usually at the time when the defence to the claim is filed. If it fails to do, it is assumed that they have agreed to the venue.
- 79 Where a suit may be instituted in any one of two or more courts (ie, courts of concurrent jurisdiction) and is instituted in one of such courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity, apply to have the suit transferred to another court, and the court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several courts having jurisdiction the suit shall proceed.<sup>76</sup>
- 80 A court receiving a matter by transfer can decide whether to rehear the case or proceed from the point where it was transferred. This makes sense especially if the trial has already commenced.<sup>77</sup> This must be distinguished from the position in China where a transfer automatically results in a case being reheard.
- 81 Sec 25 of the Code is comprehensive. It allows any party to apply to the Supreme Court to transfer a matter from a High Court or other civil court in one state to another state. The provision states:
- (1) On the application of a party, and after notice to the parties, and after hearing such of them as a desire to be heard, the Supreme Court may, at any stage, if satisfied that an order under this section is expedient for the ends of justice, direct that any suit, appeal or other proceeding be transferred from a

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<sup>75</sup> Sec 21 Code of Civil Procedure (India).

<sup>76</sup> Sec 23 Code of Civil Procedure (India).

<sup>77</sup> Sec 24(2) Code of Civil Procedure (India).

High Court or other Civil Court in one State to a High Court or other Civil Court in another State.

(2) Every application under this section shall be made by a motion which shall be supported by an affidavit.

(3) The Court to which such suit, appeal or other proceeding is transferred shall, subject to any special directions in the order of transfer, either retry it or proceed from the stage at which it was transferred to it.

(4) In dismissing any application under this section, the Supreme Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum, not exceeding two thousand rupees, as it considers appropriate in the circumstances of the case.

(5) The law applicable to any suit, appeal or other proceeding transferred under this section shall be the law which the Court in which the suit, appeal or other proceeding was originally instituted ought to have applied to such suit, appeal or proceeding.

- 82 The provision above outlines important points to consider when requesting a venue transfer. Firstly, it clearly explains the procedure for requesting a transfer. Secondly, it states that the reason for the transfer must be justified by the 'ends of justice'. One can assume that the usual factors taken into account by courts in other jurisdictions would be relevant and that the test is similar to the 'balance of convenience' test. Thirdly, if the application is deemed frivolous or vexatious, the responsible party may face a fine of up to two thousand rupees. This provision emphasizes the importance of having valid reasons for requesting a transfer and penalizes those who misuse the interlocutory process. Although other jurisdictions may have the power to sanction parties for misusing the interlocutory procedure of requesting a venue transfer by imposing an appropriate costs order, the Sec 25 provision explicitly sets out the maximum 'fine' that may be imposed. Referring to the penalty as a 'fine' emphasizes the severity of the misconduct. Finally, the section states that the transfer of a case does not impact the law that governs it. Regardless of which state the case is moved to, the law of the state where the case was initially filed will still apply. This prevents any party from engaging in forum-shopping. As the *dominus litis*, the plaintiff has the ability to choose the applicable law.

- 83 Venue transfer has been held to be a constitutional right within the context of the Indian Constitution.<sup>78</sup> In the case of *Anita Kushwaha and Others vs Pushap Sudan and Others*<sup>79</sup>, the Indian Supreme Court had to determine whether Sec 25 of the Code of Civil Procedure, which applies in the rest of India, also applied in the states of Jammu and Kashmir. It was common cause that the Civil and Criminal Procedure Codes<sup>80</sup> of those regions did not contain a provision equivalent to Sec 25 and the Constitution 42nd Amendment Act, 1997, which inserted Art 139A into the Constitution, empowering the Supreme Court to exercise its jurisdiction to transfer matters between courts across state lines, had no application in Jammu and Kashmir. The respondents argued that due to the absence of these laws, 'a litigant has no right to seek transfer of a civil or a criminal case pending in the states of Jammu and Kashmir to a court outside the states or vice versa'.<sup>81</sup> The petitioners' counsel agreed with the respondents' arguments about the various legislative instruments but argued:

[...]access to justice being a fundamental right guaranteed under Article 21 of the Constitution of India, any litigant whose fundamental right to access to justice is denied or jeopardised can approach this Court for redress under Article 32 of the Constitution of India for protection and enforcement of his/her right. This Court can in any such case issue appropriate directions to protect such right which protection may in appropriate cases include a direction for transfer of the case from that State to the Court outside the State or vice versa.<sup>82</sup>

They went on to argue:

Article 142 of the Constitution of India read with Article 32 amply empower this Court to intervene and issue suitable directions wherever such directions were considered necessary to do complete justice to the parties including justice in the matter of ensuring that litigants engaged in legal proceedings in any Court within or outside the State of Jammu and Kashmir get a fair and reasonable opportunity to access justice by transfer of their cases to or from that State, if necessary.<sup>83</sup>

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<sup>78</sup> The Constitution of India 1949, as amended.

<sup>79</sup> *Anita Kushwaha and Others vs Pushap Sudan and Others* (Supreme Court, India), Judgment 19 July 2016 [AIR 2016 SC 3506], [2016 (6) AWC 5962 SC].

<sup>80</sup> Code of Civil Procedure, 1997; Code of Criminal Procedure, 1989.

<sup>81</sup> *Anita Kushwaha vs Pushap Sudan* (n 79) para 2.

<sup>82</sup> *Ibid* para 7.

<sup>83</sup> *Ibid* para 7.

- 84 The Supreme Court, per Thakur CJI, held that ‘access to justice is an invaluable human right’, which originates in the Indian common law and can be traced to the Magna Carta. The court drew attention to Cappelletti, who wrote:

The right of effective access to justice has emerged with the new social rights. Indeed, it is of paramount importance among these new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured by a workable remedy within the framework of the judicial system. Effective access to justice can thus be seen as the most basic requirement – the most ‘basic human right’ – of a system which purports to guarantee legal right.<sup>84</sup>

- 85 The Court held that the centrality of access to the courts in the administration of justice was a cornerstone value in all democratic systems and that the ‘legal position is not different in India.’ After finding that access to justice was an integral part of India constitutional framework, the court held:

That brings us to the second facet of the question referred to us namely whether Article 32 of the Constitution of India read with Article 142 empowers the Supreme Court to direct transfer in a situation where neither the Central Code of Civil Procedure or the Central Code of Criminal Procedure empowers such transfer to/from the State of Jammu and Kashmir. The need for transfer of cases from one court to the other often arises in several situations which are suitably addressed by the courts competent to direct transfers in exercise of powers available to them under the Code of Civil Procedure (CPC) or the Code of Criminal Procedure (Cr.P.C.). Convenience of parties and witnesses often figures as the main reason for the courts to direct such transfers. What is significant is that while in the rest of the country the courts deal with applications for transfer of civil/criminal cases under the provisions of the CPC and the Cr.P.C. the fact that there is no such enabling provision for transfer from or to the State of Jammu and Kashmir does not detract from the power of a superior court to direct such transfer, if it is of the opinion that such a direction is essential to subserve the interest of justice. In other words, even if the provision empowering courts to direct transfer from one court to other were to stand deleted from the statute, the superior courts would still be competent to direct such transfer in appropriate cases so long as such courts

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<sup>84</sup>M Cappelletti, B Garth (ed), *Access to Justice Vol. I: A world survey (Book I & II)* (Milano, Giuffrè Editore/Alphen aan den Rijn, Sijthoff/Noordhoff, 1978, [European University Institute]) - quoted at para 13 of the judgment. The court also quoted Lord Steyn in *In R v. Secretary of State for Home Dept., ex p Leech* 1993 [4] All ER 539 who held in the context of English law: ‘It is a principle of our law that every citizen has a right of unimpeded access to a court’.

are satisfied that denial of such a transfer would result in violation of the right to access to justice to a litigant in a given fact situation.<sup>85</sup> (emphasis added).

- 86 The court's statement emphasizes that transfer of jurisdiction is necessary for access to justice. It asserts that even without a specific provision, the court can order a transfer if it is in the interest of justice. The court did not refer to 'inherent jurisdiction' but based its power on the right to access to justice. However, it may be argued<sup>86</sup> that in a court system where there is a separation of powers, it is part of the inherent jurisdiction of a court to order transfer for convenience in the administration of justice.

## 7 JAPAN

- 87 According to Art 16(1) of the Japanese Code of Civil Procedure (Amendment Act No 36 of 2011, JCCP), if a court finds that the whole or part of litigation is not subject to its jurisdiction, it can 'transfer' the matter '*sua sponte*' to the court of jurisdiction. The provision thus allows a court lacking in jurisdiction to transfer a case to the court of proper jurisdiction without affecting the validity of the proceedings. In other words, Art 16 makes provision for jurisdictional transfer.
- 88 A court is not always obliged to transfer the matter, especially if it shares concurrent jurisdiction with the transferee court. Thus, a District Court<sup>87</sup> can, upon petition or of its own accord, hear litigation that falls within the jurisdiction of the Summary Court<sup>88</sup> that is under its territorial jurisdiction if the District Court considers it appropriate to seize jurisdiction over the matter.<sup>89</sup> However, if the matter falls within the exclusive jurisdiction of the Summary Court, then the District Court must transfer the matter.<sup>90</sup>

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<sup>85</sup> *Anita Kushwaha vs Pushap Sudan* (n 79) para 32.

<sup>86</sup> See R S Masington, 'Venue in the Federal Courts – The Problem of the Inconvenient Forum' 1961 (25) *Miami Law Review* 237.

<sup>87</sup> The jurisdiction of the District Court is governed by the Court Act No 59 of 1947, Art 24. They may hear various civil litigation disputes in the first instance and are empowered to hear appeals from the Summary Courts. Their civil jurisdiction is more expansive than the Summary Courts.

<sup>88</sup> The Jurisdiction of the Summary Court is governed by the Courts Act No 49 of 1947, Art 33, which, among other things, provides that the Court may not hear civil matters that exceed 1 400 000 yen. These adopt simplified procedures to enhance access to justice. See E Sugiyama, 'Simplified Civil Procedure in Japan' (December 2015) *Erasmus Law Review* 4.

<sup>89</sup> The appropriateness of seizing jurisdiction would no doubt have to be determined in terms of Art 17 discussed below.

<sup>90</sup> Art 16(2) JCCP. Exclusive jurisdiction can be conferred in terms of Art 11 JCCP if the parties have by agreement determined which court shall have jurisdiction over the matter.



## 7.1 Art 18

- 89 According to Art 18, the Summary Court has the authority to transfer a case to the District Court if it deems it necessary, even if the case falls under its jurisdiction. This can be done upon request or at the Summary Court's own discretion.<sup>91</sup>
- 90 Art 18 must be read with Art 19, titled 'Mandatory Transfer.' According to Art 19(2), where the litigation is in respect of real property, the Summary Court is, upon petition for transfer, compelled<sup>92</sup> to transfer a matter (in whole or in part) to a District Court in that locality, provided that the defendant has not presented oral argument on the merits of the case before filing the petition.
- 91 The absence of the word 'exclusive' in relation to jurisdiction in Art 18 and 19 (when compared to Art 16 discussed above) must mean that a Summary Court can only transfer a matter to the District if the matter does not fall within the exclusive jurisdiction of the Summary Court. Furthermore, when real property is involved, transfer upon petition is incumbent on the Summary Court, provided that the transfer application is timed correctly so as not to interfere with the defendant's oral submissions to the court.<sup>93</sup> The value of proper timing is that the transferee court does not have to rehear the matter as is the case in India. When a matter is reheard, it can significantly increase both the costs and the time it takes to finalize it.

## 7.2 Art 17

- 92 Art 17, which is of general application, is titled 'Transfer to Avoid Delay'. The Article provides:

Even if the litigation is subject to its jurisdiction, the court of first instance, upon petition or *sua sponte*, may transfer the whole or part of the litigation to another court of jurisdiction if it finds this to be necessary in order to avoid a substantial delay in litigation or to ensure equity between the parties, in consideration of the domicile of each party and witnesses to be examined, the location of any object to be inspected that is to be used, and any other circumstances.

- 93 In terms of this article, a *first instance court*<sup>94</sup> (whether or not<sup>95</sup> it has jurisdiction) is empowered to exercise its residual discretion to transfer a matter to another court if it finds it necessary 'to avoid a substantial delay in litigation or to ensure equity between

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<sup>91</sup> Whether it appropriate to transfer jurisdiction would have to be determined in accordance with Art17 JCCP discussed below.

<sup>92</sup> Art 19(2) JCCP provides that the summary court 'shall transfer the whole or part of the litigation[...]'.

<sup>93</sup> Article 19(1) JCCP.

<sup>94</sup> That is, the District Court or the Summary Court.

<sup>95</sup> This is inferred from the words 'Even if the litigation is subject to its jurisdiction.'

the parties having regard to the domicile of the parties and witnesses, the location of any object to the inspected, or any other circumstance’.

- 94 The court can exercise its discretion to order the transfer upon application of any of the parties or by the court *sua sponte*.
- 95 Because Art 17 is a provision of general application, it would override any agreement relating to jurisdiction entered by the parties pursuant to Art 11 of the Code.<sup>96</sup> It is interesting to note that the Article uses the word ‘jurisdiction’ and does not refer to the phrase ‘exclusive jurisdiction’ as is the case in Art 16. This then raises the question of whether a court possessing exclusive jurisdiction could use Art 17 to order a transfer to a court for the reasons mentioned in the Article. On an interpretation of Art 17, it would seem that exclusive jurisdiction should be distinguished from general and concurrent jurisdiction and that transfer is only applicable in the latter instance. This interpretation is fortified by Art 20 (discussed below).

### 7.3 Art 19

- 96 As noted earlier, Art 19 deals with ‘Mandatory Transfer’. Without derogating from what has already been stated in respect of Art 19, the Article goes on to state that where the parties consent to transfer, the court is obliged<sup>97</sup> in terms of sub-Art 19(1) to order the transfer to a District or Summary Court, unless the court thinks the transfer would substantially delay litigation proceedings, or if the petition is filed after the defendant has presented an oral argument on the merits of the case, or entered a statement in preparatory proceedings. Furthermore, the petition must not be in respect of ‘a transfer from the Summary Court to the District Court of jurisdiction in that locality’. The provisions of Art 19(1) should not affect the residual discretion of a court to transfer a matter to another court in terms of Art 17 if the latter's requirements are met.
- 97 It would thus seem that Art 19 is to prevent parties from capriciously transferring matters from one court to another based on mutual consent or from horizontally transferring a case to courts in the same locality. Therefore, its purpose differs from Art 17, which has a broader objective. It should also be noted that Art 17 does not stipulate limitations regarding the timing of transfer – although it does set out requirements for exercising judicial discretion.

### 7.4 Art 20

- 98 Art 20, which is titled ‘Restriction on Transfer if there is Exclusive Jurisdiction,’ provides:

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<sup>96</sup> Art 11(1) provides that the parties may ‘determine the court of jurisdiction by agreement, but only in the first instance.’ See also preceding note.

<sup>97</sup> Art 19(1) uses the phrase ‘shall transfer’.

(1) The provisions of the preceding three Articles do not apply if the litigation is subject to the exclusive jurisdiction of the court before which it is pending (except exclusive jurisdiction determined by an agreement between the parties pursuant to the provisions of Art 11.

(2) Notwithstanding the provisions of the preceding paragraph, if litigation in an Action Involving a Patent Right, etc. is to be transferred to a court specified in either item of Art 6, paragraph (1) pursuant to the provisions of Article 17 or paragraph (1) of the preceding Article, the provisions of Article 17 or paragraph (1) of the preceding Article apply.

- 99 Art 20 draws a distinction between exclusive jurisdiction based on an agreement between the parties and other types of exclusive jurisdiction (presumably, subject matter jurisdiction). Whereas Art 17 can be used to order a transfer even where the parties agreed that a particular court would have jurisdiction, Art 20 makes it clear that the residual discretion of the court under Art 17 cannot be used to order a transfer in respect of those types of matters over which a court has exclusive subject matter jurisdiction. If the court before which the petition for transfer is brought has concurrent jurisdiction with the court to which the matter is sought to be transferred, transfer of jurisdiction under Art 17 is not hindered. In matters involving Patent Rights, a different regime applies, the specifics of which need not be traversed for this research.

## 7.5 Art 21

- 100 Art 21, titled 'Immediate Appeals', provides that an immediate appeal may be filed against a ruling for or against transfer.<sup>98</sup> Even though it is an interlocutory process, a transfer order in the Japanese procedure has a final effect and can lead to an appeal.

## 7.6 Art 22

- 101 As regards the binding nature of the order of transfer, this is covered by Art 22, which provides that the order is binding on the court that has accepted the transfer. Furthermore, a court that has taken the transfer may not transfer the case to another court. Thus, the further transfer of a case is limited, which sets the Japanese procedure apart from legal systems that allow for multiple transfers. Furthermore, once a matter is transferred, it is 'deemed to be pending before the court to which it has been assigned since it was first brought to the initial court.' Although inelegantly stated, this provision has the same effect as New South Wales.

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<sup>98</sup> This is to be distinguished from South Africa, where appeals on transfer proceedings are not permitted. See the discussion below.

## 7.7 Comment

102 While the Japanese provisions are not always the model of clarity when compared to some of the other legal systems reviewed, the rules relating to transfer contain sufficient particularity to address the significant aspects of the research question. From the rules, the following are discernible:

- (a) The timing of a transfer is important. If the case has reached a far point in the litigation, a transfer is impossible.
- (b) Transfer is not possible from a court with exclusive jurisdiction to a court with general jurisdiction.
- (c) Transferring cases between courts in the same locality is not permitted.
- (d) The court to which a matter is transferred must have subject matter jurisdiction.

103 Points (a) and (c) are important in that they strengthen access to justice because they prevent a case from being delayed by the transfer. Point (b) prevents the legislative purpose of conferring exclusive jurisdiction on some courts from being subverted by a venue transfer. Point (b) is also consistent with the law in many other legal systems. It is also important to note that the rules do not distinguish between plaintiff and defendant; thus, any party may petition the court for transfer. Point (d) is also consistent with the laws of other countries surveyed in this chapter, as it is a general rule that the transferee court must, as a minimum, possess subject matter jurisdiction.

## 8 SOUTH AFRICA

104 Chapter 8 of the Constitution of the Republic of South Africa, 1996, sets out the hierarchy of the courts. The Supreme Court of Appeal and the Constitutional Court are appellate courts. The first instance courts are the High Courts located in the nine provinces, and the Magistrates' Courts distributed across the various municipalities in the country. Magistrates' Courts are divided into the District and Regional Courts. Their jurisdiction is separated by subject matter and monetary amount.<sup>99</sup>

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<sup>99</sup> Regional and District courts can hear various claims, including property claims, contract and tort cases. The monetary limit of District Courts is R200 000, and for Regional Courts, R200 000 to R400 000. The subject matter jurisdiction of the Regional Courts is virtually identical to District Courts, except that Regional Courts can also grant divorces and hear marriage nullity suits. See Magistrates' Courts Act 32 of 1944, Sec 29.

- 105 The law relating to transfer in the High Court is provided for in the Superior Courts Act 10 of 2013<sup>100</sup> and the Uniform Rules of Court of the High Courts.<sup>101</sup> The law relating to transfers in the Magistrates' Courts is set out in the Magistrates' Courts Act 32 of 1944. These legislative enactments govern all the country's High Courts and Magistrates' Courts.
- 106 South Africa is a unitary state. The Constitution establishes Parliament as the primary legislative authority, and laws passed by Parliament apply nationally. While provincial legislatures have limited powers to make laws in certain areas, Parliament has extensive law-making functions. This is why civil law such as family law, tort law, contract law, property law, inheritance law, consumer law, company law, and civil procedure are the same throughout the country. Differences usually arise based on how the High Courts interpret legislation and the common law (Roman-Dutch law), but these differences are typically minor. The decisions made by High Courts serve as precedent, but only within their specific geographic regions. This explains why there may be differences in how the law is applied in different provinces. However, the decisions of the Supreme Court of Appeal<sup>102</sup> or the Constitutional Court applies to the entire country. The Constitutional Court is the highest court, and its decisions override any High Court decisions, ensuring consistency in the law across the country.

### 8.1 Transfer between High Courts

- 107 Sec 27 of the Superior Courts Act<sup>103</sup> deals with removing proceedings in the High Court from one Division of the High Court and from one seat<sup>104</sup> to another in the same Division. Interestingly the section is headed 'Removal of proceedings from one division to another or from one seat to another in the same division' and does not use the word 'transfer' at all. According to the section:

(1) If any proceedings have been instituted in a Division or at a seat of a Division, and it appears to the court that such proceedings —

(a) should have been instituted in another Division or at another seat of that Division or

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<sup>100</sup> The Superior Courts Act replaced the Supreme Court Act 59 of 1959.

<sup>101</sup> Uniform Rules of Court: Rules Regulating the Conduct of Proceedings on the Several Provincial and Local Divisions of the High Court of South Africa Government Notice Regulation 48 of *Government Gazette* No 999 of 12 January 1965 as amended. The Rules are delegated legislation made by the Rules Board for Courts of Law in terms of the Rules Board for Courts of Law Act 107 of 1985.

<sup>102</sup> The Supreme Court of Appeal is the highest court of appeal in all matters, other than constitutional matters.

<sup>103</sup> Superior Courts Act 10 (2013).

<sup>104</sup> In terms of s 6(3)(c) of the Act, the Minister may, after consultation with the Judicial Service Commission, by notice in the *Gazette* establish one or more local seats for a division and determine the area under the jurisdiction of each such local seat.

(b) would be more conveniently or more appropriately heard or determined

(i) at another seat of that Division; or

(ii) by another Division,

that court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other Division or seat, as the case may be.

(2) An order for removal under subsection (1) must be transmitted to the registrar of the court to which the removal is ordered, and upon the receipt of such order that court may hear and determine the proceedings in question.

108 Sec 27(1)(a) permits a High Court that lacks jurisdiction to ‘remove’ a matter to another High Court of proper jurisdiction.<sup>105</sup> The provision thus caters for jurisdictional transfer. However, it is important to note that if a case falls under the High Court's exclusive jurisdiction, it cannot be transferred to a court of equal standing, like the Labour Court or the Competition Court. Similarly, the High Court cannot appropriate the jurisdiction of a specialist court such as the Labour Court or the Competition Court. Similar to other jurisdictions surveyed, the position is that jurisdictional transfer cannot be used to undermine the subject matter jurisdiction of a specialist court.

109 Sec 27(1)(b) provides for venue transfer, and any party may apply for it.<sup>106</sup> Thus, under Sec 27, the court exercises its discretion in two situations: when it lacks jurisdiction, and another court has jurisdiction or when another venue would be more convenient. In the case of convenience, the court rarely acts on its own accord and instead waits for the parties to apply for a venue change.

110 In *Nedbank Ltd v Thobejane and Similar Matters*<sup>107</sup>, several banks elected to sue debtors in the High Court when the cases could have been heard in the Magistrate’s Court as the litigation to declare immovable property executable fell within the monetary and subject matter jurisdiction of the Magistrate’s Court. The Gauteng Division of the High Court held that it could *mero motu* effect a venue transfer if it was deemed necessary for the interests of justice, such as to reduce costs.

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<sup>105</sup> *Road Accident Fund v Rampukar; Road Accident Fund v Gumede* (Supreme Court of Appeal, South Africa), Judgment 28 November 2007 [[2007] SCA 148 (RSA) 543/06] para 12–20.

<sup>106</sup> Because the issue the lack of jurisdiction is a fundamental procedural issue, the court can of its own accord raise the issue and determine the issue.

<sup>107</sup> *Nedbank Ltd v Thobejane and Similar Matters* 2019 (Supreme Court of Appeal, South Africa) (1) SA 594 (GP). Sec 50 of the Magistrates’ Courts Act is discussed below.

- 111 However, *Nedbank* was overturned by the Supreme Court of Appeal in *Standard Bank of South Africa Ltd and Others v Mpongo*.<sup>108</sup> The appeal court held that a court acting on its own accord in transferring jurisdiction simply because another court may be better suited from a cost perspective is inappropriate. Instead, transfers between courts must follow the procedures outlined in Sec 27 of the Superior Courts Act, Uniform Rule of Court 39(22), and Sec 50(1) of the Magistrates' Courts Act.<sup>109</sup> The High Court cannot create new grounds for 'transfer' by relying on its inherent jurisdiction.<sup>110</sup>
- 112 Sec 27(1)(b) gives any High Court the discretion based on convenience to remove a matter to any other High Court, irrespective of whether it is a seat or a division.<sup>111</sup> In deference to the plaintiff, a court will not lightly order the removal of a case that falls within its competence. The applicant bringing an application for a change of venue must satisfy the transferring court that the proceedings would be more conveniently or more appropriately heard or determined by the transferee court. In deciding the removal, the court must consider the convenience of the parties, the convenience of the court, and the 'general disposal of the litigation'.<sup>112</sup>
- 113 Convenience is affected by various factors, such as the location of expert witnesses, lay witnesses, and special court procedures available in some High Courts<sup>113</sup> that can help speed up the legal process.<sup>114</sup> The distance between the court and the residences of the plaintiff and defendant is also considered.<sup>115</sup> When deciding whether to transfer a case, the court takes into account factors like the backlog of cases<sup>116</sup> and the potential for

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<sup>108</sup> *Standard Bank of South Africa Ltd and Others v Mpongo* (Supreme Court of Appeal, South Africa), Judgment 25 June 2021 [2021 (6) SA 403 (SCA)].

<sup>109</sup> Ibid para 58. The Court generally used the word 'removal' but lapsed into treating the word 'transfer' and 'removal' as synonymous.

<sup>110</sup> Historically the High Court and the Supreme Court of Appeal (formerly, the Supreme Court and the Appellate Division respectively under the pre-constitutional dispensation) had 'inherent jurisdiction' to *inter alia* regulate their own processes and procedures when the interests of justice so required. The inherent jurisdiction of the High Court, Supreme Court of Appeal and Constitutional Court is now constitutionally entrenched in Sec 173 of the Constitution, which serves as an additional mechanism to protect their independence under the separation of powers constitutional model.

<sup>111</sup> Again, as is the position with s 27(1)(a), Sec 27(1)(b) does not permit the transfer of a matter on the ground of convenience if the matter falls within the exclusive jurisdiction of the High Court to another court of equivalent standing as the High Court, such as the Labour Court or the Competition Court. Similarly, Sec 27(1)(b) does not permit the Labour Court or the Competition Court to transfer a matter to the High Court if it is determined that it would be more convenient to sue in the High Court.

<sup>112</sup> *Ying Woon v Secretary for Transport* (High Court, South Africa) [1964 (1) SA 103 (N)] 111G-H; *Mulder v Beacon Island Shareblock LTD* (High Court, South Africa) [1999 (2) SA 274 (C)] para 10.

<sup>113</sup> These special procedures are often created under *Practice Directives* as contemplated by Sec 8 of the Superior Courts Act 10 of 2013.

<sup>114</sup> See *Mulder v Beacon Island* (n 112) para 9.

<sup>115</sup> *Thembanani Wholesalers (Pty) Ltd v September* (Eastern Cape High Court, South Africa), Judgment 26 June 2014 [2014 (5) SA 51 (ECQ)] para 13. See *Ying Woon v Secretary* n 112) 111H.

<sup>116</sup> But see the discussion on the magistrate's courts below.



significant delays.<sup>117</sup> This contrasts with New South Wales (discussed above), where the size of the court roll does not affect the decision to transfer a case.

114 In order for a transfer to be considered valid under Sec 27(1)(b), the court that is transferring the case must have jurisdiction. However, the court that will receive the case does not need to have jurisdiction based on the usual jurisdiction rules. Instead, convenience allows the receiving court to assume jurisdiction.<sup>118</sup> In this regard, South Africa is similar to many of the other jurisdictions reviewed.

115 Even though Sec 27(1)(b) sets out the procedure for venue transfer namely, an application by any of the parties, it has been held that the prescribed mechanism for affecting removal on the basis of convenience does not preclude a court from *mero motu* raising the issue.<sup>119</sup> In such cases, the legal representative will address the matter orally in court or file papers to assist the court. A decision on whether or not to transfer a matter cannot be appealed as an interlocutory matter not resulting in a final judgment is not eligible for appeal.<sup>120</sup> In this regard, South Africa differs from Japan (see discussion above).

## 8.2 Transfer from the High Court to the Magistrate's Court

116 The Uniform Rules of Court (URC), which are binding on all the High Courts, make provision for a vertical transfer of jurisdiction from the High Courts to the Magistrates' Courts. URC 39(22) provides that consenting parties in a trial have the right to request, in writing through the registrar, to transfer the case to the magistrate's court before the trial. This is only possible if the matter falls under the jurisdiction of the Magistrate's Court, either by consent or otherwise. This subrule provides an expeditious procedure for transferring cases to the Magistrate's Court where all the parties consent, and provided that the matter does not fall within the High Court's exclusive jurisdiction.

117 On a literal interpretation of the rule, transfer may not be ordered in the absence of consent.<sup>121</sup> However, case law is not harmonious on this point. In *Veto v Ibhayi City Council*<sup>122</sup>, the Southeastern Cape High Court held that URC 39(22) is not intended to be exhaustive and that the High Court can, in the exercise of its inherent power, order a transfer on application by one of the parties where consent is absent. Following this line

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<sup>117</sup> *Ying Woon v Secretary* (n 112) 111H-112A.

<sup>118</sup> See *Road Accident Fund v Rampukar*; *Road Accident Fund v Gumede* (n 105) para 11.

<sup>119</sup> *Thembani v September* (n 115) para 13.

<sup>120</sup> *Ngqula v South African Airways (Pty) Ltd* (Supreme Court of Appeal, South Africa), Judgment 19 September 2019 [2013 (1) SA 155 (SCA)] 157C, 160D.

<sup>121</sup> In this regard the rules have been held to be 'deficient': *Twine v Naidoo* (High Court, South Africa), Judgment 16 October 2017 [[2018] 1 All SA 297 (GJ)] para 32.

<sup>122</sup> *Veto v Ibhayi City Council* (High Court, South Africa), Judgment 20 October 1989 [1990 (4) SA 93 (SE)] 95G-96D.



of reasoning, *Thomson v Thomson*<sup>123</sup> ordered a case instituted in the Witwatersrand Local Division of the High Court to be referred to the family maintenance court (at Magistrates' Courts level) for hearing without the parties' consent. However, in *PT v LT*<sup>124</sup>, the Western Cape High Court held that a vertical transfer is invalid in the absence of consent.<sup>125</sup> In light of the decision in *Standard Bank of South Africa Ltd and Others v Mpongo* (discussed above), it seems unlikely if the legislation is strictly construed that a vertical transfer of jurisdiction will be possible in the absence of consent.<sup>126</sup>

- 118 If both parties agree to the transfer, the court is required to transfer the matter.<sup>127</sup>
- 119 Because the procedure for transfer entails a *written* application to a judge through the registrar, compared to an application in terms of Sec 27 of the Superior Courts Act, it has been held that the procedure entails a 'quasi-administrative act' by a judicial officer but not in his capacity as an officer in a court of law.<sup>128</sup> It is interesting to note that the transfer procedure in the Chinese system also appeared to have more of an administrative rather than judicial nature.<sup>129</sup>
- 120 The procedural consequences of a transfer by consent under URC 39(22) are addressed in Rules 50 (9)-(10) of the Magistrates' Courts Rules.<sup>130</sup> The relevant subrules provides that if a case is transferred to a different court according to URC 39(22), the summons or initial document issued in the original court will be considered a valid summons in the new court. The defendant will have the right to object, but if there are no objections, the case will proceed from the appropriate stage following the stage at which it was

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<sup>123</sup> *Thomson v Thomson* (High Court, South Africa), Judgment 24 July 2003 [2010 (3) SA 211 (W)] 219E–H.

<sup>124</sup> *PT v LT* (High Court, South Africa), Judgment 15 November 2011 [2012 (2) SA 623 (WCC)] 630E–F.

<sup>125</sup> The court stated at footnote 13: 'The magistrates' courts are creatures of statute, and proceedings in those courts fall to be instituted and prosecuted in accordance with the relevant statutory provisions. The same considerations apply to proceedings in the maintenance courts. A High Court has no jurisdiction, outside the applicable statutory frameworks, in proceedings instituted before it to cause those proceedings to continue in another court. Subject to the applicable statutory provisions, it is for a claimant to determine in which court of competent jurisdiction to institute and prosecute proceedings.'

<sup>126</sup> In *Standard Bank of South Africa Ltd and others v Mpongo* (n 108), the court expressed the view that the inherent jurisdiction of the High Court could not be the *causa* for fashioning new grounds of transfer as there were clear legislative provisions. The case is discussed above.

<sup>127</sup> *Veto v Ibhayi City* (n 122) 95H.

<sup>128</sup> *Briel v Van Zyl* (High Court, South Africa), Judgment 15 February 1985 [1985 (4) SA 163 (T)] 167H.

<sup>129</sup> See discussion above.

<sup>130</sup> Rules Regulating the Conduct of Proceedings of the Magistrates' Courts of South Africa GN R740 in GG 33487 of 23 August 2010, as amended.

terminated in the original court. Costs incurred before the transfer will typically be 'costs in the cause'<sup>131</sup> unless the court directs otherwise.

### 8.3 Transfer from the Magistrate's Court to the High Court

- 121 Sec 50 of the Magistrates' Courts Act regulates the removal of actions from the Magistrate's Court to a provincial or local division of the High Court. The section provides that if the amount of a claim exceeds the amount established by the Minister in the Gazette (ZAR 400 000), exclusive of interest and costs, the defendant can apply to the court to have the case moved to a provincial or local division with jurisdiction. The defendant must give notice of the intention to make this application to the plaintiff and any other defendants before the hearing date. The notice must state that the applicant objects to the case being tried in the current court. Additionally, the applicant must give security for the payment of the amount claimed and any incurred costs as determined by the court. If the applicant complies with these provisions, all proceedings in the current court must be stayed, and the case will be moved to the appropriate provincial or local division.
- 122 It is evident from the stated provision that only the defendant can transfer a case from the Magistrate's Court to the High Court. The plaintiff does not have the ability to do so. Consequently, if the defendant files a counterclaim exceeding the monetary jurisdiction of the Magistrate's Court, they can use this provision. In order to proceed, the defendant is required to file an interlocutory application and provide security for payment of the amount claimed, as well as any costs already incurred in the case and any future costs associated with suing in the High Court. Once all requirements are met, the magistrate must approve the application, and all proceedings in the Magistrate's Court must be stayed.<sup>132</sup> The plaintiff can then choose to either start a new action by issuing a fresh summons or let the matter continue in the High Court on the existing summons.

### 8.4 Transfer between Magistrates' Courts

- 123 Sec 35 of the Magistrates' Courts Act 32 of 1944 provides that if all parties agree or if a party can prove that a trial in the court where the summons was issued would cause undue expense or inconvenience, that action or proceeding can be transferred to another court. An interpleader summons issued in the district where property was attached can be sent to the court where the judgment was given, if the court deems it appropriate.

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<sup>131</sup> 'Costs in the cause' means that the cost of the transfer will be borne by the party who eventually loses the case at the end of the trial. South Africa has a winner-takes-all system of costs; thus, the general rule is that the unsuccessful party has to pay a percentage of the legal costs to the winner. These costs are determined according to a tariff table and are 'taxed' in a formal administrative process in which the winner has to justify the costs claimed.

<sup>132</sup> *Rennie v Bosch* 1928 EDL 23 at 24.

- 124 According to precedent, Sec 35 allows for cases to be moved between Regional Courts, District Courts, and vice versa, but only if certain conditions are met. The transfer must comply with all statutory requirements and cannot involve a case that falls exclusively under the jurisdiction of a specific court. For example, divorce cases that fall within the subject matter jurisdiction of Regional Courts cannot be transferred to District Courts, which lack the authority to hear status matters. Despite the aforementioned limitation, the transfer process is quite flexible. It permits transfers from the District Court to the Regional Court in cases where amending a claim or counterclaim requires a transfer to the appropriate Regional Court,<sup>133</sup> or if the parties agree to hear the case in the District Court to save on costs, even if the claim amount falls within the Regional Court's monetary jurisdiction.<sup>134</sup>
- 125 Sec 35(1) allows for transfer to occur in two ways: with consent from all parties or by application from any party who believes it is necessary to prevent undue expense or inconvenience. Only a Magistrate's Court with jurisdiction can transfer a case to another Magistrate's Court, and the transferee court does not need to have territorial jurisdiction over the case. The transfer application can be made at any time during the proceedings, but it is common practice to wait until the pleadings have closed.<sup>135</sup>
- 126 The way transfer requests are handled in Magistrates' Courts and High Courts differ due to the language used in the respective statutes. Sec 27 of the Superior Courts Act states that a case may be moved if it can be 'more conveniently or more appropriately heard or determined', while Sec 35 of the Magistrates' Courts Act refers to situations where transferring a case could result in 'undue expense or inconvenience'. Although it may seem like the 'balance of convenience' test, which applies in the High Court, does not apply in the Magistrate's Court, the decision to transfer a case ultimately rests with the court and is based on the facts presented by the parties involved. The court must consider the convenience of all parties when making a decision on a transfer request. Despite the difference in wording, it is unlikely that it will significantly affect how transfer applications are typically decided.
- 127 When deciding whether to transfer a case, certain factors are taken into consideration. These include the location of the witnesses, the need to conduct an inspection in a

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<sup>133</sup> *Botha v Singh and Others* (High Court, South Africa), Judgment 21 May 2015 [[2015] ZAGPPHC 447]; *Matlhasa v Makda and Another* (High Court, South Africa), Judgment 04 September 2015 [(2015/17438) [2015] ZAGPJHC 229]. See also J Lekhuleni, 'Regional court to district court: Horizontal and vertical application' March 2017 *De Rebus* 22–3.

<sup>134</sup> This must be understood with reference to Sec 45 of the Magistrates' Courts Act which allows parties by consent to bring claims in the District Magistrates' Courts even if the claim's value exceeds the court's monetary jurisdiction (currently R200 000).

<sup>135</sup> *Slabbert v Priest* [1932 CPD 154]; *Gericke v Priest* [1922 CPD 229] 230; *Radloff v Union South West Africa Insurance Co Ltd* [1972 (4) SA 634 (E)].

specific area, and the financial situation of the plaintiff or defendant.<sup>136</sup> In some cases, leniency may be given to a party who is unable to travel due to age or illness. Additionally, a change of venue may be ordered to speed up the hearing process if one party is deliberately delaying the proceedings.<sup>137</sup>

- 128 In considering the convenience for parties involved in a case, the court must also consider its own convenience in ensuring a speedy resolution.<sup>138</sup> However, it's important to note that simply seeking an earlier hearing date is not enough to justify a transfer, as this would undermine the court's duty to consider the needs of all parties involved and strike a fair balance.<sup>139</sup> While delay is not the deciding factor, lengthy delays may tip the balance in favour of a transfer. Additionally, transfers will be refused if there is doubt regarding cost savings or a strong suspicion that the request for transfer is being used to cause delay.<sup>140</sup>
- 129 It is worth noting that, thus far, there is no precedent allowing venue transfer from a regional court to a district court for convenience or cost savings, but parties can agree to the transfer if they both consent.

## 8.5 Comment

- 130 While the South African civil procedure contains rules allowing for flexible transfer of jurisdiction between the various courts, there are several shortcomings. First, unlike in other jurisdictions, such as the United Kingdom (discussed below) the procedural rules relating to transfer are spread across several statutory provisions.
- 131 Secondly, the wording of the different pieces of legislation differs. For example, the test for transfer in Sec 27 of the Superior Courts Act differs from the test in Sec 35 of the Magistrates' Courts Act.
- 132 Thirdly, unlike the English Civil Procedure Rules (UKCPR 30), there is no indication in the legislation of how the courts will exercise their discretion when determining whether it

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<sup>136</sup> *Rothman v Woodrow & Co* [(1884) 4 EDC 32]; *Sapiero v Lipschitz & Tooch* [(1909) 26 SC 493]; *Raubenheimer v Smith* [(1908) 18 CTR 476]; *Swanepoel v De Klerk* [1911 CPD 508]; *Morgan v Erskine* [1913 EDL 94]; *Van Niekerk v Van Niekerk* [1969 (2) SA 430 (C)]; *Jenkins v Omdal* [(1898) 12 EDC 217]; *New Cape Central Railways v Doidge* [(1906) 16 CTR 851]; *Morris v Harris* [1913 JWR 110]; *Ex parte Putteril* [1938 (1) PH F35 (O)].

<sup>137</sup> *Maputo Cotton Estates v Ramportal* [(2) 1975 (2) PH F77 (D)].

<sup>138</sup> *Walters Brick Industries Ltd v Henkes* [1938 WLD 4] 5,6; *Maputo Cotton Estates v Ramportal* [(2) 1975 (2) PH F77 (D)]; *Thompson v Thompson* (n 123) 604; *Smith v Wilson* 1949 [(3) SA 537 (D)] 539; *Swallow v Swallow* [1947 (3) SA 3 (C)]; *Lundy v Lundy* [1962 (2) SA 481 (D)] 483E-G.

<sup>139</sup> *Maennel v Garage Continental Ltd* [1 LLR 294]; *Rothman v Woodrow & Co* [(1884) 4 EDC 32]; *Cooper v Thomas* [(1903) 17 EDC 110]; *Morgan v Erskine* [1913 EDL 94].

<sup>140</sup> *Bethge v Bester* [1911 EDL 24]; *Satisky v Ellis & Son* [(1900) 14 EDC 152]; *Stanton v Pappas* [1923 EDL 401]; *Agjee v Moosa & Sons Ltd* [1930 (2) PH F157 (D)].

is convenient to transfer a matter. The procedure is clarified through case law, but this can make it difficult for the general public to understand. The first three criticisms are consequences of having an uncoded law of procedure.

- 133 Fourthly, a transfer of jurisdiction is impossible from a High Court to a Magistrate's Court unless the parties consent. This somewhat restrictive prerequisite permits litigants with money to insist that matters be heard in the High Court when a case could easily be heard in the Magistrate's Court and convenience favours transfer.
- 134 Fifthly, although parties cannot be unsuited for suing in the incorrect Division or seat of the High Court, they can be unsuited for suing or not suing in a specialist court, such as the Labour Court or Competition Court, even though the High Court and the specialist courts have equal hierarchical standing, and transfer of matters could be easily facilitated through an administrative process between the courts. As previously mentioned, it is in line with the laws of other jurisdictions to prohibit transfers between specialist and general jurisdiction courts.

## 9 UNITED KINGDOM: ENGLAND AND WALES

- 135 The process of transferring jurisdiction is outlined in Part 4 of the Civil Procedure Rules (UKCPR), specifically UKCPR 30. This rule addresses the transfer of jurisdiction and venue between County Courts, High Courts, and the County Courts and Divisions of the High Court, enabling both horizontal and vertical transfers. UKCPR 30 is supplemented by Practice Direction 30.<sup>141</sup> In addition, one must also have regard to Sec 41 and 42 of the County Courts Act 1984.
- 136 A party wishing to apply for transfer must do so in the court where the claim is proceeding.<sup>142</sup>
- 137 The High Court can transfer cases to the County Court even if they exceed the monetary limits of the County Court.<sup>143</sup>
- 138 A judge dealing with claims in a specialist list<sup>144</sup> may order proceedings to be transferred to or from that list. An application for the transfer of proceedings to or from a specialist

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<sup>141</sup> [https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part30/pd\\_part30](https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part30/pd_part30) accessed 21 December 2021.

<sup>142</sup> UKCPR 30.2(6).

<sup>143</sup> County Courts Act, Sec 40(2). See also *National Westminster Bank plc v King* (High Court, England) [2008] EWHC 280 (Ch), [2008] Ch 385.

There are specific courts designed to handle certain types of legal matters, such as the Financial List (refer to Practice Direction Part 63A). This court specializes in finance arrangements like derivatives, complex financial products, and financial benchmarks, as long as the claim value is over £50 million. It also deals with cases that require expertise in financial markets or raise important issues in the financial

list must be made to a judge dealing with claims in that list.<sup>145</sup> An order for transfer of proceedings between the Chancery Division and a Queen's Bench Division specialist list may only be made with the consent of the Chancellor of the High Court.<sup>146</sup> Thus, in contrast to other jurisdictions, England and Wales allows for the transfer of cases to specialized courts even after they have been initiated in general courts.

139 When considering a transfer application, the court must take into account several factors. This includes the financial value of the claim and any disputed amounts, the convenience and fairness of holding hearings (including the trial) in another court, the availability of a judge who specializes in the type of claim being made, whether the legal issues involved are simple or complex, the potential impact of the outcome on the public, the resources available to the court, including those needed for parties and witnesses with physical disabilities, special measures for witnesses, and security needs. Additionally, the location of relevant government departments or officers of the Crown may be considered. In some cases, the public interest may require the matter to be tried in London.<sup>147</sup>

140 The Business and Property Courts Advisory Note<sup>148</sup> outlines additional criteria for transfer:

- (a) the extent to which the claim is connected to the circuit in question;
- (b) whether court resources, fairness, or other deployment constraints necessitate holding the hearings (including the trial) in a different court;
- (c) the preferences of the parties involved, which are important but not necessarily decisive;

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markets. Cases are initiated directly in the Financial List and can be filed in either the Chancery or the Commercial Registries using Financial List forms. Parties in existing cases can request to transfer onto the Financial List by following the procedure outlined in the Practice Direction. While Financial List cases can be commenced in the Chancery Division or the Commercial Court, the Commercial Court is preferred due to its well-suited procedures and registry for handling heavy, complex litigation. For more information, please refer to <https://www.finance-disputes.co.uk/2015/10/specialist-court-for-financial-markets-disputes-now-open/> (last accessed on 14 January 2022).

<sup>145</sup> *Collins v Drumgold* [2008] EWHC 584 (TCC).

<sup>146</sup> UKCPR 30.5(4).

<sup>147</sup> See Hickinbottom, Sime, French (ed) et al, *Blackstone's Civil Practice 2022* (Oxford University Press) § 42.10.

<sup>148</sup> <https://www.judiciary.uk/wp-content/uploads/2020/08/bpc-advisory-note-13-oct2017-1.pdf> (last accessed on 14 January 2022). § 26 of the Advisory provides:

'Cases that have specific links with a locality must be capable of being tried in that locality by a specialist judge. Therefore, although the transfer criteria in CPR rule 30.2 (transfer between the County Court and the High Court) and 30.5 (transfer between High Court Divisions and to or from a specialist list) continue to apply, new transfer rules set out in the Practice Direction will also apply alongside the existing criteria for a transfer order in CPR rule 30.3.'

(d) the international nature of the case, which may require holding a trial in a location with international transport links; and

(e) the availability of a judge who specializes in the type of claim being made to preside over the court to which the claim is being transferred.

- 141 In cases where the County Court deems that revealing certain details may pose a threat to national security and a party may be compelled to do so, the case must be transferred to the High Court.<sup>149</sup> This is a unique aspect that hasn't been observed in other surveyed jurisdictions, but it could fall under the public interest or 'special reasons' considerations of New South Wales or China.<sup>150</sup>
- 142 When a court orders a transfer, it is required to notify all parties involved. Any previous orders made before the transfer will remain unchanged.
- 143 The practical application of UKCPR 30 can be seen in two cases involving the specialist Technology and Construction Courts.<sup>151</sup> In *Neath Port Talbot County Borough Council v Currie and Brown Project Management Limited*<sup>152</sup>, the defendants applied to the High Court in London to transfer proceedings from the Bristol Technology and Construction Court.
- 144 The court determined that, despite the application under UKCPR 30 being intended for the Bristol Technology and Construction Court, it was appropriate to consider it in the High Court due to the importance of efficiently managing the proceedings. Ramsey J stated that the key factor was determining whether hearings should be held in London or Bristol based on convenience and fairness.<sup>153</sup> The court held:

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<sup>149</sup> UKCPR 30.3.

<sup>150</sup> See the discussions on the specific jurisdictions.

<sup>151</sup> This court handles disputes about buildings, engineering and surveying. It hears cases involving claims about services provided by engineers, architects, surveyors and other professionals in this sector, claims about local authority duties relating to land and buildings, environmental claims (eg, pollution), claims resulting from fires, and challenges to decisions of arbitrators in construction and engineering disputes. It does not usually handle cases with a value of less than £250,000 unless there is a good reason, e.g. the case involves a new or difficult point of law, or the case is international. The court is a specialist court and forms part of the Business and Property Court of the High Court of Justice. It includes both the High Court and the County Court. The High Court work is handled at the Rolls Building, London and district registries across England and Wales. Cases are heard by a High Court judge, certain circuit judges, and recorders. The County Court work is handled at centres across England and Wales. Cases are heard by circuit judges, recorders and certain district judges. See <https://www.gov.uk/courts-tribunals/technology-and-construction-court> (last accessed on 14 January 2022).

<sup>152</sup> *Neath Port Talbot County Borough Council v Currie and Brown Project Management Limited* (High Court, England) [2008] EWHC 1508 (TCC).

<sup>153</sup> *Neath Port Talbot County Borough Council v Currie and Brown Project Management Limited* (n 152) para 27.



On that issue I have come to the conclusion that the balance of convenience and fairness favours Bristol. Bristol is not as convenient, doubtless, for the Claimants as, say, Cardiff might have been. Equally, it is not as convenient as London would have been for the Defendants but it is more convenient than Cardiff.<sup>154</sup>

145 The defendant claimed that litigating in London, where their legal team and experts were based, would have been more financially viable. However, the court did not find this argument convincing due to the lack of evidence presented. The court then considered whether a High Court Judge should be assigned to the case. Given the complexity and size of the claim, a High Court judge was deemed necessary.<sup>155</sup> However, since the principal Bristol Technology and Construction Court judge was competently handling the case, they would continue to manage it, with a High Court judge presiding over the trial.<sup>156</sup> This sharing of jurisdiction to handle different aspects of a case is a unique feature not commonly seen in other jurisdictions, where an all-or-nothing approach to venue and jurisdictional transfer is taken. However, there is no practical reason why different courts cannot manage a case if they are aware of their respective responsibilities.

146 In *Tai Ping Carpets UK Limited v Arora Heathrow T5 Limited*,<sup>157</sup> proceedings had been commenced in the Birmingham District Registry. The defendant applied for an order to transfer the case to the London Technology and Construction Court, arguing that it would be more convenient for them due to their location, the subject matter of the contract being at Heathrow, and their witnesses, solicitors, and counsel being based in or around London. They even offered a discount to the claimant's advisers and witnesses if they stayed in their hotels in London. However, the claimant, a small company based near Birmingham, argued that the trial should be held in Birmingham due to the proximity of their witnesses and solicitors and the potential expense and inconvenience of transferring the case to London. The judge, Coulson J, considered the factors presented by both sides and ultimately dismissed the application to transfer the case. He held that the factors presented by each side cancelled each other out, and since the claimant had initiated the proceedings and bore the risk of unsuccessful claims, the case should remain in Birmingham. The judge also noted that given the relatively modest sums in dispute (GBP 600,000), it was appropriate to keep costs down by avoiding proceedings in London.

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<sup>154</sup> Ibid para 27.

<sup>155</sup> Ibid para 32.

<sup>156</sup> At para 34, the court held: 'Therefore, I refuse the application to transfer this case from the Bristol District Registry. So far as the application for the case to be managed and tried by a High Court judge, I give directions that it should be tried by a High Court judge but should generally continue to be managed by the principal TCC judge in Bristol.'

<sup>157</sup> *Tai Ping Carpets UK Limited v Arora Heathrow T5 Limited* (High Court, England) [2009] EWHC 2305 (TCC)



147 From the above, the following is discernible. The courts will carefully weigh the financial and other factors before allowing a jurisdictional and venue transfer. The courts require cogent evidence that it is more convenient to transfer the matter, and mere allegations of convenience, financial or otherwise, will not suffice. The applicant bears the burden of showing why the transfer of proceedings outweighs the convenience to the other side of remaining in the existing court.<sup>158</sup> In contrast to other legal systems, in England and Wales, the focus is on convenience rather than separating jurisdictional and venue transfers. A party will not be penalized for bringing a claim in the incorrect court. To expedite proceedings, reduce costs, and limit objections and complexity, the case will be transferred to the most suitable court based on convenience, in accordance with the ethos of the UKCPR.

## 10 UNITED STATES OF AMERICA

148 The United States has a federal legal system that protects the independent judicial autonomy of the states from each other and from federal interference. Due to this protection, there is no formal process for transferring a case from a state court to a federal court or between state courts. However, there are alternative ways for a case to move between courts, although these methods are not considered jurisdictional or venue transfers.

149 There are several ways to move a legal case from one court to another. The first is called *forum non-conveniens*, which allows a case filed in one state to be dismissed and refiled in another state on the basis that it is more appropriate for it to be heard in a different state.<sup>159</sup> The second way is through the process of remand and removal, which means that a case that qualifies for federal jurisdiction can be filed in either state or federal court. If it is filed in state court, the defendant can move it to federal court in the district where it was filed. If this is done incorrectly, the case can be sent back to the state court.<sup>160</sup> The third way is through the United States Supreme Court assuming jurisdiction over cases decided by state courts of last resort involving an issue of federal law. In this instance, the Supreme Court can decide the federal issue and remand a case back to state court to apply the federal law as the Supreme Court decided.<sup>161</sup> The fourth way is by applying the principle of abstention/exhaustion, in which a federal court might

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<sup>158</sup> See J Selby QC and E Healiss, 'Transfer of Proceedings Within England and Wales: Is It Time to Take a Fresh Look at Jurisdiction Clauses': [https://www.keatingchambers.com/wp-content/uploads/2018/07/KCSU\\_Transfer\\_of\\_ProceedingsvF.pdf](https://www.keatingchambers.com/wp-content/uploads/2018/07/KCSU_Transfer_of_ProceedingsvF.pdf) (last accessed on 17 January 2022).

<sup>159</sup> See *Gulf Oil Corp. v. Gilbert* (Supreme Court, US) [330 U.S. 501 (1947)]; *Piper Aircraft v. Reyno* (Supreme Court, US) [454 U.S. 235 (1981)]. And see M Gardner, 'Retiring Forum Non Conveniens' (2017) 92 New York University Law Review 390.

<sup>160</sup> Title 28 USC § 1441-1447.

<sup>161</sup> Title 28 USC § 1257.

dismiss or stay a case so that the litigants can seek relief in state systems first.<sup>162</sup> The fifth way is through certification, where a state's high court can accept certified questions on that state's law from a court in a different judicial system.<sup>163</sup> Finally, federal habeas corpus is a civil proceeding in federal court reviewing the constitutionality of a state proceeding that has deprived an individual's liberty.<sup>164</sup>

150 There are various methods for moving legal cases between courts. At the state level, various states have venue transfer rules, but those operate within an individual state. The state transfer rules do not permit cases to be transferred from one state to another. The only way a matter can be transferred across state lines is on an application of federal procedural law which allows a federal court in one state to transfer a matter to a federal court in another state. Therefore, in this chapter, I concentrate on venue transfer between federal courts. The following four provisions apply: Title 28 United States Code (USC) § 1391 sets general requirements for proper venue, USC § 1404 allows for federal venue transfer for convenience, USC § 1406 permits federal jurisdictional transfer, and USC § 1407 allows for federal multi-district litigation transfer. Each of these provisions will be explored below.

### 10.1 Title 28 USC § 1404

151 This is the most important general venue statute. It provides:

- (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.
- (b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.
- (c) A district court may order any civil action to be tried at any place within the division in which it is pending.

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<sup>162</sup> See *R.R. Comm'n of Tex. v. Pullman* (Supreme Court, US) [312 U.S. 496 (1941)] (*Pullman* abstention); *Sprint Communications v. Jacobs* (Supreme Court, US) [134 S. Ct. 584 (2013)] (*Younger* abstention); *Colorado River Water Conservation District v. United States* (Supreme Court, US) [424 U.S. 800 (1976)] (*Colorado River* abstention); *Jones v. Bock* (Supreme Court, US) [549 U.S. 199 (2007)] (exhaustion).

<sup>163</sup> Cantone, A Jason and Griffin, E Carly, *Certified Questions of State Law: An Examination of State and Territorial Authorizing Statutes* (2020).

<sup>164</sup> Title 28 USC § 2254.

(d) Transfers from a district court of the United States to the District Court of Guam, the District Court for the Northern Mariana Islands, or the District Court of the Virgin Islands shall not be permitted under this section. As otherwise used in this section, the term 'district court' includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term 'district' includes the territorial jurisdiction of each such court.

- 152 According to the provision, a federal court in one state can transfer a case, including a diversity case,<sup>165</sup> to another federal court located in a different state. Previously, transferring a case to a court that did not have personal jurisdiction over the defendant was not permissible. However, Congress amended the Code to allow transfer based on consent (§1404(a)). Consent-based venue enforces a forum selection clause in a contract and, in the absence of a forum selection clause, allows a defendant to agree to transfer a case to a particular venue. However, if there is no forum-selection clause, the court where the case is transferred must still have jurisdiction over the defendant, as signified by the phrase 'might have been brought'.
- 153 The primary objective of this section is to enable the transfer of a case to a venue that is convenient for the parties involved, taking into account various public interest factors, witness convenience, and the interest of justice. The court must also consider practical problems that can make a trial easy, expeditious, and inexpensive, such as access to sources of proof, availability of compulsory processes for securing witness attendance, and premises viewing if required.<sup>166</sup> Additionally, the court can take into account administrative difficulties resulting from congested court rolls, the local interest in having local disputes resolved at home, and the desire to have diversity cases tried in a forum that is familiar with the law.<sup>167</sup> The statute (§1404(d)) does not apply to certain States and territories in the United States.
- 154 In *Atlantic Marine Construction Company v. United States District Court for Western District of Texas*<sup>168</sup>, the Supreme Court of United States held that the onus as regards convenience changes when the parties selected a forum (for example, in a contract), and the applicant seeks to enforce that forum selection under § 1404 (a). The court held:

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<sup>165</sup> A diversity case refers to a situation where there is a lawsuit between residents/citizens of different states, and the amount claimed is more than USD 75,000. If these two requirements are lacking, a state must hear the matter unless there is a federal issue, in which case the two requirements above may be side-stepped.

<sup>166</sup> *Piper Aircraft Co. v. Reyno* (n 159) 241 n. 6.

<sup>167</sup> *Ibid.* See also *Gulf Oil Corp. v. Gilbert* (n 159). See also M Corna, 'Confusion and Dissension Surrounding the Venue Transfer Statutes' (1992) 53 Ohio State Law Journal 319 para 325.

<sup>168</sup> *Atlantic Marine Construction Company v. United States District Court for Western District of Texas* (Supreme Court, US) [571 U.S. 49].

In the typical case not involving a forum-selection clause, a district court considering a §1404(a) motion ... must evaluate both the convenience of the parties and various public-interest considerations. Ordinarily, the district court would weigh the relevant factors and decide whether, on balance, a transfer would serve "the convenience of parties and witnesses" and otherwise promote "the interest of justice." §1404(a).

The calculus changes, however, when the parties' contract contains a valid forum-selection clause, which "represents the parties' agreement as to the most proper forum." *Stewart*, 487 U.S., at 31. The "enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system." *Id.*, at 33 (KENNEDY, J., concurring). For that reason, and because the overarching consideration under § 1404(a) is whether a transfer would promote "the interest of justice," "a valid forum-selection clause should be given controlling weight in all but the most exceptional cases." *Id.*, at 33 (same). The presence of a valid forum-selection clause requires district courts to adjust their usual § 1404(a) analysis [...].<sup>169</sup>

- 155 When a case is transferred, the focus has traditionally been on moving it to a court that has personal jurisdiction over the defendant, especially if there is no forum selection clause. However, it is possible for a case transferred at the defendant's request to end up in a court that lacks personal jurisdiction over the plaintiff. Some argue that by initiating the lawsuit in the original court, the plaintiff agrees to the jurisdiction of the court where the case is transferred, regardless of whether they intended for it to be heard there or not. Others criticize this view, maintaining that the plaintiff's right to have the case heard in a court with personal jurisdiction over them should not be disregarded.

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- 156 There was some uncertainty when it came to determining which law applied when a case was transferred. Some precedent took the view that it was the law of the transferee court, while others opined that it is the law of the original court.<sup>171</sup> This was because some litigants used transfer to gain an advantage, such as a more favourable outcome or to get around time periods in state-specific statutes of limitations. The problem of litigants using this tactic, also known as 'forum-shopping', has been discussed by academics who argued for reform.<sup>172</sup> The difficulty, of course, is that it is difficult to

<sup>169</sup> The court went on to discuss in the three concrete ways in which the analysis changes: *Ibid* at 62-63.

<sup>170</sup> See in this regard, S Dodson, *Plaintiff Personal Jurisdiction and Venue Transfer* (2019) 117 *Michigan Law Review* 1462.

<sup>171</sup> Compare *Klaxon Co. v. Stentor Electric Manufacturing* (Supreme Court, US) [313 U.S. 487 (1947)] with *Van Dusen v. Barrack* (Supreme Court, US) [376 U.S. 612 (1964)]; *Moore v Emons* 1990 U.S. Dist. LEXIS 14024.

<sup>172</sup> *Piper Aircraft Co. v. Reyno* (n 159).

legislate for every conceivable consequence, and ossifying the law in a statute will allow advantage-seeking litigators to get away with unethical conduct. Despite previous uncertainty, general rules have emerged from *Atlantic Marine*: if the transfer is based on convenience, the law of transferring court applies, but if the transfer is based on a forum selection clause, the law of the receiving court applies.<sup>173</sup> This rule is not applied in every case,<sup>174</sup> but it does help alleviate some of the difficulties associated with forum-shopping.

## 10.2 Title 28 USC § 1406

157 This section provides for jurisdictional transfer. The pertinent subparagraph (a) of this provision provides:

(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

158 This provision was initially enacted in 1948 and amended to its current form in 1949. The purpose of this provision is to deal with the situation when a case is instituted in an improper venue. Instead of dismissing a case, the court can transfer a case to the proper court if this would be ‘in the interests of justice’. Interestingly whereas both §1404(a) and § 1406 advance transfer in the ‘interests of justice’, only § 1404(a) promotes convenience.<sup>175</sup>

159 One of the difficulties experienced by the courts is that litigants have sometimes brought proceedings relying on § 1404(a) when in fact, the case falls to be decided under §1406 (because the court lacks jurisdiction), requesting the court under §1404 to transfer a case to a court of correct jurisdiction in the interests of justice.

160 Some courts have allowed such proceedings, but other courts have not.<sup>176</sup> In *Atlantic Marine*,<sup>177</sup> the United States Supreme Court firmly rejected the practice and held that the two provisions have a distinct purpose: ‘section 1406(a) allows dismissal only when venue is “wrong” or “improper.”’ The court went on to hold: ‘Whether venue is “wrong” or “improper” depends exclusively on whether the court in which the case is brought satisfies the requirements of federal venue laws’.<sup>178</sup> The federal venue laws are

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<sup>173</sup> See also E Courson, ‘No Looking Back: The Effect of Transfer on Choice of Law Rules Applicable to Directly Filed Multidistrict Litigation Cases’ (2015) 46 University of Memphis Law Review 437 para 455.

<sup>174</sup> See *Atlantic Marine v U.S. District Court* (n 168).

<sup>175</sup> See *Norwood v Kirkpatrick* (Supreme Court, US) [349 U.S 29].

<sup>176</sup> See *Steward Organisation, Inc. v. Ricoh Corp.* (Supreme Court, US) [487 U.S 22 (1988)] and see *Atlantic Marine v. U.S. District Court* (n 168).

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid* para 4.

contained in Title 28 USC §1391. In *Atlantic Marine*, the court explained the position as follows:

[Title 28 USC §1391] states that '[e]xcept as otherwise provided by law this section shall govern the venue of all civil actions brought in district courts of the United States. §1391(a)(1) [emphasis of the court included]. It further provides that "[a] civil action may be brought in (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.' §1391(b). When venue is challenged, the court must determine whether the case falls within one of the three categories set out in § 1391(b). If it does, venue is proper; if it does not, venue is improper, and the case must be dismissed or transferred under § 406(a).

- 161 When the transferring court does not have proper jurisdiction, there is no dispute regarding which law should apply to a case under § 1406. According to precedent, only the law of the transferee court with the correct jurisdiction can be applied.<sup>179</sup>

### 10.3 Title 28 USC § 1407

- 162 The purpose of this provision is to improve efficiency and save time for all parties involved in federal cases. It enables cases with the same cause of action to be consolidated into a single district court for pre-trial proceedings, which is referred to as 'Multi-district Litigation' (MDL). Additionally, this procedure has evolved to allow plaintiffs with similar cases to file their claims directly in the district court where similar cases are being heard, without having to initiate it in the court of proper jurisdiction.
- 163 After the pretrial hearing, claims can be resolved by settling, dismissing, or transferring back to the original court for trial.<sup>180</sup> However, transfer under this provision has limited purposes and is only temporary.<sup>181</sup> The transfer does not replace the jurisdiction of the court where the case originated if the matter remains unsettled after pre-trial proceedings.

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<sup>179</sup> See A L Ryan, 'Principles of Forum Selection' (2000) 103 West Virginia Law Review 167 para 197 and the authorities there cited.

<sup>180</sup> E Courson, 'No Looking Back: The Effect of Transfer on Choice of Law Rules Applicable to Directly Filed Multidistrict Litigation Cases' (2015) 46 University of Memphis Law Review 437 para 455 – 457.

<sup>181</sup> For a contrary view, see Scott Dodson, 'Plaintiff Personal Jurisdiction and Venue Transfer' (2019) 17 *Michigan Law Review* 1463 para 1469.

164 One challenge with direct filing is figuring out which laws apply to the case. Some litigants have used the MDL process to file in the MDL court, so that they can use the laws of that state instead of the state where the case should be filed. This has led to forum-shopping. In *In re Welding Fume Products Liability Litigation*,<sup>182</sup> the court decided that the laws of the state where the MDL court is located should be used if the case is not resolved. However, in the case of *Wahl v General Electric Co*,<sup>183</sup> the court ruled that the laws of the state where the case is transferred should apply if the case is transferred out of the MDL court.

#### 10.4 Comment

165 In the United States, transfer statutes are often used to move thousands of legal cases each year. Unfortunately, this can cause a backlog in court proceedings and delays in trial dates.<sup>184</sup> Some litigants abuse these procedures to avoid substantive law issues, such as statutes of limitations. For example, a litigant may choose to file a case in a state with more favourable laws or a longer prescription period, only to later request a transfer to a different state with different conflict-of-law rules.<sup>185</sup> To address these concerns, conflict-of-law rules could be legislated, but this may be unconstitutional due to federalism.

### 11 ANALYSIS AND CONCLUSION

166 From the survey of the various jurisdictions, the following can be observed:

- (a) In countries with civil law systems, there is a reluctance to create specific principles for transfers. This is due to the conflict between the discretionary power of the judiciary and the predictability of codified civil procedure systems. See in this regard Germany, Italy and France. Consequently, there is provision for jurisdictional transfer but not venue transfer based on convenience. In this regard, China bears a similarity.
- (b) When it comes to jurisdictional transfer of a case, a court has little choice. However, when it comes to transferring a case based on the venue, it is up to the court's discretion. The court must consider the interests of all parties involved when making this decision. Most jurisdictions follow the 'balance of convenience' test or similar variations. Even in jurisdictions that use different tests, such as the 'ends of justice' test (India) or that the transfer must be 'desirable' (Ghana), the factors considered by the court are

<sup>182</sup> *In re Welding Fume Products Liability Litigation* (District Court Ohio, US) [245 F.R.D 279].

<sup>183</sup> *Wahl v General Electric Co* (Court of Appeals, US) [786 F.3d 491 (6th Circ. 2015)] para 498.

<sup>184</sup> E W Kitch, 'Section 1404(a) of the Judicial Code: In the Interests of Justice or Injustice?' (1965) 40 Indiana Law Journal 99 para 101.

<sup>185</sup> For an illustrative example, see *Ferens v. John Deere Co* (Supreme Court, US) [494 U.S. 516 (1990)].



essentially similar. If both parties agree to move the case to a different location, the court must transfer it. However, if the court thinks that the transfer would negatively affect the fairness of the legal process, they may choose not to transfer the case (see Japan).

- (c) A court can transfer a matter to another venue if the parties have agreed on forum selection, for example, in a contract. The forum selection venue need not have personal jurisdiction over the defendant. See, in this regard, the United States.
- (d) If permitted by law, either party can request the court to transfer a case to the appropriate jurisdiction. However, in some areas, the court can make the transfer without a request from either party. This can be found in New South Wales, Queensland, China and Ghana. The rules regarding who may request a transfer vary based on the type of transfer and the jurisdiction. Some areas allow both parties to request a jurisdictional transfer, while in others, only the defendant can request a venue transfer or the consent of both parties is required. For example, in South Africa, only the defendant can request a transfer, or both parties must consent to it.
- (e) The party seeking the transfer bears the onus of proving that the transfer is legally sound (see New South Wales, South Africa, United States).
- (f) For a venue transfer, the transferring court must have personal and subject matter jurisdiction to effect the transfer. However, it is not necessary for the transferee court to have personal jurisdiction over the defendant. See, in this regard, Ghana, South Africa, United States.
- (g) One common reason for transferring jurisdiction is to allow a party to file an updated claim with a higher monetary value in a higher court or to enable the defendant to raise a counterclaim on the merits that does not fall within the jurisdiction of the court where the claim was initiated (See New South Wales, Queensland, Germany, South Africa, Ghana. But see China). In that case, the matter is stayed where it was initially filed. Additionally, a court may order a jurisdictional transfer if the claim is too complex to handle or if two cases should be consolidated into one, and it would be in the interest of justice to have the matter heard by a higher-level court (see New South Wales). But jurisdictional transfer can also be open to abuse if the reason for transfer is not grounded in access to justice criteria. In this regard, see China, where a jurisdictional transfer may be accomplished for unspecified 'special reasons'.
- (h) When the defendant does not object to the court's jurisdiction, there is no need to transfer a case that exceeds the court's monetary jurisdiction. This



lack of objection is seen as giving consent to the court's jurisdiction and venue, as in many jurisdictions, one can increase the monetary jurisdiction by consent. See Queensland, Ghana, and South Africa. However, the general view is that subject matter jurisdiction cannot be extended by consent.

- (i) When a case needs to be transferred between different courts, such as from a higher court to a lower court, the request for transfer is always made to the higher court (see New South Wales, Queensland, China). When a venue transfer is contemplated between courts of the same standing, the application is made to the transferee court (see United States).
- (j) A general jurisdiction court is required to transfer a case to a specialized court (see England and Wales). However, in some instances, a specialized court can transfer jurisdiction to a general jurisdiction court as long as the matter is not within the exclusive jurisdiction of the specialized court (see Japan). However, in South Africa, a failure to sue in a specialist court will result in the matter being reinstituted in the proper court. A transfer is thus not possible from a court of specialized jurisdiction, such as the Labour Court, to a court of general jurisdiction, such as the High Court.
- (k) Just because a matter is transferred does not mean that a court is obliged to hear the entire matter; the transferee court can order that some aspects be dealt with by it and that other aspects be dealt with by the transferring court (see Queensland). However, in most jurisdictions, the entire matter is transferred as having proceedings in different venues affects convenience.
- (l) In some jurisdictions like New South Wales, a court can deny a jurisdictional transfer if it deems the plaintiff was careless in initiating the process. However, in other places like South Africa, a recklessly filed action can still be moved to the proper court. Nevertheless, the court can demonstrate its disapproval by mandating the plaintiff to pay for the incurred costs.
- (m) When a jurisdictional transfer occurs, the law of the court that receives the case will be applied since it has the proper jurisdiction (see Queensland, United States, Japan). However, when it comes to venue transfer, the law that applies is the one of the court from where the case is transferred (see India, United States).
- (n) In some countries like China and India, transferring a legal case may require the receiving court to start the proceedings again. However, in places like Ghana, South Africa, New South Wales, and Queensland, transferring a

case usually means that it will continue in the new court without starting from scratch.

- (o) Even though jurisdictional and venue transfer is an interlocutory issue, in some jurisdictions, an affected party can appeal a transfer (see Japan), but in other jurisdictions where the issue of jurisdiction does not dispose of the litigation, a transfer cannot be appealed (see South Africa).
- (p) When a case is transferred, the court that receives it is required to accept it, as stated explicitly in China and generally accepted in other jurisdictions.

## ABBREVIATIONS AND ACRONYMS

Art	Article/Articles
cf	confer (compare)
ch	chapter
CPA	Civil Procedure Act 2005 (New South Wales)
CPL	Civil Procedure Law of the People's Republic of China (CPL), which was revised in 2017
CPR	Civil Procedure Rules 1998 (SI 1998/2132) (England and Wales)
ed	editor/editors
edn	edition/editions
eg	exempli gratia (for example)
FCCP	Code of Civil Procedure (France)
ff	following
fn	footnote (external, ie, in other chapters or in citations)
GCCP	Code of Civil Procedure (Germany)
ibid	ibidem (in the same place)
ie	id est (that is)
JCCP	Code of Civil Procedure (Japan)
MDL	Multi-district Litigation
n	footnote (internal, ie, within the same chapter)
no	number/numbers
para	paragraph/paragraphs
PD	Practice Direction (England and Wales)
pt	part
Sec	Section/Sections
supp	supplement/supplements
UCPR	Uniform Civil Procedure Rules 2005 (Australia)
UKCPR	Code of Civil Procedure (UK)
URC	Uniform Rules of Court of the High Court of South Africa
USC	United States Code (US)
v	versus
vol	volume/volumes
ZAR	South African Rand

## **LEGISLATION**

### **National**

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Civil Liability Act No. 22 (2002).

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New South Wales: Civil Procedure Act 2005.

Queensland Civil Proceedings Act 2011.

The Australian Constitution,

[https://www.aph.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/Constitution](https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution) accessed 8 May 2024

Uniform Civil Procedure Rules 1999.

#### **China**

Civil Procedure Law of the People's Republic of China (Revised 2017).

Interpretations of the Supreme People's Court on Applicability of the Civil Procedure Law of the People's Republic of China (Revised 2015).

#### **France**

French Code of Civil Procedure 2009.

#### **Germany**

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#### **Italy**

Italian Code of Civil Procedure.

#### **Ghana**

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**India**

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*Hodder v The Australian Worker's Union* 4 FCR (1985).

*Kings Cross Whisper Pty Ltd v O'Neil* [1968] 2 NSW 289.

*Lehtonen v Australian Iron & Steel Pty Ltd* [1963] NSW 323.

*Mowle v Elliott* (1937) 54 WN (NSW) 104.

*National Mutual Holdings (Pty) Ltd v Sentry Corporation* (1988) 19 FCR 155.

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*Bartolo v Sunshine Coast Hospital and Health Service* [2020] QSC 213.

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*Shannon v Australia and New Zealand Banking Group Ltd (No 1)* [1994] 2 Qd R 560.

*Tereblanche v Jewell* [2013] QCA 205.

#### Ghana

*Soro v. Frans* [2005-2006] SCGLR 1003.

*The Republic v High Court (Fast Track Division) Ex Parte Ghana Lotto Operators (National Lottery Authority Interested Party)* [2009] SCGLR 372.

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*Maputo Cotton Estates v Ramportal* (2) 1975 (2) PH F77 (D)

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