LAWS557

Conflict of Laws

Textbook Notes

Chapter 1: Introduction to the Subject

- **Forum:** the jurisdiction in which the proceedings are brought by the plaintiff.
- ***Lex fori*:** the law of that forum that the plaintiff wants to apply.
- ***Locus delicti:*** The place where the wrong had occurred.
- ***Lex locus delicti:*** the law of the locus delicti, the place where the wrong occurred.
- ***Lex causae:*** refers to the law governing the substance of the case.

Methods of reducing conflict

- Countries can agree on uniform conflict rules. This would merely require them to unify conflict of laws rules that would be applied in their courts.
    - This has already been done in Hague Conference on Private International Law, of which Aus is a member.
- Countries can use international conventions, which seek to unify the domestic laws of different countries by regulating relationships between private citizens and organisations.
- Countries can adopt model laws, which are designed only as a model for domestic legislation, rather than a package of rules that must be applied in the adopting country. If a country finds the whole of a model law acceptable, it can simply give the model law force by domestic legislation.

Three stages of a conflicts problem

- Stage 1: What is the jurisdiction?
    - The parties might be from different jurisdictions, or with different connections to different jurisdictions.
- Stage 2: What is the applicable law? Choice of law question.
    - Court must make a choice between the 2 legal systems.
- Stage 3: Recognition and enforcement of foreign judgements.
    - Sometimes, if the court chooses one forum over the other, it results in an excessive verdict.
    - They will not enforce every document that bears the seal of a foreign court. Some may have standards which our court considers too wide.

The Law of an Area

- **Law area:** a territory that has a unitary system of law, where substantive rules applicable to determine the lawfulness and the legal consequences of things are the same within that territory.
- The Cth of Australia constitutes one law area.
- The states and territories consist of nine law areas:
    - ACT, NSW, Norfolk Island, NT, Qld, SA, Tas, Vic, WA.
- Conflicts between Aus law areas arise as a result of legislative intervention: either 2 statutory provisions in different states conflict or statutory reform in one state clashes with the unreformed common law of the other.

Chapter 2: Conflicts within Australia

- Parliament may legislate with respect to the recognition throughout the Cth of the laws, the public Acts and records and the judicial proceedings of the States: pl (xxv) of s 51 Con.
- The plenary powers Cth has in relation to the territories under s 122 Con enable it to provide for the recognition, enforcement and effect of state laws and judgments in the territories and vice versa: *Lamshed v Lake* (1958).
- It may be that pl (xxv) when used in conjunction with s 122, will enable the parliament to enact statutory rules for resolving conflicts of law between the states and territories.
- *Harris v Harris* [1947]: Fullagar J assumed that Cth had power to compel Vic courts to give recognition to judgments and decrees of NSW courts.

Full Faith and Credit

- S 118 Con: full faith and credit shall be given throughout the Cth, to the laws, the public Acts and records and the judicial proceedings of every State.
- HC prefers an interpretation of this section to mean that this does not interfere with the choice of law rules developed at common law, or with state and territorial legislation determining for those juris in what circumstances the law of another should be applied in their courts.
- S 118 has no effect on choice of law: *Anderson v Eric Anderson Radio and TV Pty Ltd* (1965):
    - Pl argued that the effect of the full faith and credit provision was to make the law of ACT applicable in NSW.
    - Their Honours rejected this, and took the view that the right given was enforceable only in proceedings commenced in the courts of the ACT.
    - Full faith and credit could not be invoked to make a territorial provision applicable in its own terms only in the courts of the ACT, part of the NSW law and as such applicable in the NSW courts.
    - Before that could happen, the choice of law rules of NSW had to make the law of the Territory applicable to the case before the court.
- Once the choice of law is made, then full faith and credit must be given to the law chosen, but the requirement of full faith and credit does nothing to effect a choice: *Breavington v Godleman* (1988).
- The current view of the HC is therefore that s 118 has no effect on the choice of law itself, or role to play in resolving inconsistencies.
- The alternative interpretation is that section 118 replaces choice of law rules, and that the law to be applied shall be the same, wherever in Australia the cause is tried.
- Either way, once the choice of law rule of the forum has indicated the applicable law of another state or territory, full faith and credit must be given to the chosen law. This is the effect of s 118.
- This also means that the forum cannot employ public policy of the forum to disapply or override an otherwise applicable interstate statutory law indicated by the forum's choice of law rules.
- *Sweedman v Transport Accident Commission* (2006): close analysis of competing state statutes is required to first ascertain whether or not there is in fact a true conflict.

- Unless the relevant statute of the forum in question itself is or contains a statutory choice of law provision, the common law choice of law rule of the forum will invariably only point to one applicable law which will either be the local law itself or the statute of the other state.
- In other words, the very choice of law process will itself resolve the conflict of laws.

    - find it.
    - Matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that appear to be concerned with issues of substance.
    - Rules which are directed to governing or regulating the mode of conduct of court proceedings are procedural.
- It is immaterial how the issue in question is characterised by the *lex causae.*
- Characterisation of the issue must be made according to the standards of the forum court.
- *Hamilton v Merck & Co Inc* (2006) 66 NSWLR 48:
    - NSWCA held that provisions of the *Personal Injuries Proceedings Act 2002* (Qld) requiring written notice and a compulsory conference of the parties before court action could be brought were procedural according to the *John Pfeiffer* test, despite the fact that Qld Act itself declared those provisions to be substantive.
- Cavers suggests that courts should be given the discretion to use, at counsel's request, the procedural rules of the lex causae, including the purely technical rules, whether their use would affect the outcome or not, while paying regard to matters of local policy and convenience.
- Such an approach is now open to an Australian court when exercising cross-vested juris under s 11(1)(c) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) and equivalent state and territorial legislation which permits the court to apply such rules of evidence and procedure 'as the court considers appropriate, being the rules that are applied in a superior court in Aus or an external territory.
- Limitation periods and caps on the amount of damages recoverable are now regarded as substantive.

<u>Statues of Limitations</u>

- Within Aus and between Aus and NZ, limitation laws are now governed by statute and regarded as substantive: *Choice of Law (Limitation Periods) Act 1993* (NSW)
- It provides that where the substantive law of another Aus state/territory or of NZ is to govern a claim, a limitation statute of that other place is to be regarded as part of that substantive law: s 5.
- Any discretion to extend the period of limitation shall be exercised as far as practicable in conformity with the law and practice of that other place: s 6.
- Statutes apply only where the lex causae is that of another state or territory or of NZ.
- Internationally, the traditional common law position is that limitation laws are regarded as procedural: *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1.
- A limitation provision annexed by a statute to a right created by it should be regarded as imposing a condition which is of the essence of a new right and hence party of that substantive right: *Australian Iron and Steel v Hoogland* (1962) 108 CLR 471.
- This also applies to legislation that purports to abolish an existing right in general terms, but then to restore it only in defined circumstances, including a time limitation.

Chapter 19: Contracts

The Proper Law

- **Rule:** The proper law of the contract is paramount in determining the creation, validity and effect of the contractual obligation.
- The court will look for the proper law of a contract as a whole and not for a proper law for each of the particular issues raised before the court.
- This is despite the fact that the court may find in special circumstances that a particular aspect of a contract is governed by a law other than one that governs main contract: *Hamlyn & Co v Talisker Distillers* [1894]
- The law of one country can be the proper law of the contract, but the law of another country may be applied to a particular issue where the law of the chosen country concedes that consequence.
- **Presumption:** The courts should always start with the presumption that the parties intend to refer the entirety of their obligation to one legal system only. This should not be rebutted without good reason: *Kahler v Midland Bank Ltd* [1950]
- **Party selection of governing law:** Parties intention as to the governing law may be express or inferred.
    - If expressly chosen, issue arises as to whether there are any limits to such a choice.
- **Silence on governing law:** the issue then becomes whether the court can infer an unexpressed intention from the document or the surrounding circumstances or must ascribe a proper law to the contract by some objective process.
- **Override by forum law:** once the proper law is identified, the question becomes whether and to what extent that governing law is overridden or affected in its operation by any law of the forum.
    - Principle of statutory interpretation: the principle that unless a contrary intention appears, statutory provisions are understood as having no application to matters governed by foreign law: *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581.
    - This principle is only presumptive, so in every case where a statute of the forum is potentially engaged in a contractual dispute, you'll have to assess whether or not, as a matter of statutory construction, that statute was intended to apply irrespective of the governing law, whether or not expressly or impliedly chosen.
- Where a foreign law is chosen by the parties, the choice must be of a system of private law- the law of particular country or law area.
- That chosen law governs the interpretation and construction of the contract's express terms and supplies relevant background of statutory or implied terms: *Vita Food Products Inc v Unus Shipping Co* [1939].
- Whether renvoi applies in contract is an open question in light of *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005).
- Parties should be clear in their contract whether conflict of law rules of chosen law are excluded or not.
- Application of renvoi applies equally in circumstances where the parties have not made an express choice but where it is inferred.