

NOTE in the mid-term Exam:

- The answer should start with
 - **'The analysis assumes that the NSW Court has the jurisdiction over this case, and the NSW Court decides to exercise the jurisdiction.'**

Substance/ Procedure

I. ***Lex fori* will be used to determine** whether an issue is substance/ procedure (***Hamilton; Wickham Freight Lines***)

1. **Self-characterising provisions not effective to bind the forum** (***Hamilton***)

Facts

- P (Qld Residents) **commenced a class action in NSW**
- Notice of claim
 - ***Personal Injuries Proceedings Act (Qld)*** requires it
 - before the commencement of proceedings on behalf of others (**s9(1)**), **and**
 - pre-suit compulsory conference (**s36(1)**)
 - NOT be required in NSW law
- **s7(2) of *Personal Injuries Proceedings Act (Qld)*** declared **ss9(1)** and **36(1)** to be substantive.

Rules → self-characterising provisions not effective to bind forum; need to follow *lex fori*

- Following ***John Pfeiffer*** (NSW common law Law), **ss9(1)** and **36(1)** are procedural because they were concerned with 'regulation of mode or conduct of court proceedings' or the 'mechanism or machinery of litigation.'

2. ***Wickham Freight Lines***

Facts

- P suffered the work injury in Vic
- **P commenced the negligence action in NSW**
- D argued that the proceedings should be precluded by **ss134AB(1)-(2) of *Accident Compensation Act 1985 (VIC)***.

Rules

- **Step 1:** the law of NSW is the *lex fori*
- **Step 2:** following the *lex fori*
 - **ss134AB(1)-(2)** (concern with 'the kinds of damage, or amount of damages that may be recovered') are relevantly the same as the New South Wales statutory provisions which were characterised as substantive laws in ***John Pfeiffer***
- **Step 3:** make the conclusions → those issues are substantive issues

II. Substantive Issue

1. Definition (*John Pfeiffer*)

- Matters that affect the existence, extent or enforceability of the rights/ duties of the parties to an action

2. Examples

1) Sovereign Immunity (*Garsec v Sultan of Brunei*)

Facts

- P argued that the Sultan of Brunei failed to perform the oral contract to buy a tiny gold lined Koran from P
- Under the constitution of Brunei, the Sultan has immunity from all suites (in both a personal and official capacity)
- P brought the claim in NSWSC

Rules → substantive issue

- Because it does not direct towards 'governing/ regulating the mode/ conduct of court proceedings'
- Rationale to differ substantive and procedural issue
 - To minimise any advantage that a P can obtain by suing in one forum rather than another by restricting any such advantage to one that is necessary concomitant of disputes being decided in courts/ tribunals, which have their own rules and procedures

2) Limitation Period

(1) Domestic (i.e., Intrastate)

A. Historical Position → Procedural (*McKain*)

Facts

- P (NSW resident) injured in workplace accident in SA.
- P out of limitation period in SA but NOT NSW
 - In SA → 3 years
 - In NSW → 6 years
- P brought the claim in NSW

B. Current Position → Substantive (*John Pfeiffer*; *Choice of Law (Limitation Periods) Act 1993 (NSW)*; *Limitation Act 1969 (NSW)*)

A) *Choice of Law (Limitation Periods) Act 1993 (NSW)*

(A) Characterisation of Limitation laws (s5)

If the substantive law of a place, being another State, a Territory or New Zealand, is to govern a claim before a court of the State, **a limitation law of that place is to be regarded as part of that substantive law** and applied accordingly by the court.

(B) Exercise of discretion under Limitation Law (s6)

If a court of the State exercises a discretion conferred under a limitation law of a place, being another State, a Territory or New Zealand, that discretion, as far as practicable, **is to be exercised in the manner in which it is exercised in comparable cases by the courts of that place.**

B) **Limitation Act 1969 (NSW)**

(A) **General (s14(1))**

An action on any of the following causes of action is **not maintainable** if brought **after the expiration of a limitation period** of six years running from the date on which the cause of action first accrues to the plaintiff or to a person through whom the plaintiff claims...

(B) **Debt, damages etc (s63(1))**

... **on the expiration of a limitation period** fixed by or under this Act for a cause of action to recover any debt damages or other money, **the right and title of the person** formerly having the cause of action to the debt damages or other money is... **extinguished**.

(C) **Characterisation of limitation laws (s78)**

- (1) In this section—
limitation law means a law (including but not limited to this Act) that provides for the limitation or exclusion of any liability or the barring of a right of action in respect of a claim by reference to the time when a proceeding on, or the arbitration of, the claim is commenced.
- (2) **A limitation law** of the State is to be regarded as part of the **substantive law of the State**.

(2) **International Cases (O'Driscoll v J Ray McDermott)**

NOTE:

- The Court in **John Pfeiffer** held that the limitation period in relation to intra-national torts was substantive
 - But declined to look at the international rule
- The Court in **RNDUR v Zhang** held that the application of limitation periods would be treated as substantive issues governed by *lex loci delicti*
 - But they reserved on this issue

Facts

- PLK of employment contract was Singapore
- P commenced the claim in WA
- Under the Singapore rules of PIL – issue of limitation period is procedural
- Law of limitation period
 - Singapore: 3 yrs (expired)
 - WA: 6 yrs (not yet expired)

Rules

- Whether an issue is substantive/ procedural should be determined by *lex fori*
- As the matter of common law principle, limitation laws are substantive

3) The Allowable Heads of Damage/ Amount of Damages

(1) Domestic

A. Historical Position → Procedural (*Stevens v Head*)

Facts – *Stevens v Head*

- P injured in car accident on bus trip to Qld, and brought claim in Qld
- Substantive tort liability in NSW/ Qld are the same
 - But as for **the amount of compensation** a P can receive
 - NSW has the cap (i.e., limit) on damages
 - Qld does not have the cap

B. Current Position → Substantive (*John Pfeiffer*)

Facts

- P suffered the workplace injury in NSW
- P commenced the proceeding in ACT
- For **the amount of damages** that P can recover
 - NSW has the cap (**pt.5 of WCA** capped damages for workplace injury)
 - ACT does not have the cap

Rules

- Procedure as those which are directed to governing of regulating the mode/ conduct of court proceedings
- Everything else is substantive, including the kind and amount of damage (which have nothing to do with the conduct of proceeding)

(2) International → left undecided

A. The Court in *RNDUR v Zhang* held that the all questions about the kind of damage/ amount of damages that may be recovered would be treated as substantive issues governed by *lex loci delicti* → But they reserved

B. Lower courts in AU now tend to treat this issue as substantive not procedural

C. HCA

- In *Neilson v Overseas Projects Corp of VIC*, the quantification of damages appeared to be treated as a substantive matter to be dealt with by the *lex causae* → BUT Not set out explicitly
 - So, technically, it is still open as NO HCA authority in this issue

III. Procedural Issue

1. Definition (*John Pfeiffer*)

- Rules which are directed to governing/ regulating the mode/ conduct of the court proceeding

2. Examples (*John Pfeiffer*)

- 1) Initiation, preparation and prosecution of the case
- 2) The recovery processes following any judgement
- 3) Rules of Evidence

Concurrent Liability in Tort & Contract

(If the D's acts/ omissions give rise to the P an action in both tort & contract)

- I. **P can choose tort/ contract/ both on the basis which is most advantageous to him**
(**Coupland; Busst**)

NOTE:

- The P might choose the contract because the place of the tort may be ambiguous/ diverse
(**John Pfeiffer**)

1. **P brought a claim in tort** (**Coupland**)

Facts - Coupland

- Proper law of
 - Contract → **England**
 - Tort → **Libya**
- P chose to pursue the tort claim

Rules

- If P chooses tort, the contract will be relevant only if it contains the exclusion clause

2. **P brought a claim in contract & tort** (**Busst**)

Facts – Busst

- Proper Law of
 - Contract → **Qld**
 - Tort → **NSW**
- **Workers Compensation Act 1987 (NSW)** limited damages in tort
- P chose to pursue the claim in contract and tort in Qld

Rules → The claim in contract will not be affected by Workers Compensation Act

- Because, in this case, the proper law of the contract does NOT need to be the same with the proper law of the tort
 - Although the tort and the breach of contract alleged happen to arise out of the same facts, the nature of the breach of contract alleged did not affect the proper law of the contract

- II. **The Circumstances that the Contract contains the Exclusion Clause** (**Sayers**)

1. **Step 1: Determine the validity of the Exclusion Clause under the Proper law of the Contract**

2. **Step 2: If the Clause is valid → then, consider how it will affect the claim**

Facts

- Proper law of contract → Dutch
- The Exclusion Clause indicated that the exclusive remedy is under the English Law
 - was valid under Dutch Law; Invalid under English Law

Rules → the exclusion clause was upheld by the Court of Appeal

Choice of Law in Tort

I. General Circumstances

1. **Lex loci delicti** is the **lex causae** for intranational & international torts

1) Intranational Torts (**John Pfeiffer**)

Facts

- Accident occurred in NSW

2) International Torts (**Renault v Zhang**)

Facts

- Accident occurred in New Caledonia

2. Determination of the **lex loci delicti**

1) General Principles (**Distillers**; **Voth**; **Dow Jones**)

- The place where in substance did this cause of action arise
 - In the case where the D's conducts are critical (e.g., negligence/ trespass),
 - where the D acted is more important rather than where the consequences occurred (**Voth**)

2) Specific Circumstances

(1) Misrepresentation (**Voth**)

- The place from where it ought reasonably to be expected that it will be brought to P's attention

Facts

- P were NSW corps
- Voth was an accountant in Missouri
- P alleged negligent advice given by Voth

Rules → Missouri is the **Lex loci delicti** by

- Applying **Distillers** Test ('where in substance') + ordinarily focus on D's act (rather than the act's consequences)
 - The act of providing accountancy services initiated and completed in the one place (i.e., Missouri) → thus, the tort was committed in Missouri

(2) Negligence & Omission

A. Negligence

- The place where the act was committed (**Koop v Bebb**)

Facts

- Accident in NSW; and
- died in VIC

Rules → NSW is the **Lex loci delicti**

B. **Omission**

- The place where the act was supposed to have taken place (*Ryan Wealth Holdings*)

(3) **Product Liability**

A. If the product is **negligently manufactured**

- The place of manufacture (*Renault*)

B. If the product is **inherently dangerous**

A) The place where the P was exposed to inherent risks of product/ was not provided with a safe place of work (*Amaca*; *Puttick*), or

- ***Amaca***

Facts

- P worked in NZ, and they worked under the place with high risk
- Under NZ law, they will get less compensation.
 - Thus, P attempted to argue that NSW law should be applied

Rules – NZ law should be applied

- Because NZ is the place where the cause of action arose
 - NZ is the place where Respondent was exposed to the risk

- ***Puttick***

Facts

- He worked for NZ Co
- He visited factories in Belgium and Malaysia (where he was exposed to asbestos which caused his death)

B) The place of failure to warn (*Distillers*)

Facts

- The drugs were made in UK with the package saying that 'safe and harmless with no side effects'.
- The drugs were distributed globally
- The drugs were imported to NSW, prescribed and consumed.
- P suffered serious disabilities attributing to her mother's consumption of this drug

Rules → NSW is the *Lex loci delicti*

(4) Defamation on publication

A. For **alleged defamations within Australia** (**s11 of Defamation Act 2005 (NSW)**)

A) If the allegedly defamatory material is published **only within one state/territory** (**s11(1)**)

- the law of that particular state/ territory

B) If the allegedly defamatory materials are published **in more than one state/territory** (**s11(2)**)

- The law of the place where the harm occasioned by the publication as a whole has its closest connection

○ The factors the Court will consider in the determination (**s11(3)**)

- (a) the place at the time of publication where the plaintiff was ordinarily resident or, in the case of a corporation that may assert a cause of action for defamation, the place where the corporation had its principal place of business at that time, **and**
- (b) the extent of publication in each relevant Australian jurisdictional area, **and**
- (c) the extent of harm sustained by the plaintiff in each relevant Australian jurisdictional area, **and**
- (d) any other matter that the court considers relevant.

NOTE in the exam:

- **Dow Jones** is a case occurring before **Defamation Act**; but it can be referred to in the discussion

NOTE: If it is on the internet → place of publication = place of download (**Dow Jones**)

Facts

- P argued tort was committed in VIC; and suffered damages wholly/ partially in VIC
- D argued that article published when it was uploaded on website (the server in NSW)

Rules → VIC is the place where the defamatory material is published

B. For **Foreign Defamation/ Defamation that are not wholly internal to Australia**

A) **Foreign Defamation**

- Be determined by reference to common law applicable law rule of Renault → i.e., place of the tort rule

B) **Defamation that are not wholly internal to Australia**

(A) **The Australian aspects of the claim** should be dealt with in accordance with the **Defamation Act**

(B) **The Foreign aspects of the claim** should be dealt with the **Renault's** place of the tort rule

II. Maritime & Aerial Torts

NOTE in the exam:

- As for the Maritime & Aerial Torts case, the general principle of Lex Loci delicti should still be mentioned. Can say in that way:
 - 'Following the rules in *John Pfeiffer*/ *Renault*, *Lex loci delicti* is the lex causae for intranational/ international torts; However, this case is maritime/ aerial torts case....'

1. Maritime Torts

NOTE:

- Determination of territorial sea (*UNCLOS*)
 - 'within 12 nautical miles seaward of the low watermark'

1) Torts on the international water

(1) high sea

A. Generally, *Lex fori* (i.e., the law of the forum) (*The Esso Malaysia*; *Blunden*)

Facts – *The Esso Malaysia*

- D's tanker was registered in Panama; P's trawler was registered in Latvia
- P brought the proceeding in UK

Rules – UK law should be applied

- Even though UK did not have any connection with P & D

Facts – *Blunden*

- Royal Australian Navy aircraft carrier collided with the destroyer in the international water
- P suffered injury, and sued for negligence in ACT

Rules – ACT law should be applied

- Because both of the ships are the AU ships

B. Unless another jurisdiction has a 'better claim' (*Blunden*)

A) 2 ships with the same flag state collided on high sea

- The law of the flag state (i.e., the state of registration of the ship)

B) Internal economy

Examples

- The tort occurs wholly within the ship, or
- The tort has purely internal consequences within the confines of the ship

- The law of the flag state (i.e., the state of registration of the ship)

(2) exclusive economic zone ('EEZ') (*CMA CGM SA (CCF) v Ship 'Chou Shan'*) → lex loci delicti is legally indistinguishable from the high seas

2) Torts occurs in the **territorial water**

(1) **Usually**

- The *lex loci delicti* is the *lex littori* (i.e., the law of the country in whose waters the wrong occurred) (**MacKinnon**; **Union Shipping NZ v Morgan**)

Facts – MacKinnon

- Scotland-registered ship waited to enter Dominican Republic (within 3 miles) where the tort occurred

Rules → law of Dominican Republic should be applied

Facts – Union Shipping NZ

- NZ ship carrying coal to NSW
- P injured while operating machinery to unload coal in NSW

Rules → NSW law should be applied

(2) **However**, some arguments can be made (**MacKinnon**)

NOTE in the exam → It will be better to make those arguments if they involve

- E.g., the ship is merely visiting the territorial water/ involuntarily come to the territorial water

2. **Aerial Torts**

1) Tort occurs **on an aircraft**

(1) **On ground of foreign country** (**Lazarus**)

- The law of that state (i.e., this foreign country)

Facts – Lazarus

- Tort occurs in India
- The aircraft was registered in German

Rules → *Lex loci delicti* is Indian law

(2) in a flight **over either the foreign country/ the territorial sea of a foreign country** (**Georgopolous**)

- The law of that state (i.e., this foreign country)

Facts – Georgopolous

- P suffered post traumatic shock after the accident
- It occurred when plane over territorial sea of Australia

Rules → *Lex loci delicti* is Australian law

(3) **over high seas**

- The law of the flag state of the aircraft
 - i.e., the state where the aircraft is registered

2) The **collision of 2 aircraft** above the high sea

- The law of the forum (i.e., lex fori)

III. Mandatory Forum Statutes

NOTE in the exam:

- NOTE the mandatory forum statutes overrides *Lex loci delicti*
- If the mandatory forum statutes involve, should write down
 - 'Following the rules in *John Pfeiffer*/ *Renault*, *Lex loci delicti* is the *lex causae* for intranational/ international torts; However, the mandatory forum statutes involve in this case and override the *lex loci delicti*...'

1. Workers Compensation Act 1987 (NSW) ('WCA')

- 1) **Compensation under this Act is only payable in respect of employment that is connected with NSW** (s9AA(1)) → use *WCA*

(1) Determination of whether the employment is connected with NSW

A. A worker's employment is connected with (s9AA(3))

- (a) the State in which the worker usually works in that employment, or
- (b) if no State or no one State is identified by s9AA(3)(a), the State in which the worker is usually based for the purposes of that employment, or
- (c) if no State or no one State is identified by s9AA(3)(a)/ s9AA(3)(b), the State in which the employer's principal place of business in Australia is located.

B. A worker is outside this State when the injury happens does NOT prevent compensation being payable under this Act in respect of employment that is connected with this State (s9AA(2); *United Airlines*)

(2) Application (*United Airlines v Sercel Australia*)

Facts

- Mr Arora injured on UA flight during landing at Houston.
- Sercel (Mr Arora's employer) paid compensation under *WCA*, then sought repayment from UA.

Rules

- The fact that the worker is outside the State when the injury happens does not prevent compensation being payable under *WCA*

Application

- Because Mr Arora's employment was connected with NSW, he could claim under the *WCA*, even though the tort occurred in Texas.

2) If the employment is **NOT connected with NSW** → then consider s150A(1)

If compensation is payable (whether or not it has been paid) under the statutory workers compensation scheme of a State in respect of an injury to a worker, **the substantive law of that State is the substantive law** that governs—

- (a) whether or not a claim for damages in respect of the injury can be made, **and**
- (b) if it can be made, the determination of the claim.

- BUT s150A(1) will NOT apply if (s150A(2))
 - The compensation is payable in respect of the injury under the statutory workers compensation scheme of more than one State

2. *Competition and Consumer Act 2010 (Cth)* ('CCA')

i.e., **CCA** could replace the *lex loci delicti* for torts committed that are captured by **CCA**

1) **Application of CCA**

(1) **Application (s5(1))**, and

- **various parts of the Act**, including most of the Australian Consumer Law – extends to engaging in conduct outside Australia by...
 - (companies) incorporated/ carrying on business within AU (**s5(1)(g)**), **or**
 - Australian citizens (**s5(1)(h)**), **or**
 - Persons ordinarily resident within Australia (**s5(1)(i)**)

(2) **Conflicts of laws (Schedule 2 - Australian Consumer Law s67)**

- **ACL** will apply to the contract despite the parties' choices, **if**
 - A. **the proper law of a (consumer) contract** for the supply of goods or services to a consumer **would be the law of any part of Australia** but for a term of the contract that provides otherwise (s67(a)), **or**
 - i.e., if the objective PLK is the AU law
 - B. if a contract for the supply of goods or services to a consumer **contains a term that purports to substitute**, or has the effect of substituting, **the provisions of the division of the ACL with the provisions of (s67(b))**
 - a country other than Australia (s67(b)(i)), **or**
 - a law of a State/Territory (s67(b)(ii))

It will not necessarily throw out the parties' choices → the parties can keep the choice but they still need to apply the Act

2) **Application (Valve Corp v ACCC)**

Facts

- Valve (Washington company) sells computer games over internet, including in Australia
 - Express PLK was Washington
 - There are **misleading representations** (tortious acts) about consumers' guarantees.

Application → ACL will apply

- As for **s67(a) of ACL → failed**
 - The Court should determine the objective proper law of the consumer contract → the law of Washington
 - Thus, **s67(a)** failed.
- As for **s67(b) of ACL → succeeded**
 - Because the contract for the supply of goods/ services contains a term purporting to substitute/ having effect of substituting the provisions of the ACL division with the provisions of a country other than AU/ a law of a S/T.

IV. **Renvoi Doctrine**

1. **When it will occur**

- AU law requires Australian Court to apply *lex loci delicti* in tort cases, and
- The law of the *lex loci delicti* itself requires that another system of law governs the dispute
 - Remission → back to forum
 - Transmission → reference to a 3rd jurisdiction

2. **How to deal with it (Neilson v Overseas Projects Corp of VIC)**

- **Double renvoi/ Foreign Court theory** (per majority) (**Current Position**)
 - Once it is proved that the applicable law rules of the place of the tort require non-local law to apply, **an Australian forum court must determine how a court in the place of the tort would actually decide the case**

Facts

- A WA resident brought a claim against a VIC company in WA SC for personal injuries suffered in PRC (*lex loci delicti*)
- **Article 146 of the General Principles of Civil Law of the PRC**
 - ‘...If both parties are nationals of the same country/ domiciled in the same country ...the law of their own country/ of **their place of domicile (i.e., WA Law)** may also be applied’

Application → foreign court theory (majority)

- **Step 1:** Apply the *lex loci delicti* rule to apply the law of the PRC, including internal (substantive) law and PIL (including its renvoi rule).
- **Step 2:** The forum court (Oz) then decides the case in the same way as would the foreign court (PRC) if the case had been brought in that foreign court → get the result: WA Law
- **Step 3:** Apply WA Law

Choice of Law in Contract

I. The Determination of the dispute

1. Contract Formation

- 1) Whether a contract was made and its term (*Oceanic Sun*)
 - The law of the forum (i.e., *lex fori*)
- 2) Who are the parties of the contract (*Trina Solar*)
 - The law of the forum (i.e., *lex fori*)
- 3) Consideration
 - Although the argument in *Re Bonacina* indicates that the putative proper law of the contract should be applied in consideration, following the judgement in *Oceanic Sun*, currently, the law of the forum (i.e., *lex fori*) should be applied

2. Validity/ Enforceability of Contract

1) Contracting Capacity

(1) Individuals (*Peninsula Gold*)

- The position is quite unclear
 - the lex fori might be used, **and**
 - the proper law of the contract should also be considered

(2) Corporations

- The law where the foreign corporation was incorporated (s7(3)(a) of *Foreign Corporations (Application of Laws) Act*; *PT v Maradona*)

Facts – *PT v Maradona*

- Loan Agreement (by EMF NV (Netherlands) to Maradona)
- Assignment of Loan to PT Ltd via EMF BV (Dutch Co)

Application

- EMF NV's capacity is assessed by reference to the law of Netherlands

2) Formal Validity (*Tipperary Developments v WA*)

- i.e., to be enforceable, some types of contracts must meet the specific requirements.
 - The position is quite unclear
 - the lex fori might be used, **and**
 - the proper law of the contract should also be considered

Facts

- The parties entered into an oral contract whereas the WA legislation requires that this kind of contract should be written.

Rules

- In this case, the law of WA is the *lex fori* & the proper law of the contract
 - Thus, this contract is void/ invalid.

3. Performance & Variation & Discharge & Interpretation of Contract

- The proper law of the contract governs (*Jacobs v Credit Lyonnais*; *Merwin v Moolpa*)

- **Substance of contractual liability, and**
 - Including enforceability, legality, implied obligations etc.
- **Performance (and non-performance), variation and discharge of contract, and**

Facts – *Jacobs*

- D agreed to sell esparto to P, but failed to provide all shipments
- P sued for breach of contract
- D claimed that the insurrection in Algeria made performance impossible

Application

- UK law is the (objective) proper law of the contract
 - Facts suggesting that
 - Contract was made in London between UK merchants
 - Payment to be made in London upon delivery in London
- NO such excuse over insurrection under English law

Facts – *Merwin*

- After the purchase, NSW Parliament passed the Moratorium Act
 - It applied to excuse non-payment

Application

- NSW law was the proper law of the contract
 - Because the properties located in NSW
- Thus, the discharge was determined by NSW law (i.e., Moratorium Act)

- **Interpretation** (*White Cliffs Opal Mines*)

Facts

- The NSW government made an offer, on 30 April 1902, to purchase the mine, open until '30 June 1902'.
- Plaintiffs argued that time should be measured in accordance with London time

Application

- NSW law was the proper law of the contract
 - property located in NSW;
 - communications between NSW government and P's representative in NSW

II. The Determination of the Proper Law

1. Subjective Proper Law

NOTE in the exam:

- Even it is quite obvious that there is no subjective proper law, **still should explain why**

1) Express Choice

(1) Parties Autonomy

- The Parties have the autonomy to determine the legal system/ law that will govern the contract (**Merwin**; **Vita Food Products**)

Facts – **Vita Food Products**

- P (NY Co); D (Nova Scotia Ship owner)
- Contract included
 - Express choice of UK law
 - Exclusion Clause (valid under UK Law; Not under Canadian Law)

Rules → UK law is PLK

- Parties can choose UK law; so, the exclusion clause is valid
- Whether there is sth connecting the transaction to UK is irrelevant

A. No Connection between the transaction and the chosen legal system → NOT the ground to exclude the parties' choices (**Vita Food Products**)

B. Bona fide choice

A) Generally

- It is NOT the ground to exclude the parties' choices (**BHP Petroleum**)
 - But it might be the ground for the Court refuses to allow the choice of law by the parties to operate

NOTE **Golden Acres** is the only explicit application of this argument

Facts – **BHP Petroleum**

- The contract between BHP and OBL contained the clauses
 - Clause 1 provided for its interpretation in accordance with NY law
 - Clause 2 provided that any disputes arising under the Contract should be referred to arbitration
- No requirement that the arbitrator should be appointed in Vic/ the arbitration should take place in Vic.
- OBL commenced proceeding in Texas & NY; BHP required arbitration.

Rules

- NOT the circumstances that the choice of law in the agreement intends to avoid the operation of a fiscal or policy provision of the law which would otherwise apply to the contract.

B) However, the Court might strike down the choice

- if the attempted choice of law is for no other purpose than to avoid the operation of the law which would otherwise apply to the contract (**Golden Acres**)

Facts – **Golden Acres**

- A Qld D appointed a HK agent (P, Golden Acres) to help sell land in Qld.
- The agency contract included an express choice of HK law as the proper law of the contract.
 - Under **Auctioneers, Real Estate Agents, Debt Collectors and Motor Dealers Act 1922 (Qld)**, Golden Acres was not able to recover remuneration if it was not registered as a 'real estate agent'
- Golden Acres did not register.
- Golden Acres was not paid commission under contract and sued in the Qld Supreme Court.

Rules → the selection of the relevant law was for no other purpose than to avoid the legislation

(2) **Mandatory Forum Statutes**

A. **Insurance Contracts Act 1984 (Cth)**

A) **Application of ICA**

(A) The contract should be 'contracts of insurance' and 'Proposed contracts of insurance' (s8(1)), **and**

the application of this Act extends to contracts of insurance and proposed contracts of insurance the proper law of which is or would be the law of a State or the law of a Territory in which this Act applies or to which this Act extends.

(B) **The objective PLK of the contract is the law of that S/T (s8(2))**

For the purpose of s8(1), If, but for an express provision to the contrary included or to be included in the contract or in some other contract, the proper law of the contract would have been the state or territory law, the proper law of the contract is the law of that State or Territory.

B) **Application (Akai)**

Facts

- People's insurance (Singapore Company) provided insurance coverage for Akai (NSW Company)
- The clause of the Insurance Policy indicated
 - 'This policy shall be governed by the laws of UK. Any dispute arising from this policy shall be referred to the Courts of England.'
- **S52 of Insurance Contracts Act**
 - if a contractual provision seeks to restrict the operation of act to the prejudice of anyone except for the insurer, then the contractual provision is void

Rules

- first part of CI 9 (This policy shall be governed by the laws of England) fell within **s8(2)** and was, therefore, void by operation of **s52**.

S8 will substitute the parties' choices → i.e., necessarily throw out the parties' choices

B. *Competition and Consumer Act 2010 (Cth)* ('CCA')

A) **Legislation**

(A) **Application** (s5(1))

- various parts of the Act, including most of the Australian Consumer Law – extends to engaging in conduct outside Australia by...
 - (companies) incorporated/ carrying on business within AU (s5(1)(g)), **or**
 - Australian citizens (s5(1)(h)), **or**
 - Persons ordinarily resident within Australia (s5(1)(i))

(B) **Conflicts of laws** (Schedule 2 - Australian Consumer Law s67)

- **ACL** will apply to the contract despite the parties' choices, **if**
 - a. **the proper law of a (consumer) contract** for the supply of goods or services to a consumer **would be the law of any part of Australia** but for a term of the contract that provides otherwise (s67(a)), or
 - i.e., if the objective PLK is AU law
 - b. if a contract for the supply of goods or services to a consumer **contains a term that purports to substitute**, or has the effect of substituting, **the provisions of the division of the ACL with the provisions of (s67(b))**
 - a country other than Australia (s67(b)(i)), or
 - a law of a State/Territory (s67(b)(ii))

It will not necessarily throw out the parties' choices → i.e., the parties can keep the choice but they still need to apply the Act

B) **Application** (Valve)

Facts

- Valve (Washington company) sells computer games over internet, including in Australia
 - Express PLK was Washington

Application → ACL will apply

- As for **s67(a) of ACL → failed**
 - The Court should determine the objective proper law of the consumer contract → the law of Washington
 - Thus, **s67(a)** failed.
- As for **s67(b) of ACL → succeeded**
 - Because the contract for the supply of goods/ services contains a term purporting to substitute/ having effect of substituting the provisions of the ACL division with the provisions of a country other than AU/ a law of a S/T.

C. *Contracts Review Act 1980 (NSW)*

A) **Application of CRA (s17(3))**

This Act applies to and in relation to a contract **only if**

- (a) **the law of the State** is the proper law of the contract,
- (b) **the proper law of the contract would, but for a term that it should be the law of some other place or a term to the like effect, be the law of the State, or**
- (c) **the proper law of the contract would, but for a term that purports to substitute, or has the effect of substituting, provisions of the law of some other place for all or any of the provisions of this Act, be the law of the State.**

B) **Example (*State Bank v Sullivan*)**

Facts

- There is a loan agreement between the NSW bank and Nobsa
 - Sullivan gave a guarantee to the bank of the loan agreement;
 - It was secured by the mortgager over Sullivan's house in Qld.
- Nobsa was wound up, and the bank initiated the proceeding in Qld

Rules → in this case, Qld law is the objective PLK

- Because
 - The Contract was a mortgage of Qld land subject to Qld law.
 - Mortgage was registered in Qld.
 - The contract contained references to Qld law.
- If the objective PLK is the NSW law, then NSW law can override any contrary express choice of the parties

D. *Industrial Relations Act 1996 (NSW)*

A) **If the industry work is carried in NSW, *IRA* will be used no matter where is the PLK (*Old UGC v Industrial Relations Commission of NSW*)**

Facts

- Mr. RM was employed by AU affiliate companies.
- Later, Mr. RM agreed to terminate the employment agreement and entered into C&R Agreement to resolve the legal disputes between them.
 - The C&R Agreement provided that it would be governed by the laws of the State of Colorado.

Rules

- The central conception is to fasten the performance of work in an industry and the work is performed within the jurisdiction → Not read down the operation according to territorial limitations arises

B) **Content of *IRA* (s106(1))**

The Commission may make an order declaring wholly or partly void, or varying, any contract whereby a person performs work in any industry if the Commission finds that the contract is an unfair contract.

2) Inferred Choice

NOTE:

- If no effective express choice, the Court needs to determine whether there is an actual but unexpressed choice of law

(1) To properly infer that the parties intended their contract to be governed by reference to a particular system of law (*Akai*)

A. The contract **should be constructed as a whole**, and

B. The **terms of the contract and surrounding circumstances** should be looked at to find the indications that 'ineluctably point to agreed choice of law'

A) No limit on the factors assisting the Court to draw inferences

B) **Exclusive jurisdiction clause**

- It creates a very strong presumption that the parties chose the law of that country as PLK
 - unless there is overwhelming connection with a legal system other than the selected forum

- ***Lewis Construction v M Tichauer***

Facts

- Contract between French P & D
 - NO express choice of proper law
 - But, having the exclusive jurisdiction clause
 - 'In case of litigation, the commercial court of Leon is the only competent court'

Rules → the parties have inferred an agreement to choose French Law

NOTE: The choice of jurisdiction cannot be inferred from the choice of law clause (*Dunbee v Gilman*)

(2) ***Amin Rasheed Corporation v Kuwait Insurance Co***

Facts

- Contract was for marine insurance (No express choice of law)
 - P was shipping co based in Dubai doing business in Persian Gulf
 - D was insurer based in Kuwait

Rules → UK law is the (subjective) PLK

- Whether the parties have, by its express terms/ necessary implication from the language used, evinced a common intention as to the system of law by reference to which their mutual rights and obligations under it are to be ascertained

- **Contract itself**

- Contained policy based on specimen contained in UK Marine Insurance Act, using English terminology.
- The understanding of Contract Terms should refer to UK Law

- **Surrounding Circumstances**

- Rasheed used broker in London and paid premiums to that broker in London.
- Claims settled in London bank account in pounds.
- No indigenous marine insurance of Kuwait

2. Objective Proper Law

1) Test: the objective PLK is

- The system of law with which the transaction has its closest and most real connection (**Bonython**) / The centre of gravity of the contract (**Akai**)

Facts - **Bonython**

- Qld govt borrowed 2 million pounds from UK govt.
- Before Qld govt paid the loan, the Cth govt established and issued AU pound.

Rules → Qld law was the (objective) proper law of the contract – thus, paid in AU pound.

- Debentures secured under Qld legislation, **and**
- Debentures constituted charge on public revenue of Qld, **and**
- The loans could be repaid in either Syd/ Melb/ Brisbane/ London
 - If payment only in London → would significantly affect the determination of the PLK.

- The Court will consider, including (**Oceanic Sun**; **Akai**)
 - The places of residence/ business of the Parties
 - The nature and subject of the contract
 - The place of contracting (mere matter of chance)
 - The place of performance (important but not definitive)
 - The language/ form of the agreement (**Amin Rasheed**)
 - Currency of payments (**Bonython**; **Sayer**)
 - Place of payment (**Merwin**; **Sayer**)
 - Principle of validation (**Sayer**) – i.e., presume parties want a valid contract
 - i.e., if referring to State 1's law, the contract is valid whereas referring to State 2's law, the contract is invalid → State 1's law

2) Application (**Oceanic Sun**)

Facts

- Fay, the Qld resident, suffered serious injuries on a Greek ship
- Fay bought in NSW an 'exchange order' from an NSW travel
- But the ticket was not issued until Fay arrived in Greece to board the ship

Rules → Greek law is the PLK

- Although the contract was made in NSW, it **was largely performed in Greece**.
 - Departed and returned to Greek Port
 - Cruise almost entirely in Greece
 - Subject matter was the cruise on Greek registered ship
 - Boat owned by Greek Co.
 - Passengers came from the countries besides AU.
- NOTE in this case, the contract also **has the exclusive jurisdiction clause**
 - If this clause is incorporated into the contract, it will be a strong indication that the Greek law should be the PLK.

III. **Enforcement of the Contract** – Illegality and Foreign Public Policy

1. **Forum Public Policy** (*Paradise Enterprises v Kakavas*)

- If contract was legal under its PLK, it is potentially enforceable in the forum

Facts

- Bahamas Casino loaned Victorian \$1m Bahamas to gamble
 - The loan is lawful and recoverable under **Bahamas Law** (the proper law of the contract)
 - The loan would be illegal if it had been governed by **Vic law** (the law of the forum)
- Mr. K argued that the loan is unenforceable as being against the Vic public policy because it would be illegal under Vic Law

Rules → No basis for the argument and the argument must fail.

- Because 'it is not apposite to determining whether a gaming loan made in another country in which it is lawful and recoverable would be unenforceable as being against public policy in Victoria.'

2. **Illegality in place of performance**

1) **Generally**

- The contract **should NOT be enforced** if it is illegal in place of performance (*Foster v Driscoll*; *Fullerton Nominees v Darmago*)

Facts – Foster

- P & D entered into the partnership to purchase boat to **smuggle whisky into US during the prohibition**

Facts – Fullerton

- Agent sought reimbursement of 'invisible costs' under the contract in WA
 - **The contract was entered into for the purposes of effecting a breach of the laws of Indonesia**

Rules → WASC refused to enforce the agency contract in its entirety

- Even though the contract is lawfully made in AU, the AU Court will NOT enforce an action on a contract which was made for violating the laws of a friendly country.

2) BUT **in the supervening illegality case**

- the Court might still enforce it **if the contract has sufficiently provided for what is to happen in the event which has actually occurred** (*PT Arutmin Indonesia v PT Thiess Contractors Indonesia*)

Facts

- Qld law was the proper law of the contract
- Change of Indonesian Mining law affected the performance of contract
- Arutmin sought to declare the contract is invalid on the grounds of illegality

Rules → QSC refused to declare that the contract is invalid

- Because the contract anticipated supervening events, e.g., change of law

Mandatory Forum Statutes

In Summary:

- Where a party seeks to apply a local statute, the Court constructs that statute with the presumption against the extraterritoriality.
- Where a party seeks to apply a foreign statute, the Court undertakes the choice-of-law analysis to find the *lex causae* and considered whether that statute forms part of *lex causae*.

I. General Rules

1. Basic Principles

- 1) **The forum statute can override the choice of law rules in tort & contract** (i.e., common law rules)

(1) In Tort

- It can take over the *lex loci delicti* rule

(2) In Contract

- It might substitute the parties' express choice of law in the contract, or
 - E.g., **s8 of Insurance Contracts Act**
 - ***Akai v People's Insurance Company***

Facts

- People's insurance (Singapore Company) provided insurance coverage for Akai (NSW Company)
- The clause of the Insurance Policy indicated
 - 'This policy shall be governed by the laws of UK. Any dispute arising from this policy shall be referred to the Courts of England.'
- **S8 of Insurance Contracts Act**
 - ...for the purpose of the application of this Act, where the PLK would, but for an express provision to the contrary included in the contract, be the law of a S/T in which this Act applies...then, the law of a S/T is the PLK
- **S52 of Insurance Contracts Act**
 - if a contractual provision seeks to restrict the operation of act to the prejudice of anyone except for the insurer, then the contractual provision is void

Rules → the insurance contract could NOT exclude NSW law as its objective PLK, despite a clause in contract stipulating UK law as the governing law to the contract and conferring jurisdiction on the courts of UK to determine the disputes arising from it.

- **ss 52 and 8** manifest a legislative intent that the regime established by the Act should be respected as regards contracts the proper law of which is, or but for selection of another law would be, that of a S/T.

- The Act should be applied even though the parties can keep their choices
 - E.g., **Competition and Consumer Act & Australian Consumer Law**

- 2) **Foreign Statutes might also be applied as the part of *lex loci delicti***

2. Generally-worded Statutes

NOTE:

- It would become the issue if the forum statute is silent on its effect on contracts governed by foreign law.

1) **In the absence of any countervailing consideration, the generally worded statutes should not extend to the cases which are governed by the foreign law (*Wanganui-Rangitikei*)**

2) **Examples of generally-worded statutes**

(1) ***Wanganui-Rangitikei***

Facts – contract case

- AMP (NSW) lend the money to NZ local authority (Wanganui-Rangitikei Electric Power Board)
 - PLK was NZ law
- Capital and interest payable in NSW
 - **s5 of Interest Reduction Act 1931 (NSW)** reduced amount of interest payable for some transactions
 - ‘Subject to this Act an obligation to pay interest shall be deemed to be satisfied by payment of a sum equal to the amount which would have been payable as interest if this Act had not been enacted, less nine-fortieths of such amount.’

Rules → NSW statute did NOT apply to NZ authority’s obligation

- General words should not normally be understood as extending to cases governed by foreign law under Australian principles of PIL.
- Operation of general words of statute
 - should be confined to obligations which arose under law of NSW
 - NOT applicable to obligation which arose under and was governed by NZ law

(2) ***Insight Vacations v Young***

Facts

- P (NSW resident) injured when she got out of her seat during EU tour from IV
- Contract has a clause exempting IV from liability if Passenger failed to wear seatbelt in bus with seatbelts.
- P attempted to rely on **s74(1) of Trade Practices Act 1974 (Cth)**
 - Because it was an implied term that the services IV supplied would be rendered with due care and skill, that IV had not done that
- **s5N(1) of CLA**
 - It permits parties to exclude/ restrict/modify the liability in contract for ‘supply of recreation services.’

Rules → **s5N(1) of CLA** does not apply to the Contract

- Because **s5N(1)** should be constructed as limited in its geographical scope of operation to contracts for supply of recreational services in NSW
 - Whereas the contract in dispute was for supply of recreational services in EU (outside NSW) → so, **s5N(1)** does NOT apply → **s74(1) of TPA** then was not excluded by the clause

II. Foreign Statutes

1. Introduction

- When the party seeks to apply for a foreign statute, the Court will
 - attempt to find the *lex causae* (i.e., the law applicable to the settlement of the particular case) via choice-of-law analysis, **and**
 - consider whether that the foreign statute forms part of the *lex causae*
 - And, if the foreign statute forms the *lex causae*, the Court will then consider the content of the statute.
- Usually, **the *lex loci delicti* (including any statutory rules) will determine whether a common law tort claim is maintainable in the forum (*Amaca*)**
 - i.e., **if the claim cannot be brought/ not be actionable in the *lex loci delicti*, then, it cannot be brought in the forum either.**

2. *Amaca v Frost*

Facts

- P worked in NZ, and they worked under the place with high risk
 - The place of the tort was the place of manufacture (i.e., NSW)
 - Thus, *lex loci delicti* is the NSW law.
- But here, the Court also consider the issue that what if NZ law is *lex loci delicti*
 - **s394 of Accident Insurance Act 2001 (NZ)**
 - it prohibits a person who is entitled to compensation under this Act from bringing proceedings 'in any court in NZ'

Rules

- Consider the scope and purpose of the legislative scheme, the NZ parliament intended to establish a code that covered the field of conduct in which the place of tort was NZ and was governed by the common law of NZ.

Proof of Foreign Law

In Summary:

- Foreign law is a **question of fact** that is **proved by experts**.
- The party seeking to rely on the foreign law (as basis of claim/ defence) **must plead it** and **give notice** to the other side.
- **Presumption of similarity**
 - In the absence of proof of foreign law, courts will usually presume that the foreign law is the same as the forum law.
- Interstate and Trans-Tasman law **do NOT** need to be pleaded/ proven in the same way with foreign law.

I. **Proof of foreign law as fact**

1. **The content of foreign law is a question of fact** to be proved by expert evidence (**Neilson**)

- **Therefore**

1) Stare decisis does not apply to findings on foreign law

- i.e., an earlier decision on the court of the forum on the content and meaning of a particular foreign law is not binding upon that court when it has to consider the same law on a subsequent occasion.

2) The error in the identification of such foreign law CANNOT be appealed

- Because an appeal is only available on a question of law

3) It is 'a question of fact of a peculiar kind.'

- i.e., if the case involves jury, the determination of foreign law should be made by the judge alone (**§176 of Evidence Act**)

2. **The application of those rules and principles is a question of law** for the court of the forum to determine (**National Mutual Holdings**)

Facts

- In 1987, NMH commenced proceeding in the Federal Court;
- In 1989, Sentry commenced proceeding in NY Court
- NMH sought orders that Sentry should be restrained from taking any further step in NY proceedings

- Therefore, the expert report over the application of foreign law to facts of case is inadmissible (**Allstate Life Insurance**)

Facts

- Expert Report
 - 'Accordingly, based on the facts that I have assumed...the respondent directors would be liable under the Act to persons who purchased the Debentures in the offering.'

Rules → NOT admissible

- Because the application of foreign law (content and application in foreign jurisdiction) to the case in the forum is a matter of judge
 - Application constitutes an opinion which is inadmissible for being irrelevant.

3. Foreign Discretion

- 1) Evidence is receivable as to the manner in which those discretions are exercised. (*National Mutual Holdings*)
 - when the relevant foreign law is so framed as to confer discretion upon the courts which administer them
- 2) The expert can examine how the discretion would be exercised by a foreign court in the evidence. (*Neilson v Overseas Projects Corp of VIC*)
 - Even though there is a distinction between the content and application of the foreign law

II. Pleading Foreign Law

1. Definitions (r6.42)

1) Foreign Court

foreign court means a court of a country other than Australia.

2) Foreign Law

foreign law means the law of a country other than Australia.

2. A Foreign Law Notice (rr6.43(1)-(2) of UCPR)

- 1) The party who contends that an issue is governed by foreign law **must file and serve on the other parties** affected by the issue **a notice** (i.e., a foreign law notice) **setting out** (r6.43(1))
 - (1) **the relevant principles of foreign law, and**
 - (2) **their application to the issue**
- 2) **Timing of 'file and serve'** (r6.43(2))
 - It must be filed and served **NOT more than 6 weeks** after the filing summons/ statement of claim/ statement of cross-claim/ defence

3. A Notice of Dispute as to Foreign Law (rr6.43(3)-(4) of UCPR)

- 1) A party on whom a foreign law notice is served who disputes the principles of foreign law or their application **must file and serve on the other parties** affected by the issue **a notice** (i.e., a notice of dispute as to foreign law) **setting out** (r6.43(3))
 - **the matter or matters in dispute**
- 2) **Timing of 'file and serve'** (r6.43(4))
 - It must be filed and served **NOT more than 8 weeks** after the date of service of the foreign law notice.

III. Proof of Foreign Law

1. Expert Evidence

1) Definition of 'Expert' (i.e., whether they are competent)

(1) The person who has specialised knowledge based on the person's training, study or experience (s79 of Evidence Act)

(2) Specific Examples (Clyne)

- Judge/ Former Judge/ Practitioner/ Former Practitioner in the relevant country
- Person qualified academically in the relevant foreign law
- In the issue relating to practice/ procedure/ practical knowledge (Ajaimi v Comptroller of Customs)
 - Non-lawyer with the practical knowledge gained by regular course of business (e.g., bank manager) → might be competent (Clyne)

2) Circumstances of Non-lawyer (Clyne)

Facts

- Clyne wanted to give evidence about 'anstalts' in Liechtenstein on
 - (1st category) Practice and procedure in formation of anstalts, and
 - (2nd category) Law and application on anstalts
- 'Anstalts' is a type of incorporated organisation in Liechtenstein

Rules →

- Clyne is competent to give evidence on the 1st category issue
- Clyne is NOT competent to give evidence on the 2nd category issue
 - He did NOT practise as a lawyer in Liechtenstein, and
 - He was NOT academically qualified to do so, and
 - His knowledge of the law of the Principality is extremely limited to have been acquired mainly by study rather than by any real experience

2. Parties tender the evidence in the appropriate formats

1) Evidence of statute/ proclamation/ treaty/ act (s174 of Evidence Act)

(1) Evidence of a statute, proclamation, treaty or act of state of a foreign country **may be adduced in a proceeding by producing**

- (a) **a book or pamphlet, containing the statute, proclamation, treaty or act of state, that purports to have been printed by the government** or official printer of the country or by the authority of the government or administration of the country, **or**
- (b) **a book or other publication, containing the statute, proclamation, treaty or act of state, that appears to the court to be a reliable source of information, or**
- (c) **a book or pamphlet that is or would be used in the courts** of the country to inform the courts about, or prove, the statute, proclamation, treaty or act of state, **or**
- (d) **a copy of** the statute, proclamation, treaty or act of state that is proved to be an examined copy.

(2) **...includes a regulation/ by-law of the country.**

NOTE

1. **If Expert Evidence refers to law/ regulations of a foreign country , but fails to prove the content** (*Temilkovski*)
 - NOT affect the admissibility of expert evidence
 - Affect the weight which the tribunal is prepared to attach to the expert evidence which is given
2. **Translation & Construction Issue** (*Alstom Limited*)
 - If the parties provide the translation of the legislation/ regulation, but fail to provide how to construct
 - The forum may decide the question of foreign law by itself constructing the relevant enactments
3. **Supplementing by expert evidence** (*Australian Jockey Club*)
 - Production of relevant laws may need to be supplemented by expert evidence to show how those laws have been interpreted and applied in the foreign country → the failure to provide will make the forum to decide by itself

2) Evidence of **unwritten/ common law** (*s175(1) of Evidence Act*)

...may be adduced by producing a book containing reports of judgments of courts of the country if the book is or would be used in the courts of the country to inform the courts about the unwritten or common law of the country.

3) Evidence of **interpretation of a statute** (*s175(2) of Evidence Act*)

...may be adduced by producing a book containing reports of judgments of courts of the country if the book is or would be used in the courts of the country to inform the courts about the interpretation of the statute.

IV. **Presumption of similarity**

NOTE: The circumstances that the presumption of similarity might involve:

- The party does NOT plead/ prove foreign law (i.e., NO evidence (including expert evidence) of foreign law at all)

1. **Presumption of similarity**

- 1) i.e., when dealing with the question governed by the law of the foreign country, the Court will presume that the law of that country is the same as the forum **unless** proven otherwise by the parties. (*Neilson v Overseas Projects Corp of VIC*)
 - It also includes the foreign law on construction/ statutory interpretation (*Neilson v Overseas Projects Corp of VIC*)

Facts

- **Article 146 of the General Principles of Civil Law of the PRC**
 - 'the law of their own country/ of their place of domicile **may** also be applied....'

Rules → If evidence of Chinese law is insufficient, presumption that Chinese law on construction/ statutory interpretation of **Article 146** was same as law of AU

2) Application (**Fernandez v Perez**)

Facts

- The PLK for the tour was law of Florida.
 - The parties gave evidence of the law of Florida over the issue of the 3rd party beneficiaries

Rules → the Court applied presumption of similarity, except for one issue, which the parties gave evidence about third party beneficiaries.

2. **Limits of the presumption** (i.e., the presumption does not apply)

1) **Limit 1: The law of different legal system** (**Damberg**)

Facts

- The property disputes between a husband and a wife about their assets
 - The husband intended to transfer the German lands to the children on trust to avoid German capital gains tax.

Rules → the German law in relation to the avoidance/ evasion of capital gains tax **CANNOT** be the same as Australian law

- Taxation law cannot be assumed to be a field resting on great and broad principles likely to be part of any given legal system
- Some 'characteristics' of the foreign law suggest that AU law does not apply
 - German law is NOT a common law-based system → civil law system
 - German tax law must be statutory
 - Given the related criminal issues, there was a risk that there may be special machinery and highly individual provisions in German law as there are in AU law

2) **Limit 2: The areas of complex and technical law**, e.g.,

(1) **Procedural Law** (**Damberg**)

(2) **Taxation** (**Damberg**)

(3) **Defamation** (**NAGS v Nielsen**)

Facts

- P alleged defamation in the email published in HK
- P did not attempt to prove Chinese defamation law

Rules → the assumption of similarity does not apply in the issue of defamation

- 'in the absence of evidence to the contrary, foreign law is the same as AU law is not inflexible...'
- (And in the areas of complex and technical law) 'Where the law of the forum is governed by a statute and **the law within Australia is itself lacking in uniformity**, I doubt whether it could be presumed that the defamation law in China is the same as it is in NSW.'

V. **Interstate and Trans-Tasman Law**

1. **Interstate Law**

- **NO pleading/ proof required in relation to laws and subordinate legislation of S/T (i.e., interstate law) (s143 of Evidence Act)**

- (1) Proof is not required about the provisions and coming into operation (in whole or in part) of
 - (a) **an Act...** in Australia, a Commonwealth Act, an Act of another State or an Act or Ordinance of a Territory, **or**
 - (b) **a regulation, rule or by-law made**, or purporting to be made..., **or**
 - (c) **a proclamation or order** of the GG..., or
 - (d) **an instrument of a legislative character** (for example, a rule of court) made, or purporting to be made, under such an Act or Ordinance...
- (2) A judge may inform himself or herself about those matters in any way that the judge thinks fit.
- (3) A reference in this section to an Act, being an Act of an Australian Parliament, includes a reference to a private Act passed by that Parliament.

2. **Trans-Tasman Law**

1) **NZ Statute Law (s97 of Trans-Tasman Proceedings Act)**

- **be treated like the interstate law → i.e., no pleading/ proof is required**

- (1) Proof is not required about the provisions and coming into operation (in whole or in part) of
 - (a) **a New Zealand Act** or an Imperial Act in force in New Zealand; **or**
 - (b) **a regulation, rule or by - law** made, or purporting to be made, under such an Act; **or**
 - (c) **a Proclamation or order** made, or purporting to be made, by the Governor - General of New Zealand under such an Act; **or**
 - (d) **an instrument of a legislative character** (for example, a rule of court) made, or purporting to be made, under such an Act, being an instrument that is required by or under a law to be published, or the making of which is required by or under a law to be notified, in the New Zealand Gazette .
- (2) The Australian court, or the person or body, may inform itself about those matters in any way that it considers appropriate.

2) **NZ Common Law → NO express power to take judicial notice**