

LAWS2018

Conflict of Laws

Mid Term: Scaffold

Tips

- Always start with Macmillan in Characterisation
- Do the contract question first
- ‘but for’ means mandatory forum statute
- Cross claim (likely contract)
- Is the foreign law NZ, consider proof implications
- Plans to argue proof of foreign law
 - Look at what they are saying is this admissible

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[Start Here] Characterisation and Substance and procedure

- ☐ Characterisation
- ☐ Is it a matter of substance or procedure
 - ☐ Generally
- ☐ Look for
 - ☐ Limitation Period
 - ☐ Heads of Damage and Amount of Damage
 - ☐ Evidence

ALWAYS START HERE: Characterisation

STATE: *Slaughton LJ* in *Macmillan* at [2]-[4] posits a three step test to determine the applicable law; (1) characterise the issue, (2) select the choice of law rule, (3) identify the system of law tied by the connecting factor to the issue

Courts may adopt a flexible, functional approach where appropriate *Five Star Shipping*.

STATE: all procedural matters will be governed by the law of the forum *Pfeiffer*

Is the matter substantive or procedural?

The forum determines whether an issue is procedural or substantive; procedural issues apply forum law, while substantive issues apply the foreign law. *Hamilton; Wickham*.

- (1) The question of what is and is not substantive is determined by the forum *Macmillan*

Procedural Issues

- (2) Matters which regulate or govern the mode or conduct of court proceedings *Pfeiffer* including:
- (a) Evidence, discovery, privilege
 - (b) Directed towards the regulation of court proceedings *Pfeiffer; Stevens*
 - (c) 'make the machinery of the forum court run smoothly c.f., those which determine rights and liabilities' *Kirby* in *Pfeiffer*

Substantive

- (1) Matters which affect the existence, extent or enforceability of rights or dues are substantive *Pfeiffer*
- (a) Defences are substantive *Garsec*
 - (b) Limitation periods (see below)
 - (c) Quantum and heads of damage (see below)

Mandatory Forum Statutes (Contract Specific)

- ☐ Generally worded statutes
- ☐ Overriding Forum Statutes
 - ☐ Workers Compensation Act
 - ☐ Defamation Act
 - ☐ Australian Consumer Law, Competition and Consumer Act
 - ☐ Insurance Contracts Act
 - ☐ Contracts Review Act
 - ☐ Industrial Relations Act
- ☐ Foreign Compensation Schemes

If it is determined that a foreign law is the proper law, then consider if its application is affected by an overriding forum statute

Generally Worded Statutes

Is the statute silent (or in general words) on its effect on claims governed by foreign law?

- (1) There is a presumption against generally worded statutes affecting principles of PIL *Wanganui*

However,

- (a) This can be rebutted where, the central concept or purpose of the act would be defeated by not applying the act *Wanganui; Akai*
 - (i) Interpret the statute considering parliaments presumed intention *Insight Vacations*

Case Examples

- (1) In *Wanganui* electronic power boards, under the electronic boards act, borrowed money from NSW, under the NSW Act a obligation arose for repayment, 'the act said that tis act will apply notwithstanding and agreement to the contrary'. The proper law of the contract was NZ. The law should not apply, because, it is presumed to be limited to its territory unless stated otherwise.
- (2) In *Insight Vacations* a NSW resident was injured on a European tour organized by an Australian company and claimed breach of s 74(1) TPA (now ACL). The defendant sought to rely on s 5N(1) of the Civil Liability Act (NSW) which excludes liability for recreational activity. The court **held** does not apply extraterritorially, as parliament could only have intended for it to apply domestically based on the words (even though the proper law of the contract was NSW)

- (a) We are to consider **DA s11(3)**:
 - (i) Where the plaintiff resides at the time of publication **(a)**
 - (ii) If a company, the principal place of business **(a)**
 - (iii) the extent of publication in each state or territory **(b)**
 - (iv) the extent of harm sustained in each AJA; and **(c)**
 - (v) any other matter the court considers relevant **(d)**
- (c) There is no Renvoi in domestic Defamation cases **DA s11(4)**

(2) This is a shift from the common law position

Does the Australian Consumer Law, Competition and Consumer Act apply? Carrying on Business

The Competition and Consumer Act, will apply to contracts which take place under a foreign proper law, provided that the company is either incorporated in Australia or carrying on business within Australia **CCA s5(1)(g)** it also includes individuals who are citizens or normally residents **(h);(i)**

[1] Determine the objective proper law of the contract, go to page 4

The ACL applies extra territorially s 5

[2] Is the company 'incorporated in' or 'carrying on business' within Australia?

- (1) It was held in **Valve Corp at [199]-[204]** carried on business in Australia as they:
 - (a) Had many customers in Australia, and earned significant revenue on a ongoing basis
 - (b) Steam content was deposited on Valves servers in Australia
 - (c) Valve had significant personal property servers in Australia, and paid Australian Companies (Equinix)
 - (d) Valve incurred expenses in Australia
 - (e) Does not matter that they conduct services outside Australia.
- (2) Where a company is based overseas, but makes representations to Australian customers, it is likely that these representations will be taken to have occurred within Australia **Valve**.

[3] The consumer guarantees apply, you can't contact out despite a contrary EFLC s 67

- (1) Is the contract for the supply of goods or services? **s 67**

Where there is a different proper law

- (2) As the proper law of the contract, would be Australia, but for the express choice of law clause the provision of the Part IV of the CCA and most of ACL apply **s 67(a)**
 - (a) You need to determine what the court would find the objective proper law to be, then apply this.

Is it purporting to substitute consumer protections? [the catch all provision]

Proof of foreign law

- ☐ Interstate and NZ law
 - ☐ States and Territories
 - ☐ New Zealand
- ☐ International Law
 - ☐ General Principles
 - ☐ Notice Requirements
 - ☐ Method of Proving foreign law
 - ☐ Onus of proof
 - ☐ Expert Evidence
 - ☐ Evidence Act s 174-5
 - ☐ Presumption of Similarity

Australian and New Zealand Contexts

Where the exam raises the prospect of another state or territories or NZ law applying you should apply proof of foreign law:

Australian Case Law and Statute

- (1) [AUS] As the foreign law is the law of another state, there is no requirement to plead or prove its content (case law and statute) [s143 EA](#); [s118 Constitution](#)
 - (a) We recognise, and give full faith and credit to the laws of the states [s143](#); [185 EA](#); [s118 Constitution](#)

New Zealand Statute

- (2) [NZ] As the foreign law is from NZ, there is no requirement to prove statute, or its content [TTA s 97](#) (c.f., NZ common law)

New Zealand Case Law

- (1) However, our courts will not take judicial notice of NZ common law and therefore, it must be proved as fact through expert evidence:
 - (a) go to the international scaffold below