



LAWS2018

Conflict of Laws

Case Notes and **Legislation** interim exam

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Sydney Law School

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INTRODUCTION

CASE STUDIES

Oceanic Sun Line Special Shipping Co v Fay [1998] HCA 32

Facts

- In 1983, Fay was injured during a trap shooting event on a Greek cruise ship, MS Stella Oceanic, while cruising the Aegean Sea.
- Fay sued the Greek ship owner/operator in the NSW Supreme Court.
- He had purchased an exchange order from a NSW travel agent, **this was later exchanged for a ticket in Greece.**
 - The exchange order included key details:
 - ship name, sailing date, cabin, fare.
 - The ticket contained:
 - Clause 12: limited liability to \$5,000.
 - Clause 13: **exclusive jurisdiction of Greek courts**, expressly excluding any other jurisdiction.
- Oceanic Sun sought a stay of proceedings in NSW based on the exclusive jurisdiction clause.

Issue

- Was the exclusive jurisdiction clause validly incorporated into the contract?
 - and then did the NSW court have jurisdiction to hear the case or should it dismiss the case, in favour of Greek courts?

Held

- The court **held** that the conditions printed on the ticket did not form part of the contract.
 - This was because the *lex fori* applied to determine the question of *formation of contract* and not the *proper law of the contract*.

Principle

- The *lex fori* determines questions of contract formation.

Re Canavan [2017] HCA 45

Facts

- A sitting member of parliament had foreign citizenship.
- This is prohibited per s 44 of the constitution.

Issue

- Was Canavan a Italian citizen? If he was should s 44 pose a issue?

Held

- The court considered **expert evidence** because, citizenship is the law of Italy, it was for Italian law to determine if he was a citizen or not.
 - Citizenship was substantive not procedural meaning it is determined by the law of the foreign country - here, Italian law.
 - For proof of foreign law the High Court listened to expert evidence to find he was not a citizen.

The constitutional imperative applies where:

- A person has taken all reasonable steps under foreign law to renounce citizenship; and
- The person would otherwise be irremediably prevented from participating in representative government.
- Holding: Canavan not disqualified under s 44(i); evidence did not show he was an Italian citizen.

PERFORMANCE, VARIATION AND DISCHARGE

Jacobs, Marcus & Co v. Credit Lyonnais (1884) 12 QBD 589 (ECA) | Performance, proper law of contract

Facts

- Defendants contracted to sell 20,000 tonnes of esparto grass to plaintiffs, shipped from Algeria.
- Plaintiffs sued in London for breach of contract when shipments were not completed.
- Defendants argued performance was impossible due to an insurrection in Algeria.
 - Under French law (applicable in Algeria), force majeure excused performance;
 - Under English law, no such excuse applied.

Issue

- Which law governs performance and discharge-French law (place of performance) or English law (proper law of contract)?

Held

- The court **held English law governed the contract, including performance and discharge**.
 - Despite part-performance occurring in Algeria, key connecting factors (contract formation in London, English parties, and payment/delivery in London) pointed to English law as the proper law.
 - Insurrection was not a valid excuse under English law.

Principle

- The law governing performance and discharge **is the proper law of the contract**, not necessarily the law of the place of performance.

Merwin Pastoral Co. Pty Ltd v Moolpa Pastoral Co Pty Ltd (1933) 48 CLR 565

Facts

- Merwin and Moolpa were Victorian companies who entered into a contract in Victoria for the sale of a sheep farm located in NSW.
- The proper law of the contract was NSW.
 - After the contract was made, NSW passed the Moratorium Act, limiting a vendor's remedies to repossession of the land in the event of default.
 - There was no equivalent Victorian law, so the choice of NSW law was significant.
- Moolpa defaulted on the contract.

Issue

- What is the proper law of the contract which governs the discharge of obligations.

Held

- The court **held the proper law of the contract governs discharge of obligations**
 - NSW was proper law of the contract (which had not been specified in the contract), and Moratorium Act applied to excuse non-payment.
 - **Discharge determined by NSW law, not Victorian law.**
 - “The principle is that for the discharge to be good, it must extinguish the obligation according to the law which gives rise to it.” Rich and Dixon JJ.

Principle

- The **proper law of the contract governs the discharge of obligations**. For a discharge to be valid, it must extinguish the obligation according to the law that gave rise to it (i.e., the proper law).

INTERSTATE AND TRANS-TASMAN LAW

Uniform Evidence Acts s143

143 Matters of law

- (1) Proof is not required about the provisions and coming into operation (in whole or in part) of--
- (a) an Act, an Imperial Act in force 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, under such an Act or Ordinance, or
 - (c) a proclamation or order of the Governor-General, the Governor of a State or the Administrator or Executive of a Territory made, or purporting to be made, under such an Act or Ordinance, 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, 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 any government or official gazette (by whatever name called).
- (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.

Trans-Tasman Proceedings Act 2010 s 97

Matters of law

- (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.

FILING OF NOTICES

Uniform Civil Procedure Rules 2005 (NSW) Part 6 Division 9 (“Issues arising under foreign law”)

- As [party] is seeking to plead foreign law, they must file and service notice outlining the foreign law, and its application on the other party UCPR r 6.43(1)
- The opposing party must serve a notice of dispute, if they wish to contest the foreign law UCPR r 6.43(3)
- If the opposing party admits the foreign law, then no further proof is required.