

LAWS2018

Conflict of Laws

Finals: Scaffold

Question 2: Personal Jurisdiction to Anti-Suit Injunctions

Question 3: Enforcement to Exclusionary Doctrines

Note: you may have to highlight WHERE proof of foreign law is required, but need to analyse it

CONTENTS

Exclusionary Doctrines	1
Personal Jurisdiction	3
Discretion: non-exercise of Jurisdiction – Foreign Jurisdiction Clauses ..	24
Discretion: non-exercise of Jurisdiction – Forum non conveniens	31
anti-suit injunctions	38
Recognition and enforcement of foreign judgments (common law)	42
Registration of foreign judgments (statute)	52

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

CONTENTS

[Start Here] Characterisation and Substance and procedure	1
Choice of Law in Contract	4
Mandatory Forum Statutes (Contract Specific).....	11
Choice of Law in Tort.....	17
Mandatory Forum Statutes (Tort Specific)	25
Proof of foreign law	29

[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)

Self-Characterising Provisions

Has a foreign Act deemed that a matter is substantive or procedural?

- (1) Foreign jurisdictions self-characterising foreign statutes are not binding on the forum *Hamilton*
- (a) But, integral legislative provisions which are part of a scheme, from which particular elements going to the fundamental character of the scheme are substantive *Wickham*

Case Examples

In *Hamilton* a statute stated that the matter was 'substantive'. This was not effective. The provision was procedural as it dealt with 'regulation of mode or conduct of court proceedings' which is a 'mechanism or mode of litigation'.

Conversely *Wickham* precluded damages unless the plaintiff suffered 'serious injury'. This was substantive, as it is concerned with the 'kinds of damages, amount that can be recovered'. A issue of substantive law.

Substantive or Procedural

Heads of Damage or Quantification of Damage

The Australian Position

- (1) *Pfeiffer [100]* has shifted away from the position in *Stevens*, now holding that issues relating to heads of damage, and quantification are substantive issues, and therefore the foreign law applies.

The International Position

- (1) The international position, is technically open as there is no HCA authority, as *Zhang* did not decide the question
- (a) it is likely that the courts will follow *Pfeiffer* as lower courts have done, as there is no reason to detract from this position.

Substantive or Procedural

Rules of evidence

Matters of evidence are taken to be procedural, we therefore apply the forum court *Garsec*

Substantive or Procedural

Sovereign Immunity

In *Garsec* it was found that Sovereign immunity granted under the Brunei constitution was substantive and therefore governed by the foreign law.

DISCRETION: NON-EXERCISE OF JURISDICTION - FOREIGN JURISDICTION CLAUSES

- ☐ International Cases Foreign Exclusive Jurisdiction Clauses (EJC)
 - ☐ Has a jurisdiction clause been incorporated into the contract?
 - ☐ Is the jurisdiction clause exclusive?
 - ☐ Is the dispute within the scope of the EJC?
 - ☐ Should the court exercise discretion to stay proceedings?
 - ☐ What is the result?
- ☐ New Zealand and Australian Choice of Law Agreements (CLA)
 - ☐ Is there a choice of law agreement in favour of NZ or Australia?
 - ☐ What is the result?
- ☐ Res Judicata and Avoiding Conflicting Judgments - has there already been a determination
 - ☐ Res Judicata (cause of action)
 - ☐ Issue Estoppel
 - ☐ Anshun Estoppel

*Although the court has jurisdiction, the defendant can apply for a stay on grounds that the parties agreed to the exclusive jurisdiction of a foreign forum as the court has discretion over whether to hear the matter or not **Karpik**.*

International Cases

[1] Has the FJC been incorporated into the agreement? **Oceanic**

- (1) The foreign jurisdiction clause must be incorporated into the contract, a question determined under the lex fori (forum not the proper law of the contract) **Oceanic; Venter**
- (2) If the term is contained on a website by clicking on hyperlinks, they are treated as part of the agreement **Karpik; Gonzalez**

In **Oceanic** the parties were not bound by a EJC as it was not incorporated into the contract as the EJC was printed on a ticket after the formation of the contract.

[2] Is it an **exclusive** jurisdiction clause? **Akai** (PLK)

Note: difference to COL clause

- (1) Whether the jurisdiction clause is exclusive is a matter of construction, considering the words, circumstances, subject matter governed by the PLK **FAI General Insurance; Akai**
 - (a) In **FAI** it was held that “This Reinsurance is subject to English Jurisdiction, Choice of Law: English” was exclusive.

Considerations

- (b) Using the term ‘exclusive’ is not mandatory, but it is a strong indicator **FAI**
 - (i) If they usually use exclusive, but then don’t this is an indicator that it is not **ACE Insurance**

DISCRETION: NON-EXERCISE OF JURISDICTION - FORUM NON CONVENIENS

- ☐ Permanent Stay (International)
 - ☐ General Statement
 - ☐ Onus
 - ☐ Factors
- ☐ Temporary Stay (International)
 - ☐ CONSIDER IF THEY SHOULD SEEK THIS IT IS A LOWER THRESHOLD AND TEST
- ☐ Transferring proceedings between states
 - ☐ Is it in the Supreme Court?
 - ☐ Is it in District or Local Court?
- ☐ New Zealand cases
 - ☐ Has Defendant Made a Application?
 - ☐ Would NZ have jurisdiction over matter? AND
 - ☐ Would NZ be a 'more appropriate' forum?

Even if the court has jurisdiction, it may exercise discretion finding that it is a 'clearly inappropriate forum'

International Cases

The court may decide to not exercise jurisdiction on the grounds they are a CIF, meaning their exercise would be vexatious or oppressive **Voth**

Is it a clearly inappropriate forum

- (1) The plaintiff who invoked the jurisdiction has a prima facie right to insist on its exercise **Voth**
- (2) We reject the UK approach in **Spiliada** and only consider if exercising jurisdiction would be inappropriate as it would be oppressive, vexatious or an abuse of process **Voth** applying **Oceanic**
 - (a) This is a high standard
 - (i) Vexatious: productive of serious and unjustified trouble and harassment
 - (ii) Oppressive: seriously and unfairly burdensome, prejudicial or damaging
 - (b) This is a **NOT a balancing exercise**, but rather if there a test of 'impression' if there are sufficient factors to establish that the forum is clearly inappropriate **Voth; Renault; Grigor**

Who bears the onus?

- (c) The defendant has the onus to prove that continuance of the proceedings would be oppressive or vexatious **Renault**
- (d) **Unless**, prior leave was required to serve the defendant outside Australia (only federal, NTSC, WASC), then the onus is on the applicant to establish that the forum is not inappropriate **Voth**

Factors (look at other scaffold page: 28)

- (e) Connection between the forum and the subject matter (place of parties, place of business, where the transaction occurred, subject matter) **Oceanic; Voth**