

CHOICE OF LAWS: WHAT IS THE APPLICABLE LAW?

General Applicable Law

- There must be a **true choice of law conflict**: will the forum and foreign law lead to different conflicting outcomes?

Three steps (*Macmillan v Bishopgate*)

- A. **Characterisation**: characterise the actual issue that is before the court
 - E.g. is it about the formal validity of a marriage? Or interpretation of a contract?
- B. Select the choice of law rule that lays down a connecting factor for the issue as characterised
 - E.g. the proper law, lex loci delicti, lex fori
 - E.g. the interpretation of the contract is determined by the proper law of the contract; the formal validity of a marriage is to be determined by the law of the place where it is celebrated
- C. Identify the system of law which is tied by the connecting factor found in step 2 to the issue characterised in stage 1
 - E.g. the law of England, the law of China, the law of NSW

However do NOT go through these steps as they are not rules but rather there to help you figure out the natural law. The **overall aim is to identify the most appropriate law to govern a particular issue** (*Raiffeisen Zentralbank*)

First, characterise the nature of the legal issue

- The forum Court must characterise the actual issue of law which is in dispute, rather than the cause of action which the plaintiff relies on (*Macmillan v Bishopgate*)
- The law of the forum determines whether an issue is **substantive or procedural** (*Macmillan*)
 - Rules that **govern or regulate the mode or conduct of court proceedings** are procedural (*Pfeiffer*, adopting Mason CJ's formulation in *McKain*)
 - The **lex fori** applies to issues of **procedure** (*Pfeiffer*)
 - Formation of contract
 - Pretty much everything relevant to jurisdiction
 - Evidence (*Pfeiffer*, Callinan J)
 - Discovery of documents (*Garsec*)
 - Legal professional privilege (*Stewart v ACC*)
 - *Stewart* held that LPP is substantive. Traditionally considered part of the law of evidence (and thus procedural) because it relates to admissibility. However, LPP can

affect rights and obligations. Thus, likely apply substantive law that comes from the forum

- Matters which **affect the existence, extent or enforceability of the rights or duties** of the parties are **substantive** issues (*Pfeiffer*)
 - **Foreign law (lex causae)** applies to issues of **substance** (*Pfeiffer*)
 - Limitation periods are substantive (*Pfeiffer*; s 78 *Limitation Act 1969* (NSW))
 - Interstate/NZ cases: when the applicable substantive law is the law of an AU state, then the limitation statute of that state or territory is treated as the substantive law and we apply the limitation period in the jurisdiction of the applicable law (s 5 *Choice of Law Act 1993* (NSW), *Brear*, overturning *McKain McKain*)
 - International cases: *Renault* left open the question of whether a limitation period is substantive or procedural in relation to a foreign tort. Therefore, it may be that the old position of procedural law may still apply to limitation periods in foreign torts, until the HCA says otherwise
 - Statute of frauds (*Tipperary*)
 - Sovereign immunity (*Garsec*, *Pfeiffer*)
 - All questions of damages i.e. kinds of damages and amount of damages that may be recovered are treated as substantive issues governed by the *lex loci delicti*
 - Interstate cases (*Pfeiffer*; *Wickham*)
 - International cases: HCA reserves whether *Pfeiffer* can be extended to issues re: damages (*Zhang*). Therefore may be that the old position of procedural law still applies to damages in cases applying foreign law in Australia
 - Denial of kinds of damages/statutory scheme to extinguish damages (*Amaca*)
 - Self-characterising statutory provisions (i.e. acts declaring a provision to be procedural) are not effective to bind the forum court (*Hamilton*)
 - *Hamilton*; *Brear*: since procedural issues are determined by the law of the forum e.g. a QLD statute could not change NSW Law

Next, apply the choice of law rule

Once the issue is decided as substantive, apply the CoL rule for the category into which the issue is characterised

- **Torts** = *lex loci delicti*
- **Contract** = *lex loci contractus* (proper law of the contract)
- Example: if issue is whether a tort claim is time barred, first conclude that limitation period is a substantive issue, then apply the *lex loci delicti* to the issue

Complications

The incidental question

- An incidental question is a preliminary question which must be determined before the main question of characterisation
- Issue of depeçage: there are two issues to be determined, and under normal rules would be determined in accordance with different choice of law rules
 - In *Haque v Haque*, we decided to treat the preliminary issue as merely incidental to the main issue i.e. treat them as interconnected
 - Both will be determined in accordance with the choice of law rule applicable to the main issue

Renvoi

- Renvoi occurs where the *lex causae* has rules which in turn direct the matter back to:
 - The forum country (**remission**); or
 - A third country (**transmission**)
- **Applicability:** applies to **tort** cases only (*Neilson*)