

SOME BACKGROUND ISSUES:

Step A: HCA seriously considered obiter = ratio decidendi; only one common law in AU

- **Rule:** there is one common law in Australia, courts also should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong (*Farah v Say-Dee*).
- Binding:
 - HCA seriously considered obiter binds lower courts (*Farah v Say-Dee*)
- Non-binding but may be useful only to the degree of the persuasiveness of their reasoning
 - Precedents of other legal systems (*Cook v Cook*)

Step B: Are the terms incorporated into the contract?

- **Rule:** the lex fori (law of the forum) is applied to determine the preliminary question of incorporation (*Oceanic Sun*).
- Not incorporated
 - [Ticket terms not brought to attention of purchaser at time of agreement, terms not applicable and not incorporated] – *Oceanic Sun* → conditions printed on ticket not part of contract

CHOICE OF LAW

Step 1: What is the real issue before the court?

- **Rule:** Substantive = lex cause, Procedural = lex fori (*John Pfeiffer; McKain per Mason CJ*)
 - NB: for tort the lex causae is the lex loci delicti
 - Court only applies its own procedural rules (*Amaca v Frost*)
 - **Incidental issue to main issue:** follow HCA approach in *Haque v Haque*, work out choice of law rule for main issue and apply that to the entire claim.
 - **The law of the forum determines whether the issue is substantive or procedural (*Macmillan; O'Driscoll; Hamilton*), under NSW:**
 - **Not important whether it is procedural or substantive under proper law [Qld legislation (*lex loci delicti*) “treat those as substantive” is not applied because it is not statute of NSW, NSW law regard it as procedural then it is procedural] – *Hamilton v Merck & Co (2006) 66 NSWLR 48***
 - **FACTS:** Qld resident injured in Qld. Section 9 says you must give notice before you sue, s36(1): there must be a pre-suit conference. **Section 7 says “you must treat all these provisions as substantial and not procedural”.** No notice no pre-suit meeting.
 - **HELD:** NSWCA did not apply s7(1) → mandatory rule only mandatory to Qld. So all of those treated as procedural.
 - **Substantive law:** the existence, extent or enforceability of rights or duties of the parties to an action
 - **[Sovereign immunity: You can't sue the head of state = does not regulate mode of litigation] — *Garsec v His Majesty the Sultan of Brunei (2008) NSWCA 211***
 - **FACTS:** Garsec accuses second wife of Sultan of breaching contract to buy \$3M ... made out of gold. Sultan of Brunei was head of state but does not make this argument. Brunei Head of State could change Brunei's Constitution.
 - Sovereign immunity now in the Constitution → is this substance or procedural?
 - Apply Mason CJ's formulation → has nothing to do with the mode of litigation → substance
 - **HELD:** Substance
 - **[Precludes damages except where injury serious — substance] – *Wickham Freight Lines v Ferguson [2013] NSWCA 66* → PI commenced negligence action in NSW to receiver for work injury suffered in Victoria. D argued that proceedings excluded by VIC Act (no damages recoverable in proceedings relating to work related injuries unless PI had suffered 'serious injury; as defined in the section). **HELD:** Concerned with the 'kinds of damages, or amount of damages that may be recovered'.**
 - **Procedural law:** govern or regulate the mode and conduct of court proceedings (*Hamilton*)
 - **[Act requiring notice of claim and pre-suit compulsory conference, issue = whether PI has claim in NSW] *Hamilton* → PI personally injured in Qld, brought class action in NSW. Qld Personal injuries Act required notice of claim and pre-suit compulsory conference and labelled as 'substantive'. **HELD:** Provisions were regarded as procedural by applying law of forum (NSW) → governs mode of litigation and did not concern distinct rights or their enforceability.**
- **[A] Statute of Limitations**

- **International torts – Zhang (HCA)** → NSW resident injured in New Caledonia. P commenced proceedings in NSWSC. Court held substantive law for determination of *foreign* tort is *lex loci delicti*.

- **MANDATORY RULES**

- **Contracts**

- **Rule:** The proper law of the contract by:
 - Express choice
 - Inferred choice
 - Objective choice

- **Foreign citizenship**

- **Rule:** Foreign law is used to determine whether one is a citizen under that law, but the constitutional imperative may be engaged where person has taken all reasonable step required by foreign law to renounce his citizenship (*Re Canavan*)

Step 3: Identify the system of law tied by the connecting factor to the issue

[A] TORT – where did the tort occur?

- **Locating the *lex loci delicti*:** the general rule is where the defendant negligent act or omission occurred, as opposed to where the consequences are felt (*Dow Jones v Gutnick*). **Where ‘in substance’ did the cause of action arise? (Distillers)**
- **Negligence**
 - **Omission**
 - **Product liability:** where the complaint is a failure to warn the dangerous attributes of a product, the *locus delicti* is the place where the warning should have been communicated (*Distillers*)
 - **Services:** where the complaint is a negligent failure to provide service without proper care, the tort is committed where those services ought to have been rendered (*Voth*)
 - **Employment (*James Hardie v Hall*)**
 - Failure to warn: place where the warning should have operated to protect the plaintiff
 - Failure to provide a safe workplace: place where system of work should have been safe
 - **Act**
 - **Product liability/manufacture:** Product was inherently dangerous, place of tort is where plaintiff was exposed to the inherent risks, not where it was manufactured (*Amaca v Frost*)
 - **Services:** statement is directed from one place to another, tort committed at the place to which the misrepresentation was directed, provided it was a place reasonably anticipated that it would be received or brought to the attention of the complainant, even if received elsewhere (*Voth*).
- **Defamation (*Dow Jones v Gutnick*)**
 - **If comprehensible form i.e. newspaper:** ordinarily, tort of defamation is located at the place where the damage to reputation occurs [44]
 - **If non-comprehensible form i.e. internet content:** ordinarily, tort of defamation is located where the person downloads/accesses the material and damage to reputation may be done.
 - **NB:** Kirby J expressed extrajudicially that *Gutnick* result is unlikely to remain, or in any event will not be applied in circumstances that are only slightly different (*Beyer 2004*)
- **Cases**
 - **[Online publish defamation] — *Dow Jones v Gutnick*** → DJ (NY) published online, referring to Gutnick. He downloaded the article in VIC where he was most well-known. He sued for defamation. Tort taken to have occurred at the place of download (VIC) cf place of publish NY.
 - **[Professional negligence (financial advice)] – *Voth*** → P (NSW company) sued D (US citizen) for professional negligence in providing bad advice to its subsidiary Kansas Company. D’s negligent act or omission was initiated and completed in the US. D was retained in the USA and the act was in relation to service that were provided in USA. The act was writing up advice that gave rise to bad advice, hence was in USA (Missori).
 - **[Failure to warn side effect of drug during pregnancy] – *Distillers*** → **applicable law was NSW as this was where D’s omission to warn gave rise to P’s complaint.** P is now disabled, D’s act that gave rise to this was not the manufacturing of the drug (in UK) but the failure to warn mothers not to take it when they were pregnant.
 - Do not delve into the merits of case when determining choice of law → ie. if drug can contained label warning → you do not consider whether the manufacturer failed to warn – because that is dealing with whether the tort occurred cf simply identifying the place of tort.

- **NB: Callinan J's single renvoi approach seems clearer:** (1) Apply *lex loci delicti* rule = PRC law (2) PRC law refers back to law of forum, assume this reference ignores any AU choice of law rule (so no more direction to *lex loci delicti*).
- McHugh J: no renvoi → (1) Apply *lex loci delicti* rule = PRC law (2) Ignore choice of law rules (PIL) of PRC → no redirection to AU = PRC law.

Cases:

- **Oceanic Sun** → Person injured during trap shooting on Greek cruise ship, sued Greek ship owner and operator in NSWSC. Bought in NSW an 'exchange order' from NSW travel agent, which was exchanged for ticket when in Greece. Exchange order mentioned ship, sailing date, cabin number, fare etc.
 - Terms of the ticket:
 - Clause 12 limited liability (including for damages to \$5000) and
 - Clause 13 specified exclusive jurisdiction of Greek courts
 - Held: Terms of the ticket not incorporated into the contract of the ticket as they were not on the exchange slip.
- **Re Canavan** → s44(i) Constitution says person cannot serve as Senator or member of House of Reps in parliament if they have dual citizenship.

CONCURRENT LIABILITY IN TORT AND CONTRACT

- **RULE:** Torts cannot affect contracts unless legislation says so (**Busst**). Contracts can affect torts. Deal with each claim separately and apply the appropriate choice of law rule (**Busst v Lotsirb**)
 - Start with contract first → if contract says no tort then no tort
- **Where a contract exempts liability in tort**
 - **Rule:** An action in tort that is maintainable under the *lex loci delicti* may be barred by a contractual exclusion clause if valid under the proper law of the contract and covered actions in tort of the kind pled (**Coupland; Sayers**)
- **Cases**
 - **[Proper law was Qld for contractual claim; despite *lex loci delicti* NSW] – Busst v Lotsirb Nominees** →
 - **FACTS:** Supplier based in Australia, employee in Qld, got promoted and has to go NSW Office. She does not sign a new contract but gets moved. Assumes new contract is also governed by Qld law – heard in NSW, therefore the mandatory law under workers compensation act kicks in and limits tort claims (cap).
 - **ISSUE:** Does the Workers Compensation limit her contractual claim?
 - **HELD:** NO, though the employee had worked in NSW the contract's 'closest and most real connection' was with Qld.
 - **[Plaintiff free to advance claim in tort solely, therefore contract would only be relevant if it contains exemption/exclusion] – Coupland**
 - UK citizen injured in Libya. Claim brought in UK. Proper law of contract was Libya, proper law of tort was UK.
 - **[Exclusion of liability valid under proper law therefore enforceable in tort action] – Sayers v International Drilling (UK)**
 - UK employee injured in Nigeria on oil rig. Signed contract limiting tortious claim with employer in Dutch. Contract had excluded liability for all workplace injury.
 - What was the proper law? Dutch law, that was valid therefore you cannot sue under torts.

[C] Contracts

RULE: The proper law of the contract is the choice of law in conflict, first ask whether there is an express choice of law; if there is an inferred choice of law; and lastly what is the objective choice of law with the closest connection to the contract (**Vita Food**)

a. Is there an express choice (at the time of the promise)? (**Merwin; Vita**)

- **ASK:** What law governs this contract? An express statement by parties of their intention to select the proper/governing law of the contract will be given its intended effect (**Vita Foods**)
 - E.g. *The Terms and the provision of our services shall be governed by and construed in accordance with the laws of Singapore*
 - **Why:** to give effect to the promise between the parties (**Merwin**)
- **Cf jurisdictional clause**
 - **ASK:** What is the forum, where can you sue me?
 - E.g. *Shall be exclusively be submitted to the competent courts in Singapore*

- Expressed in English language and requiring interpretation according to English rules and practice
- Use of English sterling as the money of account
- The contract itself
 - Contained policy based on specimen contained in UK Marine Insurance Act, using English terminology
 - Terms could not be understood without reference to UK law
- The surrounding circumstances
 - No indigenous marine insurance of Kuwait
 - Rasheed used broker in London and paid premiums to that broker in London.
 - Claims settled in London bank acc in pounds
- **[Exclusive jurisdictional clause of French Court = inferred choice of law] – Lewis v Tichauer** → VIC PI contracted with French manufacturer to make cranes → following incident, blamed defects and sued in VIC. HELD: Because of JC → strong presumption that French law was intended.
- **Indicators:**
 - Exclusive jurisdiction clause is strong indicator of intention of parties (**Amin Rasheed; Lewis**)
 - Accompanied with using English terms etc
 - **Lewis** → ‘in case of litigation, the commercial court of Leon is the only competent court’.
 - Exclusive arbitration clause to arbitrate in a particular place (**Amin**)
 - Technical language relevant to one country rather than another (**Amin**)
 - Use of English sterling
 - Expressed in English language
- Minor relevance:
 - Provision in claims to be paid in Kuwait (**Amin**)
- Irrelevant
 - Contract was given life by passing of an Act (**Bonython**)

c. Objective Proper Law: Which is the law with the closest connection?

- **Rule:** If there is no expression of intention, the proper law of the contract is the **‘system of law closest to the contract’** (**Akai; Bonython**).
- **Specific rules for certain scenarios**
 - **Immovable property/land: *lex situs* (place property sits)** → where the subject matter of the contract is immovable property, there is a strong indication the objective proper law of the contract is *lex situs* (**Merwin**)
 - **Contracts between banker and customer** = place where bank account kept (**Libyan Arab Foreign Bank**)
 - **Charterparties** = place of registration of the ship (**Coast Lines v Hudig and Vender Chartering**)
 - **Insurance contracts connected with London** = England (**FAI General Insurance**)
- **Factors: Akai; Valve; Oceanic Sun**
 - The places of residence or business of the parties
 - The place of contracting
 - Not relevant where generic contracts: everyone sign it in a different place – non-negotiable ones (**Oceanic Sun; Valve**)
 - Contract is enabled by legislation in a specific jurisdiction (**Bonython**)
 - A party is a public authority
 - The place of performance (**Oceanic Sun**)
 - The nature and the subject matter of the contract
- **Cases:**
 - **[Insurance Co, debt insured against arose in NSW, AU dollar was currency for the policy] – Akai** →
 - Place of residence of business of the parties
 - NSW and Singapore
 - The place of contracting
 - By communication from NSW and Singapore
 - The place of performance
 - Policy only applied to AU and NZ

- **Homestake Gold** → Free hand scheme, Co want to increase shares but did not want them to control. Gave them to minors who could not attend shareholder meetings. **Court assumed there was a contract and turned to validity** → applied proper law of contract (NSW).
- **Trina Solar v Jasmine Solar FFCA (relied on Oceanic Sun)**
 - FACTS: Solar panels.
 - RULE: Any issue of whether consensus has been given is an issue of formation
 - Anything that questions the intention to be bound
 - Apply lex fori
 - What about capacity?
- **Corporations (did they have capacity at incorporation)**
 1. **Formation (incl capacity)**
 - **Rule:** Capacity is determined by reference to place of incorporation (**s7(3)(a) Foreign Corporations (Application of Laws) Act 1989 (Cth); PT Ltd; Haugesund**)
 - s 7(3)(a): *Capacity of a corporation to contract is governed by law of place of incorporation.*
 - E.g. Made contract with corporation, they come and say they did not have capacity.
 - Did they have it? If they say no by reference to the law of the place of incorporation → the consequence is determined by the putative proper law (there may then be a change of applicable law)
 2. **Consequence of lack of capacity/or having capacity**
 - Proper law of the contract (**Haugesund; Pt Ltd**)
- **Haugesund v Depfa**
 - Two Norwegian banks swapping interests with each other, went bad needed to sell at loss. Contract had English Exclusive Jurisdiction and choice of law clauses. HELD: Norway Law applied in determining whether the authorities had capacity to contract, and issues relating to the consequences that follow be determined by English law.
- **PT Ltd v Maradona**
 - **FACTS:** Co (EMV) incorporated in Netherlands, entered into loan agreement with Australia Co, to be paid back in 3 years. Co requested extension for agreement to 5 years. Co not registered in Australia – AU law requires registration for loan agreement. Guarantors of the loan = 3 individuals all called Thompsons and the company Thomsons. AU Co tried to get money back from Co (EMV) and Thomsons. EMV argued they were not registered, therefore no capacity to enter into loan agreement.
 - **HELD:** For you to have an illegal contract, you must have had capacity to enter into a contract in the first place – a valid but illegal contract.
 - For consequence of entering and not registering → apply NSW law
 - For formation (capacity) → apply law of place of incorporation (Netherlands) → had capacity
- **[B] Offer and Acceptance**
 - **Rule:** *lex fori* (**Oceanic Sun** per Brennan and Gaudron JJ; affirmed in **Trina Solar**; overturning **White Cliffs**)
- **[C] Parties to the contract**
 - **Rule:** *Lex fori* to apply for deeming who is or is not a party to a contract (**Jasmin Solar v Trina Solar**)
 - **Jasmin Solar v Trina Solar** → J wanted to serve T in US for alleged misrepresentation as to the supply of solar panels. The court applied the law of AU and found that T was not party to contract, but rather guarantor. Therefore not party to contract and could not be bound by it so service not allowed.
- **[D] Consideration**
 - **Rule:** It is an issue of **validity not formation** – so you apply the putative proper law of the contract (**Re Bonacina**)
 - **[Italian law putative proper law therefore no consideration is fine] – Re Bonacina [1912] 2 Ch 394**
 - FACTS: Italian contract by 2 Italian parties, suing in UK. Italian law did not require consideration. 2nd contract was burying the 1st contract → technically no consideration.
 - HELD: Consideration was not an issue of formation — applied Italian law re consideration.
 - Some issues to keep in mind:
 - Always an issue of formation under common law
 - May not be one of formation under statutory contracts e.g. deeds
- **[E] Incorporation of Terms**
 - **Rule:** *lex fori* (**Oceanic Sun**)

- **[F] Formal validity**
 - **Rule:** Either proper law of the contract or lex locus contractus (where you made the contract) (**Tipperary Developments**)
 - Generally the two will be same place
 - **[Proper law determines whether in writing] – Tipperary** → Statute of Frauds requirement was substantive of procedural, therefore apply proper law of the contract.
- **[G] Performance, variation, and discharge**
 - **Rule:** Issues regarding performance (incl frustration), variation or discharge of a contract are governed by the **proper law (Merwin v Moolpa)**
 - **Immovable property, court generally applies lex situs re obligation in the contract.** The consequence is dealt with under the proper law (**Merwin**).
 - E.g. Contract to build house in Qld, contract governed by NSW law.
 - Obligation: Contract includes implied reference to build it up to standards.
 - The standards would be place of performance being → Qld (**Bonython v Commonwealth**)
 - Consequence: not building to standard → NSW law
 - **Merwin** → NSW enacted statute allowing it to modify, suspend and discharge contracts due to economic crisis. VIC also passed similar statute. A VIC Co, whose contract was affected, sued in VIC to enforce contract. HELD: Proper law was NSW law and VSC could not refuse application of NSW statute because of *Constitution* requiring 'full faith and credit' in all other state/territory ;aw.

ILLEGALITY AND FOREIGN PUBLIC POLICY

- **GENERAL RULE:** The Court will not enforce a contract where the contract is illegal under the proper law of the contract, OR the law of the place of performance. (**Kakavas**)
- **Onus of proof:** rests on the party alleging illegality (**PT Arutmin v Thiess**)
- **What is illegality:** where the real object or intention of the parties it to endeavour in the performance of an illegal act in a foreign, friendly country (**Fullerton Nominees**).
- **Severance:** What you cannot sever
 - Part of the existence of a contract e.g. consideration in common law contract
 - Where entire contract tainted by illegality → both the reimbursement for bribes (illegal) and commission (legal) would not be enforced (**Fullerton v Darmago**)

[A] Forum Public Policy

- **RULE:** Generally respect each other's laws, unless it is against the public policy of Australia — e.g. doing an illegal act in the country. Look to place of performance. (**Kakavas**)
 - Cobbitty – mutual respect for laws
 - Act of State Doctrine → do not examine other's law
- **NO — Not against public policy in forum**
 - **[Proper law Bahamas allowed line of credit for gambling therefore valid, under law of forum VIC illegal] – Kakavas**
 - **FACTS:** Goes to Casino in Bahamas, line of credit (pay it later). Gambles his life away. Illegal in Victoria to have a line of credit.
 - **HELD:** The short answer is that the agreement was governed by the laws of the Bahamas. Reference to the law in Victoria governing the conduct of gambling here 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.
- **YES – Against public policy in forum**
 - Had the law in Bahamas making it legal to get a line of credit for gambling been against the public policy of VIC → the court may not have enforced it. (**Kakavas**). NB: not the case in *Kakavas* since gambling was very prevalent in VIC

[B] Illegality in place of performance

- **RULE:** Court would not uphold an act that is to perform something that is illegal in the place of performance (**Fullerton Nominees v Darmago**)
 - If legal in AU and illegal in another country → would not enforce if to be performed in a place which the act is illegal
 - **YES illegal:**

- If (a) the proper law of a 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; OR
- (b) a contract for the supply of goods or services to consumer contains a term that purports to substitute, or has the effect of substituting, the following provisions for all or any of the provisions of this Division [relating to consumer guarantees]:
 - (i) the provisions of the law of a country other than Australia;
 - (ii) the provisions of the law of a State or a Territory;
 the provisions of this Division apply in relation to the supply under the contract despite that term.
- **Carrying on business in AU (examined in the context of ACL):**
 - **Rule:** ACL applies to supply of goods and/or services, since CCA says 'engaging in conduct outside AU'; captures supplies of games published outside of AU provided there was a business presence in AU (**Valve**).
 - Effect: If you exclude a guarantee → court will read ACL in and so invalid exclusion
- **[Objective proper law also US, express proper law US but because excluded ACL provision → s67(b) kicked in] – Valve Corporation v ACC**
 - **FACTS:** Gain distribution network stream. "All streams are payable in advance and are not refundable". Tried to contract out of a guarantee → ACCC contends false and misleading conduct on Valve.
 - **ISSUE:** Does the Consumer Laws apply to goods, services, or both?
 - Both
 - Does it apply to supply that take place under a contract with the objective proper law of which is not Australia?
 - Yes → evident purpose of s64 is so parties cannot contract out of the guarantees [107]
 - Where was the representation made?
 - Submission:
 - Valve argued it was not tailored to AU, not targeting AU
 - ACCC argued 2M consumers in AU
 - **Held:** if respondent overseas and has a relationship with customers in AU → then it is directed/represented to AU consumers → does not matter if other consumers of the world can access it.
 - The proper law of the contract was Washington States, it was not excluded, but ACL guarantees were read into it
 - "Carrying on Business" according to the ACL? Cf Corporations Act
 - The CCA says that the ACL guarantees "**extends to the engaging in conduct outside Australia by: incorporated or carrying on business within Australia ...**"
 - P.S.: The supplies took place when the users downloaded the games = AU
- **[Other parts of the ACL by operation of CCA s5 has extraterritoriality] – Karpic v Carnival** → representative action re claims under ACL against Carnival for loss or damage allegedly suffered by passengers on cruise — COVID and some died. HELD: Despite no equivalent s67, s23 ACL Unfair terms of consumer contracts and small business contracts also had extraterritoriality effect.
- **OTHERS:**
 - **Insurance Contracts Act**
 - **Effect:** Where a provision of insurance contract purports to exclude, restrict or modify or would, but for this section have the effect of excluding, restricting or modifying, to the prejudice of a person other than the insurer, the operation of this Act, the provision is void (s52).
 - Insurer cannot rely on s8 (s52 ICA)
 - **[Choice of law clause and exclusive jurisdiction clause were deemed void by operation of ss8; 52 ICA] – Akai** → **CI 9:** Governing Law This policy shall be governed by the law of England. Any dispute arising from this policy shall be referred to the Courts of England.
 - **Section 8(1):** Applies to contracts of insurance and proposed contracts of insurance the proper law of which is or would be the law of a State or Territory in which this Act applies to to which this Act extends
 - **Section 8(2): ignore express choice**, if the objective putative proper law would have been Australian law then INA applies.
 - This will override/overwrite the contract
 - Explanatory memo → is mandatory

- **State this:** Since the foreign law is the substantive proper law (tort: *lex loci delicti*; contract: *lex causae*), it can be pled by plaintiffs and defendants alike. There is no obligation to plead foreign law, but the parties can do so (**Zhang**).
 - **If not proved & presumed to be same as *lex fori*** → apply law of the forum.
- **NB: Evidence is procedural therefore apply the *lex fori* – law of the forum (our law)**
- **Issues:**
 1. How do you plead and prove the foreign law
 2. Who has the burden of proof?
 3. What if the evidence of the foreign is insufficient

(1) Pleading foreign law

- **[A] Rule: Foreign law is proved as fact (Neilson)**
 - **Exceptions**
 - **NZ Law:** Treat NZ Law like law and is not treated as fact (**Section 97 Trans-Tasman Proceedings Act**). Proving it just by bringing it up.
 - **Intranational: States or territories (s143 Uniform Evidence Acts; s118 Constitution)**
 - **Presumption of no knowledge by Court:** Court does not have knowledge of any foreign law, must be proved by expert evidence, and content of foreign law will create no precedence (**Neilson**)
 - **[Case law in Florida put to court without expert, presumption of similarity applied] – Fernandez v Perez** →
 - **FACTS:** Contract of supply of services, Pitbull one of the artists engaged. Contract under Florida Law, which says third party beneficiaries are a party to the contract (NB: Privity of contracts in Australian Law).
 - **HELD:** AU Courts have presumption they do not know foreign law, since the law of Florida not proved, it is applied in the same fashion as AU law. Law of privity applies – third parties cannot be joined.
 - **[No proof of PNG law, so presumption kicked in] – Dyno Wesfarmers v Knuckey** → Two men dies in PNG due to mining accident, their widows sue. Following *lex loci delicti* in **Zhang**, PNG law was the substantive proper law. Limitation period in PNG bar the suit, but not proved by defendant. **HELD:** Not applicable law.
 - **Question of foreign law for the judge cf jury (S176 EA)**
 - **Process:** Pleadings in statement of claim → material facts
 - **Must give notice** of pleading foreign law (**UCPR r6.43(1)**)
 - **Other party disputes:** disputing part then serve a notice of dispute as to foreign law (**UCPR r 6.43(3)**)
 - **Where in contest.** NSWSC can order that proceedings be commenced in foreign court to answer questions as to the principles of foreign law or as to their application, requires consent of the parties (**UCPR r6.44(1)**)
 - Foreign court can **refer questions** AU law to NSWSC (**UCPR r6.45**)
 - **By party consent: Contacting foreign jurisdiction** → **UCPR r 6.44**
 - **Discretion of Court: Asking foreign court for advice** → **UCPR r 20.14**
 - Go to CJ, our CJ ask their CJ “can we ask you a question”
 - If yes, lawyers generally write it up and send it off
 - **Onus of proof**
 - Party relying on the law needs to prove the law and the content of it
 - **Appeals on foreign law allowed (Nygh 17.7; Studorp)**
 - **Studorp** → NZ born person exposed to asbestos in NZ, manufactured by Studorp (NZ subsidiary of James Hardie). PI moved to NSW to bring proceedings in DDT. DDT prevents appeals on issues of fact. Factor going to DPP as clearly inappropriate forum.
- **[B] Presumption of similarity/Content of proof**
 - **Rule:** In the absence of proof, and the presumption of similarity is tenable because the **foreign law rests on broad principles likely to be part of any given legal system**, the Court will apply the *lex fori* (**Damberg**)
 - If there is no reason to question agreed fact/applicable law = *lex fori*, court will not question it. But if there is, the court will (**Damberg**). Only generally apply presumption to ‘great and broad principles likely to be part of any given legal system’ (**Damberg**).

- US lawyer re US security law (debentures) (**Allstate**)
- **NO**
 - **[Expert had experience in formation of Anstalts; not law and legal effect] – Clyne** → Court held him as expert in category 1 → formation of Anstalts; not the law and legal effect
- **Wholly or substantially based on that knowledge:**
 - **Rule:** Cannot give evidence outside of area of expertise/no connection with area of expertise → opinion → inadmissible (**Allstate**)
 - **YES wholly or substantially based on that knowledge**
 - **[Banker 24 years of exp = specialised knowledge on Nigerian Banking law] – Ajami** → Required to give evidence on Nigerian banking law → found banker who worked for 24 years. **HELD:** Expert based on experience.
 - **NO**
 - **[Expert in securities law give opinion on investment behaviour] – Allstate**
 - **FACTS:** Anti-suit injunction → trying to stop someone from suing you in another state. Altman was expert in securities law, but gave opinion on investment behaviour.
 - *'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'*
 - **HELD:** Altman not allowed to give evidence on investment behaviour, not admissible.
 - s76. EA Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.
 - **[Expert had experience in formation of Anstalts; not law and legal effect] – Clyne** → Tax related case, Tax Office said Clyne needed to pay \$250M tax, Clyne said money was held in 'Anstalts', which under Lichtenstein law was separate legal entity. Clyne argued he was not qualified lawyer in Lichtenstein but he helped clients set up Anstalts, and discussed them with Lichtenstein lawyers and written about them in his published books.
 - Taxation was not subject offered by USYD when Clyne did his LLB, but he did course of taxation law in his Masters.
 - Court held him as expert in category 1 → formation of Anstalts; not the law and legal effect
 - First argument → **Ajaimi**
 - Clyne said non-lawyer can be competent to give evidence on foreign law
 - Category 1 Evidence
 - Evidence relating to the practice and procedure in the formation of anstalts in the Principality of Liechtenstein and the identification of the documents evidencing that formation
 - Category 2 Evidence
 - State and to apply the relevant law of that Principality, and to state the legal effect of the documents, including one which purports to appoint the taxpayer as an agent to act on behalf of his own anstalt.