

Your law or mine? Choice of Law Issues in Banking and Financial Transactions

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Introduction

MANY LAWYERS NOW IN PRACTICE WOULD NOT HAVE STUDIED A CURRICULUM WHERE THE SUBJECT OF CONFLICT OF LAWS, WHETHER FEDERAL OR INTERNATIONAL, WAS A COMPULSORY SUBJECT. THOSE WHO, LIKE ME, HAD 72 HOURS OF ITS COMPLEXITY, PROBABLY HAVE SOME PARTICULAR INTELLECTUAL SCARS. FOR ME, THE GREATEST OF THESE WAS THE MYSTERY OF CLASSIFICATION OF LEGAL CONCEPTS DRAWN FROM DIFFERENT AND CONFLICTING LEGAL SYSTEMS. SADLY, IN THE 50 PLUS YEARS SINCE I WAS A LAW STUDENT, THAT ITCHY SCAR HAS NOT GONE AWAY AND IT CONTINUES TO HAUNT ME AND THE LAW. ONE RELEVANT EXAMPLE COMES FROM THE IMMINENTLY OPERATIVE FEDERAL LEGISLATION ON PERSONAL PROPERTY SECURITIES LAW,¹ AND IS DISCUSSED BELOW.

MY PAPER IS NOT A DETAILED EXAMINATION OF THE LAW, BUT RATHER IT LEAPS FROM ALP TO ALP ON SOME SPECIFIC ISSUES, WITHOUT TIME TO TRAVERSE THE CREVASSES AND RAVINES OF THE LAW. FORTUNATELY, WE HAVE AN EXCELLENT TEXT TO TURN TO IN AUSTRALIA, ALTHOUGH NOT SADLY IN NEW ZEALAND.²

Is this a simple choice?

1. "YOUR LAW OR MINE?". THE CHOICE IS NOT A SIMPLE UNITARY CHOICE. IN THE CASE OF COMPLEX TRANSACTIONS EMBODIED IN A NUMBER OF CONTRACTS OR OTHER INSTRUMENTS, THERE MAY BE DIFFERING APPLICABLE LAWS. WHEN THOSE INTERLOCK, AS WHERE CALLING ON A GUARANTEE IS PRECIPITATED BY AN EVENT OF DEFAULT OR A BREACH AS DEFINED IN ANOTHER DOCUMENT, OR WHERE AN ARBITRATION CLAUSE HAS A SEPARATE GOVERNING LAW, THE RELATIONSHIP CAN BECOME INTERESTING.

What system of law governs choice of law issues at common law?

OUR INHERITANCE OF ENGLISH CASE LAW GAVE US A FOUNDATION. THAT INHERITANCE PETERS OUT IN THE 1980S AS ENGLISH LAW IS MORE DIRECTLY AFFECTED BY ITS OBLIGATIONS AS A MEMBER OF THE EUROPEAN UNION TO GIVE EFFECT TO AGREED RULES ON JURISDICTION AND CHOICE OF LAW.

¹ Personal Property Securities Law (PPSA) 2010 to come into operation October 2011

² Nygh's Conflict of Laws in Australia, (Nygh's) M Davies, A Bell, P Le Gay Brereton (8th ed) 2010.

OUR AUSTRALIAN APPROACH TO CHOICE OF LAW ISSUES WHERE PARTIES HAVE MADE NO EXPRESS EFFECTIVE CHOICE IS SET OUT IN AKAI V PEOPLES INSURANCE CO ³.

“...THERE IS, IN TRUTH, ONLY ONE QUESTION ... AND THAT IS WHETHER, UPON THE PROPER CONSTRUCTION OF THE CONTRACT (WHICH MAY INCLUDE AN EXPRESSION OF CHOICE IN DIRECT LANGUAGE) THE COURT PROPERLY MAY CONCLUDE THAT THE PARTIES EXERCISED LIBERTY GIVEN BY THE COMMON LAW TO CHOOSE A GOVERNING LAW FOR THEIR CONTRACT. IF THE ANSWER TO THIS IS IN THE NEGATIVE, THEN THE LAW ITSELF WILL SELECT A PROPER LAW”⁴

THE DEFAULT SETTINGS APPEAR TO BE:

(I)FORMATION: THIS INCLUDES OFFER & ACCEPTANCE & CONSIDERATION (IF NEEDED) (LEX FORI) THE LAW OF THE FORUM.⁵

(II)STATUS , POWERS AND CAPACITY:

-GOVERNED EITHER BY LEX DOMICILII (LAW OF THE DOMICILE) OR LEX CAUSAE (THE GOVERNING OR APPLICABLE LAW)

- IN CASE OF CORPORATIONS, IT IS ALWAYS THE LEX DOMICILII - I.E. THE PLACE OF RESIDENCE, INCORPORATION AND CONTROL

(III)FORMALITIES: (NB MUST CHARACTERISE AND DISTINGUISH)

IF PROCEDURAL - LEX FORI (LAW OF THE FORUM)

IF SUBSTANTIVE - LEX CAUSAE OR LEX FORI

EG THE LAPSE OF TIME - WHETHER LIMITATION OR PRESCRIPTION DETERMINES ITS EFFECT.

THIS CHARACTERISATION DONE BY LAW OF FORUM , BUT HAVING REGARD TO INCIDENTS UNDER LEX CAUSAE.

(IV) MATERIAL OR ESSENTIAL VALIDITY _ LEX CAUSAE

BUT EXCEPTIONS :

³ (1996) 188 CLR 418.

⁴ Per Toohey, Gaudron, & Gummow JJ.

⁵ Oceanic Sun Shipping v Fay (1988) 165 CLR 197; Nygh: "Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort" (1995) 251 Recueil des Cours 268, 314-6; 252 Recueil des Cours 1. This is not consistent with Art 3.4 of the Rome Regulation on Choice of Law Applicable to Contractual Obligations (Rome I), which prefers the governing law. Rome I applies to obligations between members of the European Union except Denmark. In Denmark, the same result is reached through other means.

(A) CONTRACT ILLEGAL AT PLACE OF PERFORMANCE

(B) CONTRACT CONTRA PUBLIC POLICY OF FORUM

(V) INTERPRETATION - LEX CAUSAE

(V) EFFECT - SUBSTANTIVE ISSUES - LEX CAUSAE

(VII) DISCHARGE - LEX CAUSAE

- BUT EXCEPTIONS E.G. EFFECTS OF MORATORIA, EXCHANGE CONTROL, INDEXATION, REVALORISATION, ANNULMENT, TAXATION, FRUSTRATION, ACTS OF STATE,

MATTERS OUTSIDE PROPER LAW:

(I) CAPACITY - PERSONAL LAW (EXCEPT INDIVIDUALS)

(II) FORMALITIES - ESPECIALLY FOR BONDS, LAW OF PLACE OF ISSUE OTHERWISE LEX LOCI CONTRACTUS (THE PLACE OF CONTRACTING)

- DETAILS OF PERFORMANCE - LEX SOLUTIONIS (THE PLACE OF PERFORMANCE)

Codification

2. WE MOVE AWAY FROM THE CASE LAW FOR TOTAL OR PARTIAL STATUTORY CODIFICATION. THIS MAY BE GIVING EFFECT TO AN INTERNATIONAL AGREEMENT OR REFLECTING INTERNATIONAL PRACTICE OR MAY BE PART OF OUR COLONIAL LEGACY.

EXAMPLES – SEE APPENDIX

- BILLS OF EXCHANGE ACT (CTH) 1909 SS 77 & 77A
- CHEQUES ACT (CTH) 1986 S 117
- INSURANCE CONTRACTS ACT 1984 S 8
- CARRIAGE OF GOODS BY SEA ACT (CTH) 1992 S 11
- COMPETITION AND CONSUMER LAW (CTH) 2010 SCHEDULE 2 (AUSTRALIAN CONSUMER LAW) SS 67 & 68
- PERSONAL PROPERTY SECURITIES ACTS 2010, PART 7.

THE CODIFICATION OF THE RULES ABOUT GOVERNING LAW IN RELATION TO CHOICE OF LAW IN TRANSACTIONS INVOLVING PERSONAL PROPERTY SECURITIES AS DEFINED IN THE NEW ACT IS AN EXAMPLE OF MANY OF THE ISSUES THAT ARISE. THIS IS NOT A COMPLETE CODIFICATION, SO THERE ARE AREAS WHERE THE GAPS LEFT ARE FILLED BY REFERENCE TO THE PRINCIPLES OF PRIVATE INTERNATIONAL LAW, THAT MUST BE APPLIED BY AUSTRALIAN COURTS.⁶ IT MUST ALSO BE

⁶ But see Goode: "Rule, Practice, and Pragmatism in International Commercial Law" (2005) 54 ICLQ 539. In this Mann lecture, Sir Roy Goode makes the point that sometimes general principles do not solve the problem. What is

REMEMBERED THAT AUTONOMY (THE ABILITY TO CHOOSE THE GOVERNING LAW)IS RESTRICTED TO CONTRACT⁷, AND THAT THERE IS NO CHOICE OF LAW IN RELATION TO PROPRIETARY INTERESTS. NOR IS THERE A CAPACITY TO CHOOSE A LAW OTHER THAN THAT PRESCRIBED BY THE STATUTE, WHERE THE STATUTE MAKES THAT LAW A MANDATORY LAW.

BUT HOW WIDELY CAN SUCH A STATUTE CAST ITS SHADOW? IN AKAI, THE HIGH COURT APPLIED THE INSURANCE CONTRACTS ACT TO IGNORE A CHOICE OF ENGLISH LAW AS THE GOVERNING LAW OF AN INSURANCE CONTRACT. BUT AN ENGLISH COURT WOULD NOT BE UNDER THE SAME LIMITATION, NOR WOULD AN AUSTRALIAN COURT EXPECT IT TO BE⁸. IN AKAI, THE MAJORITY MADE IT CLEAR THAT IT WAS ENTIRELY A MATTER FOR THE FOREIGN COURT, AS IT WOULD BE IN AUSTRALIA WERE THE SITUATIONS REVERSED, TO DECIDE WHETHER A FOREIGN MANDATORY LAW WOULD APPLY⁹. PRIVATE INTERNATIONAL LAW IS THE BATTLEGROUND WHERE THE VALUES OF SEEKING A UNIFORM RESULT, NO MATTER WHERE A DISPUTE IS RESOLVED, CONFLICT DIRECTLY WITH THE VALUES OF NATIONAL INTEREST. IN THIS CONFLICT, THE OVERRIDING COMMERCIAL VALUE OF GIVING EFFECT TO THE REASONABLE EXPECTATIONS OF THE PARTIES SEEMS TO DISAPPEAR¹⁰. ALTHOUGH COMITY HAS BECOME AN IMPORTANT CONCEPT IN SOME ASPECTS OF CONFLICT OF LAWS¹¹, IT DOES NOT ALWAYS GIVE THE ANSWER.

A choice is one of domestic law

3. TO WHAT DOES THE REFERENCE APPLY? IN THE CASE OF A CONTRACT REFERENCE, IT IS TO THE PARTICULAR DOMESTIC LAW, AS IT OPERATES FROM TIME TO TIME. THERE IS NO RENVOI OR REFERENCE TO ANOTHER SYSTEM OF LAW, AS MIGHT OCCUR IF THE REFERENCE WERE TO THE SYSTEM OF PRIVATE INTERNATIONAL LAW. EACH SYSTEM OF PRIVATE INTERNATIONAL LAW IS A DOMESTIC SYSTEM AND EACH WILL DIFFER IN ITS SUBSTANCE AND IN THE WAY IT HANDLES PROCEDURAL ASPECTS OF ISSUES RAISED BY A REFERENCE TO A FOREIGN LAW.

THIS RAISES TWO FURTHER ISSUES OF RELEVANCE TO BANKING AND FINANCIAL TRANSACTIONS.

Can that law chosen be frozen at a particular point of time?

4. CAN THE REFERENCE BE TO A SYSTEM OF LAW AS AT A PARTICULAR DATE, SO FREEZING THE CONTENT OF THE REFERENCE? THIS IS IMPORTANT IN TAX OR ROYALTY MATTERS AS IS CURRENTLY BEING SEEN IN WESTERN AUSTRALIA. THERE ARE A NUMBER OF TECHNIQUES THAT CAN BE USED,

needed is a transaction-specific solution as in the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary 2006 . This Convention is not yet in force.

⁷ This may be contentious. However both the Rome Regulation and the US Restatement (2nd) of Conflict of Laws uphold this.

⁸ Akai Pty Ltd v People's Insurance Co Ltd [1988] 1 Lloyd's Rep 90.

⁹ This would be the case under Rome 1.

¹⁰ Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2000) 203 CLR 579, 589. "What matters is what each party by words and conduct would have led a reasonable person in the position of the other to believe. References to the common intention of the parties are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement."

¹¹ Voth v Manildra Flour Mills (1990) 171 CLR 538

INCLUDING INCORPORATION BY REFERENCE OF CRITICAL DEFINITIONS. BUT IF THE PURPOSE IS TO LIMIT ANY CHANGES IN THE FUTURE, WHERE THE CONTRACT IS WITH A STATE OR A STATE AGENCY, THE EFFECTIVENESS CENTRES AROUND “STABILISATION CLAUSES”¹².

AS PART OF THE CONTINUING DEBATE ABOUT STATE CONTRACTS IN THE TWENTIETH CENTURY, THE INTERNATIONAL COURT OF JUSTICE HAS UPHELD THE VALIDITY OF SUCH CONTRACTS IN ISSUES BETWEEN STATES. THIS WAS FURTHER EXTENDED TO ARBITRATION AGAINST STATES IN THE 1970S, EVEN BY NON-STATE PARTIES. SUCH CLAUSES ARE NOW COMMON IN OIL AND GAS AND ENERGY CONTRACTS GENERALLY, BUT DRAFTING THEM HAS ITS PERILS¹³. THERE IS ALWAYS A RISK FROM BEING TOO CAUTIOUS AS THE PARTIES IN CAC V CHALK¹⁴ DISCOVERED NOT TOO FAR FROM THE GOLD COAST WHEN THEY SOUGHT TO ENTRENCH THEIR ROYALTY RIGHTS THROUGH LEGISLATION, ONLY TO DISCOVER THAT THE BILATERAL CONTRACT RIGHTS HAD MERGED INTO STATUTORY RIGHTS WITHIN THE SOLE CONTROL OF THE LEGISLATURE.

SO THERE IS LITTLE CHANCE OF DRAFTING SO AS TO AVOID A CHANGE IN THE GENERAL LAW. A CURRENT EXAMPLE WOULD BE THE INCREASE IN THE SCOPE OF THE MEANING OF SERVICES IN THE DEFINITIONS IN THE COMPETITION AND CONSUMER ACT, WHICH HAS BEEN BROUGHT ABOUT BY THE FUNDAMENTAL CHANGES IN THE MEANING OF “PERSONAL PROPERTY RIGHTS” BECAUSE OF THE PERSONAL PROPERTY SECURITIES ACT 2010. A FURTHER CHANGE IS THE CONVERSION OF THE CONDITIONAL SALE PROVISION INTO A RETENTION OF TITLE SECURITY INTEREST, WHICH WILL REQUIRE COMPLIANCE WITH THE PPSA TO BE UPHELD. GIVEN THAT THERE IS NO CORRESPONDING CHANGE IN ENGLISH LAW, A CONTRACT OF SALE WITH A RETENTION OF TITLE CLAUSE FROM AN ENGLISH SELLER TO AN AUSTRALIAN BUYER, WHERE THE GOODS ARE IMPORTED INTO AUSTRALIA, WILL MEAN THAT SO FAR AS ENGLISH LAW IS CONCERNED, THERE IS AUTONOMY TO CHOOSE A GOVERNING LAW, BUT WHEN THE GOODS ARE SUBJECT TO ANY LITIGATION IN AUSTRALIAN COURTS, THE PROVISIONS OF THE PPSA WILL APPLY NOTWITHSTANDING A CONTRARY CHOICE OF LAW. THIS ILLUSTRATES BOTH THE RISKS OF CHANGE, AND THE PROBLEMS OF CLASSIFYING INTERESTS AS CONTRACTUAL OR PROPRIETARY.

What exactly is your law?

6. THE REFERENCE TO THE LAW OF A JURISDICTION DOES NOT ABSOLVE THE USER FROM UNDERSTANDING THE LEGAL SYSTEM TO WHICH REFERENCE IS MADE. A NOTORIOUS EXAMPLE IN THE FIELD OF BANKING AND FINANCE IS HAZELL V HAMMERSMITH & FULHAM BOROUGH COUNCIL¹⁵, WHERE IT WAS UNDERSTOOD THAT THE CAPACITY OF THE COUNCIL TO ENTER INTO SWAPS TRANSACTIONS WAS GOVERNED BY ENGLISH LAW, BUT THERE WAS A FAILURE TO APPRECIATE THAT LOCAL GOVERNMENT HAD RESTRICTIONS NOT FOUND IN THE CASE OF THE MAJORITY OF CORPORATIONS. THIS RAISES THE REAL DEVIL OF CHOICE OF LAW. IF IT IS NOT “MY LAW”, HOW DO

¹² A typical stabilisation clause “...this concession shall throughout the period of its validity be construed in accordance with the Petroleum Law and the Regulations which were in force on the date of execution of the Agreement. ...any amendment to repeal such Regulations shall not affect the contractual rights of the parties”.

¹³ Drafting Stabilisation Clauses in International Energy Contracts: Some Pitfalls for the Unwary, AFM Maniruzzaman vol 5, Oil, Gas & Energy Law Intelligence, (2007).

¹⁴ [1976] Qd R 231.

¹⁵ 1992 AC 1.

YOU KNOW WHAT IT IS. THIS PROBLEM ARISES AT THE STAGE OF NEGOTIATION AND DRAFTING, BUT IT IS A PARTICULAR PROBLEM IN DISPUTE RESOLUTION.

Depecege or Issue by Issue Choice of Law

7. BEFORE MOVING TO THE ISSUE OF HOW DO YOU PROVE FOREIGN LAW, THERE ARE SOME FURTHER COMPLICATING ISSUES. THE FIRST IS DEPECEGE OR ISSUE BY ISSUE CHOICE OF LAW¹⁶. MUST THERE BE A SINGLE GOVERNING LAW TO E.G. INTERPRET THE WHOLE CONTRACT? MUST THERE BE A SINGLE UNITARY CHOICE OF THE LEX CAUSAE OR THE GOVERNING LAW? THE POSSIBILITY OF A FORM OF DEPECEGE IS INHERENT IN THE COMMON LAW ANALYSIS ABOVE, BUT CAN ONE SPLIT THE CONTRACT PROVISIONS ANY OTHER WAY? IT IS BROADLY ACCEPTED THAT THE SAME GOVERNING LAW MUST APPLY TO ALL PARTIES TO A SINGLE CONTRACT, SO THAT THE QUESTION “YOUR LAW OR MINE?” CAN NOT BE ANSWERED “ YOU HAVE YOUR OBLIGATIONS GOVERNED BY YOUR LAW AND I WILL HAVE MY OBLIGATIONS GOVERNED BY MINE”. THIS ISSUE MOST COMMONLY ARISES WHERE THERE IS A STATUTORY BASIS GOVERNING CHOICE OF LAW. DEPECEGE IS PERMITTED UNDER ROME I.

Can you “float” the choice of law ?

8. CAN YOU HAVE A FLOATING CHOICE OF LAW. IN OUR LEGAL SYSTEM, YOU CAN NOT¹⁷. THE PARTIES OBLIGATIONS HOWEVER, INCLUDING CHOICE OF LAW, CAN BE CHANGED BY MUTUAL CONSENT.

The effects of the choice of the method of dispute resolution

9. DISPUTE RESOLUTION IS A CRITICAL LEVER. THERE ARE SIGNIFICANTLY DIFFERENT PRACTICES IN RELATION TO ARBITRATION FROM THOSE IN LITIGATION. IT IS A RULE IN MOST ARBITRATION REGIMES, INCLUDING ICC, ICSID, AND UNCITRAL THAT, IF THE PARTIES HAVE NOT MADE AN EXPRESS CHOICE OF LAW, IT IS OPEN TO THE ARBITRATORS TO MAKE SUCH A CHOICE, SUBJECT ONLY TO THE FACT THAT THEY CANNOT CHOOSE A LEGAL REGIME THAT WOULD HAVE THE EFFECT OF AVOIDING THE CONTRACT. IT IS ALSO NOTEWORTHY THAT ARBITRATION CONTRACTS ARE EXCLUDED FROM THE OPERATION OF ROME I.

IT IS THE EXPRESS EXPECTATION THAT THE STATUTORY CODIFICATIONS IN AUSTRALIA APPLY TO COURTS, AND THE POSITION IN RELATION TO ARBITRATION IS UNCLEAR. THE PPSA MENTIONS EXPRESSLY THAT IT IS TO BE APPLIED IN AUSTRALIAN COURTS, AND THIS SHOULD APPLY TO PROCEEDINGS TO ENFORCE ARBITRAL AWARDS IN AUSTRALIA. BUT HOW FAR THAT WOULD GO ONLY TO A MERITS BASED REVIEW OUTSIDE THE SCOPE OF AN ENFORCING COURT IS A GOOD QUESTION, TO WHICH I DO NOT HAVE AN ANSWER.

¹⁶ Tomlinson v First Pennsylvania Banking & Trust Co. [1961]A.C.1007 Hamlyn v Taliskers Distillery [1894] A.C. 202 ; Weckstrom v Hyson [1966] V.R. 277; Samarni v Williams [1980] 2 NSWLR 389; Wanganui Rangitikei Electric Power Board v AMP (1934)50 CLR 581, 604. The Australian and New Zealand cases reflect a concern with this approach.

¹⁷ The Armar 1981 1 WLR 207.

Can you choose a law which is not a national law as a governing law?

10. CAN YOU CHOOSE, NOT THE LAW OF A PARTICULAR JURISDICTION, BUT A SET OF GENERAL PRINCIPLES OF LAW? THIS WAS FURIOUSLY REJECTED IN THE 1980S IN ENGLAND, NOTABLY BY MANN, AND BY THE COURT OF APPEAL.¹⁸ BUT CERTAINLY THIS IS POSSIBLE WHERE THE DISPUTE IS ARBITRATED, AND IT IS NO IMPEDIMENT EVEN IF THE MATTER COMES TO AN ENFORCING COURT¹⁹. TO MY KNOWLEDGE, THERE IS NO AUSTRALIAN AUTHORITY. THE DRAFTING OF THE REGULATION IN THE EU REGENERATED THIS DISPUTE, AND IT WAS FINALLY RESOLVED IN FAVOUR OF A LIBERAL REGIME OF CHOICE OF LAW, WHERE THE SCOPE OF THE GOVERNING LAW IS SUBJECT ONLY TO THE DISCIPLINE OF CERTAINTY.

Are there relevant international Conventions affecting Australia?

11. AUSTRALIA IS NOT YET A PARTY TO INTERNATIONAL CONVENTIONS ON CHOICE OF LAW THAT WOULD SIGNIFICANTLY AFFECT OUR PRACTICE. THERE ARE TWO TO CONSIDER: THE HAGUE CONVENTION ON THE LAW APPLICABLE TO CERTAIN RIGHTS IN RESPECT OF SECURITIES HELD WITH AN INTERMEDIARY 2006 AND THE UN CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE 2001. NEITHER OF THESE IS IN FORCE, AND IT IS UNLIKELY THAT AUSTRALIA WILL ACCEDE TO THE LATTER CONVENTION. THERE ARE ALSO CURRENT NEGOTIATIONS BETWEEN AUSTRALIA AND NEW ZEALAND. THESE MAY AFFECT RULES ON THE CHOICE OF FORUM SITUATION, BUT NOT NECESSARILY THE CHOICE OF LAW.

THE UN CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE 2001 DEALS WITH BOTH SUBSTANTIVE RIGHTS AND OBLIGATIONS AND ALSO CHOICE OF LAW RULES. THIS CONVENTION EXCLUDES INTERMEDIATED SECURITY INTERESTS FROM THE CHOICE OF LAW RULES ON RECEIVABLES.

SHOULD AUSTRALIA ACCEDE TO EITHER OF THESE CONVENTIONS, THEN THE CONFLICTS RULES IN THE PPSA WILL REQUIRE SOME MODIFICATION.

THERE IS A FURTHER POSSIBILITY THAT CAN ARISE IN THE CASE OF A BILATERAL OR MULTILATERAL FREE TRADE AGREEMENTS (FTAS). THESE AGREEMENTS COVER BOTH TRADE AND INVESTMENT, AND USUALLY HAVE VERY WIDE DEFINITIONS OF THE COVERED INVESTMENTS THAT WILL INCLUDE CONTRACT RIGHTS AND ANY OTHER LEGAL ITEM OF VALUE. WHEN TRANSACTIONS ARE ENTERED INTO UNDER THESE AGREEMENTS, THEY SHOULD SPECIFY THEIR OWN GOVERNING LAW. THERE IS A FIERCE CURRENT CONTROVERSY IN INTERNATIONAL INVESTMENT LAW AS TO WHETHER ANY BREACH OF SUCH A CONTRACT AMOUNTS TO A BREACH OF THE TREATY, AND BECOMES SUBJECT POSSIBLY TO TWO DIFFERENT DISPUTE RESOLUTION REGIMES, ONE OF WHICH IS IN THE TREATY AND THE OTHER IS IN THE

¹⁸ Amin Rasheed Shipping Corporation v. Kuwait Insurance [1984] A.C.50; Mann: "Rejection of "delocalised" Contracts" (1984) 33 ICLQ 193

¹⁹ [1988] 3 W.L.R. 230 (HL) sub nom Deutsche Schachtbau und Tiefbohrgesellschaft v Shell International Trading Co.

CONTRACT²⁰. THE EFFECT OF THESE CLAUSES IS TO CREATE AN OBLIGATION IN THE STATES THAT ARE PARTIES TO THESE TREATIES TO OBSERVE OBLIGATIONS BY OTHER PARTIES THAT ARE COVERED BY THE TREATY. OPINION IS EQUALLY DIVIDED ALTHOUGH MY OPINION IS THAT IT IS POSSIBLE TO SEPARATE OUT TWO DISPUTES IN THESE CASES: ONE BETWEEN THE STATES PARTY TO THE TREATY AND THE OTHER BETWEEN THE CONTRACTING PARTIES. A RECENT EXAMPLE FROM THE SPATE OF DISPUTES ARISING IN ARGENTINA IS COMPAÑÍA DE AGUAS DEL ACONQUIJA S.A. AND VIVENDI UNIVERSAL S.A. V. ARGENTINE REPUBLIC.²¹ THERE WAS A BREACH OF CONTRACT ALLEGED BETWEEN A FRENCH COMPANY AND A PROVINCIAL GOVERNMENT IN ARGENTINA. THIS WAS GOVERNED BY PROVINCIAL LAW AND HAD AN EXCLUSIVE JURISDICTION CLAUSE. THE CONTRACT FELL WITHIN THE FRANCE ARGENTINA BILATERAL INVESTMENT TREATY. COULD A PRIVATE AGREEMENT OVERRIDE A TREATY IN RELATION TO DISPUTE SETTLEMENT AND CHOICE OF LAW? CLEARLY NOT, BUT DID TWO DISPUTES RUN IN PARALLEL OR WAS THERE ONLY ONE?

But the real problem ishow do you prove foreign law?

12. FOR ME, THE OVERRIDING PROBLEM IS A PRACTICAL ONE. HOW DO YOU PROVE THE APPLICABLE RULES AND CONCEPTS OF FOREIGN LAW IN OUR COURTS? FOREIGN LAW OCCUPIES A PECULIA R POSITION I²²N OUR SYSTEM IN THAT ITS EXISTENCE AND CONTENT ARE A MATTER FOR EVIDENCE BEFORE THE COURT. ALTHOUGH TREATED AS A MATTER OF FACT, IT IS EXCLUSIVELY RESERVED FOR DECISION TO A JUDGE. IF THERE IS NO SATISFACTORY EVIDENCE OF FOREIGN LAW, THERE IS A REBUTTABLE PRESUMPTION THAT IT IS THE SAME AS THE LAW OF THE FORUM.

THE POSITION IS MITIGATED SLIGHTLY BY AMENDMENTS TO THE EVIDENCE ACTS²³ THAT NOW PERMIT USE OF PUBLISHED PRIMARY SOURCES OF LAW. BUT IN SOME CASES THIS CAUSES MORE PROBLEMS THAN IT SOLVES. THE COMBINATION OF EXPERT EVIDENCE AND FOREIGN LAW AND AN ADVERSARY SYSTEM COMPOUND THIS ISSUE, AND IT IS ONE FROM WHICH OUR COLLEAGUES IN A CIVIL LAW SYSTEM ARE MERCIFULLY RELIEVED. I REFER YOU TO AN EXCELLENT SEMINAR GIVEN LAST MAY AT THE SYDNEY LAW SCHOOL, BY AMONGST OTHERS, ONE OF MY CO-PRESENTERS, ANDREW BELL SC, THAT DEALS COMPREHENSIVELY WITH THE ISSUES²⁴. IT ALSO RAISES THE IMAGINATIVE SOLUTIONS THAT HAVE BEEN DEVELOPED WITHIN NSW AT THE INITIATIVE OF THE CHIEF JUSTICE OF NSW TO ASSIST IN THIS PROCESS BY ENTERING INTO AGREEMENTS WITH SOME FOREIGN COURTS AND JUDGES TO ACT AS REFEREES.

MY CLASSIC EXAMPLE OF THE PROBLEMS IS THE TRANSCRIPT OF A FEDERAL COURT HEARING IN NEW YORK BEFORE LEARNED HAND J, A HIGHLY EXPERIENCED COMMERCIAL JUDGE. HIS ATTEMPTS AT

²⁰ Australia has a number of umbrella clauses in treaties e.g. Article 11 Australia -Chile BIT 1996; Article 11 Australia -China BIT 1988; Article 2(2) Australia-Hong Kong BIT 1993; Article 11 Australia-Papua New Guinea BIT 1990; Article 10 Australia-Poland BIT 1991.

²¹ ICSID. Case (No. ARB/97/3).

²² NYGH'S CH 17

²³ IBID NOTE 27

²⁴ The Future of Private International Law in Australia, 16 May 2011.

UNVELING THE MYSTERIES OF FRENCH LAW ON A TIME CLAUSE COULD HAVE BEEN SCRIPTED BY MONTY PYTHON²⁵.

²⁵ Wood & Selick Inc v Compagnie Generale Transatlantique (1909) 43 F 2d 941

BILLS OF EXCHANGE ACT 1909 - SECT 77

Rules where laws conflict

Where a [bill](#) drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:

(a) The validity of a [bill](#) as regards requisites in form is determined by the law of the place of [issue](#), and the validity as regards requisites in form of the supervening contracts, such as [acceptance](#), or [indorsement](#), or [acceptance](#) supra protest, is determined by the law of the place where such contract was made:

Provided that:

(i) where a [bill](#) is [issued](#) out of Australia, it is not invalid by reason only that it is not stamped in accordance with the law of the place of [issue](#);

(ii) where a [bill](#), [issued](#) out of Australia, conforms, as regards requisites in form, to the law of Australia, it may, for the purpose of enforcing payment thereof, be treated as valid as between all [persons](#) who negotiate, hold, or become parties to it in Australia.

(b) Subject to the provisions of this Act, the interpretation of the drawing, [indorsement](#), [acceptance](#), or [acceptance](#) supra protest of a [bill](#), is determined by the law of the place where such contract is made.

Provided that, where an inland [bill](#) is indorsed in a foreign country, the [indorsement](#) shall as regards the payer be interpreted according to the law of Australia.

(c) The duties of the [holder](#) with respect to presentment for [acceptance](#) or payment, and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the [bill](#) is dishonoured.

(d) Where a [bill](#) is drawn out of but payable in Australia and the sum payable is not expressed in the currency of Australia, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the [bill](#) is payable.

(e) Where a [bill](#) is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.



CARRIAGE OF GOODS BY SEA ACT 1991 - SECT 11

Construction and jurisdiction

(1) All parties to:

(a) a sea carriage document relating to the carriage of goods from any place in [Australia](#) to any place outside [Australia](#); or

(b) a non-negotiable document of a kind mentioned in subparagraph 10(1)(b)(iii), relating to such a carriage of goods;

are taken to have intended to contract according to the laws in force at the place of shipment.

(2) An agreement (whether made in [Australia](#) or elsewhere) has no effect so far as it purports to:

(a) preclude or limit the effect of subsection (1) in respect of a bill of lading or a document mentioned in that subsection; or

(b) preclude or limit the jurisdiction of a court of the Commonwealth or of a State or Territory in respect of a bill of lading or a document mentioned in subsection (1); or

(c) preclude or limit the jurisdiction of a court of the Commonwealth or of a State or Territory in respect of:

(i) a sea carriage document relating to the carriage of goods from any place outside [Australia](#) to any place in [Australia](#); or

(ii) a non-negotiable document of a kind mentioned in subparagraph 10(1)(b)(iii) relating to such a carriage of goods.

(3) An agreement, or a provision of an agreement, that provides for the resolution of a dispute by arbitration is not made ineffective by subsection (2) (despite the fact that it may preclude or limit the jurisdiction of a court) if, under the agreement or provision, the arbitration must be conducted in [Australia](#).

CHEQUES ACT 1986 - SECT 117

Conflict of laws

(1) Where a cheque drawn in one country is:

(a) payable in another country; or

(b) transferred by negotiation in another country;

the rights, duties and liabilities of the drawer, indorsers and [holder](#) shall be ascertained in accordance with this section.

(2) Subject to subsections (4), (5) and (6), the validity, as regards requisites in form, of a cheque shall be determined in accordance with the law of the place of [issue](#).

(3) Without limiting the generality of subsection (2), the question whether a particular instrument is a cheque shall be determined in accordance with the law of the place of [issue](#).

(4) A cheque [issued](#) outside [Australia](#) is not invalid by reason only that it is not stamped or properly stamped in accordance with the law of the place of [issue](#) or any other law.

(5) A cheque [issued](#) in [Australia](#) and payable outside [Australia](#) that is not stamped or properly stamped in accordance with the law of the place of [issue](#) or any other law:

(a) is not invalid by reason only that it is not so stamped; and

(b) may be received in evidence if the proper duty and penalty (if any) is paid.

(6) A cheque [issued](#) outside [Australia](#) that conforms, as regards requisites in form, to the law of [Australia](#) is, for the purpose of enforcing payment of the cheque, valid as between all persons who, in [Australia](#), transfer the cheque by negotiation or hold or become indorsers of the cheque.

(7) The validity as regards requisites in form, of a [supervening contract](#) on a cheque shall be determined in accordance with the law of the place where the [contract](#) is made.

(8) Subject to subsection (10), the effects of a transfer of a cheque by negotiation shall be determined in accordance with the law of the place where the cheque is transferred by negotiation.

(9) The capacity of a person to incur liability on a [contract](#) on a cheque shall be determined in accordance with the law of the place where the [contract](#) is made.

(10) Subject to subsections (12), (13) and (14), a [contract](#) on a cheque shall be interpreted and have effect in accordance with the law of the place where the [contract](#) is to be performed.

(11) Without limiting the generality of subsection (10), where a cheque is dishonoured, the amount (if any) recoverable as damages in respect of a [contract](#) on the cheque shall be determined in accordance with the law of the place where the [contract](#) is to be performed.

(12) The necessity for presentment for payment, and the sufficiency of a presentment for payment, in relation to a cheque shall be determined in accordance with the law of the place where the cheque is payable.

(13) Where a cheque is dishonoured the necessity for, and the sufficiency of, a notice of dishonour, and any other act, in relation to the dishonour shall be determined in accordance with the law of the place where the cheque is payable.

(14) Where a cheque drawn in one country is payable in another country, the date on and after which the cheque may be paid by the [drawee institution](#) shall be determined in accordance with the law of the place where the cheque is payable.

(15) In this section:

"contract" , in relation to a cheque, includes:

- (a) a [contract](#) or warranty arising out of the drawing; and
- (b) a [supervening contract](#) in relation to the cheque.

"supervening contract" , in relation to a cheque, includes a [contract](#) or warranty arising out of:

- (a) an indorsement; or
- (b) a transfer by negotiation.

AUSTRALIAN CONSUMER LAW (SCHEDULE 2 OF COMPETITION AND CONSUMER LAW)

67 Conflict of laws

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 a [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:

- (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.

68 Convention on Contracts for the International Sale of [Goods](#)

The [provisions](#) of the United Nations Convention on Contracts for the International Sale of [Goods](#), done at Vienna on 11 April 1980, as amended and in force for Australia from time to time, prevail over the [provisions](#) of this Division to the extent of any inconsistency.

INSURANCE CONTRACTS ACT 1984 - SECT 8

Application of Act

(1) Subject to section 9, the application of this Act extends to contracts of insurance and proposed contracts of insurance the proper law of which is or would be the law of a State or the law of a Territory in which this Act applies or to which this Act extends.

(2) For the purposes of subsection (1), where the proper law of a contract or proposed contract would, but for an express provision to the contrary included or to be included in the contract or in some other contract, be the law of a State or of a Territory in which this Act applies or to which this Act extends, then, notwithstanding that provision, the proper law of the contract is the law of that State or Territory.