Legal Profession Admission Board of New South Wales

Diploma in Law
18 Conflict of Laws
Examinable Curriculum

Subject Description

Conflict of laws (private international law) is the part of Australian law concerned with questions of a private law nature (tort, contract, property and so on) which contain a foreign element. A legal question will contain a foreign element if a fact or party has a relevant connection with a foreign legal system (a foreign country in the conflict of laws sense). For example, conflict of laws issues may arise if proceedings are contemplated in New South Wales in respect of a tort committed in Singapore or against a defendant resident in Norway or to recover damages for breach of a contract governed by the law of California.

In seeking to develop an understanding of the transborder dimension of private law and an appreciation of the fact that questions which arise in legal practice are not necessarily confined within a single legal system, the subject includes detailed consideration of jurisdiction (including discretionary non-exercise of jurisdiction), choice of law in contract, choice of law in tort and choice of law in property (with particular emphasis on governmental seizure of property (expropriation)). The subject also includes detailed consideration of the distinction between substance and procedure, proof of foreign law and the exclusionary doctrines such as forum public policy which may indicate that, in particular circumstances, an Australian court should reject foreign law.

Subject Objectives

At completion of this subject, a student-at-law should be able to:

- Demonstrate an acquisition of knowledge and understanding of conflict of laws.
- Apply professional skill in the analysis of primary materials (decided cases and statutes).
- Appraise questions involving conflict of laws and apply relevant legal principles in answering those questions.
- Express, in clear and concise language, well-structured and logical arguments with particular reference to conflict of laws.

Prescribed Books and Materials

As updated by the LPAB Examinations Committee from time to time.

Prescribed Topics

Topic 1: Scope of conflict of laws

- Concept of a country or legal system for conflict of laws purposes.
- Terminology (forum/lex fori/lex causae and so on).
- Choice of law rules and connecting factors.
- Rationale of conflict of laws.
- Historical development.
- International and intranational conflict of laws.
- Constitutional and federal considerations.
- Conflict of laws and public international law.

Topic 2: Jurisdiction

- Concept of personal jurisdiction.
- Common law jurisdiction based on the defendant's presence or voluntary submission.
- Service out of the jurisdiction including service outside Australia under the Uniform Civil Procedure Rules 2005 (NSW), service within Australia under the Service and Execution of Process Act 1992 (Cth) and service in New Zealand under the Trans-Tasman Proceedings Act 2010 (Cth).
- Enforcement of foreign judgments and the concept of jurisdiction in the international sense.
- Subject-matter jurisdiction in claims which relate to foreign land.
- Discretionary non-exercise of jurisdiction with particular reference to foreign jurisdiction clauses and forum non conveniens.
- Anti-suit injunctions and the restraint of foreign proceedings.

Topic 3: Substance and procedure

- Rationale of the distinction between substance and procedure.
- Characterisation by the lex fori and detailed consideration of limitation of actions (limitation laws) and issues relating to damages.

Topic 4: Proof of foreign law

- Foreign law as fact.
- Methods of proof including the role of expert evidence, the presumption of similarity and statutory modes of proof as provided in the Evidence Act 1995 (NSW) and the Trans-Tasman Proceedings Act 2010 (Cth).

Topic 5: Exclusionary doctrines

- The exclusionary doctrines in respect of foreign revenue laws, foreign penal laws, foreign public laws, foreign governmental interests and foreign laws contrary to forum public policy.

Topic 6: Choice of law in contract

- Concept of the proper law of a contract and its identification, including express choice of law, inferred choice of law and the objective proper law of a contract.
- Historical background.
- Time factor.
- Renvoi doctrine.
- Choice of law with respect to substantive issues including capacity to contract, formation of contract, illegality and foreign public policy, duress and forum public policy, performance, variation and discharge of contract and issues relating to damages for breach of contract.

Topic 7: Choice of law in tort

- Place of a tort.
- Foreign torts and local torts.
- International torts and intranational torts.
- Maritime torts and aerial torts.
- Historical background and the double actionability rule.
- Modern Australian law and the lex loci delicti rule.
- Standard of care.
- Forum statutes and the lex loci delicti rule.
- Concurrent liability in tort and contract.
- Renvoi doctrine.
- Foreign compensation schemes including the New Zealand accident compensation scheme.
- Comparative approaches to choice of law in tort (European Union, New Zealand, People's Republic of China).

Topic 8: Governmental seizure of property (expropriation)

- Overview of choice of law in property and succession on death.
- Historical background.
- The lex situs rule and foreign act of state doctrine.
- The role of forum public policy including foreign governmental seizure of property in circumstances constituting gross violation of human rights, penal expropriation or breach of public international law.
- Recognition of foreign governments including judicial criteria for recognition.

This subject is not designed to cover Priestley 11 content.