

**Legal Profession Admission Board****March 2014****Conflict of Laws****Examiner's comments**

This is a guide to the issues and primary materials relevant to answering the questions in the examination. Overall, candidates displayed a sound understanding of the principles of conflict of laws and the application of those principles to the questions.

**Question 1**

This question required consideration of a range of issues including jurisdiction (and the discretionary non-exercise of jurisdiction), substance and procedure, proof of foreign law, exclusionary doctrines (e.g. forum public policy), choice of law in contract (particularly the identification of the proper law of the contract) and choice of law in tort. In this regard, it may be noted that, as the facts of the case are indistinguishable from the facts of *Oceanic Sun Line Special Shipping Co v. Fay* (1988), it will be necessary for the originating process to be served out of the jurisdiction in conformity with Part 11 of the Uniform Civil Procedure Rules 2005 (NSW). It also may be noted that, as the accident occurred while the ship was on the high seas, the locality of the tort for choice of law purposes is the flag state (or state of registration) of the ship. See *Roerig v. Valiant Trawlers* (2002); compare *MacKinnon v. Iberia Shipping Co* (1955); *Union Shipping New Zealand v. Morgan* (2002). As the plaintiff was a fare-paying passenger, the claim to recover damages for personal injury may be framed alternatively in tort (governed by the *lex loci delicti*) and contract (governed by the proper law of the contract).

**Question 2**

The "double actionability" requirement of the rule in *Phillips v. Eyre* (1870): wrongs actionable if committed in the forum and not justifiable (i.e. giving rise to civil liability) under the *lex loci delicti*. *The Halley* (1868); *The Waziristan* (1953); *Nalpantidis v. Stark* (1996). *Lex fori* as the applicable substantive law under the rule in *Phillips v. Eyre*. See *Anderson v. Eric Anderson (Radio & TV)* (1965). A flexible exception to the rule in *Phillips v. Eyre*? See *Boys v. Chaplin* (1971); *Corcoran v. Corcoran* (1974); *McKain v. RW Miller & Co (SA)* (1991).

Modern Australian law. The *lex loci delicti* as the applicable substantive law; rejection of "double actionability"; no role for forum public policy as an exclusionary doctrine in the context of international torts; rejection of a flexible exception. See *John Pfeiffer v. Rogerson* (2000); *Regie Nationale des Usines Renault v. Zhang* (2002). Application of the *renvoi* doctrine. See *Neilson v. Overseas Projects Corp of Victoria* (2005).

**Question 3**

The *situs* rule and foreign act of state doctrine. See *Princess Paley Olga v. Weisz* (1929); *Banco Nacional de Cuba v. Sabbatino* (1964); *Glen v. Club Méditerranée* (2006).

Public policy exceptions. Gross violation of human rights; discrimination against “particular individuals or classes of individuals”; penal expropriation; breach of public international law. See *Re Claim by Helbert Wagg & Co* (1956); *Williams and Humbert v. W & H Trade Marks (Jersey)* (1986); *Anglo-Iranian Oil Co v. Jaffrate (The Rose Mary)* (1953); *Kuwait Airways Corp v. Iraqi Airways Co (Nos 4 and 5)* (2002).

**Question 4**

- (a) Foreign revenue laws and the policy against direct/indirect enforcement and the extra-territorial assertion of foreign sovereign authority. See *Government of India v. Taylor* (1955); *Jamieson v. Commissioner for Internal Revenue* (2007); *Sydney Municipal Council v. Bull* (1909); *Damberg v. Damberg* (2001).

Foreign penal laws. What is a penal law for purposes of the exclusionary doctrine? See *Loucks v. Standard Oil Co of New York* (1918); *Huntington v. Attrill* (1893); *USA v. Inkley* (1989).

- (b) Express choice of law and limitations on party autonomy. See *Vita Food Products v. Unus Shipping Co* (1939); *Golden Acres v. Queensland Estates* (1969); *Akai v. The People’s Insurance Co* (1996). Inferred choice of law in cases where the contract includes an exclusive jurisdiction clause or the contract, taken as a whole, points “ineluctably” to an agreed choice of law. Objective proper law as the legal system with which the transaction has its closest and most real connection. See *Bonython v. Commonwealth of Australia* (1951) (Lord Simonds); *Oceanic Sun Line Special Shipping Co v. Fay* (1988). Contracts relating to immovable property. See *Merwin Pastoral Co v. Moolpa Pastoral Co* (1933).