

Conflict of Laws
March 2013
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

A case of this kind potentially presents issues of conflict of laws across the spectrum of the course (with the exception of the topic governmental seizure of property (expropriation)). Personal jurisdiction over the defendant and the discretionary non-exercise of jurisdiction e.g. on the ground of forum non conveniens. Substance and procedure with particular reference to limitation of actions and damages. Proof of foreign law, including the role of expert evidence and the "presumption of similarity". Is there an onus of proof of foreign law? See *Reigie Nationale des Usines Renault v. Zhang* (2002) 187 ALR 1; *Neilson v. Overseas Projects Corp of Victoria* (2005) 221 ALR 213. Choice of law in contract and tort. Proper law of the contract? Place of the tort? Choice of law rule for liability in contract? Choice of law rule for liability in tort? Compare the double actionability rule (*Phillips v. Eyre* (1870) LR 6 QB 1) with the lex loci delicti rule in modern Australian law.

Question 2

The "special considerations" that arise in the case of maritime and aerial torts. See *Reigie Nationale des Usines Renault v. Zhang* (2002) 187 ALR 1 per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

Torts in the territorial sea. *Mackinnon v. Iberia Shipping Co* 1955 SC 20; *Union Shipping New Zealand v. Morgan* (2002) 54 NSWLR 690; *Saldanha v. Fulton Navigation* [2011] EWHC 1118 (Admlty).

Torts on the high seas. *Roerig v. Valiant Trawlers* [2002] 1 WLR 2304; *The Esso Malaysia* [1975] QB 198.

Aerial torts. *Lazarus v. Deutsche Lufthansa* (1985) 1 NSWLR 188; *Georgopoulos v. American Airlines* NSWSC, Ireland J, 10 Dec 1993 (unreported); *Smith v. Socialist People's Libyan Arab Jamahiriya* 113 ILR 534 (1997).

Question 3

Substance and procedure. Rationale of the distinction between substantive and procedural issues in the context of conflict of laws. Characterisation by the lex fori. *Hamilton v. Merck & Co* (2006) 230 ALR 156.

Limitation of actions. *The Commonwealth v. Mewett* (1997) 146 ALR 299; *Subbotovsky v. Waung* (1968) 72 SR (NSW) 242; Choice of Law (Limitation Periods) Act 1993 (NSW).

Damages. A distinction between kinds or heads of damage and amount or quantification of damages? *John Pfeiffer v. Rogerson* (2000) 203 CLR 503; compare *Harding v. Wealands* [2006] 4 All ER 1.

Question 4

Exclusionary doctrines in conflict of laws. Foreign law contrary to forum public policy e.g. foreign law which constitute a violation of fundamental principles of justice or morality or which constitutes a gross violation of human rights. *Loucks v. Standard Oil Co of New York* 120 NE 198 (1918); *Kaufman v. Gerson* [1904] 1 KB 591; *Saxby v. Fulton* [1909] 2 KB 208; *Oppenheimer v. Cattermole (Inspector of Taxes)* [1976] AC 249.

Role of forum public policy in the context of governmental seizure of property (expropriation) and foreign torts. See *Kuwait Airways Corp v. Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883; *Regie Nationale des Usines Renault v. Zhang* (2002) 187 ALR 1.