

Orthodoxy & Innovation in the Proof of Foreign Law

Sydney Law School Commercial Issues in Private International Law, 16 February 2018

Justin Hogan-Doran FCI Arb FACICA

Dominique Hogan-Doran SC FCI Arb

Issues of foreign law are on the rise...

- ▶ Increase in international trade, commerce, travel and migration
- ▶ Increase in foreign direct investment - foreign corporations choosing foreign law for domestic activities
- ▶ Rise of the Statutes - the increased divergence in the law between common law legal systems
- ▶ Not reason enough to make local forum inappropriate: *Puttick v Tenon* (2008) HCA 54 238 CLR 264
- ▶ Adoption of the *Lex Loci Delicti* rule for torts
- ▶ Difficulties in reading s.44 (oh, that section!) of the Constitution: *Re Gallagher* [2018] HCATrans 14 (12 Feb 18)

The orthodox approach: Foreign law is a question of fact (of a peculiar kind)

- (1) In jury trials, questions of foreign law are decided by the judge (s.176 *Evidence Act*).
- (2) No 'doctrine of precedent' applies to earlier decisions by the forum on the content of foreign law
- (3) Foreign court decisions are merely evidence of the law, not conclusive
- (4) Appellate review of factual findings of foreign law less constrained
- (5) Law of the forum applied if foreign law not proved
- (6) Court can substitute its own interpretation of foreign law if expert evidence absurd, untenable or contradictory
- (7) Application of foreign law to the facts is a question of law: *Neilson v OPCV* (2005) 223 CLR 331

Some shortcuts exist to aid in proof

- ▶ ss.174-175 *Evidence Act* NSW & Cth
 - ▶ 174: Content of foreign statutes etc. proved from:
 - ▶ Source material from official printers
 - ▶ Sources used in foreign courts
 - ▶ Other material which “appears...to be reliable”
 - ▶ 175: Foreign law reports tendered to prove
 - ▶ common law
 - ▶ interpretation of statutes
- ▶ Judicial notice of notorious foreign laws: *Saxby v Fulton* [1909] 2 KB 208 at 211 (gaming is legal in Monte Carlo)

And unorthodox approaches to outsourcing can be pursued...

- ▶ Order that the parties seek a declaration from the foreign Court
Westacre Investments Inc v The State-Owned Company Yugoimport SDPR [2009] 2 SLR(R) 166
- ▶ Appointment of a referee
Kadam v MiiResorts Group 1 Pty Ltd (No 4) [2017] FCA 1139 (Lee J) - Law of India
- ▶ International Judicial Cooperation - References on Foreign Law:
 - ▶ MOU - NSW Supreme Court and New York Superior Court - 20 Dec 2010
 - ▶ MOU - NSW Supreme Court and High Court of Singapore - 14 Sep 2010
 - ▶ Hague Conference - European Commission Joint Conference 2012 - need for a global instrument?

...or the judges can just work it out for themselves

- ▶ Federal Rules of Civil Procedure, r 44.1 (1966 Notes)

[The Court] may engage in its own research and consider any relevant material thus found. The court may have at its disposal better foreign law materials than counsel have presented, or may wish to re-examine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail...

- ▶ *Bodum USA v La Cafetiere* 621 F.3d 624 (7th Cir. 2010), Posner J:

Trying to establish foreign law through experts' declarations not only is expensive (experts must be located and paid) but also adds an adversary's spin, which the court then must discount. Published sources such as treatises do not have the slant that characterizes the warring declarations presented in this case. Because objective, English-language descriptions of French law are readily available, we prefer them to the parties' declarations.

- ▶ *United States Surgical Corp v Hospital Products Int'l Pty Ltd* [1982] 2 NSWLR 766 at 801 McLelland J - parties agreed to FRCP 44.1 equivalent re *Sherman and Clayton Acts* (but judge declined to go beyond evidence)