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ARTICLES

PROOF OF FOREIGN LAW: PROBLEMS AND INITIATIVES

Hon Justice P L G Brereton AM RFD

The phenomenon of globalisation and recent decisions of appellate courts have resulted in an increased incidence in Australian courts of litigation that requires the resolutions of questions of foreign law. Foreign law is a question of fact of a peculiar kind, conventionally proved by expert evidence, the utility of which in accurately establishing the foreign law is often limited, although some of the difficulties have been mitigated by provisions facilitating the admissibility of documentary proof of foreign statutes and law reports, and the inclination of Australian courts, where the foreign law is controversial, to examine the foreign sources and draw conclusions based on them, informed by the expert evidence where appropriate, rather than merely to prefer one expert to the other. This is not the optimal means of determining a question of law in a way which all parties can

accept as authoritative. The best court to determine the content of foreign law is a court of the foreign forum. Innovative reforms instigated in New South Wales by Chief Justice Spigelman, including amendments to rules of court and the establishment of memoranda of understanding with the Supreme Court of Singapore and the Chief Judge of New York, facilitate proof of foreign law by the provision of advisory opinions on its content by foreign courts or panels of foreign judges. 554

GETTING TO THE FORUM: WITNESSES IN TRANSNATIONAL COMMERCIAL LITIGATION

Andrew Bell SC

Private international law is renowned for its intellectual challenges and the complexity of the analysis required in a multi-jurisdictional context. But practical considerations often loom large and present their own particular challenges in a cross-border dispute. This article highlights, in the context of witnesses in transnational disputes, some of the practical and conceptual difficulties that can arise. Particular topics addressed include the significance of foreign witnesses in the forum non conveniens calculus, letters of request, evidence by video-link, transnational subpoenas and evidence of foreign law. Consideration of these topics calls into question some established practices and requires fresh light to be cast upon some of the traditional assumptions made in relation to territoriality, sovereignty and comity. Recent judicial initiatives in the area also demonstrate a further phenomenon – the globalisation of dispute resolution as a concomitant of an increasingly globalised economy. 562

CLASS ACTIONS: SOME CAUSATION QUESTIONS

Jonathan Beach QC

There are many complex causation questions that arise in class actions. Such complexity is a defining feature of these actions as compared with individual actions. Questions of causation inform how a class action is structured and how the first stage trial involving common issues is managed. Moreover, forensic causation questions at both general and individual levels are usually major areas of dispute. This article explores some of these questions. It also addresses some contemporary causation issues that arise in shareholder and cartel class actions, including the possible application of US quantitative techniques to solving some of these problems. 579

THE HIGH COURT AND THE WOOLWICH PRINCIPLE: ADOPTION OR ANOTHER BULLET THAT CANNOT BE BITTEN?

Derek Wong

If an individual is aware of legislation that imposes a tax, believes the legislation is invalid, but pays a public authority on the basis that it would be commercially expedient to do so, is the individual entitled to recover the money on proof that the legislation was invalid? The answer to this question may seem intuitively simple, but it was only in 1993 that the House of Lords pronounced that recovery did not depend on a finding of mistake or duress, but rather on the special position of the public authority. The High Court has yet to consider whether a similar doctrine applies in Australia. This article considers the rationale and development of the principle and the likelihood of this line of reasoning being accepted and applied in Australia. 597

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