MARKS

THIS EXAMINATION CONSISTS OF 6 PAGES
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THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW

FINAL EXAMINATION – APRIL 2022

LAW 325
Conflict of Laws

Section 1
Professor Emeritus Blom

TOTAL MARKS: 100

TIME ALLOWED: 3 HOURS
including reading time

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NOTE: 1. This is a limited open book examination. You may use the required casebook and supplementary cases and statutory material for the course, class handouts and postings to the Connect site, and your own notes. Only hard-copy materials (i.e. no material stored on computer) may be taken into the examination room. No other sources, whether original, photocopied, or electronically reproduced or accessed, may be used in the examination.

2. If you think you would need more facts in order to answer any question completely, please state what those facts are.

3. Please answer all 4 questions.

THIS EXAMINATION CONSISTS OF 4 QUESTIONS

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35 1. Alfred Alloy is a wealthy Vancouver, BC resident who has a world-renowned collection of prehistoric small bronze sculptures from various Mediterranean countries. He had acquired his pieces from dealers or auction houses in various centres of the antiquities trade, including London and Geneva. Last year, while staying at a house he owns in Palm Springs, California, he went to a party where he met Irina Luna, a collector from Los Angeles who also specialized in such art works. She told him he might be interested in a spectacular piece she was putting up for auction in Geneva in two months' time. The piece came from a prehistoric site in Sardinia, Italy. She had bought it from a dealer in Rome. She specifically mentioned that she had been fortunate to get an export permit for the piece from the Italian authorities. This is important because artifacts of this type are very often illegally exported and, if that is the case, can be reclaimed by the nation from which they have been illegally removed.

After he returned to Vancouver, Alloy followed up with Luna and emailed her to ask for the name of the Geneva auction house and for a photo of her export permit. She sent him both via return email.

Alloy contacted the Geneva auction house she had mentioned, Nokdaun SA, and they forwarded the sale catalogue to him. Luna's artifact was featured in several photographs. He fell in love with the piece immediately and resolved to buy it. The sale catalogue included the statement, in italics, "*Export permit from Italy has been provided by the owner to Nokdaun*."

Alloy bid by phone from Vancouver at the Geneva sale and acquired the piece for $350,000 (USD). He had it shipped to Vancouver and installed it in his collection. Not long afterwards he was contacted by the Italian Consulate in Vancouver, notifying him that the Italian government was making a formal claim to ownership of the artifact, because there was no export permit for it and, under Italian law, the state automatically owns any such property that is exported from Italy without a permit.

It transpired that Luna had not been entirely truthful, to Alloy or to Nokdaun. She had indeed been provided with an export permit, but it had been arranged on her behalf by the Rome dealer from whom she bought the piece and she had suspicions as to its authenticity. The original permit that Luna had provided was forwarded by Nokdaun to Alloy when it sent the artifact. Investigation has revealed that it is, indeed, not genuine. Apparently there were indications of its falsity that would have been noticed by those who are familiar with Italian export permits, which Alloy, unfortunately, was not.

The artifact is still in Vancouver because Alloy is fighting, on various grounds, the Italian government's moves to acquire possession of it. A BC court has issued an order that it is not to be removed from BC until these proceedings are resolved.

Whatever happens to the artifact, Alloy wants to sue Luna for the tort of fraud and the auction house, Nokdaun, for the tort of negligence in stating in the sale catalogue that

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(Question 1, continued)

there was an export permit without having inquired into its authenticity as they ought to have done. He wants to sue both defendants in one proceeding in British Columbia.

Luna has a defence under California law, if it applies, because the tort limitation period has run in California. It has not run according to BC law or Swiss law.

Nokdaun would not be liable in tort under the law of Switzerland because statements about property put up for sale by an auctioneer are actionable only in contract against the auctioneer, not in tort. Under Swiss law, the failure to inquire into the permit, though (according to an expert in Swiss law that Alloy has consulted) a "serious breach of professional standards," did not make the statement in the sale catalogue any kind of breach of contract between Nokdaun and Alloy. Under BC law, the statement that "export permit from Italy has been provided" would, at least arguably, be a negligent misrepresentation by Nokdaun, and so actionable by Alloy in tort, if Nokdaun should have noticed the signs that the permit was not genuine.

Nokdaun's sale catalogue included a page headed, "General Conditions of All Sales." One of the listed conditions was "All sales are subject to Swiss law and any legal dispute concerning a sale must be brought before the Cantonal Court of Geneva, Switzerland."

Advise Alloy about the conflicts issues in his potential BC lawsuit.

30 2. One of your clients, Aquastyle Ltd, is a wholesaler in plumbing equipment and fixtures, based in Vancouver, BC. Up to now Aquastyle has bought its stock from Canadian sources, but it is planning to become the exclusive Canadian distributor for an American producer of high-end faucets and sinks, Hitflow Inc, whose head office and manufacturing facilities are in the state of Ohio, USA. Aquastyle has retained you to advise on the distributorship contract with Hitflow.

As far as the contents of the contract are concerned, you expect there to be a clause (which is routine) that Hitflow warrants that all products sold to Aquastyle will comply with Canadian safety standards. You also expect that all inventory must be purchased by Aquastyle from Hitflow, with title passing when Hitflow delivers the products in Ohio to a carrier for shipment to Aquastyle. You expect that Aquastyle will be required to pay Hitflow in US dollars for inventory purchased.

Below are set out four alternative scenarios about the forum selection and choice of law provisions of the contract that you are thinking of trying to negotiate on behalf of Aquastyle with Hitflow. In relation to each of these four scenarios, please discuss the following sets of questions:

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(Question 2, continued)

(a) Where Aquastyle can sue Hitflow, and where Hitflow can sue Aquastyle, if there is a dispute between the parties about their contractual obligations. You can assume that British Columbia and Ohio are the only jurisdictions in issue. Please include *forum non conveniens* in your discussion.

(b) What law you think the court will apply to the dispute, and why.

(c) Whether a BC judgment will be recognized or enforced in Ohio and vice-versa.

For all three sets of questions (a)-(c), please assume (somewhat unrealistically) that the conflict of laws rules of Ohio are identical to those of British Columbia.

Here are the four scenarios:

Scenario 1. There is no reference in the contract to any governing law.

Scenario 2. The contract contains an express provision that BC law governs the contract. It contains no provision about where disputes may be litigated.

Scenario 3. The contract contains an express provision that BC law governs the contract. It also includes a provision that the parties agree to accept the jurisdiction of the BC courts for any legal dispute between them. It does not say that the jurisdiction is to be exclusive.

Scenario 4. The contract contains no express choice of law to govern the contract. It does include a provision that the parties agree that any dispute between them will be subject to the exclusive jurisdiction of the courts of British Columbia.

20 3. Lek Tronn is a very able software designer, specializing in a particular type of video gaming software. For about four years he worked at Flashworks, a Seattle, Washington, USA-based video game developer. He then left them without notice and started immediately working for BigByte, a competitor of Flashworks' also based in the state of Washington. Flashworks sued him in Washington state court for breach of his employment contract. One of the breaches, for which Flashworks sought an injunction, was that Lek was in violation of a covenant in his contract with Flashworks that stated that if he terminated his employment with Flashworks, he would not work for any "competing software developer in the Pacific Northwest" for a period of two years after the date of termination. There was an extensive definition of what a "competing software developer in the Pacific Northwest" meant. It specifically included any developer "with a head office in Washington, Oregon or British Columbia."

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(Question 3, continued)

The court gave judgment against Lek, holding him liable for damages, which he paid, and issuing a permanent injunction against his working for BigByte or "any other employer contrary to the covenant" in the Flashworks contract. The injunction was until expiry of the covenant at the end of its two-year term.

Shortly before the court issued its judgment, Lek moved to British Columbia and started working for Tekster, which was a "competing software developer in the Pacific Northwest" as defined in the Flashworks contract.

Lek consults you about a notice he has just received that Flashworks has brought an action in the British Columbia Supreme Court to have the Washington judgment, specifically the injunction, enforced. He wants to argue that the injunction would not have been issued in British Columbia, because a lawyer friend of his has told him that the covenant in the Flashworks contract was unenforceable under BC contract law. He said it was unreasonably broad and therefore, according to the case law, in "restraint of trade." Washington law has the same "restraint of trade" doctrine, and the same argument was made to the Washington court, but the Washington judge held that on the Washington authorities the covenant was reasonable and valid.

Advise Lek about the prospects that the BC court will enforce the Washington judgment against him. The covenant still has more than a year to run, so enforcement would mean he could not work for Tekster for that period.

15 4. The Law Commission of Ontario, *Defamation Law in the Internet Age* (Final Report, March 2020) makes the following recommendation at p 65:

> "The rebuttal stage of the jurisdiction analysis remains ill-defined, even after [*Haaretz.com v Goldhar*]. The LCO proposes an additional, non-exhaustive factor that courts may find relevant in rebutting the presumption of jurisdiction. In assessing the reasonable foreseeability of a defendant being subject to a defamation action in Ontario, it may be relevant that the publication was not targeted at an Ontario audience. . . . [T]he LCO suggests that whether a publication was targeted to an Ontario audience may be an additional, discretionary factor building on the Supreme Court's rebuttal analysis in *Haaretz*."

Discuss whether you agree that legislation requiring the court to consider such a factor, as part of the jurisdiction *simpliciter* analysis in cases of internet defamation, would help make the outcome in a rebuttal argument more predictable. Please include in your discussion whether you think that such legislation might have altered the conclusion in

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(Question 4, continued)

Haaretz.com v Goldhar itself that the presumption of jurisdiction *simpliciter*, based on the tort being committed in Ontario, was not rebutted because, under the circumstances, Haaretz could reasonably have expected to be called to answer a legal proceeding in Ontario.

END OF EXAMINATION