

Chapter Three

Choice of Law

Introduction

- ❑ Assuming a particular court of a country is properly exercising jurisdiction in a matter, the next logical question that it will necessarily confront with will be:

Among the competing laws of different countries that are linked to the case, which one should apply to reach a just decision?

- ❑ If courts were to apply their own domestic laws for those cases containing a foreign element invariably, the question of choice of the applicable law would not be an important matter. However....
- ❑ ***Why foreign law is applied by forum courts?***
 - + Fair and just outcome for parties
 - + Courtesy or respect towards the foreign country whose law is applied

Note That

- ❑ General choice of law principles does not by itself automatically indicate to the law of a certain named country to apply to a case. Rather, it points in a general manner to characters of a legal system that deserves application.
- ❑ Choice of law principles provide solutions based on links called connecting factors

Characterization/Classification

- ❑ It is the course that should be followed by courts to choose the applicable law
- ❑ It involves the systematic putting in to groups of things, facts, knowledge or any other thing.
- ❑ Classification/characterization is a three stage process. The stages are:
 1. *Primary Characterization/Classification (Characterization of the Factual Situation)*
 2. *Secondary Characterization/Classification (Characterization of the Connecting Factor) and,*
 3. *Third Stage Characterization/Classification (Characterization of the Proper Law)*

1. Primary Characterization/ Classification of the Cause of Action or the Factual Situation

- ❑ In this stage, a court allocate the case to its correct legal category (cause of action)
- ❑ Here, the court decide whether the action relates to contract/ tort/ family/succession/tort...
- ❑ In most cases, the allocation of a factual situation in to a certain category may not be a difficult task for a court to perform. Seldom, however, it may be a tough task. A difficulty in characterizing may arise due to two reasons:
 - i. It may be a case near the line in which it is difficult to determine whether the question falls naturally within this or that judicial category
 - ii. It may be a case whether the forum law and the relevant foreign law hold diametrically opposed views on the correct classification. There may, in other words, be a conflict of classification.

➤ ***According to what system of law must the classification be made?***

- Theoretically, there are three suggested possible answers to this question.
- ***View 1:*** characterization should be governed by the *lex fori*, or the law of the forum.
- ***View 2:*** w advocates characterization under the *lex causae*, or the governing law.
- ***View 3:*** The third view suggests that classification must be made on “the essential general principles of professedly universal application of analytical jurisprudence and comparative law”.

2. Second Stage Classification/ Characterization of the Connecting Factor

- ❑ In this stage the court characterize the connecting factor as is found in a choice of law rule
- ❑ Connecting factors are some outstanding facts or contact points that are found in conflict rules.
- ❑ Based on the nature of the facts involved, the connecting factor that may be used in a choice of law rule differs.

Examples

- ❑ In *capacity/status* matter: Domicile, Nationality or Habitual residence could be used as a connecting factor

- ***Contract***: Place of making of a contract or/and Place of performance of a contract
- ***Property matter*** : place where a property is located, and
- ***Extra contractual*** claims: Place where the tort act is committed/ result is obtained
- ❑ By which of the competing laws shall the connecting factor be defined/ characterized???

3. Characterizing the Proper Law/ Lex Causea

- ❑ At this stage, a court, identify the legal system (the law of the country) to which it is referred to by the connecting factor
- ❑ If the law that is selected by applying the choice of law rules is forum law then, the court applies the domestic law of the court without any further inquiries.
- ❑ If, however, the chosen law is a foreign law, a further question arises as to whether the whole foreign substantive as well as procedural law has to be applied by the forum court.
- ❑ Characterizing laws as either procedural or substantive would, therefore, be the next necessary step.
- ❑ It is almost universally recognized that when foreign law is selected based on the application of the forum's choice of law rules, the selection concerns only foreign substantive law and not procedural ones.
- ❑ It is always important to remember that matters of procedure are governed by the forum law, even when the substantive issue/s is/are governed by foreign law.

■ *Discussion*

- What do you think accounts for the exclusion from applicability of foreign procedural laws in the domestic forum?
- What constitutes procedural rule? And, based on what country's law should the demarcation between substantive and procedure be made

Renvoi

- Renvoi (read as *ranvoua*) is a French term which means ‘to send back’ or ‘to return unopened.’

Example

Suppose Aman dies intestate and a question arises concerning succession to his estate. Aman is Kenyan but has died domiciled in South Africa. Kenyan conflict rules say that succession to his movables is governed by South Africa law as this was his domicile. Suppose that by South Africa domestic law, Jhon would succeed to the estate, but that according to South Africa conflict of laws rules, succession would be governed by the law of nationality and this is the law of Kenyan. Suppose also that as a matter of Kenya domestic law, Kabir would succeed.

- ❑ In the above case, if a reference to a foreign law is understood as a reference to the whole law including the private international law rules of France, then South Africa private international law rules refer back the case (*renvoi*) to the first system. The Kenya judge in this circumstance cannot figure out the applicable law it needs to apply. And, this may go on forever!
- ❑ So, what is the court to do to solve this problem? Three different theories have developed to tackle the puzzle

Approaches to resolve renvoi

1. Single Renvoi/ Partial Renvoi/ Accepting the Renvoi Theory

- ❑ According to this doctrine, if a court is referred by its own rule of the choice of law to the ‘law’ of another country, but the rule of the choice of law of the other/second country refers such a case back to the law of the forum state, then the judge in the forum state must apply the internal law of his own country

2. Rejecting the Renvoi or the Internal Law Theory

- ❑ According to this doctrine, a reference to a foreign law is understood as a reference only to the internal rules of that country excluding its private international law rules.
- ❑ The effect of application of this doctrine is that any possibility of a reference back (renvoi) is avoided or rejected.

3. Double Renvoi/ Total Renvoi Theory/ The Foreign Court Theory

- ❑ The doctrine of double renvoi dictates that a forum judge, who is referred to the law of another country, must apply ‘whatever law a court in that foreign country would apply if it were hearing the case.’
- ❑ The basic thing in this theory is that the court needs to decide the case in the same way as it would be decided by the foreign court.

The Incidental Question

- ❑ The problem of the incidental issue or incidental question is said to arise when dealing with the main issue another issue incidentally arises and it becomes necessary to resolve this issue to decide on the main issue.
- ❑ E.g. in many cases the issue of the validity of marriage arises incidentally as a secondary question while the principal claim concerns like divorce, property or pecuniary rights, succession, support and alimony, etc
- ❑ The main issue may be governed by one law and the incidental issue by another.
- ❑ In interstate choice of law in Ethiopia incidental question may not be a big problem due to the fact that we will not, hopefully, have choice of law rules for each state but one Federal Conflicts Rules.
- ❑ As a result, all issues, whether they are main, incidental or incidental of second degree are going to be resolved by the federal choice of law rules.

Public Policy Exception

- ❑ Even if a legal issue is determined to be substantive for purposes of conflict of laws, and even if the forum's choice-of-law rules determine that foreign law should apply to the issue, it does not mean that such a foreign law surely applies to the case.
- ❑ Forum courts may yet refuse to apply the foreign law if it is "offensive to the deeply ingrained or strongly felt public policy of the state."
- ❑ Public policy however, is a very fluid concept that sometimes everything can fall within its ambit. To avoid or minimize this problem in conflict of laws, it is obviously necessary that public policy be kept within limits, for otherwise the whole basis of the system is liable to be frustrated.
- ❑ What do you think should a court that has rejected the application of a foreign law on public policy reasons do to case before it? The options available are two.
 - i. apply forum law
 - ii. Dismiss the case

Exclusion of Foreign Law

Non-Applicable Foreign Laws

- ❑ It is an almost universal principle that one state will not enforce criminal, administrative and tax laws of another state.
- ❑ Some authorities also suggest it is rational that claims for the enforcement of foreign laws which are analogous to penal and revenue laws should be dealt with similarly. These would include, for example, laws about nationalization and laws regulating exchange control.
- ❑ The reason/s for their exclusion???

Other issues...

Proof of Foreign Law

- ❑ It is a question about whether or not parties need to prove a foreign law that they have pleaded in litigation and, if they shoulder this obligation, the manner how they proceed to discharge it
 - i. Foreign law as a question of fact:*
 - ii. Foreign law as a question of law:*

Mode of proof

- ❑ In the majorities of countries of the world, foreign law must be proved by expert evidence. But, 'Expertise in foreign law is easier to describe than define'.
- ❑ Who do you think should qualify to be an expert witness with regard to a certain foreign law?
- ❑ What to do when a party fails to prove foreign law?