

PRIVATE INTERNATIONAL LAW CONCEPTS

CHOICE OF LAW IN CONFLICTS RELATING TO DOMICILE AND RESIDENCE

The lecturer stated with the famous case of

Grant v. McAuliffe, 41 Cal.2d 859

Grant, Manchester and Jensen are the plaintiffs. McAuliffe is the defendant who is also an administrator of an estate.

It happened that, on December 17, 1949, plaintiffs were riding West on United States in the car owned and driven by the third plaintiff. It happened that Pullen was driving his car Eastward on the same road that the plaintiffs were driving westward. The two cars collided in Arizona. The plaintiffs' car was badly damaged and the three plaintiffs suffered injuries. 19 days later, Pullen died because of the accident and the injury he sustained. It was at that point that the defendant was appointed as an administrator. At the time of accident, all the three plaintiffs were domiciled in California or residents of California.

After defendant's appointment, each plaintiff presented a claim for damages but the defendant rejected all the three claims. The plaintiffs decided to file an action against the estate of Pullen in order to recover damages for the injuries caused by alleged negligence of Pullen. Defendant decided to file a general demurrer (a legal objection that admits the facts of an opposing argument but asserts that those facts alone are not adequate to make the case) and a motion to abate each of the complaints. The trial court entered an order granting the motion in each case. Each plaintiff has appealed. Since all the appeals are on the same ground, they have all been consolidated.

The court was of the view that, the answer to the question whether the causes of action against Pullen survived and are maintainable against his estate depends on whether Arizona or California law applies.

The court again observed that, "In actions on torts occurring abroad, the courts of this state (California) determine the substantive matters inherent in the cause of action by adopting as their own the law of the place where tortious acts occurred (Arizona) unless it is contrary to the public policy of this state (California)." Emphasis supplied.

But that the forum (the courts in California where the case was brought) does not adopt as its own the procedural law of the place where the tortious acts occurred (Arizona). It must therefore, be determined whether survival of causes of action is procedural or substantive for conflict of laws purposes.

In some jurisdiction survival of the causes of actions has been held to be a matter of substantive law and so the law of the place where the tort was committed applied. However

before, 1929 when Restatement Draft was given, it was a custom that, matters surviving the causes of action of the deceased are procedural and so the law of the forum applied.

After passing on some authorities, the court was of the view that, a cause of action arising in another state, by the laws of which an action cannot be maintained thereon because of lapse of time, can be enforced in California by a citizen of this state, if he has held the cause of action from the time it accrued.

The court found out that the survival of the causes of action is to be governed by the law of the forum as it relates to the procedures for its enforcement of the legal claim for damages.

In short it is like the plaintiffs were saying that in the circumstances of the case, the law applicable is that of California and the defendant is saying that the law applicable is that of Arizona so that the court was able to rule that only the law of California is applicable as that would make it out easy to enforce the judgment of the court and so that the government's interests are not in jeopardy.

The Court reversed the Orders of the trial court which granted abatement and remanded the case for further proceedings.

Appeal allowed.

Walton v. Arabian American Oil Company, 233 F.2d 541 (2d Cir. 1956)

Walton is a plaintiff and a citizen who is a resident of Arkansas (United States). The Defendant is a corporation incorporated in Delaware, licensed to do business in New York (United States) and engaged in extensive business in Saudi Arabia.

While the plaintiff was in Saudi Arabia temporarily, he was seriously injured when a car he was driving collided with a truck which is owned by the Defendant Company and which on the material day in question, was driven by one of the defendant's employee.

The plaintiff brought an action in New York Courts against the defendant for injury resulting from their negligence. At the trial, the plaintiff did not prove the Saudi Arabian Law. The defendant did not, in his answer, allege such law and the defendant did not offer to prove the existence of such law. There were well established decisions in New York that the defendant was negligent and therefore liable to plaintiff. The trial judge, saying that he would not take judicial notice of Saudi-Arabian law, directed a verdict in favour of defendant and gave judgment against the plaintiff.

The court repeated a well settled principle that, "substantive law applicable to an alleged tort is the law of the place where the alleged tort occurred (Lexi Loci delict commissi)." This is because to hold contrary to that principle would be like interfering with the foreign sovereign.

The court said that, it has been also suggested that, “where a suit is brought in an American Court by an American plaintiff against an American defendant, complaining of alleged tortious conduct by the defendant in a foreign country, and that conduct is tortious according to the rules of the forum, the court, in some circumstances, should apply the forum’s tort rules.”

The court went further to hold that, “Law of a foreign country is a fact which must be proved.” It must be proved by the parties asserting its existence. That is not the work of the court to take its judicial notice. This was the duty and the burden which the plaintiff failed to discharge deliberately.

This means that, even where the law applicable is the law where the tort was committed, if such a law brings government’s interests in jeopardy, the law of the forum shall prevail.

The court therefore dismissed the case.

Private International Law is concerned with three things namely

- a. Jurisdiction;
- b. Applicable law; and
- c. Whether court will recognize and enforce foreign judgment (rules of jurisdiction, choice of laws, recognition of foreign judgments).

All these questions are determined by what we call connecting factors—which means links between events, things, transactions, persons and countries which in turn link a certain dispute to particular countries. It can also be a certain particular legal categories to applicable laws it be contract, sale, tort, succession etc. or a certain fact which when taken will connect a dispute to a particular legal system.

Domicile:

“A person’s legal home. That place where a man has his true, fixed and permanent home and principal establishment, and to which whenever he is absent he has intention of returning.” It is considered to be a connecting factor which links a person with a particular legal system. Registration to vote is a conclusive proof of the domicile of a person.

The term domicile is sometimes called either habitual residence or person’s permanent home. What matters is the intention of the person or his purpose to stay at a given place permanently or indefinitely.

There are three types of domicile which are:

a. Domicile of origin

This is the domicile a person acquires by operation of the law when he is born. This domicile can never be extinguished. It is the domicile which depends on domicile of one parent at time of birth and not where the person is born nor where parents were residing at time of birth.

b. Domicile of choice

Is the domicile which a person chooses after he has attained the age of majority. It is a kind of domicile a person acquires by deciding to stay in a certain country for the foreseeable future. So there are two important factors here namely the residence in a new jurisdiction and an intention to reside there permanently. So there is an objective test of residence which is "factum" and a subjective test of intention which is "animus."

Bell v. Kennedy, [1808] LR. Sc & Div 307

It was held that new domicile is not acquired until there is not only a fixed intention of establishing permanent residence, but until also the intention has been carried out by actual residence there. Residence of any duration provided that there is an intention to stay permanently that will suffice. But such residence must be acquired lawfully and not in contravention of public policy or any law. And a person can have two residences but he must have the chief residence.

c. The domicile of dependence:

Is the domicile of married women, children and people of unsound mind. It is a domicile that depends on another domicile.

Citeria v. Citeria

'It was held that "a woman...even if infant, automatically acquires on marriage domicile of husband; so long as marriage is subsisting, wife cannot have different domicile than that of her husband even if the court separated them but if the husband changes domicile, wife's domicile automatically changes." Separation does not annul marriage and therefore it cannot change the domicile of dependence of the woman but when the husband dies, the domicile of dependence becomes the domicile of choice.

Attorney General for Alberta v. Cook, [1926] AC 444

Where a wife was separated by her husband by court order in Alberta but the husband domicile of origin was in Ontario and this meant that the wife had a domicile of dependence in Ontario. So she instituted the divorce proceedings in Alberta. It was held that the courts in Alberta have no jurisdiction to entertain the case as the case was only maintainable in the

Ontario where her husband had domicile. Separation even by the court does not annul marriage and therefore, it does not change the domicile of dependence by the wife.

Udny v. Udny

It was held that, “a domicile of choice is acquired only if it be affirmatively shown that the **propositus**—the person immediately affected by or concerned with an action—is resident within a territory subject to a distinctive legal system with the **intention**, formed **independently** of external pressures, of residing there **indefinitely**. It was also in this case where we find an old principle that “the domicile of origin revives when a domicile of choice is abandoned without another such domicile being acquired.” One of the evidence of domicile is the right to vote in a certain country. The case laid the principle that there is no man who has no domicile.

Harrison v. Harrison, [1953]1 WLR 865,

Harrison was born in England with English domicile of origin. When he reached 18 (the age of majority) at which an independent domicile could be acquired was then 21) his parents emigrated to South Australia and acquired a domicile there, leaving him in England. Under the rules explained above, Harrison acquired South Australian domicile of dependence. When he was 20 he migrated to New Zealand, intending to remain there permanently and married a New Zealander. Shortly thereafter he returned to England, where he turned 21. His wife petitioned the English court for a divorce and at that time the English court could have exercised jurisdiction. When Harrison turned 21 he lost his South Australian domicile of dependence. As he had not yet acquired a New Zealand domicile of choice (because he had not resided there since turning 21) his English domicile revived.

***Ramsay v. Liverpool Royal Infirmary*, [1930] AC 588**

Where the over thirty years stay in England did not made George (a man with Scotch domicile of origin) to acquire a domicile of choice of England because, “The Law as I understand it is this, that the domicile of origin clings to a man unless he has acquired a domicile of choice by residence in another place with an intention of making it his permanent place of residence.”

In this case, the court noted that George remained in England for so long because of economic gain and that if it was not that, he would not have stayed in England but rather he would have returned to Glasgow. So while he had residence, he had no intention to make it his permanent home. In fact every day he used to read the magazine of Scotland and he used to refer to himself as a man of Scotland. All these meant that he did not intend to stay in England.

FIVE FUNDAMENTAL PRINCIPLES OF DOMICILE

- a. There is no person who has no domicile.
- b. A person cannot have two domiciles at a time but he can have two residences at a time.
- c. Domicile denotes a territorial connection with a territorial system of law.
- d. The burden of proof in case of an allegation of the change of domicile rests with a person who alleges such a change.

Winans v. Attorney General, [1904] AC 287,

It was held as a settled principle that “the Onus for proving that domicile has been chosen in substitution for domicile of origin lies upon those who assert domicile of origin has been lost.”

In this case Mr. Winans who was an American citizen lived in England for about 37 years. But there was no place where it was shown that he had an intention to stay in England forever. Upon his death, he bequeathed through the will that his property has to go to his son. Thereby the Crown asserted that legacy tax is to be paid as he was a citizen of England by domicile of choice. The issue was whether he was a citizen of England or of America. It was held that he was a citizen of America by domicile of birth as the crown failed to prove that he acquired a domicile of England by choice. To levy tax they had to prove that he was a citizen of England by Choice—a work which they utterly failed—to prove the intention of residence in England.

- e. The domicile of person is determined basing on the laws of the land but this is subject to certain limitations and exceptions.

Residence

The term residence comes from 2 Latin words namely “res” which means “a thing” and “ident” which means “identified.” It can either be ordinary or habitual. Ordinary residence refers to man’s abode in particular place or country which he adopts voluntarily and for settled purposes as part of regular order of life for the time being, whether long or short. It is a question of fact as a person may be a resident of more than one country. Only that residence must be voluntary and not through kidnapping or imprisonment. Habitual residence connotes a person has taken up residence, lived in relevant country for a period of time that shows residence is habitual (sometimes the term habitual residence is used interchangeably with the term domicile).

SOME REFLECTIONS FROM THE MAJOR CASES IN DOMICILE AND RESIDENCE

White v. Tenant, [1880] WLR 790

“Where a person entirely abandons his former residence (West Virginia) in one state with no intention of resuming it and goes with his family to another residence (Pennsylvania), which he has rented in another state, with the intention of making the latter his residence for an indefinite time, the latter state is his domicile notwithstanding the fact, that, after he and his family arrive at the new residence, which is only about a half a mile from the state line, they go on the same day on a visit to spend the night with a neighbor in the former state intending to return in the morning of the next day, but he is detained thereby by sickness, until he dies, and never does in fact return to his new home.”

Another principle is that, “the laws of the state in which the domicile of a decedent is at the time of his death, control and govern the distribution of his personal estate, although he may die in another state.”

In this case, Mr. Michael moved from West Virginia to Pennsylvania permanently with no intention to return at all. He sold all that he has in Virginia and moved to establish his house in Pennsylvania. But the place where he was in Pennsylvania was at the border with Virginia. So he was invited at the party with his in laws in Virginia where he went. He was attacked by fever and ten days later he died while still in Virginia. The father of Michael's wife (Mr. Tenant, the defendant), applied for the letters of administration and administered the estate and he divided the estate, he paid all the debts and the remaining portion was given to the wife. Mr. Tenant applied the laws of Virginia. But it was contended that had he applied the laws of Pennsylvania, the wife would have got one half and another half would have been given to the sons of Mr. Michael White. And note that it is a settled principle that the law of domicile governs succession matters.

The court concluded that though Mr. Michael died in West Virginia, his domicile was in Pennsylvania, therefore, the laws of Pennsylvania should apply.

Udny v. Udny, [1869] L. R q. 3c. & Div. 441

“Every individual at his birth becomes the subject of some particular country by the tie of natural allegiance, which fixes his political status, and becomes subject to the law of the domicile, which determines his civil status.”

Lord Westbury, "It is a settled principle that no man shall be without a domicile, and to secure this end the law attributes to every individual as soon as he is born the domicile of his father if the child be legitimate, and the domicile of his mother if the child be illegitimate. This is called the domicile of origin, and is involuntary. It is the creation of law and not of the party. It may be extinguished by act of law, as for example, by sentence of death or exile for life, which puts an end to the status civilis of the criminal but it cannot be destroyed by the will and act of the party."

"The domicile of choice is the creation of the party. When a domicile of choice is acquired the domicile of origin is in abeyance but is not absolutely extinguished or obliterated."

"When the domicile of choice is abandoned, the domicile of origin revives—a special intention to revert to it being unnecessary."

"if after having acquired a domicile of choice a man abandons it and travels in search of another domicile of choice, the domicile of origin comes instantly into action and continues until a second domicile of choice has been acquired."

In this case Colonel Udny was of Scottish domicile by origin. Later on he moved to England where he married and had one son. The wife later on died and the son later on died a bachelor. The husband stayed in England for a very long time. Later on he moved to Boulogne in France. While there he had a relationship with another woman through whom a child was born who is the respondent in this case—the child was bastard. Later on he took his woman to Scotland where their marriage was officiated. The question was whether, officiating the marriage legitimized the illegitimate child—the respondent. The father who is the appellant contends that the son who is the respondent here is bastard and he cannot succeed his estates in Scotland. The fundamental question to resolve all these rested upon one fundamental question—what is the father's domicile?—when he was born, his stay in England, when the respondent was born, when the marriage was officiated in Scotland?

The court ruled that while in England he had the domicile of choice and thereby abandoned the domicile of origin but he ran from there to France, the domicile of origin reverted. In addition to that, it was held that since the child was begotten in France, the child acquired the domicile of his father—that of Scottish so that the marriage legitimized the child to entitle him to the estate.

Bell v. Kennedy, [1808] LR. Sc & Div 307:

"The Law is, beyond all doubt, clear with regard to the domicile of birth, that the personal status indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal status of another domicile is acquired."

"The domicile of origin adheres until a new domicile is acquired."

“The onus of proving a change of domicile is on the party who alleges it.”

In this case, Mrs. Kennedy and her husband claimed from her father (Mr. Bell, the above appellant) her share of the parental goods in communion on the allegation that Mr. Bell when his wife (Mrs. Kennedy's mother) died on the 28th of September 1838, had acquired a Scotch domicile, and so had become subject to the Scotch law as to communion Bonorum inter conjuges.

The defense of Mr. Bell was that on September 1838, when his wife died, he had not acquired a Scotch domicile, for that he had then retained unchanged his domicile of origin in Jamaica, where he was born, where he married, and where communion of goods between husband and wife was unknown.

In this case, the parents of Mr. Bell were of Scottish origin. They went to live indefinitely in Jamaica and acquired a domicile of choice there. Bell was born in Jamaica he went for School in Scotland but returned again in Jamaica to live. Therefore he had his domicile of origin in Jamaica. He married and had three children in Jamaica. His parents died. Bell's health failed him. He decided after consultation with his wife and medical doctor to live in a place where his health may not deteriorate. He went to Scotland. He did not get a good place to live and he was not happy with that. His estate still was in Jamaica. While he was looking for place to settle, his wife died. Her daughter and her husband claim that the domicile of their mother was in Scotland as the domicile of her dependence because her father acquired the domicile of choice in Scotland. Their intention (respondents) was that they will be able through Mrs Kennedy (who is the daughter of Mr. Bell) to acquire some of the estates under the laws of Scotland.

The court found out that when Mr. Bell was in Scotland trying to find a place to live, he had no intention to stay there. So his domicile was still in Jamaica. The court allowed the appeal.

Whicker v. Hume, [1858] 7 HLC 124

A man of Scotch Origin and hence with the domicile of origin in Scotland went to live in East Indies where he was employed in a company. Later on he moved to Scotland and thereby he married and had children. In Scotland he registered his name in the municipality and was a member of many societies in England.

For reasons which were uncomfortable to him, he deregistered himself totally in Scotland and moved to live in London intending to stay for foreseeable future. For some health reasons, he went to France and lived there. He wrote a will and a codicil and which he bequeathed his properties to several peoples including his right-heir in law who is the current appellant. After one year, he died. The appellant brought an action to the effect that what has been written in the will and the codicils whose effect was to confer properties to other people were wrong and

that the deceased is domiciled in Scotland in which case the law applicable will be in his favour.

The two lower courts ruled that the deceased by his conduct has abandoned the domicile of Scotland for the domicile of London and that it is a settled principle that the execution of the will is to be governed according to the law of the place where the deceased when he died, was domicile which is the law of England and it was also stated that a man cannot be said to have lost his domicile unless he has chosen another. The appellant decided to appeal to the House of Lords.

The House of Lords ruled that the domicile of the deceased was in England and not in Scotland or France.

Hodgson v. De Beauchefne, [1858] 12 Moo PC 285

The General Hodson was born in England with English domicile of origin. He went to West Indies where he served in the company as an officer. While there, he married a woman with French origin and with her he had a daughter, the respondent. They lived in England for a considerable time and then went to live in French. Mr. Hodgson was in active service in Her Majesty's army and he had been on active duty of service for all his life and he was informed that he had another mission to execute at any time when informed so.

His wife died in Paris and was buried there and Mr. Hodgson bought the graveyard and provided that he shall also be buried there upon his death. His daughter who is here the respondent was married by a Frenchman but they separated due to ill conduct of the respondent (Hodgson's daughter). Hodgson requested his daughter to live with him in his house but after sometime, Mr. Hodgson was unable to tolerate the behaviours of his daughter and so they parted and he decided to marry the appellant. He kept on moving to England and Scotland then back to France on considerable numbers. Later on he died with a will and codicils executed in English form and in fact even the second wife was married at the English Embassy.

The will appointed the appellant as an executrix of the properties of the deceased. The respondent declined to accept that and hence the case was brought on its legality. The question of what was the domicile of the deceased came up. The respondent contends that the deceased died domiciled in France and under the laws of France, such a will written was invalid and so she was asking for the court to declare the deceased died interstate so that the case would be decided on her favour. The appellant claimed that the deceased died domiciled in England as he had no intention to be domiciled in France and so she is a valid executrix.

Up to the level of the Court of Appeal, it was contented that the deceased died domiciled in French.

The House of Lords unanimously reversed the judgment of the Court of Appeal on grounds, among others, that;

HELD:

"It was not competent to the deceased to acquire a domicile in a foreign state, as such domicile was incompatible with the obligations and duty of an Officer in the military service of the Queen and the east India Company.

Secondly, the presumption of law arising from his profession and status was against any intention by the deceased to abandon his original domicile and acquire a new domicile in a foreign state, as it would be inconsistent to presume an intention contrary to his duty as an Officer in the military service.

Thirdly, England being the domicile of origin of the deceased, the onus was upon the party who alleged that the deceased had abandoned it and had acquired another domicile, to establish that proposition.

Fourthly, the presumption raised by the deceased's residence in France, of his intention to acquire a French domicile, was rebutted by the facts in evidence.

Lastly, the presumption of law is against the intention to abandon the domicile of origin."

The case reiterated the old principle that, to constitute the change of domicile, residence itself is not enough, it must be shown that there was a clear intention by the propositus himself or from the facts given and evidence that he intended to change his domicile.

Mass v. Perry, 489 F. 2d 1396 (5th Cir. 1974)

Mr. & Mrs. Mass were graduates assistant of the University of Louisiana. After wedding in Mississippi, they returned to Louisiana and rent an apartment. They later on discovered that Perry was spying them on their bedroom and bathroom.

They brought a lawsuit against Perry in Louisiana. Mr. Mass was a citizen of France and did not have a permanent residence in United States and the wife was a resident of Mississippi.

Perry contented that the case be dismissed on diversity of citizenship between the parties. The District court denied Perry's motion. The defendant appealed but the decision remained the same.

HELD:

Domicile requires two things: **taking up residence in a different domicile** with **intention to remain there**. A person remains a domicile of one place until that person has adopted a new domicile through physical presence and intention to remain.

Judgment was given in favour of Mass.

Private international law is that part of the law of every state which deals with cases having a foreign element. Foreign element means a contact with some system of law other than the domestic law. Take this example, if a contract was made or is to be performed in a foreign country, or because a tort was committed in a foreign country, or because property was situated in another country, or because the parties are not citizens of the same state, then as between them, there is a contact. This contact we call it foreign element.

Therefore, in Private international law, because of “foreign element” you will be faced with three questions to answer namely:

- a. Has one state’s court jurisdiction to determine this case? And in order to establish jurisdiction, FORUM is needed. This is an element used by the domestic legislator in order to recognize the international jurisdiction to his own domestic courts. All this process is started by the claimant. The parties in the law of contract for example chose for themselves the law to be applied provided that such law is fair and does not put the interest of the government in Jeopardy, it shall not be against the public policy nor against the laws of the state.
- b. If so, what law should apply? As a general rule, the court applies the law of the forum for all procedural matters in a case involving a foreign element. This law of the forum is called Lex Fori. But to other matters, the court can decide to choose a law from several connecting factors such as the law of domicile which is Lex Domicilii, or the law of the state in which then property is situated or Lex Situs, or the law of nationality or Lex Patriae) or the law of the place where the transaction took place or Lex Loci actus, or the law of the place where the marriage was officiated or Lex Loci Celebrationist.
- c. And finally, will that state recognize or enforce a foreign judgment purporting to determine the issue between the parties?

These three are steps to solve a private international law dispute.

Vita Food Products Inc. v. Unus Shipping Co. Ltd, [1939]1 ALL ER 513

In this case, a contract of shipping of goods was entered for the shipment of goods from Newfoundland to New York. The Ship was registered at Nova Scotia. The parties agreed that in case of dispute, English Law shall apply—even though the transaction had no actual connection with England. The court held that parties were free to choose any law to govern the contract provided that the choice was bonafide and legal and there must be valid reasons for choosing such a law. Like in this case, the parties were familiar with English Commercial law and wanted such law to apply.

This case overruled the decision in the case of ***Owens***.

CHOICE OF LAW RELATING TO CONFLICTS IN CONTRACTS

Some of the key principles are:

- a. The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which with respect to that issue has the most significant relationship to the transaction and the parties.
- b. In the absence of effective choice of law by the parties, the principles which can be taken into consideration in order to determine the choice of law include:
 - i. The place of where the contract was concluded (Lex Loci Contractus);
 - ii. The place of negotiation of the contract;
 - iii. The place of performance of the contract (Lex Loci Solutionis). Normally if the place of performance is not made, then, the place where the contract was made is the place of performance. Parties are given ability to choose their own law but such law should not be repugnant to governmental interests, illegal or against public policy.

Owens v. Hagenbeck-Wallace Shows Co,

The parties entered into the contract of employment with a circus who travelled around the country which was executed in Indiana; the permanent headquarters of the circus company was Illinois; the parties provided that all questions were to be decided according to the law of Florida. The court held that Florida had no connection with the contract—and so the choice of the law was not valid.

A reasonable basis will be found when the state of the chosen law is the state where one of the parties is domiciled or has its principal place of business, where performance by one of the parties takes place or where the contract took place and the choice is not wholly fortuitous.

So if there has not been an effective choice of law by the parties, a court will apply the local law of the state that, with respect to the particular issues, has the most significant relationship to the transaction and the parties.

Fricke v. Isbrandtsen co,

The German passenger made a contract of passage to New York while in Germany. He was unable to read the ticket which was wholly written in English and which provided that all questions are to be determined according to the law of New York. It was held by the New York Courts that the proper law to apply is that of Germany as Mr. Fricke did not chose to be bound the law of New York.

Louis-Dreyfus v. Patterson Steamships Ltd,

The parties entered into the contract for the transport of goods from New York to Canada. The ship sank in Canadian waters. The question was which law shall govern the dispute. It was held that the law of Canada should govern the case as it was in Canada were the portion of the contract was to be performed and given the fact that Canada had the greatest interest in determining liability where the alleged breach occurred in Canadian waters.

Capacity of the parties to the contract is governed by the proper law of the contract or the law of domicile and residence of the parties or under the law which a close connection with the contract).

Charron v. Montreal

“A party’s capacity to contract is governed by the proper law of that contract but that even if a party lacks capacity by the law with which the contract is most closely connected, but has capacity by his personal law, the contract should be valid.” The personal law applicable to the party will depend on the place of domicile in the case of an individual, or the place of incorporation in the case of corporate bodies.

Likewise, questions as to the form are governed by the law of the place where agreement is made or done—Locu Regit Actum. Land contracts must be in writing, contracts of insurance and guarantee should be in writing.

- iv. The location of the subject matter of the contract, and
- v. The domicile, residence, nationality, place of incorporation and place of business of the parties.

- vi. The place where the contract is delivered is also taken into consideration when solving conflicts.
- vii. Also the place where the contract is made binding is taken into consideration (mostly for unilateral contract)
- viii. The place where contract is accepted (mostly for bilateral promise)

However, all these factors depend on the merit of the case.

- c. If the place of negotiating and performance of the contract are in the same state, the local law of this state will usually be applied, except as otherwise agreed upon.

Sabah Shipyard (Pakistan) Ltd. v Pakistan [2002] APP.LR. 11/14,

There was a contract between the plaintiff and the respondent for the production of electricity in Karachi. In the power purchase agreement, the government of Pakistan guaranteed to indemnify the plaintiff in case of anything. When there was delay in providing services by the plaintiff, the electricity authority of Karachi treated that as breach of the contract instead of giving an extension of time for the giving of services. The plaintiff applied to an arbitrator in Singapore who ruled in favor of the plaintiff and awarded damages. The government of Pakistan went to court alleging that it did not accept the decision of an arbitrator to bind Pakistan as it has state immunity.

There was clause in the agreement which empowered the parties to refer the dispute to be adjudicated in England in case of conflicts. While the issue was thus pending, the plaintiff applied in the court of England to stay proceedings and to claim for the relief.

The court held that though the laws of Pakistan provide immunity and exclusion of the courts of England from entertaining the case, the Courts have authority to adjudicate under the contract and agreement as between the parties.

Charron v. Montreal Trust Co, [1958] 15 DLR (2d) 240

“A party’s capacity to contract is governed by proper law of that contract and that, even if a party lacks capacity by the law with which the contract is most closely connected but has capacity by his personal law, the contract should be valid.” The personal law applicable to the party will depend on the place of domicile in the case of an individual, or the place of incorporation in the case of corporate bodies.

In this case, husband and wife lived together in Ontario for 12 years, though the husband retained the Quebec domicile of origin—meaning that the woman also had the Quebec as

domicile of dependence. They then instituted a separation and maintenance agreement which they had capacity to enter under Ontario Law only. Later on the wife sued for arrears in payment for maintenance, the court held that, the Law of Ontario was the law of the Contract as it gave parties such capacity.

Auten v. Auten

Previous to the decision of the case of Auten v. Auten, it was a settled principle of conflicts relating to contracts that, "matters bearing upon the execution, interpretation and validity of a contract were determinable by the internal law of the place where the contract was made, while matters connected with their performance were regulated by the internal law of the place where the contract was to be performed." However, the case of Auten laid down a new principle basing on what is called as **"The Centre of Gravity"** rule. Which rule states that:

"The courts, instead of regarding as conclusive the parties' intention or the place of making or performance, will regard the law of the place which has the most significant contacts with the matter in dispute."

Peninsular and Oriental Steam Navigation Company v. Shand, [1865] 3 Moo. P.C. (N.S.) 272 (PC)

"The cause of action rests upon the rights given by that law."

In this case, the plaintiff who was an Englishman boarded a ship from England by English Company to Mauritius. On reaching there, some of his luggage was missing. He instituted an action for damages in which the defendant pleaded an exemption clause contained in the ticket which was issued in England. French law which prevailed in Mauritius regarded such clause as void. It was held that the defendant was protected by the clause because the law applicable for the contract of carriage was Lex Loci Contractus and not Lex Loci Fori as the contract was entered in England and its performance commenced in England too.

The Assunzione, [1954] 1 ALL ER 278

There was a contract of carriage of wheat between the French and Italian Governments and Charterers were French grain merchants. The Italian owners of the ship did not know that the agreement was between the two governments and the contract was negotiated between Italian and French Brokers by correspondence. The contract was formally concluded in Paris was written in the English language in an English standard form but freight and demurrage

were payable in Italian Lire. The Courts stated unanimously that Italian law was the proper law of the contract mostly due to the fact that both parties had to perform the contract in Italy. Here is the Lex Loci Solutionis and here is where there was real and mostly closely connection.

Lloyd v. Guibert, 6 Best & S. 100; 3 C. L. R. 1 Q. B. 115

The plaintiff was a British subject and at the time, he was in Danish island where he chartered a French ship with French flag. That ship belonged to the defendants who were French ship-owners. The contract was to carry a cargo from Haiti to England.

During the voyage, the ship sustained minor damages and so it was repaired in Portugal where the captain of the ship gave a bond over the cargo for the costs of such repairs. These costs were later on enforced against the plaintiff. The plaintiff sued the defendants for indemnity for which he was allowed so to do and to be entitled under the English, Denmark and Portuguese law but not under French law. The question was therefore which law has to govern the transaction.

HELD:

“The effect of a contract of affreightment, and of a bottomry bond, given by the master, is governed, not by the law of the place where the contract was made (Danish Island law), nor by that of the place where it was to be performed, nor yet by the law of the place in which the suit was brought (English law), but by the law of the country to which the ship belonged (French law).” Emphasis supplied.

Chatenay v. Brazilian Submarine Telegraph Co Ltd

A Brazilian subject residing in Brazil executed in Brazil a power of attorney empowering a London Broker to buy and sell shares on his behalf in England. He later disputed the broker's authority to sell his shares in English company.

HELD:

If the power of attorney authorized the broker to act upon it in England, the extent of his authority in England should be ascertained according to English Law.

If a contract is made in one country to be carried out between the parties of another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it would be carried out according to the law of that other country.

Similar but a slight different holding is taken in the case of **Mount alberta Borough Council v. Australasian Life Insurance Society Ltd.** it was the case on Debentures or lex situs.

Bonython v. Commonwealth of Australia

In the case on the repayment of money issued under debentures by the Queensland government to be paid either under sterling currency of Queensland or pounds Sterling of England,

HELD:

Lord Simonds, the amount payable was determined by proper law, the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection (the law of Queensland applied).

R v. International Trustees, [1937] A. C 500, Lord Atkin

The British Treasury entered into a contract to borrow money from America. The terms were written in America, the currency was American currency and the entire contract was made in America.

The issue was whether the holders are entitled to be paid in New York in American currency the present value of the amount of gold represented by the nominal amount of bonds in gold coins of the specified fineness of 1917 or are only entitled to be paid in New York in American currency the nominal amount of the bonds.

The law of the contract to be applied is a law the parties intended to apply. This does not matter whether the government is involved as the party or not to the case.

The court concluded that the contract was governed the law of America from the facts of the terms of the contract even though the parties never say openly which law is to be applied.

Ralli Brothers v. Compania Naviera Sota, [1920] 2 KB 287

The obligation under an English charter party to pay freight on jute in excess of the rate permitted by the law of the place of delivery (Spain) was held to be unenforceable in England.

If the contract is entered which is contrary to the internal law of the country in which it is to be performed, the forum court will not enforce it.

CONFLICTS IN TORT

Babcock v. Jackson, 12 NY2d 473, Fuld J

The plaintiff is Miss Babcock domiciled in Rochester, New York, United States of America. Mr. Jackson and his wife Mrs Jackson are the defendants though for the present case, the real defendant is Mr. Jackson. The plaintiff and the defendant are friends all residing in Rochester, New York.

It happened that, Mr. and Mrs Jackson had a week-end trip to Canada where they took the plaintiff as a guest. While defendant was driving the car in the Province of Ontario, he lost his control of the car and he hit an adjacent stone wall thereby causing serious injuries to the plaintiff. Upon her return to Rochester, she brought the present action against the defendant, alleging negligence on his part in operating his automobile.

At the time of the accident in Ontario, the Highway Traffic Act of Ontario provided that, "the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in the motor vehicle."

Though the laws of Rochester do not provide for any such bar, the defendant argued that, the law of the place where the accident occurred (*lex loci delicti commissi*) governs and therefore, the statute bars recovery. The trial court granted the motion in favour of the defendant and the Appellate Division, affirmed the judgment of dismissal.

The court reiterated the principle that, "the substantive rights and liabilities arising out of a tortious occurrence are determinable by the law of the place of the tort." The judge went further explain that this principle owes with regard to its origin from the doctrine of vested rights which doctrine states that, "that a right to recover for a foreign tort owes its creation to the law of the jurisdiction where the injury occurred and depends for its existence and extent solely on such law." But the judge in this case went on to show that the vested rights doctrine is no longer popular today.

The court went on to discuss some of the most compelling decisions whose effect was to decline to apply the *Lex Loci Delicti Commissi* if such a law has nothing or no interest at all with the case to be adjudicated or where such a law if applied, brings the government's interests in Jeopardy. The court went further to explain that, "The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort."

The New York laws allow such compensation which is denied under the Ontario laws. But the Judge was of the view that the issue, in this case is not that rather it was whether the plaintiff who was the guest in the defendant's car is barred from recovering damages for a wrong concededly committed.

And the court with regard to the issue, observed that, "it is New York, the place where the parties resided, where their guest- host relationship arose and where the trip began and was to end, rather than Ontario, the place of the fortuitous occurrence of the accident, which has the dominant contacts and the superior claim for application of its law."

The judgment appealed from should be reversed, with costs, and the motion to dismiss the complaint denied.

So the conclusion is that:

Lex Loci Delicti Commissi will be rejected and on its place Lex Loci Fori will be applied if apply Lex Loci Delicti Commissi would result into unjust and bringing the government's interests into jeopardy and provided also that such Lex Loci Delicti has no any interests and connection with the issues to be adjudicated.

Phillips v. Eyre, [1870] L. R. 6 Q. B (Exchequer Chambers) Willes J

Edward John Eyre had been the governor of Jamaica during the time of Morant Bay rebellion. He had ordered the arrest and murder of many citizens. At the end of his term as governor he passed an Act prohibiting any legal actions being taken against him for what he had done while governor.

When he returned to England several Jamaicans sued him in tort in the courts of England. Phillips was one of the persons who during that time was alleged to be assaulted and falsely imprisoned by the governor. When he was charged in Jamaica, the Parliament of Jamaica had already passed an Act of Indemnity whose effect was to exempt him from such a liability and this Act was valid according to the laws of Jamaica and so the acts of the governor could not be questioned there as they were justifiable there in Jamaica so they cannot be questioned in England.

HELD:

To be able to sue him (for it was impossible to sue him in Jamaica) two conditions must be shown to exist namely:

- a. That the alleged conduct must be of such a character that it would have been actionable if it had been committed in the local jurisdiction (England);
- b. The act must not have been justifiable by the law of the place where it was done. It must be justifiable under the Lex Loci actus (the law of the place where the act arose which action the court has to determine).

Since the Act passed could be justifiable in Jamaica and such a case was not allowed by the laws of Jamaica (the Act that was passed by Eyre) it was held that such a case cannot be maintained in England.

Conclusion:

When a tort has been committed on foreign soil, it cannot be brought on home soil unless it was actionable if it had occurred on home soil, and without legal justification at the place it occurred. (the case brought the double actionability rule which rule states that where a person who had suffered damage abroad and who wished to bring proceedings to recover compensation for that damage in the English courts he had to show that his claim was actionable both under English law (the *lex fori*) and under the law of the country where the injury had been sustained (*Lex Loci Delicti*).

Machado v. Fontes, [1897] 2 Q. B. 231

The plaintiff Machado sued the defendant Fontes in English Court for a pamphlet published in Brazil containing libelous materials against the plaintiff (him). Under the then law of Brazil, publication was not actionable by the law in civil proceedings, though, it was probably subject to criminal proceedings. It was obviously actionable as tort by English law. The main defense of the defendant was that the publication was not actionable by the law of Brazil (*lex loci delicti commissi*)

Rejecting this plea the court said that the two conditions laid down in **Phillips** case are fulfilled in as much as the first condition was fulfilled because the libel was of such a character that it would have been actionable if committed in England, and the second condition was fulfilled because it was not justified by the law of Brazil, since it was not an innocent act there but subject to criminal proceedings.

The Court of Appeal relaxed the rule to a certain extent by holding that it was sufficient if the act was wrongful in the country where it was committed, even though any damage would not have been actionable in civil proceedings there.

Boys v. Chaplin, [1969] 2 ALL ER 1085, Lord Wilberforce

The plaintiff, an Englishman stationed in Malta as a member of H. M Armed Forces, was thereby seriously injured in a road accident caused by the negligence of the defendant, another Englishman who was also a member of the Armed Forces and who was insured against liability by an English insurance company. The plaintiff brought suit in England to

recover for his injuries, and the question was whether the Maltese or the English measure of damages should be applied.

The Court applied English law because England was the state with an interest in the matter. The parties were both English and at the time of the action were both back in England. Also the defendant's liability insurer was an English company. Under the circumstances, it is difficult to see how any interest of Malta could be adversely affected by giving the plaintiff a higher measure of recovery than would be granted him by Maltese law.

This case overruled *Machado*'s case and declared that, in general, damage or head of damage had indeed to be actionable under the *lex loci delicti* as well as under English Law. Provided that, the claim passed this test, the foreign law then fell out of the picture and the defendant's liability for the damage is to be determined in accordance with English Law.

But the Lord went further to hold that in appropriate cases, a claim or head of claim could proceed even though it was not actionable under the *lex loci fori*. This last part was brought in because had the House of Lords failed so to do, that would have resulted into increased risk that the test would exclude certain claims which it would actually be just to admit. So in turn this means that in so far as justice demands in particular circumstances, an action could proceed in the courts of the forum on the basis of the *lex loci delicti*, even though the damage or head damage would not be actionable under the *lex fori* (*Red Sea Insurance Co Ltd v. Bouygues SA* [1995] 1 AC 190).

***Spiliada Maritime Corporation v. Cansulex Limited*, [1987] AC 460 House of Lords**

Lord Goff of Chieveley

"The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action—in which the case may be tried more suitably for the interests of all the parties and the ends of justice."

"The legal burden of proof is on the defendant, but the evidential burden will rest on the party who asserts the existence of a relevant factor."

"The burden is on the defendant to show both that England is not the natural or appropriate forum, and also that there is another available forum which is clearly or distinctly more appropriate than the English Forum."

"The court will look to see what factors there are which point to the direction of another forum, as being the forum with which the action has the most real and substantial connection—factors affecting convenience or expense (such as availability of witnesses), the law governing the transaction, and the places where the parties reside or carry on business."

“If at that stage the court concludes that there is no other available forum which is clearly more appropriate it will ordinarily refuse a stay;”

“If there is another forum which prima facie is clearly more appropriate the court will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should not be granted, and, in this inquiry the court will consider all the circumstances of the case. But the mere fact the plaintiff has a legitimate personal or juridical advantage in proceedings in England is not decisive; regard must be had to the interests of all the parties and the ends of justice.”

Rickshaw Investments Ltd and Another v. Nicolai Baron von Uexkull, [2007] 1 SLR 377

Rickshaw Investments Limited is in this case, the first appellant. Seabed Corporations GBR is in this case, the second appellant identified as “Another.” Nicolai Baron von Uexkull is the respondent and former employee of the appellants. The respondent is a resident of Singapore and does the business of the appellants from Singapore, even at the time of filing the case, he was based in Singapore. They appealed against the decision of the trial court (German Court) that their action against the respondent be stayed on the ground of *forum non conveniens*.

The respondent was employed as an employee of the second appellant orally. Later on the contract was written and signed by both parties. The employment agreement provided that the German laws and the German Courts shall exercise jurisdiction in case of conflicts. He was employed in order to do business of advertising Tang Cargo (a product of the second respondent) in Singapore and many other countries under agreement for payment.

Later on the second appellant shifted the business to the first appellant. The first appellant then, decided to terminate the work of the respondent the reason being that the respondent has been dealing with him deceitfully.

The first appellant said so because the respondent lied to him that the Tang Cargo was soon to be bought by a certain company (STB) at higher cost (\$48). In truth, that was not the case. In fact, the respondent negotiated the lower cost (\$32) and he told the STB to say that he never negotiated anything with them. The first appellant was unaware. The financial situation of the first appellant was bad so he decided to sell the Tang Cargo at \$48 but the STB said he will buy at \$32 and because the first appellant was in such a bad situation, he sold it at \$32. Later on the first appellant came to discover that it was the workings of respondent that has resulted into all these. He decided to terminate the employment of the respondent by the letter.

The respondent was dissatisfied and so he decided to file the case in Germany for the claim of his unpaid skipped salaries as well as to letter of termination to be declared null and void.

After some proceedings a certain amount was granted to the respondent. The first appellant decided to stay the case and open the case in Singapore where the respondent was based and sued him for the breach of his fiduciary and confidential duty to the appellants which breach were all done in Singapore.

The court went on to consider the suitable forum and so it deeply considered the principles laid down in the case of *Spiliada* by Lord Goff and went further to adopt them as its own. In so doing it considered many connecting factors such as the general connecting factors, the jurisdiction in which the tort occurred, the choice of law—whether the choice of law in the contract was exclusive, and if not, which law should be applied to the claims in tort and equity; and the effect of concurrent proceedings in Germany.

With regard to the choice of law in torts cases, the court ruled that the double actionability rule applies in the case at hand—the rule states that, “in order for a tort to be actionable in Singapore, the alleged wrong must be actionable not only under the *lex loci fori* but also under the law of the place where the wrong was in fact committed (*lex loci delicti*).

So the court ruled that it is Singapore which is the proper forum to hear the case and so it allowed the appeal with costs.

Harding v. Wealand, [2006] UKHL 32 Lord Hoffmann and Lord Rodger of Earlsherry,

Mr. Harding is a resident of England and he is the appellant in this case. Miss Wealand is a resident of Australia and she is the respondent in this case. The two formed a relationship while Mr. Harding went in Australia for an official activity. When he came back in England, Miss Wealand came to live with him. Later on they decided to go to Australia in order to introduce the appellant to Miss Wealand's parents. The accident in question happened when they were in Australia.

In 2002, while in New South Wales, Australia, the respondent, Miss Wealand was driving the car in which the appellant was a passenger. Miss Wealand lost her balance and the car overturned causing serious injuries to the appellant. When he returned to England, the appellant decided to sue for injury he has sustained against the respondent.

The court finding out that the law on assessment of damages is a procedural matter applied the English law and it went further to reason that even if the law was that of Australia, still English was the proper forum for the parties. The court even went further to say that the amount of damages for an injury actionable by the *lex causae* must be determined according to the *lex fori* as that is a procedural matter. In this lower court, it was the contention of the claimant the English law is the proper law to be applied as he will get more while the defendant (now respondent) claimed that the law of Australia was more applicable as that

would limit the damages to be awarded and that the assessment of damages is to be measured according to the laws of Australia where the accident took place.

The defendant appealed to the Court of Appeal which court ruled in favour of the defendant (the appellant at the Court of Appeal and the respondent in this case). The effect of this judgment was that the claimant gained little damages for the injury under the laws of Australia (Motor Accidents Compensation Act, 1999 or known as MACA) than he would get the English law [(Private International Law (Miscellaneous Provisions Act, 1955)]. Being dissatisfied the he appealed to the House of Lords which House restored the judgment of the trial court for the above-mentioned reasons.

Berezovsky & Gloukhov v. Michaels and Others, , [2000] 1 WLR 1004, these are consolidated appeals to the House of Lords; Lord Steyn

Berezovsky is the respondent to the House of Lords in this case. Glochkov is also respondent to the House of Lords. Mr. Michaels is the Editor of the Forbes Magazine who in this case is the appellant.

The two respondents are Russians by residence though they have connections in England and can speak English very well. Forbes is an international business organization based in United States with coverage in the entire World.

The two respondents were great political figures during the time of communism in Russia. At the time when Russia was in transformation from communism to market-oriented economy, the two respondents had been occupying some of the top positions in Russia.

Forbes wrote an article which described them as “Criminals of outrageous scale.” It went further to portray them as very criminal persons who cannot be tolerated. The appellant went further to provide other information which to a large extent destroyed their reputation.

The article published was read in Russia by 13 people, in United States of America and Canada by 748, 123 and in England and Wales by 566.

The plaintiffs (who are now the respondents) filed the case in England for tort of defamation against Forbes. The plaintiffs had the view that the Court had jurisdiction and a stay could be applied to recognize such jurisdiction. The appellant completely rejected that by saying that the proper jurisdiction was United States or Russia but not England where connections were lacking.

The trial Court under **Popplewell J** gave two judgments. The first one was that, “notwithstanding that an English tort was established, the English Court had jurisdiction to stay

the action on the principles laid down by the House of Lords in the case of **Spiliada**. In the second judgment, it was concluded that the connections of the plaintiffs with England was tenuous and held that Russia was the more appropriate forum to try the case and informed Forbes to submit to the Russia Courts.

The plaintiffs appealed to the Court of Appeal. At the appellate level, the respondents gave additional evidence showing how they were defamed in England which evidence was contested by the Forbes as inadmissible. However, the Court of Appeal considered such evidence and it allowed the appeal. **Hirst L. J** concluded that there was a substantial complaint about English torts in the case of both plaintiffs. Accordingly, there was jurisdiction to try the action in England and in all the circumstances England was the appropriate jurisdiction for the trial of the action.

The Appellant decided to appeal to the House of Lords where some of the contested issues were:

- a. Did the Court of Appeal err in admitting the plaintiffs' new evidence?
- b. Should the House of Lords grant a petition by Forbes to produce new evidence on the appeal to the House and, if so, should the House grant a counter-petition by the plaintiffs?
- c. Depending on the answers to the first two issues, what is objectively the realistic view on the Primary issue of fact, viz the plaintiffs' connections with England and reputation there?
- d. Did the Court of Appeal correctly apply the *Spiliada* test?
- e. Was the Court of Appeal entitled to interfere with the exercise by **Popplewell J** of his discretion?
- f. Even if the decision of the Court of Appeal in respect of Mr. Berezovsky's action was correct, what is the position with regard to Mr. Glouchkov?

With regard to issue (a), the House of Lords found in favour of the plaintiffs (the respondents in this case) the reason being that the law for such an admission was complied with and was given earlier.

With regard to issue (b), the House of Lords rejected the petition on the ground that the petition was too late and had malice against the plaintiffs.

With regard to issue (c), the House found out that the two had strong connections in England and most importantly is the first plaintiff, Mr. Berezovsky. The court reached this conclusion from the totality of the evidences presented.

With regard to issue (d), the Court found out that England was the most appropriate forum because: in Russia only few copies were distributed there so that only few people had that information and the ends of justice cannot be met there in measure of the injury in reputation which they suffered; that United States is also not a right forum because though many copies have been distributed there, the connections of the plaintiffs is minimal. The Court therefore, found out that England was the proper forum because these people had deep connections and their reputation was badly injured there.

With regard to issue (e), the House of Lords found out that the Court of Appeal had such powers to interfere because; the trial court judge misdirected himself in holding that the plaintiffs had not connection at all in England which connection exists.

With regard to issue (f), the Court found out that the argument by appellant that the cases of two plaintiffs are to be decided differently is not persuading because they were unable to advance such an argument in previous cases.

The Court dismissed the appeal and ruled in favour of the plaintiffs.

THE CHOICE OF LAW IN CONFLICTS RELATING TO MARRIAGES

Brook v. Brook, [1861] 9 HLC 193

William Leigh Brook, a resident of York, England, married in May 1840, at the parish church of Huddersfield, Charlotte Armitage. They had two children namely; Clara Jane Brook and James William Brook. In October 1847, Mrs. Brook Died.

On the 7th June 1850, William Leigh Brook took the sister of his deceased wife and went to Denmark where they were duly according to the laws of Denmark, married at the Lutheran church at Wandesbeck to Emily Armitage. At the time of marriage in Denmark, both of them were residents and domiciled in England. They had three children namely Charles Armitage Brook, Charlotte Amelia Brook and Sarah Helen Brook. On 17th September 1855, Mrs. Emily, the second wife of Mr. Brook, died in England of Cholera, and two days later Mr. Brook himself died of the same complaint in England leaving behind the five children surviving him. Mr. Brook went to marry in Denmark purposely in order to avoid the England law which law prohibits such a marriage.

Before he died, he wrote a will where he appointed his brother, Mr. Charles Brook and his two brothers-in-law, John and Edward Armitage, his executors and trustees.

Since there were some pending matters relating to the property of the deceased: there were pending purchase of land, Charles Armitage Brook died, it became necessary to open an

administration suit in which the Attorney General was joined as a necessary party as defendant and respondent.

Immediately before determining the administration suit, the question arose as to the validity of the marriage in Denmark between the widower and the sister of his deceased wife. Counsels said that the marriage was lawful for all the purposes and intents whatsoever.

This question rose in order to help to determine right of succession to real and personal estate of the deceased and the validity of the marriage was important as that would help to decide title by heirship. It was the argument of the appellant that the marriage in Denmark is valid as it was in Denmark that the Contract was concluded. It was the argument by the respondents that the marriage as celebrated in Denmark is a nullity in England even though it would have been valid in Denmark.

The Court of Chancery declared the marriage to be invalid under the laws of England. James William Brook (who is one of the children of William Leigh Brook) decided to appeal to the House of Lords against the decision of the Court which was in favour of Charles Brook (who is the brother of William Leigh Brook who was also appointed as an executor).

The House of Lords reiterated some of the fundamental principles relating to marriages in Private International Law as follows:

“It is a settled rule of international law that every contract must depend for its validity on the law of the country in which it is made (*lex loci contractus*). Marriage is a contract which falls within this rule (*lex loci celebrationis*). Being valid where it is made, its validity must be accepted throughout the world.

There are two exceptions to this general principle: First, where the contract is *Malum in Se*. Secondly where, though valid in the country where it was made, it is by express law prohibited in another country, and all the subjects of this latter country are forbidden anywhere and under any circumstances to enter into such a contract.” emphasis supplied

The court found out that this country falls under the second exception. The court found out that the marriage was invalid and for that purpose void in England by the laws of God and that was not expressly provided for in any statute in England as the only statute that provided for that principle—28 Hen. 8, c. 7 was already repealed when the marriage was celebrated. But such marriage is declared invalid under special provisions of 5 & 6 Will. 4, c. 54 as contrary to the law established by the special provisions of that statute.

The Attorney General advanced some propositions which propositions are known to apply in Private International Law and which were adopted in this case:

First, the *lex loci* determine the form of the contract; secondly, the capacity of the parties to the contract is determined by the *lex loci* of their domicile. Thirdly, that even supposing the contract to have been duly solemnized according to the law of the forum of its constitution,

and even supposing the parties to have the capacity to contract, yet, if there is anything in the contract which is prohibited by English law, or is at variance with the institutions and policy of the English law the contract cannot be accepted as valid in England court of justice.... Fourth, that by the Common and Statute of England all subjects, if within the prohibited degrees of affinity, are incapable of marriage, and a contract of marriage in disregard of that law is void.

The appeal was dismissed with costs. Note that this case cited the case of **Warrender v. Warrender** with approval. The case is explained here in bellow.

Warrender v. Warrender, (1835), 2 Cl. & Fin. 488

Sir George Warrender born and domiciled in Scotland married an Englishwoman in England according to the rites and ceremonies of the Church of England; but instead of changing his domicile he meant that his matrimonial residence should be in Scotland where he had large landed estates.

Having lived a short time in Scotland they separated. Sir George continuing domiciled in Scotland commenced a suit against her in the Court of Session for dissolution of the marriage on the ground of adultery alleged to have been committed by her on the continent of Europe.

It was objected that this being a marriage celebrated in England a country in which by the then existing law marriage was indissoluble the Scotch court had no jurisdiction to dissolve.

In holding so the House of Lords cases were relied upon in which an Englishman domiciled in England being married in England and while still domiciled in England having been divorced by decree of the Court of Session in Scotland and having afterwards married a second wife in England his first wife being still alive he was convicted of bigamy in England and held by all the judges to have been rightly convicted because the sentence of the Scotch court dissolving his first marriage was a nullity.

But your Lordships unanimously held that as Sir George Warrender at the time of his marriage was a domiciled Scotchman and Scotland was to be the conjugal residence of the married couple although the law of England where the marriage was celebrated regulated the ceremonials of entering into the contract the essentials of the contract were to be regulated by the law of Scotland in which the husband was domiciled and that although by the law of England marriage was indissoluble yet as by the law of Scotland the tie of marriage might be judicially dissolved 'or the adultery of the wife the suit was properly constituted and the Court of Session had authority to dissolve the marriage.

Auten v. Auten, 308 New York Reports 155, 124

Married in England in 1917, Mr. and Mrs. Auten continued to live there with their two children until 1931. In that year, according to plaintiff, defendant deserted her, came to this country and, in the following year, obtained a Mexican divorce and proceeded to "marry" another woman. Unable to come to terms with the ocean between them, plaintiff made a trip to New York City to see and talk to defendant about adjustment of their differences. The outcome was the separation agreement of June, 1933, upon which the present action is predicated. It obligated the husband to pay to a trustee, for the "account of" the wife, who was to return to England, the sum of 50 a month for the support of herself and the children. In addition, the agreement provided that the parties were to continue to live separate and apart, that neither should sue "in any action relating to their separation" and that the wife should will not open a case in any jurisdiction against her husband for the alleged divorce or remarriage in agreement.

Immediately after the agreement was signed, plaintiff returned to England, where she has since lived with her children, and it is alleged by her and but disputed by the defendant that the latter is also domiciled in that country. Be that as it may, defendant failed to live up to his agreement, making but a few payments under it, with the result that plaintiff was left more or less destitute in England with the children. About a year after the agreement had been executed, in August of 1934, plaintiff filed a petition for separation in an English court, charging defendant with adultery. The defendant was requested to pay alimony pendente lite but the action failed. She decided therefore to come and sue in New York for the recovery of the maintenance costs from the time when her husband stopped paying her.

The first court ruled in favour of the defendant husband that when the wife filed a case in England she breached the agreement and she thereby forsook all her rights to be reimbursed. The trial court went further to even say that it was the law of New York that was applicable (as claimed by the defendant husband) and not the law of England (as claimed by the plaintiff wife). The Court dismissed the case. The plaintiff appealed to the superior Court which also dismissed her appeal on similar grounds. She therefore decided to appeal to the Court of Appeals of New York which reversed the judgment of the two inferior courts by holding that the law applicable to the case is the law of England.

The Court of Appeal on reaching to that decision had these general principles in mind:

"All matters bearing upon the execution, the interpretation and the validity of contracts are determined by the law of the place where the contract is made", while "All matters connected with its performance are regulated by the law of the place where the contract, by its terms, is to be performed."

And that, "What constitutes a breach of the contract and what circumstances excuse a breach are considered matters of performance, governable, within this rule, by the law of the place of performance."

The court also cited and applied with approval the theory of "centre of gravity" or "grouping of contacts" to apply the laws of England.

Hyde v. Hyde and Woodmansee, [L. R.] 1 P. & D. 130, Lord Penzance

A marriage contracted in a country where polygamy is lawful, between a man and a woman who profess a faith which allows polygamy, is not a marriage as understood in Christendom; and although it is a valid marriage by the *lex loci*, and at the time when it was contracted both the man and the woman were single and competent to contract marriage, the English Matrimonial Court will not recognize it as a valid marriage in a suit instituted by one of the parties against the other for the purpose of enforcing matrimonial duties, or obtaining relief for a breach of matrimonial obligations.

The petitioner was an Englishman by birth, and in 1847, when he was about sixteen years of age, he joined a congregation of Mormons in London, and was soon afterwards ordained a priest of that faith. He made the acquaintance of the respondent, then Miss Hawkins, and her family, all of whom were Mormons, and they became engaged to each other. In 1850, Miss Hawkins and her mother went to the Salt Lake City, in the territory of Utah, in the United States; and in 1853 the petitioner, who had in the meantime been employed on a French mission, joined them at that place. The marriage took place at Salt Lake City in April, 1853, and it was celebrated by Brigham Young, the president of the Mormon Church, and the governor of the territory, according to the rites and ceremonies of the Mormons. They cohabited as man and wife at Salt Lake City until 1856, and had children. In 1856, the petitioner went on a mission to the Sandwich Islands, leaving the respondent in Utah.

On his arrival at the Sandwich Islands, he renounced the Mormon faith and preached against it. A sentence of excommunication was pronounced against him in Utah in December, 1856, and his wife was declared free to marry again. In 1857 a correspondence passed between the petitioner and his wife, who continued to live in Utah. In his letters he urged her to leave the Mormon territory, and abandon the Mormon faith, and to join him. In her letters she expressed the greatest affection for him, but refused to change her faith, or to follow him out of the Mormon territory. He did not return to Utah, and one of the witnesses was of opinion that he could not have done so after he had left the Mormon Church without danger to his life.

In 1857 he resumed his domicile in England, where he has ever since resided, and for several years he has been the minister of a dissenting chapel at Derby. In 1859 or 1860, the respondent contracted a marriage according to the Mormon form at Salt Lake City with the co-respondent, and she has since cohabited with him as his wife, and has had children by him.

At the time when the marriage between the petitioner and the respondent was celebrated, polygamy was a part of the Mormon doctrine, and was the common custom in Utah. The petitioner and the respondent were both single, and the petitioner had never taken a second wife. A counsellor of the Supreme Court of the United States proved that a marriage by Brigham Young in Utah, if valid in Utah, would be recognised as valid by the Supreme Court of the United States, provided that the parties were both unmarried at the time when it was contracted, and that they were both capable of contracting marriage. The Supreme Court, however, had no appellate jurisdiction over the courts of other States in matrimonial matters; and the matrimonial court of each State had exclusive jurisdiction within its own limits. Utah was a territory not within any State. There was a matrimonial court, having primary jurisdiction, in that territory, and the judge was nominated by the President of the United States, with the consent of the Senate. The judge was bound to recognize the laws which the people of Utah made for themselves, as long as they did not conflict with the laws of the United States. No evidence was given as to the law of that court respecting Mormon marriages.

The claimant brought this action in England for the dissolution of the marriage with his wife on the ground of adultery on his wife when she agreed to be married by another man and cohabited with him and had in fact children with him. It is to be noted that the plaintiff brought a case in England where polygamy is not recognized as marriage.

The court reiterated some of the fundamental principles of the law of marriage in Private International Law:

“A marriage between two persons competent to contract marriage, and valid by the law of the place where it was contracted, is valid in every country in the world.”

“It does not follow that because the consequences of a marriage in Utah and in England are different; the marriage in Utah is not to be recognized as valid in England. The validity of the marriage must be determined by the law of the place where it was contracted; the consequences of the marriage depend upon the law of the country where the parties reside, whether temporarily or permanently, after the marriage.”

“Marriage has been well said to be something more than a contract, either religious or civil – to be an Institution. It creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of “husband” and “wife” is a recognized one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite lights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage,

as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.”

The court found out that the case on polygamous marriage cannot be entertained in England and so it was dismissed.

Munro v. Munro, 1840 7 Cl 7 & Fin 842 HL

Mr. Munro inherited the estates of his father when he died, and in this case, he is the respondent. Miss Munro is the daughter of Mr. Munro and she is hereby an appellant to the House of Lords.

Mr. Munro is a Scotch by residence and domicile. He was living with his mother in Scotland when his father died. After sometime he quarreled with his mother and so he decided to come to England for the short visit. While in that short visit, he fell in love to a certain English lady and where they have a relationship of more than one year. Consequently, a child was born (the appellant). Mr. Munro decided to rent apartments where he stayed with his woman with the child for nearly a year. Later on while still in England he decided to marry her in the Church of England. He then lived with her for some months and then he took his family to Scotland and introduced his wife and his child to his relatives and connections.

After some years, his wife and another woman drowned and died as they were showering in a certain castle. The rumors spread about the legitimacy of the appellant as legitimate heiress of the estate. She decided to bring the case at the Court of Sessions in Scotland for the declaratory order that she was the legitimate child to succeed in inheritance in entailed estates. The respondent claimed that the child was illegitimate for all purposes under the laws of England. The appellant claims to be legitimate. The court ruled in favour of the respondent and held that the child is of England domicile and under the laws of England, she is illegitimate and so she cannot succeed in entailed estates of her father. She decided to further appeal to the House of Lords.

The case quoted the principle of Private International law relating to domicile from the case of **Somerville v. Somerville**, where it was held that the mere place of birth or death does not constitute the domicile, the domicile of origin, which arises from birth and connections, remaining until clearly abandoned and another taken.... The original domicile, or as it is called, the forum oriffinis, or domicile of origin, is to prevail until the party has not only acquired another, but has manifested and carried into execution and intention of abandoning his former domicile and taking another as his sole domicile.

In England, the domicile of a family follows that of the father; his domicile is that of his family. Absence from the place where the domicile of origin was acquired, however long, if not accompanied by such an intention, can have no effect. To acquire a new domicile, there must

be both residence and intention; to retain it, intention alone is sufficient. Upon all these considerations, the domicile of Mr. Munro was found to be in Scotland. This is because, long stay in any country, if there is no intention to change domicile, the domicile of origin still survives.

The court found out that the laws of Scotland allow subsequent marriage to legitimize children born before solemnization of such marriage. Since the man is domiciled in Scotland, it follows that even the marriage itself, though contracted in England, is still a Scottish marriage. Again in contracting marriage, the wife adopts the domicile of her husband by dependence. So in this case, the deceased wife had Scottish domicile.

So the appellant is entitled to be declared as the lawful heir of entail.

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

Ordinarily courts of law do not have extra territorial jurisdiction—courts in Tanzania cannot exercise jurisdiction beyond its borders. A decision of the court given in Tanzania cannot be enforced in another country unless there is an agreement to that effect.

Thus, one sovereign cannot extend its jurisdiction to another sovereign without the consent of that sovereign. The reasons for this situation include:

- a. There are different environments;
- b. The questions of different laws;
- c. The possibility of the two different verdicts; and
- d. Also, there is a question of expenses.

The question of recognition and enforcement of foreign judgment is not a new phenomenon. In the past, it was based on comity theory—once one state recognizes and enforces the judgments of another state, then, the judgments of the country which recognizes and enforces the judgment of another state, its judgment will also be enforced by that other state.

However, as time went on people thought comity theory was not sufficient because it was based on mercy of one another then; the thinking was that, once the judgment was given it becomes the obligations of all other jurisdictions (courts) to enforce the same (courtesy).

This thinking had some challenges such as:

- a. The issue of public policy;

For example, a question of same sex marriage. It is against the public policy in Tanzania. Then, the doctrine of obligation was watered down.

Then, they reverted to comity theory but which is modified in effect; read section 3-(1) of the Reciprocal Enforcement of Foreign Judgments Act which states that, “the president of this country may extend that courtesy of the country which is likely to render reciprocal treatment to the verdict of this country.”

The law under section 11 empowers the president to withdraw that privilege when he thinks that, the other country cannot render the same reciprocal treatment.

In practical terms there is no modification of comity theory in Tanzania—comity theory is applied as it is.

There are three factors which must exist for a foreign judgment to be enforced:

- a. The foreign court must have been competent;
- b. The judgment sought to be enforced must be final and conclusive;
- c. The judgment sought to be enforced must be of a fixed sum and not fine, penalty or tax.

The court in Tanzania can recognize and enforce a judgment of a foreign court provided that the court recognizes jurisdiction of that court in that matter.

A. JURISDICTION

A court must have been a competent court to determine that matter. Jurisdiction in international sense means that the court concerns mainly with the final results (judgment) of a foreign court unless that absence of abiding by the procedure of that court occasioned miscarriage of justice.

Pemberton v. Hughes, [1899] 1 Ch. 781,

One of the factors or basis to reach a particular verdict by a foreign country is the residence or presence of the defendant in the foreign country at the time of the suit. The law stipulates that for a foreign country to have jurisdiction over a person, he must be a resident of that country at the time of the suit.

EXCEPTION

In some few or rare cases a mere presence of a person in a foreign country can be taken into account.

The laws in Tanzania need the condition of a residence and not that of a mere presence.

SUBMISSIONS TO THE JURISDICTION OF THE FOREIGN COURT

The foreign court will have jurisdiction if the defendant has submitted himself to the jurisdiction of that court.

This can be done by agreement—inserting a phrase in a contract to that effect. Also, when one sues or is sued in a foreign country, a verdict in these circumstances can be enforced in our country.

THE JUDGMENT MUST BE FINAL AND CONCLUSIVE

A final and conclusive judgment is the one which has been decided on merits and if there are other rights arising from it, must have expired.

THE DOCTRINE OF RENVOI

To understand Renvoi, take this simple example:

Nicksoni Filbert, a Tanzanian citizen dies in America leaving movable property in Tanzania. At the time of his death, Nicksoni was domiciled in America according to the law of Tanzania but not according to the law of America. The law of Tanzania directs the distribution of movables in accordance with the law of the domicile of the deceased. American law directs such distribution according to the law of the nationality of the deceased (which is the law of Tanzania). The Tanzanian court is seized with the case.

This scenario at least, involves two scenarios:

- a. The rule of conflict of laws which determines as a preliminary matter the choice of law by which distribution should be effected. This is called the conflicts rule.
- b. The municipal or internal rules of law directing the actual distribution of the property. This is called, the Internal Law.

We have there possible solutions here:

- I. The judge may decide that the Tanzania conflicts rule refers him solely to American Internal Law;
- II. The judge may decide that the Tanzania conflicts rule refers him to the American conflicts rule which, in turn, refers him solely to the Tanzania Internal Law; this is the doctrine of renvoi in its usual form;

- III. Lastly, the judge may decide that the Tanzanian conflicts rule refers him solely to the American conflicts rule which, in turn, refers him solely to the Tanzanian conflicts rule. This results in into a *circulus inextricabilis* since it indicates an infinite number of cross references.

Renvoi is a French word which means referring back or making a reference back. It means making or referring back to the foreign law of another jurisdiction. In the jurisprudence of Private International Law, renvoi is called a necessary evil as the law of the forum is confronted with a difficult situation which in order to resolve, foreign law is to be consulted. And this has always been the case in succession matters as shown above.

The law of the forum of Tanzania therefore, can say that succession to the property of the deceased is governed by the law of the domicile of the deceased. The deceased is a Tanzanian who died domiciled in Italy.

What will the courts in Tanzania do? It is indeed a necessary evil. A judge has been trained according to the law of Tanzania but he is required to consult the law of another forum for which he has not been trained for. He has to import the Italian law of succession to Tanzania. What if Italian law uses a different connecting factor than that used by Tanzania? The Renvoi comes in again. That is the Italian law can say that succession to moveables is governed by the law of the nationality of the deceased.

Here Tanzania uses domicile as a connecting factor and Italy uses the law of nationality as a connecting factor.

SETTING THE PROCEDURAL GROUNDS

1. The court (the domestic forum) in dealing with matters relating to renvoi, it must ensure that it has jurisdiction to entertain the case. The jurisdiction must be in reference to the subject matter of the litigation; this is regulated by the law of the forum or the local law or internal law is it is called;
2. Assuming that the court has jurisdiction; if it appears that the factual situation includes a place element or any connecting factor, a question of choice of law arises. The court has to decide whether to apply the domestic law of the forum or to apply the foreign law of another forum;
3. The court has to select the appropriate place element or connecting factor which in turn will help the said court in determining which law it has to apply. This is called selection of the connecting factor and it is the selected factor which ultimately decides the law to be applied. This means that without a connecting factor, there is no law to

apply to the factual situation. This means that characterization of the connecting factor is the condition precedent to the proper choice of law to apply;

4. Logically, the selection of the connecting factor and consequently, the selection of the proper law to apply must be preceded by characterization of the proper cause of action for which the law selected will be applied. These causes of action can be family issues, tort or contract. Procedure number 4 includes three stages namely:
 - a. Characterization of the legal question or cause of action. The court should characterize or define the juridical nature of the legal question upon which adjudication or decision is required. Here is where the court has to know whether the matter is succession, tort, contract or marriage. This is important because rule of conflict of laws are usually expressed in terms of legal concepts combined with place elements (connecting factors). For example, formalities to the contract are governed by the law of the place where the contract is concluded. So, this must be determined earlier before selection of the proper law to be applied.
 - b. Selection of the connecting factor whether it be succession, tort, contract or marriage.
 - c. Application of the proper law. In doing so the court has to apply either the domestic conflict of law rules of the forum which for the purpose of renvoi does not mean local law of Tanzania or the rules similar to or identical to the domestic rules of a given country in the factual situation as it exists. Consequently it can be that the local law of the forum is applied or the internal law of a foreign jurisdiction is applied.

THE PROBLEM OF RENVOI STATED

Once it has been decided that the court has jurisdiction and how the issue before it is to be characterized in terms of conflict of law and what choice of law rules are applicable, nothing remains for the judge but to apply the chosen law.

Thus where a person is domiciled in Tanzania dies interstate leaving movables in Tanzania, the rules of distribution contained in the domestic conflict of law rules of the forum—in this case Probate and Administration of the Estates Act will apply.

However, if the conflicts of law rules refer to the law of the foreign country, the complications of the doctrine of renvoi comes in.

The conflict may arise where two systems of conflict of law rules apply different connecting factors.

The problem that we are confronted with in the cases of examples we gave is that, what is exactly meant by foreign law for which renvoi refers to? What is the scope of the foreign law which the judge of the forum is requested to refer to? Is it national law of a foreign country enacted by the parliament which is analogous to the local law of the forum in the distribution of property? Or does it mean the whole of law substantive as well as procedural law—meaning conflict of law rules as used and recognized in Italy? This is the exact problem of renvoi.

If the foreign law is understood in the second sense—the conflict rules of law of Italy, further difficulties arise—the difficulty is caused by the difference between Tanzanian and Italian conflict of law rules since on referring to Italian Conflict of Law Rules the court of the forum finds itself referred to back to the Tanzanian law; that is why there is a problem.

That being so, the court of the forum is faced with a dilemma—whether to IGNORE the divergent Italian conflict of law rules which refers back to Tanzanian law or to accept the reference back. If the court accepts the reference back, is the judge stopping finally at that point? And therefore, to distribute the property according to Tanzanian law; this concludes the statement of the problem of renvoi

POSSIBLE SOLUTIONS

These solutions have been devised by the Courts as well as distinguished writers. Three possible solutions have been suggested to this dilemma.

- a. To IGNORE conflict of law rules of the foreign country.

In practice it means that you only take the substantive laws of the foreign country and you reject the conflict of law rules as these will refer you back to your jurisdiction. The back stops at foreign substantive or internal law which is applied by the court of the forum.

The justification for this approach is from a certain writer who says, “If England chooses the law of the place of domicile and wants to apply it to a certain relationship, does she mean the ORDINARY LAW of ordinary people, his friends and neighbours in that domicile or does she include that country’s rules for the choice of law? Common sense would answer that the last alternative is absurd otiose: a rule for the choice of an appropriate law has already been applied namely our own. To proceed to adopt a foreign rule is to decide the same question twice over.” Polarized law, by Bart.

Hamilton v. Dallas, [1875] 1 Ch. D 257

b. single or first degree renvoi

The court of the forum is required to apply the doctrine of the single renvoi whose effect is that if a judge in Tanzania is referred by his own conflict of law rules to the law of Italy but the choice of law rules in Italy refers such a case to the conflict of law rules of Tanzania, then there is a renvoi to Tanzanian law (that is called a remission—referring back to the conflict of laws of Tanzania). If renvoi is to the third country, it is called transmission.

Then, under the doctrine of single renvoi the judge in Tanzania, must apply the internal or substantive law of Tanzania—if it is the case of succession to movables then, Probate and Administration of Estates Act would apply. It is a reverse scenario to the first solution. In short; this doctrine of single renvoi demands that a reference to the law of the country (foreign law) shall mean reference to the whole of its law excluding its conflict of law or private international law rules.

In the first solution, Italian conflicts of law rules have been ignored completely as if it does not exist. In the second solution, the conflict of law rules of Italy have been allowed not to give a direct solution to the problem of succession but to indicate what legal system shall furnish the final solution—namely succession provision of Tanzanian law.

This still brings us to the substantive law of another jurisdiction. It is a simplistic solution to a big problem.

The idea behind the second solution is to avoid the problem of infinite regression where one system of law is constantly referring to another system of law in attempting to determine which law applies to the scenario. In the second solution, Italian law is an indicative of which law is to be applied—which is the law of Tanzania.

Forge, [183] 10 Clunet 63

Forgo was a Bavarian national. At the age of 5 and he went to live in France where he died interstate. He left all his movables in France.

The question before the forum (French court) was whether his movables in France should be distributed according to the internal law of France or that of Bavaria.

Collateral relatives were entitled to inherit such movables according to the law of Bavaria. But according to the law of France, they cannot; rather the property passed to the French government to the exclusion of collaterals.

French Private International Law (conflict of law rules) referred the matter of succession to be governed according to the law of Bavaria. Bavarian Private International Law referred back

to French Law. The Court in France accepted the remission and applied the succession provisions of French Law.

c. Double Renvoi or total Renvoi:

This approach has also been called foreign court theory. It demands that a Tanzanian judge who is referred to by his own law (conflict of law rules of Tanzania) to the legal system of the foreign country must apply whatever law a court in that forum would apply if it were hearing the case. There is no need to refer to the conflict of law rules of this foreign jurisdiction because the local jurisdiction acts as the foreign jurisdiction. This particular doctrine has support in many jurisdictions and by jurists.

There are possible objections to this theory. How can a judge trained in another jurisdiction use the law of another jurisdiction and decide the case? This is the main objection of this case. Here the judge surrenders his conflict of law rules of his own jurisdiction in favour of the total law of another jurisdiction.

It obliges the judge of the forum to ascertain a fact that a foreign judge would decide upon as well as the law. Sometimes you need an expert to testify that this is a foreign law to be applied in such a case.

Thomas stated that, public policy is whatever the government chooses to do or not to do. Public policy is based on morality.

Major cases in Renvoi

- a. Forgo's case (1882)
- b. Soulle's case (1910)
- c. Ross's Case
- d. Loucks v. Standard Oil Co
- e. Re Annesly (1926)
- f. Re Astew (1930)

CONFLICT OF LAWS IN TRUST AND SUCCESSION

Trust is legally defined under the Hague Convention on the Law Applicable to and on the Recognition of Trusts, 1986.

Being the Convention that "specifies the law applicable to trusts and governs their recognition" as provided for under article 1, article 2 defines a trust when it says that,

“For the purposes of this Convention, the term trust refers to the legal relationships created- inter vivos or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

A trust has the following characteristics –

- a) The assets constitute a separate fund and are not a part of the trustee’s own estate;
- b) Title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustees;
- c) The trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as beneficiary, are not necessarily inconsistent with the existence of a trust.”

The real parties to the trust are the settlor and the trustee. The beneficiaries are normally not parties to the contract or agreement. A trust may not necessary be for the benefit of anyone. It can just be for a certain specified purpose other than for the beneficiaries.

The law of the trust comes into play when a person dies testate.

The trust is created by:

- a. Personal acts or deed of trust; we have in mind acts of the settlor and the trustee through a deed of trust or a trust deed as it is called. It is a kind of a contract.
- b. A trust created by a will;
- c. Through a court order; or
- d. By operation of the law

CHOICE OF LAW WITH REGARD TO TRUSTS

It depends on several scenarios

- a. Where there is a trust created by a trust deed

The choice of law will depend on the choice of the settlor. The trust shall be governed by the law chosen by the settlor. Article 6 provides that, “A trust shall be governed by the law chosen by the settlor. The choice must be express or be implied in the terms of the instrument creating

or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case.”

In practice, when you are instructed to draw a trust deed, you have to ask which law is applicable to the deed. This position is the same as in the common law as in Convention we have just cited. The common law says that when there is a trust deed, the applicable law is that law taken by the settlor under the trust deed.

Under the Hague Convention, in order to be effective, the settlor's choice of law must be the **substantive law** of the jurisdiction chosen and this choice cannot include the foreign jurisdiction's private international law rules or conflict of law rules. In fact article 17 provides that, “In the Convention the word law means the rules of law in force in a State other than its rules of conflict of laws.”

This Convention says so because unless that is done, the problems of renvoi will be brought again.

b. Absence of settlor's choice

Is a situation where a trust may be silent as to applicable law or the trust may have been created without a trust deed or may be by a will. A trust can be implied by the court in equity in the absence of a will or a trust deed. Here there is no choice of law.

The Convention says under article 7 that, “Where no applicable law has been chosen, a trust shall be governed by the law with which the trust is most closely connected.

In ascertaining the law with which a trust is most closely connected reference shall be made in particular to –

- a) The place of administration of the trust designated by the settlor;
- b) The situs of the assets of the trust;
- c) The place of residence or business of the trustee;
- d) The objects of the trust and the places where they are to be fulfilled.”

SCOPE OF THE APPLICABLE LAW

This is discussed while having in mind both scenarios mentioned above. So what shall be the scope of the law or what exactly shall a chosen law govern?

Article 8 provides that the law so selected shall govern:

- a. The validity of the trust; the law governing the creation of trust is to be consulted which law governs the creation of trusts.
- b. Construction of the trust; the question can be who are the beneficiaries under the trust if the previous beneficiaries have and successors want to inherit.
- c. Effect of the trust; it must be known what amount of property was intended for the beneficiary.
- d. Administration of the trust; the issue could arise with respect to the manner in which the trust could be administered by the trustees.

The same law chosen governs all these issues.

This law governs across the board regardless of whether the trust governs the movable or immovable property. This is important because in trust it is not the law of the place where the property is situated which governs the law, it is the law chosen by the settlor. This is a departure from the general rule that the immovable property is governed by the law of the place of property (lex situs).

CONFLICT OF LAWS IN SUCCESSION

We define succession narrowly to exclude administration. Administration concerns the **appointment** or **authorization** of a legal personal representative and **management** and **distribution** by an executor or administrator or trustee of the property of the deceased person among the beneficiaries. This is what administration entails.

On the other hand, for the purpose of the present lesson, succession concerns itself with questions of rights of beneficiaries and successors on the death of a property owner. It is the ascertainment of the persons entitled as successors to the estate. It deals with a question of who is entitled and to what proportion? This is the concern of our study.

As regards succession, the selection of the proper law is based upon the distinction between immovable (land) or interests in land on the one hand and movables or interests movables on the other hand. This is important because in matters of succession, different rules apply with regard to movable and immovable properties.

INTESTATE SUCCESSION

MOVABLE PROPERTY IN INTESTATE SUCCESSION

What is the law that governs movable property in matters of succession? It is important to establish whether he died testate or intestate.

Movable property in the case of intestacy is to be distributed according to the law of the domicile of the intestate at the time of his death. It is in accordance with the principle that movables follow the person.

If a person whose domicile is in England and he dies in Tanzania leaving movable property in Tanzania, then English law shall apply as to the distribution of property.

The questions to be determined by the law of the domicile are as follows:

- a. Class of persons to inherit;
- b. The relative proportions to which the distributees are entitled;
- c. Rights of surviving spouses and all analogous questions.

What is important is not exactly these questions but rather the matter is what is the law governing the case at hand.

If a person dies intestate and does not leave a next of kin or a would be heir or heiress, leaving movables abroad, the principle is that the state or the crown takes the movable as bona vacantia. It is like it is no one's property.

IMMOVABLES IN INTESTATE SUCCESSION

As far as land is concerned, the selection of the proper law depends on the nature of thing itself in its actual state and not on the nature of the interest. If for example, the thing is land, the interest of the free holder, lease holder, mortgagee, mortgagor, vendor, purchaser or beneficiary under a trust or occupier is an interest in land and the property law is the law of the situs of the thing itself and not an interest in it.

Where the owner of the land dies, the order of distribution is governed by the law of the situs no matter what the law of the domicile of the intestate might have been.

TESTATE SUCCESSION

WILLS OF IMMOVABLES

The law governing is the law of the place where the land is situated. And so the principle is the same.

There are several international conventions on matters of wills which have to a large extent changed the position of the common law substantially. They include:

- a. The Washington Convention on International Wills, 1973;
- b. The Hague Convention on Conflict of Law Rules Relating to the Form of Testamentary Dispositions, 1961;
- c. The Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons, 1989;

The first two Conventions deal with will and the last Convention deals with trusts. They are all important on the way they modify the common law rules in the choice of law.

INTERNATIONAL ASPECTS CONVENTIONS ON WILLS

a. The Washington Convention on International Wills, 1973;

It deals with movables only as opposed to immovable. The essential provision of this convention is that a will will be formally valid in all contracting states if it complies with formalities laid down in the Convention irrespective of where a will was made or executed, irrespective of the location of the assets and irrespective of the nationality of the testator or the domicile or residence of the testator.

Formalities of a will include:

- a. A will must be in writing;
- b. A will must be signed or somehow acknowledged by the testator in the presence of two witnesses;
- c. It must be authenticated by an authorized person—commissioner for Oaths;

b. The Hague Convention on Conflict of Law Rules Relating to the Form of Testamentary Dispositions, 1961

Convention applies to both movables and immovables. A will is treated as properly made if it conforms to the internal law of:

- i. The country where the will was executed;

- ii. The country where the testator was domiciled or had his or her **habitual residence**¹
- iii. The state or country for which a testator was a national—lex patriae;
- iv. As far as immovable property is concerned, the country where the property is situated.

The gist of the Convention is that it increases the relevant connecting factor by adding nationality and habitual residence to those factors already recognized by the common law namely domicile and the place of execution. It expands the scope of the validity of the will

c. The Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons, 1989,

It governs succession to both movable and immovable property. According to this Convention, succession is governed by the following laws:

- a. The law of the country where the deceased was habitually resident provided that he was a national of that country;²
- b. The law of the place where the deceased has been resident for at least 5 years prior to death unless the deceased was manifestly more closely connected with the place in which he was a national;
- c. In other cases, the law of the deceased nationality unless he was most closely connected with another place. It is a question of presumption. Nationality applies unless another jurisdiction was closer.

The applicable law whether of habitual residence or nationality, applies to determine the following:

- a. Who is the heir or heirs of the deceased when they are disqualified to inherit;
- b. What proportion of the assets of the deceased are disposable; and
- c. The material or essential validity of the will.

The Convention is important in two respects:

- i. The definition of the applicable internal law means rules of law other than the conflict of law rules; so the definition avoids possible application of renvoi;

¹ As a new connecting factor. What makes something habitual residence is a matter of fact

² Two connecting factors are combined together—nationality and habitual residence.

- ii. It dispenses or does away with the distinction between moveable and immovable; it creates a unified system of succession applicable to all property.

The three conventions have not been domesticated in Tanzania. The emerging trend is that:

- i. There is a moving from a single factor approach to a multiple factor approach and so these are good Conventions