The Nature and Scope of the Conflict of Laws

Aim:
To provide an overview of the nature and scope of the Conflict of Laws.

Objectives:
After carefully studying the following notes, and other prescribed readings for this lecture, you will be able to:

1. Explain how an English court may acquire jurisdiction in a Conflict of Laws case;
2. Explain the stages in the choice of law process and outline what is meant by categorization; characterization (or classification); substance and procedure; an incidental question; a connecting factor; and renvoi;
3. Provide an outline account of the process by which the recognition and enforcement of foreign judgments is made.

Introduction

The Conflict of Laws is an integral part of English private law in which, by definition, the subject matter always contains a *'foreign element.*' In a simple example, the foreign element differs from (i.e., '*conflicts*' with) the English rule on the same point. Resolution of the problem - i.e., resolution of the conflict - is by way of determining the courts of which country have jurisdiction to hear the case and which system of law they would apply. The following examples illustrate the distinction between uncomplicated, domestic cases and those requiring further analysis because of the inclusion of the foreign element.

Examples

George, an autonomous individual who has always lived in England, contracts in London with Arthur, another autonomous individual who, also, has always lived in England, for the purchase of Arthur's vintage car. If, subsequently, Arthur should breach the terms of the contract, then it would appear to be a relatively straightforward matter for an English court to deal with if litigation should ensue: the parties to the contract are English, the place of contracting is England and so, in the absence of evidence to the contrary, the contract will be governed by English law. There is no *'foreign element'* in that there is no connection with a legal system other than the English Legal System.

Application of essentially the same legal points to natural persons in another country might illustrate that Stefan, who has the capacity to make a binding contract and who has always lived in Sweden, has contracted, in Stockholm, with Anders, for the purchase of Anders' vintage car. Anders has the capacity to make a binding contract and he has always lived in Sweden. If, subsequently, Anders should renege on the contract, it would appear to be a relatively straightforward matter for a Swedish court to deal with if litigation should ensue. For a Swedish court there is no *'foreign element'* in this case: it is purely a matter for Swedish domestic law.

However, if George, the Englishman, should contract with Anders, the Swede, in (say) New York, USA, for the purchase of Anders' vintage car, it is not immediately obvious as to which legal system will have jurisdiction to hear a claim which may result from an action for an alleged breach of contract. But irrespective of where the dispute is heard, the courts in that particular ***country***, or ***law district***, will have to decide a case which contains a foreign element.

If George was to initiate an action in England it would be for the court to determine, first of all, whether it has ***jurisdiction*** to hear the case. Even if the answer is yes, it might not be appropriate for resolution of this problem for English law to be applied. Consequently, it is a function of the court in a Conflict of Laws case to determine not only the question of *Jurisdiction* but also what *system or* ***choice of law*** to apply. If the deemed choice of law is other than English law, New York law, for example, then its relevant provisions have to be proved in the same manner as other evidence, i.e. as a matter of fact. Thus, the plaintiff who aims to rely on the foreign law will try to prove it by relying on an *expert witness* to testify as to the law of the country in question. If, for some reason, the plaintiff does not discharge his burden of proof, then an English court will presume that English law is to be applied.

Furthermore, had George succeeded in having judgment made in his favour in an action for breach of a contract unrelated to the one noted above, and which was brought before a court in a different country (New Zealand, for example), but then finds that the defendant and all his assets have arrived in England without the judgment

having been satisfied, then George, no doubt, will hope that he can pursue the matter through an English court, not by having to prove his case again, but by persuading the court to ***recognise and enforce the foreign judgment***.

Essential Elements of the Conflict of Laws as Developed from the Examples

The foregoing examples are merely indications that matters relating to ***Jurisdiction*** and ***Choice of Law***, in cases involving a foreign element, and ***the Recognition and Enforcement of Foreign Judgments*** form the basis of, or the essential elements of, the Conflict of Laws. Moreover, the determination of jurisdiction and the choice of law are as important for arbitration matters as for any other 'conventional' litigation issues in the Conflict of Laws

Summary of the Nature of the Conflict of Laws

The Conflict of Laws is part of the *private law* of a country dealing with a foreign element. It is a function of the court to apply rules to the facts before it in order to select the ***appropriate legal system*** (jurisdiction) under which the problem may be resolved. In this respect it is unique: all other legal subjects apply rules to facts in order to resolve problems. In contrast, in the Conflict of Laws, resolution of the problem in question is possible only after selection of the appropriate legal system, i.e. once it has been established that a court has the jurisdiction to hear and decide a case, the next step is to determine the appropriate choice of law.

Whereas the Conflict of Laws is as much a part of English Law as is (say) Labour Law, Contract, Tort or Family Law, it differs from other English legal subjects in that:

1. its subject matter always includes a foreign element;
2. one of its prime objectives is the pursuit and application of the appropriate legal system; and
3. jurists have been more influential in this branch of the law than is typical with other legal subjects.

Since the subject *is part of English Law,* then the application of foreign law (if deemed appropriate by the court) is ***not*** a derogation of sovereignty. Given that ***Austin*** had said that law was a 'command of a Sovereign backed by a sanction', this statement might imply that if foreign law is applied by an English court then the foreign law has a position of relative supremacy over English law and that is why it prevails. However, the application of foreign law is made under the authority of *English law* and it is applied by the courts in the interests of justice for all the parties concerned. If, in any way, the application of foreign law would be offensive to English public policy, however, then the general rule is that the courts would not enforce it: English law would be substituted instead.[1]

An Outline of the Elements of the Conflict of Laws

1. Jurisdiction

In the English Conflict of Laws the principal concern relating to jurisdiction is that of jurisdiction *in personam*, i.e. jurisdiction over a particular person (natural or legal) as opposed to jurisdiction *in rem* which involves a particular thing - such as a ship in an Admiralty action in rem.

The basic common law rule is that a court may only exercise its jurisdiction *in personam* if the defendant personally has been served with a writ of summons in England or Wales. It is ***not*** a prerequisite that the matter being litigated has a connection with the English legal system nor is it necessary for the defendant to be in England for a specified minimum period before a writ may be served. Thus, in ***Maharanee of Baroda v. Wildenstein*** [1972] 2 QB 283, the defendant, who was resident in France, was served with a writ when he was in England merely for a day at Ascot racecourse. That was held to be sufficient to give the English High Court jurisdiction.

A defect of the common law, however, was that if the defendant was not present in England, or if he had neither expressly or impliedly submitted (i.e. agreed) to the jurisdiction of the English court, then the court did not have jurisdiction over him. To remedy this defect, the ***Common Law Procedure Act 1852*** was enacted. This introduced the principle of an 'assumed' or 'extended' or 'exorbitant' jurisdiction, i.e. this gave the court *a discretionary power* to summon before it defendants (irrespective of nationality) who were not domiciled or resident or present in England, by having them served with the writ or notice of the writ.

1 **N.B.:** That ***EC Law*** prevails over conflicting English law on the same point is a matter that has been decided by the ***Court of Justice of the European Communities (ECJ)*** in 1964 in ***Case 6/64, Costa v. ENEL*** and affirmed in the ***Factortame*** case in which an English Act of Parliament breached the 'non-discrimination' and 'rights of establishment' provisions of the Treaty of Rome (as amended) - an international Treaty to which the UK had voluntary acceded and to which it had voluntarily ceded its sovereignty over specific issues. See the ***ECA 1972*** and the notes on EC Law

The present rules relating to the serving of a writ on a defendant, who is not present in England nor domiciled in another EC Member State, are contained in the ***Rules of the Supreme Court Order 11. r.1(1) (RSC Ord.11)***. The discretion to serve a writ outside England will not be exercised, however, unless the court believes that England is the appropriate forum in which the dispute should be resolved i.e. England must be regarded as the ***forum conveniens***. A significant feature of an English court having jurisdiction over a case is that in many instances, e.g. in proceedings for separation, divorce, maintenance of wives and children, it will apply English domestic law. Conversely, as the late ***Dr. Morris*** notes,

There are many situations in which, if a foreign court has jurisdiction according to English rules of the conflict of laws, its judgment or decree will be recognised or enforced in England, regardless of the grounds on which it was based or the choice of law rule which it applied.[2]

When a defendant is domiciled within a Member State of the EC, the general rule is that he shall be sued in the courts of the country of his domicile: ***Art.2*** of the ***1968 Brussels Convention.*** However, there are notable exceptions to this as provided for in ***Arts.5; 16*** and ***17*** of the Brussels Convention.[3]

2. Choice of Law Rules

North & Fawcett[4] point out that: 'If the English court decides that it possesses jurisdiction, then a further question, as to the choice of law, must be considered; i.e. which system of law, English or foreign, must govern the case?' The general rule is that, whatever the case relates to - for example, contract, tort or property - the answer to this question can be expressed in the same straightforward manner. This is illustrated by the evolution of common law rules which include, *inter alia*:

1. Succession to immovables [a category of property which, essentially, corresponds with the English notion of ***'real property'*** or '***land***', is governed by the ***lex situs*** [i.e. law of the place where the land is situated (situs)].
2. Succession to movable property ['personalty'] is governed by the law of the last domicile of the deceased: ***lex ultimi domicilii.***
3. The formal validity of a marriage is governed by the law of the place of celebration: the *lex loci celebrationis*.

Clearly, each rule consists of two parts: (i) a category such as succession to immovables or movables; or the formal validity of a marriage; which is governed by: (ii) a factor, known as a connecting factor, since it connects, or links, the category with what is deemed to be the applicable law. Thus, ***the basic analysis of choice of law rules reduces to***: (1): a ***'category'*** is *governed by* (2): a ***'connecting factor.'***

The ***category*** determines what type of case is to be resolved and the ***connecting factor*** indicates the appropriate legal system that is applicable. The connecting factor can only be *indicative* and not determinative of the applicable law since, for example, reasons of public policy may exist for excluding the application of foreign law. When the connecting factor links the category with the law of the Country (or *forum)* in which the Court decides the dispute, the applicable law (especially the English procedural law in the English Conflict of Law rules) is referred to as the *lex fori.* The *substantive law* that is applied (may be English law or a foreign law) is usually described as the *lex causae.*

In practice, however, an attempt to compartmentalise the choice of law rules into two 'clear cut' components is often met with difficulties and further analysis is required before the applicable law can be determined. This analysis may introduce considerations of: characterisation; an incidental question; the time factor; questions of substance and/or procedure; and renvoi.

Characterisation.

Whereas it has been decided that succession to the movables of an intestate is governed by the law of his domicile at the time of his death, (his *lex ultimi domicilii)* it is not at all obvious that, say, a widow who makes a claim against her intestate husband's estate is seeking ***'succession to the movables of an intestate'***. For example, as Scots law entitles a widow to a portion of her husband's estate, then it may be that the correct category of

2 **NB.:** Note the qualification 'many situations'. As previously noted, on p2 supra, if the enforcement of a foreign judgement would be contrary to English public policy then the English court will apply the appropriate rule of English law instead

3 N.B. 1. The '***Brussels Convention***' is a Convention which has resulted from agreements that Member States were required to enter into under ***Art.293EC (***'*old' Art.220***)***; and 2. Jurisdiction in personam is dealt with in detail in Lecture 2.

4 ***Cheshire & North's*** *Private International Law*, 12/e, 1992

claim involves the 'proprietary consequence of the marriage' and that it is not a matter of succession at all. If this is the case, then it is governed by the husband's domicile at the time of the marriage. Suppose, then, that H was domiciled in Scotland at the time of his marriage but that he died domiciled in France. If :-

(i), W's claim is categorised as intestate succession, the French law applies. However, if

(ii), her claim is categorised as a proprietary cause of marriage, then Scots law will apply.

Consequently, there has to be a process under which the correct category is determinable. There is such a process and it is known as *characterisation* (sometimes known as classification).[5]

The Incidental Question.

Pierre, a testator who was domiciled in France, granted movables in England to Claudia, his 'wife'. Now if the legal category is *succession to movables* then it is governed by *the last domicile of the deceased - the lex ultimi domicilii* - so French law applies. However, a subsidiary or *incidental question* may arise: this relates to the validity of Pierre's marriage and it may be dependent on the validity of a previous divorce. In such a case it has to be decided whether this incidental question, of whether Claudia is Pierre's wife, is to be referred to the English or French rules of the conflict of laws which relate to the validity of marriages and recognition of divorces. It would appear from what limited authority there is that the incidental question is *usually* determined by the conflict rule of the law governing the main issue.

The Time Factor.

The time factor refers to the problem to be addressed when changes in the law over time give rise to a change in any of the factors affecting the choice of law process, viz;:

1. the conflict rule of the forum; or
2. the connecting factor; or
3. the lex causae.

Morris said: "*Changes in the* lex causae *present much the most important and difficult problem of time in the conflict of laws, especially when the change purports to have retrospective effect*".

Yet, in principle, the position is straightforward: the *lex causae* <u>*as amended*</u> should apply. The reasoning behind this principle being that that is the law which would be applicable in an entirely domestic situation and, if the pursuit of uniformity in decision making is a goal of the Conflict of Laws, then that is what should be applied by the forum. There can be derogation from this principle, however, if enforcement of this would be offensive to the public policy of the *lex fori*.[6]

Substance and Procedure.

In essence, ***substantive*** issues are those which concern the existence of a right whereas *procedural* issues are those which relate to the method and means of enforcement of a right. However, the difficulty lies in distinguishing a substantive issue from a procedural issue. Again, this is a problem of characterisation: is a matter categorised as procedural and governed by the *lex fori*; or is it substantive and governed by the *lex causae*? A House of Lords decision, ***Boys v Chaplin*** (1971), recognised <u>*remoteness of damage*</u> in a tortious claim as substantive and governed by the <u>*lex causae*</u>. On the other hand, an issue of ***quantification of damages*** is procedural and governed by the ***lex fori***.[7]

Connecting Factor.

There are relatively few connecting factors linking legal categories to the applicable law. As already noted *supra* examples of connecting factors include:

lex situs (in relation to succession to immovables);

lex loci celebrationis (the law of the place where a marriage was celebrated);

lex domicilii (domicile) - a very important connecting factor linking a person to a system of law and used in relation to; inter alia, succession to movables and capacity to marry.

The influence of English law on the determination and meaning of connecting factors is clearly expressed by ***Collier*** who says: *"Since the conflict of laws forms part of English law, English law alone can determine when a foreign*

5 See Lecture 3 for further information

6 The Incidental Question and the Time Factor are considered in more detail in Lecture 7

7 Substance and Procedure is subjected to further analysis in Lecture 7.

law is to be applied. It follows from this that **English law must not only select the connecting factor, it must also say what it means**. *This is clear, though it is only in respect to two connecting factors, domicile and, for jurisdictional purposes, the place of contracting, that authority exists."*

The authority cited by Collier in relation to domicile is ***Re Annesley*** (1926). Both English and French law use *domicile* as a connecting factor. However, whereas, according to English law, Mrs A died domiciled in France, this did not accord with French law.

HELD: English law prevailed; Mrs A died domiciled in France.[8]

Renvoi

Whereas the process of characterisation is deemed necessary when there is not a uniform approach to the determination of a legal category, another approach, known as ***renvoi***, may need to be employed when there is **not a uniform approach to the applicable *connecting factor***. Diversity of approach may arise by way of either: (a) the *lex fori* and the lex causae employing the same connecting factor but meaning different things by it, as in ***Re Annesley*** (1926); or, (b) the *lex fori* and the *lex causae* using different connecting factors in conjunction with the same legal category, e.g. English law using domicile when Italian law uses nationality. However, the real problem reduces to this: if the connecting factor indicates that the law of country X is the applicable law, just what is meant by 'the law of X' [bearing in mind that it is English law that decides what the connecting factor means]? As country X will have its own Conflict of Laws rules does the law of X refer to: (i) the domestic or internal law of X, i.e. X minus its conflict rules, as in contract (including arbitral agreement) cases; or, perhaps, (ii) the law of X including its conflict rules but minus its conflict rules applying renvoi (if it has any) which may indicate that the appropriate law is either that of the country from which the litigation arose (i.e. the problem is remitted to England) or perhaps the law of some third country, e.g. Utopian law (a case of transmission); or, finally, does it mean (iii) the law of X including its conflict rules *and which* ***include*** *renvoi*, if applicable? If it is the last, then the problem should, in theory, be viewed from the perspective of a judge hearing the case in country (X) first indicated by the forum, with the forum then applying the same law (of England or of X) as determined by the judge in country X.

The process for resolving problems generated by diversity in the application of collecting factors between the lex fori and the potential lex causae is known as ***renvoi***. In the examples above:

(i) refers to 'no renvoi';
(ii) refers to single or partial renvoi; and
(iii) refers to double or total renvoi, or is sometimes known as the foreign court theory.[9]

3. The Recognition and Enforcement of Foreign Judgements.

The recognition by an English court of a foreign judgment simply means that the English court has taken notice of the foreign judgment. It is not required to do anything else: it is an essentially passive function. So, for example, the recognition by an English court of the granting of a decree of divorce by a foreign court dissolving the marriage of H & W means that in a case before the English court, H & W will be recognised as not married to each other. In contrast, enforcing a foreign judgment requires the English court to act: P is petitioning the court seeking an order demanding that D must pay him a fixed sum of money - the sum that was awarded by the foreign court.

At common law, the situations under which a court would recognise or enforce a foreign judgment were listed by ***Buckley L.J.*** in ***Emanuel v Symon*** (1908). He referred to ' *... [the] five cases in which the courts of this country will enforce a foreign judgment.*' In essence, however, one of the cases (that based on nationality) has been doubted; three of them constitute various aspects of submission to the foreign court's jurisdiction; and the fifth relates to residence within the jurisdiction of the foreign court. Thus, the effect at common law is that for the foreign court to have jurisdiction (or international competence), i.e. for the judgment of the foreign court to be recognised or enforced by the English court, it must have had the authority to decide a case by way of the defendant's ***residence*** within, or ***submission*** to, its jurisdiction.

8 Domicile, arguably the most important of connecting factors, is dealt with, as appropriate, in Lecture 2

9 **N.B.:** 1. Since *Re Annesley* (1926) double renvoi has emerged as the orthodox English approach. 2. Renvoi has no further part to play in this course: it is specifically excluded from having a role to play in the choice of law process by ***s.46(2) Arbitration Act 1996***

The basic principle, then, is that an English court will usually enforce a judgment of a foreign court provided that the foreign court had jurisdiction to render that judgment. As to whether the foreign court had jurisdiction is a matter of *English law:* and English law has decided that it is irrelevant that the foreign court did not have jurisdiction under its own internal (or domestic) law: ***Buchanan v Rucker*** (1808). The reason for this is that the enforcement of a foreign judgment by an English court is largely (though not exclusively) dependent on the sufficiency of the link between the defendant and the foreign court. If the strength of this link is established, then lack of jurisdiction by the particular foreign court (by reference to its own internal law), or the making of an error of fact or law by that court will not enable the defendant to invoke either of these '***mistakes***' in order successfully to defend an action for enforcement in an English court.

The common law rules still predominate in situations where enforcement is sought of judgments made outside EC countries. In addition to :-

(i) the foreign court having to have International competence 'in the eyes of English law', two other points must be satisfied, viz;
(ii) the foreign judgment must be for a fixed sum of money; and
(iii) the judgment must be final and conclusive, i.e. 'final and conclusive' in the court which rendered the judgment. It does not mean that if it is subject to appeal in a higher court that it is not 'final and conclusive'.

Apart from enforcement at common law for judgements rendered outside the EC there are situations dealing with *statutory enforcement* of judgments of non-EC countries; and enforcement of judgements rendered within the EC.

Judgments Rendered Within the EC.

With regard to judgments being rendered within Contracting States of the EC, there are provisions under the ***Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in civil and Commercial Matters*** (the '1968' or 'Brussels Convention') which are very protective of the defendant in that, *inter-alia*, they ensure that the only court he is sued in is one with which he has a substantial connection - usually the court of his domicile. Having benefitted from these protective measures there is then no reason why, once the court with which he has that substantial connection gives judgment against him, it should not be enforced against him in any other Contracting State of the EC. Indeed, ***Article 31*** of the ***Brussels Convention*** specifically provides that: *A judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, it has been declared enforceable there.*

In common with the situation at common law, with regard to judgments rendered outside the EC, the scope for a defence to the enforcement of a judgment rendered within the EC is very limited.10

Summary

The functions of the English Conflict of Laws are, firstly, to ascertain which court has jurisdiction over the case in question and, then, to select the appropriate system of law for determining an action which contains a foreign element. Once the applicable legal system is selected and the appropriate choice of law is applied the essential function of the Conflict of Laws is completed.

In addition to the first two functions relating to ***Jurisdiction in personam*** and the determination of the appropriate ***Choice of Law rules***, the ***Recognition and Enforcement of Foreign Judgements*** constitutes the third of the three principal functions of the conflict of laws.

References:

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Stone, *The Conflict of Laws*. London: Longman, 1995, Ch.1

10 The Recognition and Enforcement of a Foreign Arbitral Judgement is dealt with in detail in Lecture 8

PRIVATE INTERNATIONAL LAW : CONFLICT OF LAWS

Short-Answer Workshop Questions

1. How, if at all, does the Conflict of Laws differ from other branches of English private law?
   (a) What significant point of law was confirmed in ***Maharanee of Baroda v. Wildenstein*** [1972] 2 QB 283?
   (b) If this, or a very similar, case was being heard for the first time post 2000, what point of law would you cite as authority for the English courts having / not having jurisdiction?

2 Explain
   (a) what is meant by 'assumed' or 'extended' or 'exorbitant' jurisdiction; and
   (b) how the need for this jurisdiction arose.

3 What are the circumstances which have to be satisfied for a writ to be served on a defendant who is neither in England nor domiciled in another EC country?

2. Explain the meaning of *forum conveniens*
   (a) Explain the significance of the provision contained in Art.2 of the Brussels Convention; and
   (b) outline the exceptions to it, if any.

5 Explain the basic rule that determines how the choice of law in a Conflicts case is determined.

6 With reference to appropriate examples,
   (a) Explain what is meant by characterisation or classification;
   (b) What is the relationship, if any, between characterisation and the Incidental Question?

7 Outline the type(s) of problem associated with the time factor.

8 To what extent, if at all, might difficulty be encountered in trying to distinguish substantive and procedural issues?

9 Critically assess the influence, if any, of English Law on the determination and meaning of connecting factors.

10 If, in a Conflicts case, country X refers to connecting factor p, whereas country Y refers to connecting factor q, what process will indicate which connecting factor should prevail?

11 Outline the significant points of law that emerged from
   (a) ***Emanuel v. Symon*** (1908) and
   (b) ***Buchanan v. Rucker*** (1808).

12 What does ***Art.31*** of the ***Brussels Convention*** specifically provide for?

13 Review
   (a) the principal elements of the subject 'Conflict of Laws'; and
   (b) explain how, if at all, it is possible for a foreign law to govern a conflicts case which is heard in an English court.

14 When, if ever, can a foreign judgment be recognised without being enforced?