كليةالقانون/ جامعةالقادسية

القانون الدولي الخاص

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1.3 Thebasesofconflictoflaws

Whatjustificationisthereforapplyingaforeignlaw?Whynotjustapplythe lawoftheforumtoeverycase?CheshireandNorth(*PrivateInternationalLaw,* 12thedn,p39)putitinthefollowingterms:

> Thereisnosacredprinciplethatpervadesalldecisionsbut,whenthe circumstancesindicatethattheinternallawofaforeigncountrywill provide a solution more just, more convenient and more in accord withtheexpectationsofthepartiesthantheinternallawofEngland, theEnglishjudgedoesnothesitatetogiveeffecttotheforeign rules.

Nevertheless, two main reasons for the application of a foreign law can be put forward.

1.3.1 Justice

An underlying reasonforapplyingaforeignlaw, rather than English

law,is
toservetheinterestsofthepartiestothecaseandachievejustice.Itwouldbe
unjusttotreatparties,whoenteredintoacontractunsupportedby

consideration in Italy, as if they had contracted under English law, and accordinglydeclaretheircontractvoidforlackofconsideration(see*ReBonacina* (1912)). It is clear that English courts apply Italian law in order to do justice betweentheparties.

1.3.2 Comity

Althoughtheoldtheorythatcomityisthemainfoundationoftheconflictof laws has faded away, its impact cannot be excluded altogether. Even today, referencestocomityaresometimesfoundinEnglishjudgments(see*Travers v Holley*(1953);and*IgravIgra*(1951)).If,forexample,firstcousinsdomiciled in PortugalmarryinEngland:supposethatsuchamarriageisvalidbyEnglish law, but void by Portuguese law. The English court will hold this marriage void,eveniftheparties wishedittobevalid.(Thismaybeinferredfromthe CourtofAppealdecisionin*SottomayorvDeBarros*(1877).)Clearly,thisdecision does not serve the interests of the parties, but it is based on comity, partly to protecttheinterestsofaforeigncountryandpartlyintheexpectationthatthe

favour will be returned.

1.3.3
Publicpolicy

Whateverthebasesfortheapplicationofaforeign law are,thequestionis how far, if at all, should English public policy be relevant? In other words, will the English court enforce a contract for prostitution, albeit valid by its properlaw?Willitenforceacontractforslavery,althoughvalidinthe*lexloci solutionis*? Scarman J observed in *In the Estate of Fuld (No 3)*(1968):

> An English court will refuse to apply a law which outrages its sense of justiceordecency.But,beforeitexercisessuchpower,itmustcons iderthe relevantforeignlawasawhole.

Hence,itisageneralprincipleoftheconflictoflawsthataruleofforeignlaw, which would be applicable under the *lex causae*(that is, the governing law), maybedisregardedifitsapplicationwouldbecontrarytopublicpolicy.This doctrineisclearlynecessaryinthecontextofconflictoflaws,butitsboundarie s cannotbeeasilydefined.

Examinationofthecasesinwhichpublicpolicywasinvokedtoinvalidate theenforcementofrightsarisingunderforeignlawsindicatethat,ingeneral, the doctrine has been applied in cases involving foreign contracts, and

those involving foreign status. These will be considered under their respective headings,anditsufficesforthemomenttoillustrateitsoperationbriefly.On the groundofpublicpolicy,theEnglishcourtrefusedtoenforcecontractsin restraintoftrade(*RousillonvRousillon*(1880));contractsbreakingthelaws of a friendly country (*RegazzonivSethia*(1958));anincapacityexistingundera penalforeignlaw,suchastheinabilityofpersonsdivorcedforadulteryto

remarry,solongastheinnocentspouseremainssingle(*ScottvAG*(1886));the Englishcourtalsorefusedtorecogniseamarriageofachildundertheageof puberty(impliedin*MohammedvKnott*(1969)).

1.4 Classification or characterisation

In a conflict case, much depends on how the issue is classified or characterised. Is it an issue of breach of contract or the commission of a tort? This may be labelled as 'classification of the cause of action'. Once this has been determined, the next stage is to ascertain the governing law which, as we have seen, depends on some connecting factors, such as the lex situs, the lex loci delicti, the lex domicilii, and so forth. These factors link the issue to a legal system. At this stage, a second type of classification has to be done in order to identify the legal characteristic of a particular rule. For instance, in English conflict of laws, capacity to marry is governed by the law of each party's ante-nuptial domicile, and formal validity of a marriage is governed by the law of the country where the marriage is celebrated. Is the issue of parental consent classified as a rule of capacity or formal validity? This question may arise in a different scenario; for instance, a contract between an English employer and a French employee made and to be performed in France. The applicable law to the contract is French. In an action brought in the English court for breach of this contract, the English court will apply French law to issues of formal and essential validity so long as these rules are rules of substance and not procedure. The latter is subject to English law. However, problems may arise as to whether a particular rule is to be classified as a rule of substance or procedure. This type of classification may be labelled as 'classification of a rule of law'. Each of these types will be considered separately.

1.4.1 Classification of the cause of action

Every legal system arranges its rules under different categories which must form the basis of a plaintiff's claim. These categories may be concerned with tort, contract, property, status, succession, etc. Before the English court can proceed to ascertain the lex causae, it has to determine the particular category into which the action falls. Does the action relate to the

formal validity of a marriage, intestate succession to movables, or some other category? Given the standard categories operating in English law, the difficulty arises when some cases do not fit easily into any single one of them. An action may fall under more than one category. For example, an employee may be able to sue his employer either in contract or tort; or the action may not fall under any of them, such as the duty of a father to provide a dowry for his daughter under Greek law (Phrantzes v Argenti (1960)). The crucial question, therefore, is how does the English court classify the cause of action? Is the classification made according to English internal law? It is obvious that the classification process

is very crucial to the outcome of cases. However, case law does not show how this process is or should be conducted. According to Cheshire and North (Private International Law, 12th edn, p 45):

There can be little doubt that classification of the cause of action is in practice effected on the basis of the law of the forum…But, since the classification is required for a case containing a foreign element, it should not necessarily be identical with that which would be appropriate in a purely domestic case.

It follows, therefore, that an English judge must not rigidly confine himself to the concepts or categories found in English internal law.

It is worthy of note, however, that in the context of both the Brussels Convention on Jurisdiction and the Enforcement of Judgments 1968, and the Rome Convention on the Law Applicable to Contractual Obligations 1980, characterisation is unlikely to be referred to the legal system of any particular Contracting State, and is rather determined in a Community sense. Indeed, as shall be discussed in Chapter 3, whether a particular relationship amounts to a contract, or whether a specific act can be characterised as a tort, have been determined in a Community sense. For instance, in the case of Jacob Handte GmbH v Traitements Mécano-Chimiques des Surfaces (1992) an action brought by an ultimate manufacturer of defective

goods could not be classified as an action in contract for the purposes of jurisdiction under Art 5(1) of the Brussels Convention, despite the fact that it was regarded as such under French law, the law of the forum. The European Court of Justice (ECJ) expressed the view that a contractual relationship 'is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another'.

1.4.2 Classification of a rule of law

Once the legal category of a given case has been identified, the next stage is to apply the relevant choice of law rules in order to identify the lex causae. However, even at this stage, it may be necessary to classify a particular rule in order to determine whether it falls within one choice of law rule or another. This process can be better illustrated by examining two choice of law rules. For instance, capacity to marry is governed by the law of each party's ante-nuptial domicile (that is, the dual-domicile rule), and the formal validity of a marriage is governed by the law of the place where the marriage was celebrated. A problem of characterisation will arise if it is doubtful whether a certain rule of the domicile of one party is an issue of capacity, in which case the dual-domicile rule will apply, or whether it is an issue of formal validity, in which case it will not apply. A good illustration of this issue can be found in Ogden v Ogden (1908). A domiciled Englishwoman married, in England, a domiciled Frenchman aged 19. By French law, a man of that age needed his parents' consent to marry and, without such

consent, the marriage was voidable. In fact, the husband had not obtained such consent. How did the court classify thisissue of consent? Was it an issue of formal validity and, therefore, the rule would not be applicable, or was it an issue of capacity, in which case it would apply? The Court of Appeal classified it as a rule of formal validity and, therefore, declined to apply the dual-domicile rule, for the marriage had been celebrated in England. In this case, the issue involved a classification of a foreign rule, but what if it relates to an English rule? Leroux v

Brown (1852) illustrates the process applied to an English rule. The case concerned an oral agreement made in France between a French employee and an English employer whereby the former was to work in France for a period longer than a year. This oral contract was governed by French law, under which the contract was formally and essentially valid. The employee brought an action in the English court to enforce the contract. The employer pleaded that the contract was unenforceable in England on the ground that the then English Statute of Frauds provided that no action shall lie upon a contract which was to last more than a year, unless the agreement was in writing.

If this provision were to be regarded as a rule of formal validity, then its application would be excluded, for the formal validity of the contract was governed by French law. However, the English court held it to be a rule of procedure and, therefore, it was applied as part of the lex fori. The justification given by the court was that the effect of the statute was only to prevent a party from bringing an action on a valid contract and not to make the contract void.