

Chapter six

Non-contractual Obligations

6.1. The Main Rules Governing Choice of Law in Tort

- The traditional rule for choice of law in multi state tort cases have always been the *lex loci delicti* .i.e., the law of the place of wrong.
- Place of wrong full act and place of harmful result could be different and difficult to ascertain.
- E.g. Mr. Armanda a Kenyan resident in Ethiopia sends to Mrs. Selena in Zimbabwe a package of poisoned chocolate. Mrs. Selena receives the package and boards the Saudi Arabian Airways. In the plane, she ate the chocolate and got sick and died in a hospital in Dubai.

- Countries differ in the meaning they attach to the phrase “place of wrong”.
- Some legal systems defined it as the place where the wrong full act necessary to make the tortfeasore liable took place.
- Some others define it as the place where the damage occurred.
- Still others hold *lex loci delicti* to mean the place of the act or the place of injury and, in case of conflict ,the plaintiff is given the right to choose the one more favorable to him.
- Even though the Europe has always placed a great emphasis on the control of the *lex loci delicti*, recent developments indicate countries are looking for more flexible connections.

Choice of law in Tort

1. The US Approach Under the Second Restatement

- The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the ***most significant relationship*** to the occurrence and the parties. These contacts would be ascertained based on :
 - *The place where injury occurred:*
 - e.g. In the case of personal injuries or of injuries to tangible things except where place of injury is purely fortuitous.
 - *The place where conduct occurred*
 - E.g. the place where the conduct occurred is given particular weight in the case of torts involving interference with a marriage relationship or unfair competition ,
 - *The domicile, residence, nationality, place of incorporation and place of business of the parties:*
 - E.g.. When the interest affected is a personal one such as a person's interest in his reputation, or in his right of privacy etc.
 - *The place where the relationship, if any, between the parties is centered* (E.g. When there is a relationship between the plaintiff and the defendant and when the injury was caused by an act done in the course of the relationship)

2. The Approach Under the Rome II Proposal

- "Regulation on the Law Applicable to Non-Contractual Obligations" known as "Rome II." which come in to effect in 2009.
- Rome II will have "universal application," in the sense that it will cover torts occurring both within and outside the Union, and it may lead to the application of the law of a non-Member State.
- **The Main Rule Under the Proposal**
- Rome II's central provision is Article 4, which contains the general and residual rules and the applicable law shall be the law of the country in which "the damage occurs" (*lex loci damni*). i.e place of harm.
- Thus the general rule of Rome II is nothing but a restatement of the traditional *lex loci delicti commissi* rule.

- **The Exceptions where lex loci damni may not apply**
- The general exceptions include the following:
- (1) the application of the law of the parties' common habitual residence, under Article 4(2);
- If both the tortfeasor and the victim are domiciled in the same place their common domicile law has legitimate claim for application.
- (2) the application of the law of a state that has a "manifestly closer connection," under the escape clause of Article 4(3)
- E.g. a manifestly closer connection based on a "pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."
- (3) the application of the mandatory rules of the forum state, under Article 16;
- (4) the "taking into account" (and possible application) of the "safety and conduct" rules of the state of conduct, under Article 17;
- (5) the application of the law chosen by the parties before or after the occurrence of the tort, under Article 14;
 - It allows post-tort agreements between all parties and allows pre-tort agreements only if all the parties are "pursuing a commercial activity." In the latter case, the agreement must be "freely negotiated."
- (6) the non-application of the lex loci (or any other law) when it is manifestly incompatible with the ordre public of the forum, under Article 26.

6.2.Choice of Law in Tort Under the Federal Draft Conflict of Laws

- The main rules are provided under Art.82 and 83.
- Distinction made between tort issues that arise in fault or non fault liabilities (Art82) and
- Other extra contractual liabilities arising from unlawful enrichment, unauthorized agency, and undue payment.(Art 83)

- Concerning the first category the provision of Art.82 extra- contractual liability is governed by the law of the place where the damaging act occurred. Lex loci delicti
- No exceptions like common domicile etc here which are recognized in other systems.
- Generally this governs all issues arising in relation to tort liabilities like Defamation, Personal injury , Unfair Competition, Strict liabilities. No specific rules for specific torts as recognized in other systems.
- Specific rules could be developed through interpretation. But it would have been better to state clearly in the law.

- Even though, the *lex loci delicti* is said to be the governing law, this provision does not clearly indicate the position taken when the place of the happening of the facts and the place of harm fall under different jurisdictions.
- However, the wording of the provision seems to indicate that the '*law of the place where the damaging act occurred*' refers to the law of the place where the final wrong (harm) occurred or suffered by the victim.

- In liabilities arising from unlawful enrichment, unauthorized agency, and the payment of that which was not due, it seems the law of the place where the decisive facts that gave rise to the final harm occurred is given priority than the final place of harm.
- Why different rules for these tort liabilities is not clear.

- No particular rules governing particular torts like Unfair Competition, Personal injury, Defamation, and product liability under the Ethiopian draft.
- **1. Personal Injuries and Damage to Property**
- **Meaning**
- **Personal injury means**, either physical harm or mental disturbance, such as fright and shock, resulting from physical harm or from threatened physical harm . On the other hand, injuries to a person's reputation or the violation of a person's right of privacy are not "personal injuries" in the sense here used. Fall under Defamation.
- **Damage to property** means, physical injury to the thing and all other sorts of physical interference with the thing, including trespass and conversion.

- The basic rule the local law of the state where the injury occurred (*lex loci delicti*) unless, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties.
- The two principal elements of the tort, namely, conduct and injury occurred within one its territory the law of that territory has significant relationship.
- But if conduct and personal injury occur in different states , the local law of the **state of injury** will usually be applied to determine most issues involving the tort

- In determining which is the state of most significant relationship we need to consider the purpose sought to be achieved by the rule of tort law involved.
- If this purpose is to punish the tortfeasor and thus to deter others from following his example, there is better reason to say that the state where the conduct occurred is the state of dominant interest
- if the tort rule is designed primarily to compensate the victim for his injuries the state where the injury occurred would seem to have a greater interest than the state of conduct.

2. Choice of law Governing Damage To Property

- The local law of the state where the injury occurred governs unless, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties.

3. Unfair Competition

- By Article 5(1) of the Rome II, the law applicable to a tort arising out of an act of unfair competition is that of the country where competitive relations or the collective interests of consumers are, or are likely to be, directly and substantially affected.
- Then Article 5(2) makes an exception where an act of unfair competition affects exclusively the interests of a specific competitor. In such a cases: the law of
 - a common habitual residence, and of
 - a manifestly closer connection, apply.

4. Product Liability

- Article 5 of Rome II provides a special rule for non-contractual obligations arising from an injury caused by a product.
- Paragraph 1 of the article designates, **in successive order**, three countries whose law may govern:
 - (a) the country of the victim's habitual residence;
 - (b) the country in which the product was acquired; and
 - (c) the country in which the injury occurred.
- The application of each country's law depends on whether the product was "marketed in that country."
- For example, if a German plaintiff is injured in India by a product acquired in Egypt, the applicable law will be that of Germany, if the product was marketed there; or, if not, Egypt, if the product was marketed there; or, if not, India, if the product was marketed there.
- **Exception:** if the parties have their **habitual residence in the same country**, its law applies to the exclusion of all others, even if the product was not marketed in that country.
- If another country other than the above stated is shown to have **manifestly closer connection** the law of this country governs.
- The burden of proving that the product was marketed in the particular country would rest with the plaintiff, although the defendant may also have an incentive, and should be allowed to either disprove or prove that fact.

5. Defamation

- In systems that require damages for defamation, the tort "occurs" where the victim's reputation suffers, and, therefore, the conflicts analysis should focus on the victim.
- Many scholars advocate applying the law of the place of injury because that is where the legal right was infringed.
- Current American law focuses on the plaintiff's place of domicile as the most likely place of injury where the defamatory act publicized causes damage

Ethiopian Draft on Specific Torts

- Ethiopian Draft is silent on the various specific torts and provides a very general and crude provision governing all types.
- Better to provide specific rules for various specific torts because each has its peculiar nature that requires different places as places of wrong occurred.