

MEANING OF PRIVATE INTERNATIONAL LAW

According to Cheshire, Private international law is that part of law which comes into play when the issue before the court affects some fact, event or transaction that is so closely connected with a foreign system of law as to necessitate recourse to that system¹.

Conflict of laws comes into operation whenever the court is faced with a **case involving one or more foreign elements**. This foreign element may be an event which has occurred in foreign country, for example a Tanzanian is injured in a road accident in Spain; it may be the place of business of one of the parties, for example, an Tanzanian company agrees to purchase computer software from a company incorporated in New York; or it may be a foreign domicile, for example, an Tanzanian woman marries a man domiciled in Iran².

BASES OF PRIVATE INTERNATIONAL LAW

Why should the courts depart from the rules of the country's law and apply those of another system? What justification is there for applying a foreign law? Why not just apply the law of forum to every case? Cheshire and North, put it in the following terms: There is no sacred principle that pervades all decisions but, when the circumstances indicate that the internal law of a foreign country will provide a solution more just, more convenient and more in accord with the expectations of the parties than the internal law of England, the English judge does not hesitate to give effect to the foreign rules³.

THEORIES ARGUING ABOUT THE THEORETICAL BASES OF PRIVATE INTERNATIONAL LAW

Essentially, there has been a couple of theories postulated to explain the theoretical basis of the private international law, however there still no a single and universally accepted theory that have adequately answered the theoretical basis of the private international law as most of them have been criticized for being insufficient to capture the whole lot of private international law. Hereunder are various theories advanced to explain the theoretical basis of private international law and their criticism thereof:-

¹Cheshire & North, *Private International Law* p.5

²Mayss, A., (1998). *Principles of Conflict of Laws* p. 1

³Cheshire & North, *opt. cit* p. 39

STATUTE THEORY

Statute Theory was propounded by Ulric Huber who laid down the following three maxims, from which he considered a sufficiently comprehensive system for the reconciliation of conflicting laws could be evolved. These are: a) The laws of a State have absolute force within, but only within the territorial limits of its sovereignty; b) All persons who, whether permanently or temporarily are found within the territory of a Sovereign are deemed to be his subjects, and as such are bound by his laws. c) By reason of Comity, however, every Sovereign admits that a law which has already operated in the country of its origin shall retain its force everywhere, provided that this will not prejudice the subjects of the Sovereign by whom its recognition is sought⁴. Generally this theory maintains that Personal law may be applied if it is not opposed to public policy or public order.

Criticism: Apparently the theory appears to be very simple. But in its practical application it presents great difficulties. The greatest difficulty lies in the determination as to which statute is personal, real or mixed. According to Cheshire & North's Private International Law, the Statute Theory lacks a scientific basis, and affords no solid ground upon which a sound and logical system can be erected⁵.

INTERNATIONAL THEORY

This maintains that there are rules of conflict of laws which are universal and common to various legal systems of the world. The most damaging **criticism of this theory** is that it starts on the assumption that there is uniformity in the laws of the countries on characterization of legal relations, while in fact it is not so. For instance, breach of marriage promise is regarded as breach of contract in some countries, while in some it is regarded as a tort. In such a situation it may be difficult to find out the natural seat of the legal relationship⁶.

TERRITORIAL OR ACQUIRED RIGHT THEORY

Courts of sovereign state do not apply foreign law but merely recognize the consequences of the operation of a foreign law. This theory tries to reconcile the territoriality of a law and the need

⁴Kalidhass, D. (2017). *Theories of Private International Law* p. 8

⁵Ibid at p. 9

⁶Diwan, P. (1998). *Private International Law* p. 56

for private international law. Dr. Cheshire has vehemently criticized this theory as being, unnecessary', untrue', and unhelpful'⁷.

Criticism: This theory of Acquired Rights receives insignificant support at the present day, and it has been seriously criticized. The theory does not give room for us to try any case by reference to the law of the country where the rights existed or originated. The theory strictly says that a judge cannot directly recognize or sanction foreign laws, nor can he directly enforce foreign judgments, for it is his own territorial law which must exclusively govern all cases that require his decision. So why should he in this case have to refer to the law of the country where the rights existed?⁸.

LOCAL LAW THEORY

The Local Law Theory was expounded by Walter Wheeler Cook. This theory is a slight variation from territorial theory. The gist of this theory is that the court recognizes and enforces a local right that is created by its own law. But as the dispute in question has a foreign element the court would necessarily apply the rule of the forum that would be applied in the case of a purely domestic dispute. But for reasons of social expedience and practical convenience it takes into account the laws of a foreign country in which the decisive facts have occurred. Cheshire has observed that this theory is a sterile truism'. Sterile because it affords no basis for the development of a system of Private International Law⁹.

According to Cheshire, North & Fawcett, this local law theory affords no basis for the system of Private International Law. For to remind an English Judge about to try a case containing a foreign element, that whatever decision he gives, he must enforce only the law of the Forum is a technical quibble that explains nothing and solves nothing. It provides no guidance whatever as to the limits within which he must have regard to the foreign law. The local law theory is based more on judicial precedence in determining the outcome of a case, and even though the court applies its own rules to the total exclusion of all foreign rules, it is not bad altogether¹⁰.

⁷Cheshire, North & Fawcett; *Private International Law* p. 27

⁸Prof. Giovanni Distefano; (nd). "Theories on Territorial Sovereignty: A Reappraisal" Retrieved from www.lindquist.com/files/publication on 27, May 2018 at 21:00HRS

⁹Supra Note 4 p. 14

¹⁰Supra Note 4 p. 15

THE THEORY OF JUSTICE

The approach of English courts to private international law is pragmatic and ethical. It has sociological, ethical and legal aspects towards the end of justice. According to Dr. Graveson, the basis of Public International Law is *sociologically*, in the international need for fair treatment in the private transactions of individuals, *ethically*, in the desire of English courts to do justice; and *legally*, in the obligation of their oath in office. In essence the rules of Private International Law in England are made from the precedents with the ultimate view of doing justice¹¹.

Graveson admits that this theory is not a perfectly valid theory in every case, for one cannot explain in terms of absolutes an empirically developed system like our own. The application of generally sound principles in this, as in other branches of law, may lead at times to hard individual cases¹².

In the upshot, from the above presented theories it can be construed that despite the fact that there many theories emerged to explain the theoretical basis of conflict of law but no any theory has gained a universally recognition and acceptance as being a more convincing in explaining adequately the theoretical basis of conflict of laws. Most of these postulated theories are just coupled with a lot of criticisms a thing that gives one an impression that they are inadequate to explain the theoretical basis of conflict of laws.

¹¹David McClean & Kisch Beevers. (2010). *The Conflict of Laws* p. 156

¹²Ibid p. 156

INTRODUCTION

INCIDENTAL QUESTIONS DEFINED

In any case in private international law, there will be a central question that can only be resolved by reference to a particular foreign law and there may be a difference of opinion as to the appropriate foreign law to resolve that central question¹³.

However, in the same case, there may be another question also requiring reference to foreign law that requires to be resolved before the central legal question can be satisfactorily determined. That other legal question is sometimes alluded to as ‘**the subsidiary question**’ or ‘**the preliminary question**’ but it is more often known to the many writers on the topic as ‘**the incidental question**’¹⁴.

It thus follows that, Where a court is asked to decide a main question which contains a foreign element, such as the parties’ capacity to marry, sometimes another subsidiary question may incidentally arise in the course of determining the main question, for example, the validity of an earlier divorce that later question is what is termed as **incidental question**¹⁵.

The incidental question arises where a court has to decide a main issue with foreign element and in order to do so has to decide a subsidiary question which also contains a foreign element. **One of the rationale of applying the incidental question is that** where the main question is to be determined by foreign choice of law rule, the secondary question should also be determined in the way the foreign court would determine it. Therefore the law applicable to incidental question should also be determined by the law applicable to the main question including its choice of law rules¹⁶.

To illustrate the definitions, a case might arise in the law of tort in which it was important to determine the appropriate choice of law rule in respect of the tort but the facts also indicated that

¹³O'Brien, J. (1999). *Conflict of Laws* p. 103

¹⁴Ibid at p. 103

¹⁵Supra Note 2 p. 229

¹⁶Panagopoulos, G. (2000). *Restitution in Private International Law* p. 107

the victim was working under a contract which contained an exemption clause. Manifestly, questions would arise as to the validity of such a contract and the court would have to determine whether the foreign law that governed the contractual questions was the same as that which applied to the tort. One approach would, of course, simply be to identify the law applicable to the main question and then simply determine that such a *lex causae* governed any other subsidiary question¹⁷.

Therefore, from the above exposition, an incidental question is the subsidiary question arising when determining the central question of the dispute which basically necessitate the forum court to resolve it first (normally they have to be answered by the law applicable to the main issue that is *Lex Causae*) before turning to the main issue and it has a nature of providing solution to the central question.

ELEMENTS OR CONDITIONS FOR INCIDENTAL QUESTIONS TO ARISE

It is sometimes argued that for a genuine incidental question to arise then three conditions must be fulfilled: (a) the main question must, by the rules of English private international law, be governed by the law of some foreign country; (b) a preliminary question must arise involving foreign elements but which is capable of arising in its own right and for which there is a separate conflict rule; (c) the English rule in private international law for governing the subsidiary question must result in a different outcome from the equivalent conflict rule of the country whose law governs the main question. In those cases where the problem of the incidental question has been acknowledged, then English courts have generally applied the *lex causae* of the main issue¹⁸.

Illustration: Suppose an individual testator dies domiciled in Arcadia, leaving movables in England to his wife; the central question here is the succession to movable property and whether it is governed by the law of Arcadia as that of the law of the domicile of the deceased. However, as a matter of logic, there will be a preliminary question as to whether the deceased was married to X and this question may in turn depend on whether X was validly divorced in Blueand from

¹⁷O'Brien, Supra note 13 p. 103

¹⁸Ibid p. 105

her first husband, Y. In such a case, the central question can only be properly approached by disposing of a number of preliminary questions¹⁹.

RELEVANT CASES INVOLVING INCIDENTAL QUESTIONS

There are two forms of case where the problem of an incidental question and the question as to which law should apply has arisen. The first is drawn from the **area of family law** where problems arise in cases of remarriage and the second is drawn from the **law of succession**. Clearly, each case will depend on how the court classifies the questions and whether a clear distinction is drawn between the principal question and the secondary, or incidental, question. It is proposed to examine each of the subject areas in turn²⁰.

A) CASES CONCERNING REMARRIAGE

Problems have arisen in the case law where a person seeks to remarry and questions then arise as to: (a) capacity to remarry; and (b) the recognition of any foreign decree of divorce or decree of nullity. Difficulties have arisen in determining which is the principal question and which is the incidental question²¹.

An example is afforded by the case of **R v. Brentwood Marriage Registrar exp Arias**²², Where an Italian man domiciled in Switzerland married a Swiss woman in that country. They were later divorced in Switzerland and the wife re-married. The husband desired to marry, in England, a Spanish national also domiciled in Switzerland. Notice of the marriage was given to the Registrar, who refused to marry them on the ground in his view, there was an impediment on the part of the husband.

By Swiss law, capacity to marry was governed by the law of the nationality, and by Italian law, the law of his nationality, the divorce of Italian nationals was not recognised. The parties came to England on a temporary basis to evade Swiss law. The main question here was the husband's capacity to re-marry which, by English conflict of laws, was governed by his Swiss law of

¹⁹Ibid p. 104

²⁰O'Brien Opt. cit p. 106

²¹Ibid p. 106

²²[1968] 2 QB 956

domicile, and the incidental question was the validity of the earlier divorce, which was recognised as valid by English conflict of laws, but not recognised by Swiss conflict of laws. The Divisional Court upheld the Registrar's objection and held that the husband did not have capacity to re-marry.

In other words, the incidental question was determined in accordance with the Swiss rather than the English conflict of law rules.

In **Lawrence v Lawrence**²³, where the facts were: a husband and wife married in Brazil and lived there until 1970. In 1970, the wife obtained a divorce in Nevada, USA. The divorce was not recognised in Brazil. However, the next day, the wife married a second husband in Nevada. The couple then acquired a domicile of choice in England. At a later date, the second husband petitioned for a declaration as to the validity of the second marriage. A first problem arose in that, under the English choice of law rules, the wife did not have capacity under her Brazilian domicile. A second question arose because the Nevada decree was recognised in England.

B) SUCCESSION

In cases concerning succession, difficulties have arisen when the court is required to determine whether the person entitled under the *lex successionis* is in fact the lawful spouse or legitimate child of the deceased. In such cases, the opinion in most Commonwealth jurisdictions is that the incidental question (the legitimacy of the child or the lawfulness of the marriage) should be governed by the *lex causae* of the main question²⁴.

An example is afforded by the case of **Re Johnson**²⁵, where the facts were as follows: Mary Johnson, who was born in Malta, died domiciled in Baden, Germany. A question arose as to the distribution of her movable property, which was referred by the law of Baden to the law of her nationality. The court determined that the property was to be distributed according to the law of her domicile of origin. Having reached the conclusion that Maltese law was the *lex successionis*, Farwell J then referred any question of the legitimation of the deceased *per matrimonium* to the law that governed the main question.

²³[1985] Fam 106; 1 All ER 506.

²⁴O'Brien *Opt. cit* p. 109

²⁵[1903] 1 Ch 821.

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