

LECTURE ELEVEN

The Common Law Rules Governing the Choice of Law in Contract.

Aim:

To outline the common law rules governing the choice of law in contract.

Objectives.

After careful study of the following notes, and other prescribed readings for this lecture, you will be able to:

1. Explain what is meant by the proper law of a contract and how it may be ascertained;
2. Explain the circumstances under which statutory provisions may override the parties' choice of law;
3. Explain what is meant by the putative proper law of a contract.

Introduction

For English conflict of laws purposes, a 'contract' may acquire a different meaning from that used in English domestic law. Thus in *Re Bonacina* (1912),¹ an agreement made in Italy and unsupported by consideration was regarded as a contract.

In common with the domestic law of contract, choice of law in a conflicts-of-law contract case has a substantial foundation at common law. However, with effect from 1 April 1991, a fundamental change has been brought about by the enactment of the *Contracts (Applicable Law) Act 1990, (C(AL)A 1990)*.

This Act replaces the provisions of the common law in the areas where it applies. *The C(AL)A 1990* was enacted to give the force of law, subject to reservations, to the *1980 Rome Convention on the Law Applicable to Contractual Obligations (the Rome Convention)*.

Nevertheless, that the common law will continue to apply in conflicts cases for years to come, there is no doubt: reasons for this include *article 1(2)* of the *Rome Convention* which excludes certain matters from the Convention; and *article 17* which provides that the *Rome Convention* is not retrospective, i.e. it is inapplicable to contracts made before the Convention came into force.

Areas still covered by the common law. Article 1(2) Rome Convention :-

1(2) They shall not apply to:

- (a) questions involving the status or legal capacity of natural persons, without prejudice to Article 11;
- (b) contractual obligations relating to:
 - wills and succession,
 - rights in property arising out of a matrimonial relationship,
 - rights and duties arising out of a family relationship, parentage, marriage or affinity, including maintenance obligations in respect of children who are not legitimate;
- (c) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;
- (d) arbitration agreements and agreements on the choice of court;
- (e) questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or unincorporate and the personal liability of officers and members as such for the obligations of the company or body;
- (f) the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or unincorporate, to a third party;
- (g) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;
- (h) evidence and procedure, without prejudice to Article 14.

¹ *In Re Bonacina : Le Brasseur v. Bonacina* [1912] 2 Ch. 394. ; [1912] WL 17417 (CA). Cozens-Hardy M.R., Farwell and Kennedy L.JJ.

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The legal system under which a contract is created and by which it is governed is known as *the proper law of the contract*. In *Amin Rasheed Shipping Corp. v Kuwait Insurance Co.* (1983),² Lord Diplock described the proper law of a contract as: '... *the substantive law of the country which the parties have chosen as that by which their mutually legally enforceable rights are to be ascertained ...*'

Suggestions as to what the proper law of the contract is.

Two connecting factors have been suggested as being appropriate to govern the law of a contract, viz;

- (i) *Lex loci contractus* (law of the place where the contract was made);
- (ii) *Lex loci solutionis* (law of the place where performance of the contract was due.)

However, each of these connecting factors has its limitations. For example, the *lex loci contractus* may be entirely fortuitous as in a situation where a South African business man and an American business man may agree in London to the sale of goods situated in Germany. English law has no 'close or real connection' with the transaction yet it would be the proper law of the contract if the *lex loci contractus* prevailed.

Focus on the *lex loci solutionis* as the proper law of the contract may be inappropriate for a couple of reasons:

- (i) the parties respective obligations may take place in different countries, e.g. the seller agrees to deliver goods in Germany in exchange for the buyer's promise to pay the price in New York. It would be highly unsatisfactory (and totally impractical) for the parties to have their respective obligations governed by different laws.
- (ii) The place of performance of the contract may not have been determined at the time of formation of the contract and then it may be determined unilaterally, e.g. a port of delivery for (say) a cargo of oil from the Gulf states may not be specified until the vessel is at sea. It is uncertain as to what would be the proper law before the place of performance is known.

Accordingly, there is no generally applicable connecting factor that can be used in English law to determine the proper law of the contract. Nevertheless, a significant feature of English law is the principle of party autonomy; i.e., '*the proper law of the contract ... is the law which the parties intended to apply*' per Lord Atkin.³ This would appear to be a manifestation of *consensus ad idem*, a subjectivist approach.⁴

A Subjectivist or an Objectivist approach to the Proper Law? An Overview.

Either a subjectivist view or an objectivist view may be appropriate in determining the proper law of a contract. Both views were expressed in the *Amin Rasheed* case. Representing the subjectivist view is part of Lord Diplock's dictum in which he said, with respect to a contract contained in an insurance policy:

'English conflict rules accord to the parties to a contract a wide liberty to choose the law by which their contract is to be governed. So the first step is to examine the policy in order to see whether the parties have, by its express terms, or by necessary implication from the language used, evinced a common intention as to the system of law by reference to which their mutual rights and obligations under it are to be ascertained.'

From this, it would appear that a subjectivist view prevails where the parties have expressly chosen the law to govern their agreement, or, at least, the proper law can be inferred or implied.

In contrast the *objectivist view* was expressed by Lord Wilberforce in the same case (*Amin Rasheed*) where, *in the absence of a choice of law* he said that: '*... it is necessary to seek the system of law with which the contract has its closest and most real connection.*'

Clearly, then, neither view is generally applicable.

² *Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.* [1983] AC 50; *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50 per Lord Diplock;

³ *R. v. International Trustee for the Protection of Bondholders A/G.* [1936] 3 All E.R. 407 (C.A.); [1937] A.C 500 (H.L.).

⁴ N.B.: Whereas the proper law governs most aspects of the contract, questions of capacity, formation, performance and illegality are not necessarily governed by the proper law

Ascertaining the Proper Law

(A) The Subjectivist Approach

i. Where the Parties have Expressly Chosen a Law to Govern Their Agreement.

In *Vita Food Products Inc. v Unus Shipping Co. Ltd.* (1939)⁵, Lord Wright said that: . 'provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on grounds of public policy' the intention of the parties as to the choice of law prevails'.⁶

Three points with respect to the parties choice of law are:

- (a) They can choose a law which has no obvious connection with the contract and still be bona fide and legal.
- (b) If the choice of law was made for the 'specific purpose of avoiding the consequence of the illegality' ... then it is not bona fide and legal;
- (c) There is no reported English case in which a choice of law clause has been struck down by the courts.

ii. Where the Parties have Impliedly Chosen the Proper Law.

Case law has established that the parties to a contract may be deemed to have impliedly chosen the law to govern it perhaps by including a term relating to the resolution of a dispute by way of arbitration in a particular forum. Thus the tenuous connection with English law "as the proper law" in *Tzortzis v Monark Line A/B* (1968).⁷ was due to the inclusion in the contract of an arbitration clause subjecting the parties to arbitration in London. Whereas 'the fact that the parties have agreed arbitration shall take place in England is an important factor and in many cases it may be a decisive factor ... it would ... be highly anomalous if our law required the mere fact of arbitration ... in England to be decisive as to the proper law of the contract' per Lord Reid in *Compagnie Tunisienne de Navigation v Compagnie d'Armement Maritime* (1971).⁸ The leading case on the impliedly chosen proper law is: *Amin Rasheed v Kuwait Insurance* (1983).

In *Amin Rasheed*, P, a Liberian company resident in Dubai, insured a ship with D, the Kuwait Insurance Company. When a claim made by P under this policy was rejected by D, P sought an order to serve a writ on D under **RSC O.11** which could be granted, providing the contract 'by its terms, or by implication, [was] governed by English law.' There was no express choice of English law, nor was it clear as to what was the implied law: both Kuwaiti law and English law had claims to being the proper law of the contract.

Favouring Kuwaiti Law

Policy was issued in Kuwait;
Insurers were Kuwaiti;
Payment of claims to be made in Kuwait.

Favouring English Law

English language used in the contract;
Premiums to be made in Sterling;
Contract made in English form.
(all relatively insignificant)

However, the surrounding circumstances as well as the terms of the contract itself 'point[ed] ineluctably to the conclusion that the intention of the parties was that their mutual rights and obligations under [the policy] should be determined in accordance with the English law of marine insurance' per Lord Diplock. A significant factor in reaching this conclusion was that at the time of making the contract, Kuwait had no law of marine insurance!

So, from the *Amin Rasheed* case, it may be deduced that the contemporary approach to the resolution of what is the impliedly chosen proper law is to take into account 'the rest of the contract and relevant surrounding facts.' However, that no single factor will be decisive gives rise to the

⁵ *Vita Food Products Inc. v Unus Shipping Co. Ltd.*, [1939] A.C. 277 (P.C.) per Lord Wright.

⁶ That the parties to the contract 'are entitled to make such an agreement' was confirmed: by Lord Reid in *Whitworth Street Estates (Manchester) Ltd. v James Miller & Partners Ltd.* [1970] A.C. 583.

⁷ *Tzortzis v Monark Line A/B*, [1968] 1 W.L.R. 406 (C.A.);

⁸ *Compagnie d'Armement Maritime SA v. Compagnie Tunisienne de Navigation SA* (1971) AC 572-609 HL; *Compagnie Tunisienne de Navigation S.A. v. Compagnie D'Armement Maritime S.A.* [1969] 3 All E.R. 589 per Denning.;

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unfortunate consequence of great uncertainty as to the impliedly chosen proper law in the case under consideration. That pursuit of the case to the House of Lords may be required in order to resolve the issue is an expensive, if necessary, way to do it.

The *Amin Rasheed* case may also be cited as authority for renvoi not having a role in contract. Lord Diplock said that the proper law of a contract was the 'substantive law of the country which the parties have chosen as that by which the mutual legally enforceable rights are to be ascertained, but excluding any renvoi, whether remission or transmission, that the courts of that country might themselves apply if the matter were litigated before them.'

(B) Objectivist View *i.e.*, Where the Parties have Neither Expressly nor Impliedly Chosen the Proper Law.

When there is neither an expressed nor an implied choice of law then 'the court has to impute an intention or to determine for the parties the proper law which, as just and reasonable persons, they ought to or would have intended if they had thought about the question when they made the contract.' per Lord Wright in *Mount Albert Borough Council v Australasian Assurance Society* (1938).⁹

The factors which help the court determine the proper law of the contract are those with which the transaction had its 'closest and most real connection' per Lord Simonds in *Bonython v Commonwealth of Australia* (1951);¹⁰ (approved by Lord Wilberforce in *Amin Rasheed*, supra).

As to the determination of the relevant factors, this involves the court in 'an exercise of judgement, a weighing of a multitude of factors ... [Indeed] ... There is no limit to the number of factors, provided only they have some bearing on the "transaction".' per Donaldson MR in *Amin Rasheed*. The 'closest and most real connection' of the 'transaction' is then determined by a 'system of law' and not by 'the country' with which the contract is most closely connected.¹¹

Presumptions as an aid to Ascertaining the Objectivist View

Whereas, in the past, judges were prepared to rely on presumptions in favour of particular legal systems, e.g. the *lex loci contractus*, or the *lex loci solutionis*, or, perhaps, the law of the flag in shipping cases, reliance on such presumptions was disapproved of by the Court of Appeal in the *Coast Lines Case* (1972).¹²

However, the statement of Megaw LJ in that case that: 'presumptions, once fashionable during the earlier development of English private international law, are now whether for good or ill, out of fashion and rejected' should, perhaps, be reconsidered in the light of the presumptions contained in Article 4 of the *Rome Convention on Contractual Obligations*.¹³

The Impact of Statutory Provisions on the Expressed Choice of Law.

That certain statutory provisions of the *lex fori* can override elements (compare the law chosen by the parties to govern their contract) there is no doubt.

For example, s.153(5) *Employment Protection (Consolidation) Act 1978* provides that where an employee ordinarily works in Great Britain, then 'for the purposes of this Act it is immaterial whether the law which (apart from this Act) governs [that] person's employment is the law of the United Kingdom, or of a part of the United Kingdom or not'. Accordingly, an employee can rely on the protection afforded to him under the 1978 Act even if the rest of his contract is governed by a foreign law.

Furthermore, s.27(2)(a) of the *Unfair Contract Terms Act 1977* provides that where it appears to the court that a choice of law has been 'imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of the Act,' the Act shall continue to apply.

⁹ *Mount Albert Borough Council v. Australasian Temperance & General Mutual Life Assurance Society* [1937] 4 All.E.R. 214; [1938] AC 240.

¹⁰ *Bonython v Commonwealth of Australia* [1951] AC 201 per Viscount Simmonds.

¹¹ cf. Article 4, *Rome Convention*, next lecture

¹² *Coast Lines Ltd. v. Hudig & Veder Chartering N.V.* [1972] 1 All E.R. 451,

¹³ See the next lecture

The 'Proper Law of the Contract' when it is uncertain that a contract has been concluded:

The Putative Proper Law.

When the existence of a valid contract is in issue, perhaps because a vitiating factor is claimed to be present, it cannot be said that the issue in question is governed by the proper law: if there is no contract there can be no proper law.

Accordingly, as *Collier* notes: 'In these situations it has been suggested [by, inter-alia, *Dacey and Morris*; and *Cheshire and North*] and held in *The Parouth* (1982)¹⁴ that the putative proper law, that is that system of law which would be the proper law assuming that there is a valid contract, should govern. This not very logical device is adopted, since there is no other way of deciding the question at issue.'

It is uncertain as to whether the parties to a contract can choose a particular legal system as the putative proper law.

Cheshire and North, and *Dacey and Morris* appear to believe that the answer is 'no': that the putative proper law would be that system of law with which the purported contract has its closest and most real connection; any express choice of the parties would be ignored.

Collier finds this difficult to accept and cites *Ackner L.J.* as having had no difficulty in deciding that an expressly chosen law could be the putative proper law in *The Mariamina* (1983).¹⁵

Choice of Law and Aspects of Simple Contracts

Formation of the Contract.

That English law determines where a contract is formed there is no doubt: *Entores v Miles Far East Corporation* (1955);¹⁶ *Brinkibon v Stahag Stahl* (1982).¹⁷

Whether a contract has been concluded is, apparently, determined by the putative proper law: *The Parouth* (1982). Thus, whether an offer has been accepted is determined by the putative proper law:

Albeko Schumaschinen v Kamborian Shoe Co. (1961).¹⁸ A letter posted in England and sent to Switzerland contained an offer. The offeree alleged that he posted a reply in Switzerland, although it was never received by the offeror. Whereas English law decides that a contract is made when the letter of acceptance is posted, irrespective of whether the offeror receives it, Swiss law provides that the contract is concluded only if the offeror receives the letter of acceptance.

HELD: *Salmon J* found that the offeree failed to prove that he had in fact posted the letter of acceptance. However, he indicated that had the offeree proved that the letter had been posted, then Swiss law, as the putative proper law, would be used in ascertaining whether a contract had been concluded.

The putative proper law will also determine whether *consideration* is a necessary element of a contract. If the putative proper law is English law then the absence of consideration will render a purported contract *void ab initio*. However, if the putative proper law does not require consideration as a necessary element of a valid contract, then a valid contract may result: *Re Bonacina* (1912).

Validity and Vitiating Factors.

Formal validity.

Here the concern is *not* with procedural formalities (which are governed by the *lex fori*, e.g. enforcing a contract of guarantee under the *Statute of Frauds 1677*, but with non-procedural formalities such as a contract for the conveyance or creation of a legal estate in land having to be in a deed: **s.52(1) LPA 1925**. It is likely that compliance with either the *lex loci contractus* or the *putative proper law* will suffice to formally validate the contract.

¹⁴ *The Parouth* [1982] 2 Lloyd's Rep 351 (CA);

¹⁵ *Astro Venturoso Compania Naviera v Hellenic Shipyards SA (The Mariamina)* [1983] 1 Lloyd's Rep 12

¹⁶ *Entores Ltd. v. Miles Far East Corp.*, [1955] 2 QB 327

¹⁷ *Brinkibon Ltd. v. Stahag Stahl Und Stahlwarenhandels-gesellschaft mbH* [1983] 2 A.C. 34, [1982] 2 W.L.R.264, [1982] 1 All E.R. 293 (H.L.)

¹⁸ *Albeko Schuhmaschinen. v. The Kamborian Shoe Machine Co* (1961) 111 LJ 519.

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Essential Validity.

The proper law determines whether the contract or its terms, including exemption clauses, are valid and effective. If a contract made in England is procured through pressure which amounts to duress, it is voidable by the innocent party:

Dimskal Shipping v I.T.W.F. [1991].¹⁹ The International Transport Workers' Federation had threatened to 'black' Dimskal's vessel while it was in a Swedish port unless Dimskal entered into new contracts with the crew, and pay back-dated increased wages. Dimskal avoided the 'blackening' by agreeing to the demand and paying the money. The proper law of the contract was English law, under which a contract induced by duress is voidable by the innocent party. One form of duress is illegitimate economic pressure and this includes the 'blackening' of a ship. On this basis, *Dimskal* sued ITWF in London for a declaration that the contracts were void for duress and for return of the sums paid under the void contracts. Economic pressure amounting to duress was not unlawful in Sweden. **HELD:** Dimskal succeeded: the terms were invalid under the proper law.

Interpretation.

Whereas interpretation of the terms of a contract is usually governed by its proper law, it is permissible for the contracting parties themselves to nominate one legal system to govern the contract and to specify that another system be used to interpret it, i.e. 'the parties may well contemplate that different parts of their contract shall be governed by different law' per Upjohn J in *Re Helbert Wagg* (1956).²⁰

Performance or Discharge of Obligations

It is a matter for the proper law to determine whether the parties obligations have been discharged by:

- performance: *Mount Albert Borough Council v Australasian Temperance & Assurance Society* (1938).²¹; or
- frustration: *Jacobs v Credit Lyonnaise* (1884).²² or
- breach: *Jacobs v Credit Lyonnaise* (1884).

Capacity

At least three possibilities arise: Capacity can be governed by;

- (i) *the lex domicilii* of each contracting party (unreasonable); or
- (ii) *the proper law of the contract* (unrealistic if based on subjectivist approach; but o.k.. if on objectivist approach?); or
- (iii) *the lex loci contractus* (which may be entirely fortuitous).

However, in the absence of any established view in English law, perhaps there is merit in the suggestion that the rule varies depending on who is seeking to rely upon the incapacity e.g. a party who is capable under his *lex domicilii* should not be able to plead incapacity under the proper law of the contract.

Illegality.

In *Mackender v Feldia* (1966),²³ Diplock L.J. said:

- [a] 'English courts will not enforce an agreement, whatever be its proper law, if it is contrary to English law, whether statute law or common law;
- [b] nor will they enforce it, even though it is not contrary to English law, if it is void for illegality under the proper law of the contract.
- [c] Furthermore, subject to one exception, the English courts will not enforce performance or give damages for non-performance of an act required to be done under a contract, whatever be the proper laws of the contract, if the act would be illegal in the country in which it is required to be performed. The exception ... is where the illegality is a breach of a revenue or fiscal law of a foreign state.'

¹⁹ *Dimskal Shipping v I.T.W.F.* [1991] 4 All E.R. 871.

²⁰ *Re Helbert Wagg & Co* [1956] 1 All ER 129 ;[1956] Ch. 323

²¹ *Mount Albert Borough Council v Australian Temperance and General Mutual Life Assurance Society Ltd* [1937] All ER 205; [1938] A.C. 224

²² *Jacobs v. Credit Lyonnais* (1884) 12 QBD 589

²³ *Mackender v. Feldia* A.G. [1967] 2 QB 590 CA

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Thus, *Diplock LJ's* dictum refers to illegality under:

- (i) the lex fori (proposition [a]);
- (ii) the proper law of the contract (proposition [b]); and
- (iii) the lex loci solutionis (proposition [c]).

Proposition [a] causes no problems providing the statute in question is regarded as an overriding statute. (See, for example: *Boissevain v Weil* (1950)).²⁴

Dalmia Dairy Industries Ltd. v National Bank of Pakistan (1987).²⁵ illustrates proposition [b].

Until recently, *Ralli Bros. v Compania Naviera Sota Y Azinar* (1920).²⁶ has been regarded as the leading case on proposition [c].

Ralli Bros. Case. Here, Spanish shippers contracted with R, English charterers, in London, to carry goods from Calcutta to Barcelona. The shippers were to be paid £50/ton freight in Barcelona on delivery there. [i.e. Barcelona was the place where the contract was to be performed]. However, after the voyage had begun, but before the goods arrived in Barcelona, a Spanish law enacted that freight must not exceed £10/ton freight. Accordingly, the charterers, R, agreed to pay £10 but no more. The shippers brought an action in England for the balance.

HELD: English law, which was the proper law of the contract, regarded the Spanish legislation as a frustrating event. The action for recovery of the balance was unsuccessful.

Perhaps the major uncertainty relating to the *Ralli Bros.* case was, in fact, whether it was illegal under the lex loci solutionis or whether English public policy prevented the contract from being enforced.

A clear exception to *Diplock LJ's* proposition [c] in *Mackender v Feldia* is the decision in: *Howard v Shirlstar Container Transport* (1990).²⁷ Two aircraft had been leased from Shirlstar for private use in Nigeria. When the hire instalments became overdue, S was entitled to repossess the aircraft. They aimed to do this by engaging H, a qualified pilot, to recover them under contracts which provided, inter alia, for the payment of £25,000 to H 'for successfully removing [each] aircraft ... from Nigerian airspace.' [The contract provided for half the amount to be paid when the aircraft was removed from Nigerian air space and the other half on return of the aircraft to England]. H went to Lagos, Nigeria, with a wireless operator (his fiancée) where he found one of the aircraft parked at the airport. They prepared it for take-off with the assistance of two British engineers who were there. Then, when H was warned that 'powerful people wished to prevent them taking the aircraft', and that his life and that of his wireless operators was in danger, he took off in the aircraft without obtaining permission from air traffic control at the airport. The aircraft was flown to the Ivory Coast where it was seized by the Ivory Coast Government and subsequently returned to Nigeria. H and his wireless operator were allowed to come back to England where he sued for the second instalment because S refused to pay the full amount on the basis that the contract had been illegally performed in Nigeria i.e. H taking off without permission.

HELD: Although the court would not normally enforce a contract which would enable a plaintiff to benefit from his criminal conduct, since to do so would be an affront to the public conscience, there were circumstances where it would be wrong to disqualify a plaintiff from recovery, even though his claim was derived from conduct which constituted a statutory offence. Here the conscience of the court would not be affronted by allowing the plaintiff to succeed since he had committed the illegal act to save his life and that of his wireless operator. H succeeded in his claim.

Summary

The common law rules governing the choice of law in contract are applicable to contracts, the terms of which were agreed upon, *pre* 1 April 1991. The rules were clear and represented (approximately) 140 years development of common law.

²⁴ *Boissevain v Weil*. [1949] 1KB482, 490 (CA), affirmed on ... at 723; *Boissevain v Weil* [1950] 1. All ER 728; [1950] AC 327.

²⁵ *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223, 287 (CA)

²⁶ *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287

²⁷ *Howard v Shirlstar Container Transport Ltd* [1990] 3 All ER 366 ; 1990]1 WLR 1292 (CA).

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When ascertaining the proper law, it would appear that a subjectivist view applies whether the parties to the contract have expressly or impliedly chosen a law to govern their agreement. However, in the absence of any agreement, express or implied, it would appear that an objectivist view prevails. That presumptions as an aid to ascertaining an objectivist view were said to be going 'out of fashion' and, accordingly, should be rejected, contrasts with the provisions of the Rome Convention which apply to contracts the terms of which were agreed upon on or after 1 April 1991.

FURTHER READING

Forsyth, Conflict of Laws Textbook, London: HLT Publications, 7/e 1993
McClellan, J.D. Morris: The Conflict of Laws. London: Sweet & Maxwell, 4/e 1993.

CASE LAW

Macmillan v Bishopgate [1995].²⁸ Conflicts : Applicable Law - Restitution - UK or New York.

LORD JUSTICE AULD: "The question between the parties to this appeal is "Who has the better right to ownership of shares in a corporation?". The question in this part of the appeal is "How, in the English Conflict of Laws, is the applicable law for such an issue to be determined?" Is it a matter of property to be governed by the location of the shares or the incorporation of the company? Or is it to be determined by one or other of the rules governing obligations? If the latter, does it come within the existing rules governing choses in action, or does it form, as Millett J. held, at [1995] 1 WLR 992G-H, "a special sub-species of chose in action with its own rules"?". Per Staughton "....."

1. In any case which involves a foreign element it may prove necessary to decide what system of law is to be applied, either to the case as a whole or to a particular issue or issues. Mr Oliver, for *Macmillan Inc.*, has referred to that as the proper law; but I would reserve that expression for other purposes, such as the proper law of a contract, or of an obligation. Conflict lawyers speak of the *lex causae* when referring to the system of law to be applied. For those who spurn Latin in favour of English, one could call it the law applicable to the suit (or issue) or, simply the applicable law.
2. In finding the *lex causae* there are three stages. First, it is necessary to characterize the issue that is before the court. Is it for example about the formal validity of a marriage? Or intestate succession to movable property? Or interpretation of a contract?
3. The second stage is to select the rule of Conflict of Laws which lays down a connecting factor for the issue in question. Thus the formal validity of a marriage is to be determined, for the most part, by the law of the place where it is celebrated; intestate succession to movables, by the law of the place where the deceased was domiciled when he died; and the interpretation of a contract, by what is described as its proper law.
4. Thirdly, it is necessary to identify the system of law which is tied by the connecting factor found in stage 2 to the issue characterised in stage 1. Sometimes this will present little difficulty, though I suppose that even a marriage may now be celebrated on an international video link. The choice of the proper law of a contract, on the other hand, may be controversial.
5. In an ideal world the answers obtained in these three stages would be the same, in whatever country they were determined. But unfortunately the Conflict rules are by no means the same in all systems of law. In those circumstances a choice of Conflict rule may have to be made. It is clear that, in general, the second and third stages are to be determined by the law of the place where the trial takes place (*lex fori*). That law must tell one what the connecting factor is for the issue before the court, and what system of law it points to. But the first stage, characterisation of the issue, presents more of a problem.
6. In *Dicey and Morris on The Conflict of Laws* (12th edn) p.35 there is this passage:
"The problem of characterisation has given rise to a voluminous literature, much of it highly theoretical. The consequence is that there are almost as many theories as writers and the theories are for the most part so abstract that, when applied to a given case, they can produce almost any result."
Fortunately the next sentence reads: "They appear to have had almost no influence on the practice of the courts in England."

²⁸ *Macmillan Inc v Bishopgate Investment Trust Plc* [1995] EWCA Civ 55. Staughton LJ; Auld LJ; Aldous LJ. 2nd November 1995.

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The authors conclude (p.44): "The way the court should proceed is to consider the rationale of the English conflict rule and the purpose of the rule of substantive law to be characterised. On this basis, it can decide whether the conflict rule should be regarded as covering the rule of substantive law. In some cases the court might conclude that the rule of substantive law should not be regarded as falling within either of the two potentially applicable conflict rules. In this situation a new conflict rule should be created."

Later (p.47): "... the way lies open for the courts to seek commonsense solutions based on practical considerations."

7. Before leaving these preliminary matters, I would add that if at all possible the rules of Conflict should be simple and easy to apply. One might say that all rules of law should be of that character; but we have less control over rules of domestic law. The litigant who is told by his advisers that his case may or may not involve the application of a foreign system of law, and that he must be armed with expensive expert evidence which may, in the event, prove unnecessary, deserves our sympathy. For many years even cases of tort/delict involved uncertainty and the analysis of five different speeches in the House of Lords. Academic writers of distinction concern themselves with Conflict, not surprisingly since it is a subject of great intellectual interest. We must do our best to arrive at a sensible and practical result.
33. The judge held that the applicable rule of Conflict of Laws required him to apply the law of the place of the transaction (*lex loci actus*), which in turn he held to be New York law. Both those conclusions are challenged. Macmillan argue for the law of the restitution obligation, which in turn they claim to be the law of the place where the benefit was received, or the law with which the transaction has its closest and most real connection. Alternatively they say that the place of the transaction, even applying the judge's rule, was England and not New York.
34. The defendants are content with the judge's conclusions as they stand. But the preferred view of Shearson Lehman and Credit Suisse is that the applicable law is the *lex situs* of the shares, or (if there is any difference) the law of the place of incorporation or where the register is kept. All these tests point to New York in this case. Swiss Volksbank on the other hand adopt the judge's solution as their primary case, but are content with the *lex situs* or the law of the place of incorporation as alternatives.

Stage 1: Characterisation

35. Macmillan contend, as they did before the judge, that their claim is restitutionary in nature; and that in consequence the appropriate Conflict rule is rule 201 in *Dicey & Morris*:
- "201 (1) The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation.
- (2) The proper law of the obligation is (semble) determined as follows:
- (a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract;
- (b) If it arises in connection with a transaction concerning immovable (land), its proper law is the law of the country where the immovable is situated (*lex situs*);
- (c) If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs."
36. The rule appears in the section of *Dicey & Morris* which deals with the law of obligations. It is sub-paragraph (c) which is said to be relevant here.
37. The case of *Chase Manhattan Bank NA v. Israel-British Bank (London) Ltd* (1981) Ch. 105 was cited in support of the rule. That was a case of money paid under a mistake of fact; but, the defendants being in liquidation, there was a proprietary claim to trace the money asserted as well as a common law claim for money had and received. It was, as Goulding J. said (at p.115):
- "common ground that the legal effects of the mistaken payment must in the first instance be determined in accordance with New York law as the *lex causae*."
38. Counsel (Mr Chadwick) had cited the predecessor of rule 201(2)(c) from the 9th edition of *Dicey & Morris*. *El Ajou v. Dollar Land Holdings plc* (1993) 3 All ER 717 was about a claim to trace the proceeds of fraud. Millett J., at first instance, held that (p.736)
- "the law governing such claims is the law of the country where the defendant received the money,"
- and referred to *Dicey & Morris* (11th edn) and the *Chase Manhattan case*. In the Court of Appeal (1994) 2 All ER 685 the decision was reversed, but not upon any consideration of the applicable law - perhaps because there had been no evidence of foreign law.

LECTURE ELEVEN

In re Jopia (1988) 1 WLR 484 concerned claims for money paid under a mistake and/or for money had and received. Sir Nicolas Browne-Wilkinson V-C said this (at p.495):

"As at present advised, I am of the view that quasi-contactual obligations of this kind arise from the receipt of the money. I find it difficult to see how such obligation can be said to be 'made' or 'arise' in any place other than that of receipt. As to the proper law, *Dicey & Morris, the Conflict of Laws*, 10th edn. (1980), p.921 expresses the view that, save in cases where the obligation to repay arises in connection with a contract or an immoveable, the proper law of the quasi-contact is the law of the country where the enrichment occurs. This accords with the American Restatement and seems to me to be sound in principle."

This passage was not essential to the decision, but rather obiter. Rule 201 was followed by Hwang JC in the High Court of Singapore in *Hongkong & Shanghai Banking Corporation v. Overseas Bank Ltd* (1992) 2 SLR 495 in relation to money purloined from a bank account.

39. Millett J. in the present case accepted (as he had done in *El Ajou*) that *Dicey's* rule applied to some restitutionary claims; but he held that it did not apply to all. He drew a distinction between the claim of an equitable owner to recover his property, or compensation for the failure to restore it, from the person into whose hands it had come, and a claim by a plaintiff in respect of a breach of a fiduciary obligation owed to him. Whilst the latter class of a case would be within Rule 201(2) (c), the former would not. The issue in the former case was one of priority, to be governed by the law selected by a Conflict rule as appropriate to that issue.
40. It is clear that Macmillan's claims in the present case are to some extent proprietary. Mr Oliver asserts that they are receipt based. But he needs to do more than show that the defendants received the shares; he must also plead, in effect, that they are Macmillan's shares; and the Statement of Claim does indeed say that. Millett J. described this requirement as "**an undestroyed proprietary base.**" Against that it is said that, whilst Macmillan do have an equitable title to the shares, equity acts *in personam* and gives effect to that title only by orders directed at those who would disturb it. Hence the fact that, while the English courts do not have jurisdiction to decide questions of title to foreign land (*Dicey & Morris* rule 116), there are many instances where they will grant a remedy against defendants who are here and who are sued here: *Mercantile Investment & General Trust Co v. River Plate Trust, Loan & Agency Co*, (1892) 2 Ch.303, *Webb v. Webb* (1994) 3 WLR 801. Mr Oliver points out that Macmillan claim not only a declaration as to their proprietary rights, but also an order that the defendants restore the shares to Macmillan and compensation or damages.
41. In my judgment the considerable learning directed at those issues does not need to be considered in the present case. This part of this appeal is not in my opinion the place to confront the law of restitution "in a logical, consistent and coherent fashion". (*Bird* (1995) LMCLQ 313). I am prepared to accept that Macmillan's claim is restitutionary in nature; and I would accept without deciding that rule 201 of *Dicey & Morris* determines what system of law governs such a claim. But the issue is not, or not any longer, whether Macmillan have a cause of action for restitution; it is whether the defendants have a defence on the ground that they were purchasers for value in good faith without notice of Macmillan's claim. As the judge said, and Mr Oliver asserts, "**Shearson Lehman cannot resist Macmillan's claim unless it can establish the defence of bona fide purchaser for value without notice.**" The same applies to Credit Suisse and Swiss Volksbank. Mr Oliver went so far as to submit that, once one has determined the law which governs the cause of action, that same system governs all issues which arise in the suit. That cannot be right. Procedure, for instance, which sometimes includes limitation, is governed by the law of the place of trial; or, to take a rare example, a contract to exchange one currency for another may be invalid by its proper law, or by the law of the place of performance, or by the law of the forum, or by the law of the country whose currency is involved! I would regard it as plain that the rules of Conflict of Laws must be directed at the particular issue of law which is in dispute, rather than at the cause of action which the plaintiff relies on. We should translate *lex causae* as the law applicable to the issue, rather than the suit. In this case the issue is whether in law the defendants were purchasers for value in good faith without notice, so as to obtain a good title to the shares.
42. Macmillan still assert, against Credit Suisse only, a claim in conversion, although the judge thought that it had been abandoned during the trial. That claim, it is said, must be governed by English law. But again it is the defence which identifies the issue. If Credit Suisse have by New York law a good title as purchasers for value in good faith and without notice, they are not liable in damages; or if for some reason they became liable at one stage, there are now no damages."

PRIVATE INTERNATIONAL LAW : CONFLICT OF LAWS

Latvian Shipping v Ingosstrakh Ltd [1998].²⁹ Conflicts : Applicable Law. Pre-Rome I. Common Law Rules. Claim for "Roll-back-relief" - viz "monies provided under the terms of a voluntary agreement between oil cargo interests (CRISTAL) by way of partial reimbursement to ship owners and/or their insurers who have paid claims by third party victims of pollution. It is Ingosstrakh's and The Association's case that although LSC (and third parties) have been indemnified in full in respect of the pollution incident. LSC has also subsequently received US \$ 864,692 by way of roll-back relief which LSC is obliged to pay, but has not paid, over to them. That obligation is said to arise either in contract under the Policy and/or by a separate agreement with the Association or as a matter of the law of "unjust enrichment". Held : English Law applied.

Ennstone v Stanger [2002].³⁰ Conflicts ; Action in contract and in tort for negligent advice. Where the tort consists in essence of the giving of negligent advice, that tort is committed where the advice is received: see *Diamond -v- Bank of London and Montreal*, page 346G. On that basis I would regard the alleged tort in this case as having been committed in England, in which case English law would apply.

Workshop Questions

1. Nickel, domiciled and resident in Akkadia, agrees to sell to Zinc, domiciled and resident in Lavonia, 10 tons of copper from Nickel's mine in Numibia. The agreement is concluded by exchange of letters. It is expressed to be governed by Numibian law. The price is 1,000 U.S. dollars per ton payable in Akkadia in Akkadian francs. The copper is to be transported by ship from Numibia and delivered to Zinc in Lavonia. Any dispute arising out of the agreement is to be determined by the English courts only.

By Akkadian law, but no other law, Akkadian copper producers are forbidden to sell copper for less than 2,000 U.S. dollars per ton. By Lavonian law, but no other law, a contract to import copper into Lavonia must be registered with a solicitor. This has not been done. While the ship carrying the copper was on the high seas, Akkadia enacted a law forbidding delivery of copper by Akkadian residents to Lavonia.

Zinc tendered payment to Nickel in Akkadia of the equivalent in Akkadian francs of 10,000 U.S. dollars. Nickel refused to accept it, saying that the agreement was invalid under both Akkadian law and Lavonian law. The ship's captain obeyed Nickel's order not to deliver the copper to Lavonia. Zinc wishes to sue Nickel for non-delivery.

Advise Zinc.

2. Umma, an Egyptian exporter, sent from Cairo (Egypt) to London (England) a telex to Victor, a Brazilian importer, offering to sell him some Egyptian potatoes to be delivered to Rio de Janeiro (Brazil). The message also stated that any contract would be governed by Egyptian law and the price was to be paid into Umma's bank account in Switzerland. Umma received a telex from Victor accepting the offer. Umma shipped the potatoes, but before they reached Rio de Janeiro, Victor sent another telex to Umma purporting to repudiate the contract. Umma replied, saying that he refused to accept the repudiation. Victor returned to Brazil. The potatoes arrived at Rio de Janeiro, but Victor refused to accept or pay for them.

Umma now sues Victor in England for the price. Victor argues that he is not liable:

- (a) because Umma's first telex contained misrepresentations and by Egyptian law these render the contract void;
- (b) that by Brazilian law it is illegal for anyone resident in Brazil to make payments in Switzerland; and
- (c) that Umma's action is time barred under Egyptian law, though not under English law.

Advise Umma.

²⁹ *Latvian Shipping Comp v Insurance Co "Ingosstrakh" Ltd* [1998] EWHC 1201 (Comm). Mr Justice Langley. 27th November 1998.

³⁰ *Ennstone Building Products Limited v. Stanger Limited* [2002] EWCA Civ 916. Potter LJ; Keene LJ. 28th June 2002.