

HOW CONFLICT OF LAWS RULES HAVE DEVELOPED, AND MAY CONTINUE TO DEVELOP, TO ACCOMMODATE THE REQUIREMENTS OF INTERNATIONAL COMMERCE

The Conflict of Laws, which is also known as private international law, is that part of the private law of a particular country. It is made to regulate disputes of a private nature. In order to make a conflict of law to be effective, the dispute between parties must have a connection with at least one foreign legal system. Every modern legal system has a private international law and it is not the same in all countries.

The definition of conflict of laws is explained by Lord Nichols of Birkenhead. According to him, "Conflict of Laws jurisprudence is concerned essentially with the just disposal of proceedings having a foreign element. The jurisprudence is founded on the recognition that in proceedings having connections with more than one country an issue brought before a court in one country may be more appropriately decided by reference to the laws of another country even though those laws are different from the law of the forum court."¹

Given an example is better to understand the conflict of laws. For instance, if the contract was made between two people from country X, and the claim for breach of contract made in country X between parties who is domiciled in country X. In here, there is no foreign element, so the case is not the case in the conflict of laws. On the other hand, if the contract had been made between X and Y countries' company and its performed in country Z, then the case is a case in the conflict of law for three countries. Under this situation, the court of the Z's country has to use its choice of law rules to determine the applicable law whether to apply country X or Y or Z.

Furthermore, it is also better to indicate the distinction between private international law and public international law. As I explained before, the former deals with cases that have particular nature and it is not an international system of law. The latter is a system, which regulates relations between different states, and its rules, unlike the private international law, are the same everywhere.²

¹ Kuwait Airways Corpn V Iraqi Airways co [2002] UKHL 19.

² Morris, Conflict of Laws, 6th Edt., Sweet & Maxwell, 2005, Page 4.

The growth of the trade between countries had led to have increasing numbers of disputes during 19th and 20th century. The development of trade between countries resulted to strong international movements towards harmonising the various systems of laws.

It is important to know that, how those different kinds of conflict of laws rules have been harmonised with each other, in spite of having a lot of differences between them. It might be understood only the way that to look at the historical background of the private international law.

First of all it is necessary to explain the development of the English conflict of laws rules, because the English approach of conflict of laws rules is the most effective approach to over the European approach.

The conflict of laws rules in England has started to develop during the 18th century. Before that, generally, English law was not dealing with choice of law problems. After that, the English conflict of laws was written by Westlake in the 19th century.³ The improvement of the English conflict of laws in the 19th century, as a result of the rapid increase in commercial and social relations between England and the Continent of Europe.

By contrary with the history of the English conflict of laws, the Continent of Europe conflict of laws has generally started to develop around 13th century.

There are three most important sources of the English conflict of laws. Namely, it is statutes, the decisions of the courts, and the opinions of the jurists.⁴ As a result of the implementing to the international conventions into English law, the status has become the most important source for the English conflict of laws. The English conflict of laws was affected from conventions such as Brussels, Lugana and Rome conventions. At the same time, the decisions of the courts, which are the other source, were having

³ PM North JJ Fawcett, *Private International Law*, Oxford University Press, 13th Edt., page 16

⁴ Dicey & Morris, *The Conflict of Laws*, Sweet & Maxwell, 13th Edt., 2000, Chap. 1-015.

a very important role to be a reference for the conflict of laws, especially under the decision of the European Court of Justice.⁵

Moreover, the process of the English conflict of laws can observe under some cases. Especially, under the **Robinson v Blant** case⁶, there was the first mention of the doctrine that the law to govern a contract is the law intended by the parties. According to Lord Mansfield that, “the general rule, established ex comitate et jure gentium, where the action is brought, is to be considered in expounding and enforcing the contract. But, this rule admits of an exception when the parties at the time of making the contract had a view to a different kingdom.”⁷

Furthermore, under the case of **Phillips v Eyre**⁸ that, the common law rules in relation to foreign torts are settled with this case.

Most of the necessary principles of the English conflict of law rules were established under the case law in 18th century.⁹ Such as, the law of the place of celebration governs the formal validity of a marriage was established under the **Scrimshire v Scrimshire** case¹⁰. Moreover, under the **Pipon v Pipon** case¹¹ it was established that, movables is to be governed by the law of the domicile of the owner. And also Lord Mansfield expressed the point that, “the English court must give effect to foreign laws with regard to contracts legally made abroad.”¹²

The English conflict of laws rules may differ from many continental European countries.¹³ There are many situations in which, if the English court has jurisdictions, it will apply English domestic law, such as in the field of family law.¹⁴ On the other hand, there are many situations in which, if a foreign court has jurisdiction according to English rules of the conflict of laws, its judgement of decree will be recognised or

⁵ Dicey & Morris, [Opcit], chap. 1-015

⁶ [1760] 1 Wm BL 234

⁷ Robinson v Blant, [1760] 1 Wm BL 234 at 258- 259.

⁸ [1870] LR 6 QB1

⁹ PM North & JJ Fawcett, [Opcit], p 18

¹⁰ [1752] 2 Hag. Con. 395

¹¹ [1744] Amb 25

¹² Holman v Johnson [1775] 1 Cowp 341

¹³ Dicey & Morris, [Opcit], chap. 1-005

¹⁴ Zanelli v Zanelli, [1948], 64 T.L.R. 556

enforced in England, regardless of the grounds on which it was based on the choice of law rule which it applied.¹⁵

According to **Godard v Gray** case¹⁶, the foreign court is wrong on the law, because the foreign court applied its own domestic law according to English conflict of laws. However, it should have applied English domestic law. Moreover, in the case of the **Zeiss Stiftung v Rayner & Keeler**¹⁷, the foreign judgments were recognised in England.

Before England ratified the Rome convention by 1990 act, the English common law approach was based on the “proper law of the contract” during 19th century by English judges.

According to common law approach, when the contract is made, the applicable law might be the law chosen by the parties or that with which the contract is closest to and has its most natural connection. The Privy Council developed the latter in 1950 in **Bonython v. Commonwealth of Australia**.¹⁸

The common law approach can be explained under three stage rules according to **Vita Food Products Inc. v. Unus Shipping Co. Ltd.**¹⁹

First one is that, if the parties have chose the law, and then this law will be applicable. According to Lord Wright, as long as the parties have made a bonafide a legal law, that law is to be applied.

Second one is that, absence of express choice of law. Under this situation, the court will look for an implied choice under the circumstances.

The last one is that, if there is neither an express nor an implied choice, the court will apply the legal system with which the contract is most closely connected.

¹⁵ Morris, [Opcit], p 5

¹⁶ [1870] L.R. 6 Q.B.139.

¹⁷ [1967] 1 A. C. 853

¹⁸ [1951] A.C. 201

¹⁹ [1939], A.C. 277

However, when the Rome Convention has been incorporated in the UK by the 1990 Act, the common law rules on choice of law was displaced.

As I mentioned before, there is no single system of conflict of laws rules. They differ from country to country. Every country has got their traditional legal system. Application of foreign law in cases which, including foreign element might result unsatisfactorily judgement. Every legal system has to take into account to be developed and well-defined set of rules of the conflict of laws. Moreover, jurist searched for theories to explain the application by the courts of one country of the laws of other countries, and since these have had some influence of the doctrines and evolution of the English conflict of laws rules.²⁰

It is necessary to look at some theories in order to understand development of the conflict of laws.

The first one is theory of comity. This theory was originated by Story J. [1779-1845]. The theory was derived from Huber's doctrine of comity. According to theory of comity, "it is necessary to apply foreign laws in cases involving a foreign element because not do so would constitute a disregard of the sovereignty of another state within its territory and thus show a lack of comity towards it."²¹

The second one is that, it is the theory of vested rights. This theory was propounded by Huber, but it was refined by Dicey in England and by Beale in the USA.²²

The theory of vested rights is based on the principle of territoriality. According to it, the judge cannot directly neither recognise nor enforce foreign judgements. It has to be recognised by its own territorial law. The territorial law must govern all cases. It was derived from Huber's statement. It was said that, "the laws of another state which have been applied within its frontiers maintain their force everywhere." As a result of this, when the vested right obtained in one country have to be enforced and protected

²⁰ J.G. Collier, Conflict of Laws, 3rd Edit. Cambridge University Press, 2001, page 378.

²¹ J.G. Collier, [Opcit], p. 379

²² PM North JJ Fawcett, [opcit], p 20

in other countries. And also it was supported by Sir William Scott in the case of **Darlrymple v Darlrymple**²³.

Another theory is the local law theory. This theory was propounded by Walter Wheeler Cook. It determines that the country's court recognises a local right and never apply foreign law as their own law. However, if there is a foreign element in the case, it always applies its own law to the case. In doing so, the rule of the law will not be a purely domestic character, but also it has to take into account the law of the foreign country.²⁴

The Austro- American jurist Kelsen also supported the view of Cook. According to him, "the true meaning of the rules of so-called private international law is that, the law of a state directs its organs to apply in certain cases norms which are the norms of the state's own law, but which have the same contents as corresponding norms of another state's law."²⁵

The conflict of laws rules has also developed under the some important techniques. There are two general techniques. The first one is jurisdiction-selection technique. It was develop by Caver in 1933. This requires that, the court applies the law of the country which is chosen by choice of laws rules and it is irrespective to the content of the particular rule of law thereby selected.²⁶Such as, the validity of the contract is governed by the law chosen by the parties.

Moreover, Caver introduced seven 'principles of preference' in 1965. It was guides for courts in cases where the conflict of laws rules is neither false nor avoidable. Five of these principles are related with torts and two of them with contracts and conveyances.²⁷

²³ [1811] 2 Hag. Con. 54

²⁴ PM North JJ Fawcett, [Opcit], p 23.

²⁵ G. Kelsen, General Theory of Law and State, 2nd edit. ,Cambridge,Mass, Harvard University Press, 1961, p.244-5.

²⁶ PM North JJ Fawcett, [Opcit], p 24

²⁷ Morris, [Opcit], p 532.

However, his principle was criticised and claimed that, it does not work an international area, because these principles were not related any other than torts, contracts and conveyances.

The second technique is the rule-selection technique. This technique was mostly used by American courts. This is requires that, the court examines the particular rules of law. Choice of law rules should be identified by court and to apply one particular legal system rather than a different substantive rule of another legal system.²⁸

Another important development for conflict of law rules is conventions. First of all, it is important to evaluate the Rome Convention to better understand the importance of conflict of laws. The Rome Convention is the one of the most important element on conflict of laws, which accepted choice of laws rules. The convention is a product of the European Community. It was accepted in 1980 by the European Commission.²⁹ It was signed by all of the member states in 1981. It was the first step towards unification and codification of general rules of conflict of laws in the field of civil law in the European Community; that unification would make it easier to determine the applicable law and increase legal certainty.³⁰ The convention eventually received enough ratification and came into force on 1 April 1991.

The Rome Convention, however, is not open for signature to the States, which are not members of the European Comminute.³¹ On the other hand, non-member countries can incorporate the rules of the Rome Convention into their private international law. The effect of the Rome Convention is that, if the contract made after the Convention came into force, the national law rules on contract choice of laws are replaced by the rules of the Convention. It does not have retrospective effect.³²

Two protocols were signed in 1988 on interpretation of the Rome Convention by the court of justice.³³ The first one is that, the jurisdiction of the court of justice was

²⁸ PM North JJ Fawcett, [Opcit], p 24

²⁹ [1980],OJL 266, 9 October.

³⁰ Dicey-Morris, [Opcit], Chap. 32-010.

³¹ Article 28[1] of the Rome Convention.

³² Article 17 of the Rome Convention.

³³ OJ L 48 of 20 February 1989.

accepted. And second one is the court of justice has a power to interpret the Rome Convention.

Furthermore, the scope of the convention is described under the article 1 of the Rome Convention. According to article 1, **”The rules of this convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.”** There are two requirements under this article. First one is that the obligations must be contractual, and second one is that, there must be a choice of law problem.

Moreover, in the case of federal states in which each federal units has its own rules of law in respect of contractual obligations. Each unit is to be considering as a ‘country’ for the purpose of the convention.³⁴ Federal states are not bound to apply the convention as a result of the conflicts between each federal unit.³⁵ However, according to 1990 Act, if there is a conflict between the laws of different parts of the United Kingdom, the convention rules will be applicable between the laws of such parts.³⁶

The selection of the applicable law is the essence of the convention. There are some approaches to determine to the applicable law. According to article 3 of the Rome Convention, the parties expressly choose the law. Article 3 sets out the basic principles, **“a contract shall be governed by the law chosen by the parties.”**

However, according to US principles, there must be some important connections between the law and the subject matter contract. As a result of this view, the rule of the party autonomy was accepted by the United States later on.³⁷

Contrary to American view, the Rome Convention allows the choice of law, which has no connection with the contract. And also it was supported by the case of **Egon Oldendorf v Libera [corp]**³⁸.

³⁴ Article 19[1] of the Rome Convention.

³⁵ Article 19[2] of the Rome convention.

³⁶ Section 2[2] of the 1990 Act.

³⁷ Dicey-Morris, [opcit], chap. 32-061

³⁸ [1961], 1 Lloyd’s Rep. 380.

The second approach to determine the applicable law is identified under the last sentence of article 3[1] of the Rome Convention. It provides that, **“By their choice the parties can select the law applicable to the whole or a part only of the contract.”** According to article 3[1], the parties have a right to pick and choose the applicable law to the whole or a part of the contract. This allows **depeçage**, which allows the parties to choose the different laws for different parts of the contract.

The last approach is that, according to article 4[1] of the Rome Convention, **“to the extent that the law applicable to the contract has not been chosen in accordance with article 3, the contract shall be governed by the law of the country with which it is most closely connected.”** That is means, if there is an absence choice of law, the law of the country, to which it is most closely connected, shall govern the contract.

Moreover, the Rome Convention provides special rules to protect the consumer under article 5 and individual employment under article 6 of the convention. These articles are designed to protect the weaker party.

According to article 5[1], it applies to such contract which object is to supply goods or services to a person [the consumer] for a purpose, which can be regarded as being outside of his trade or profession.

According to article 6 of the convention, **“in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection”**. However, the convention does not clearly identify the “employment”. According to Giuliana- Lagarde report, “employment contract would include even if where the employee has failed to issue a formal employment contract.”³⁹

Another important development of conflict of laws rules was made under the Brussels and Lugano Conventions.

The Brussels Convention was signed by the six original members of the European Community in 1968 and came into force in 1973. The Brussels Convention is

³⁹ At p.26

amended by the 1978, 1982 and 1989 Accession Conventions. It was also provided to be in force between United Kingdom and all the Contracting States by the 1982 Act. The purpose of the convention is to provide free circulations of judgement throughout the community.

On the other hand, the Lugano Convention was signed in 1988 by the 12 Member States of the European Community and by the 6 Member States of the European Free Trade Association (EFTA). The purpose of the convention is to provide free circulations of judgements between two groups of countries. So, it can be said that, it is the amendment of the Brussels Convention. The Convention came into force for the United Kingdom by the Civil Jurisdiction and Judgement act 1991. 1991 Act is also amended the 1982 Act.

However, there are some differences between them. The European Court of Justice has no jurisdiction on the Lugano Convention, because the EFTA members would not have accepted the European Court.⁴⁰ On the other hand, under the Brussels Convention, the European Court can give a preliminary ruling to fill the gaps in the convention.⁴¹

As far as Brussels Convention concerned, it is only concerned with the jurisdiction of Contracting States. So the dispute between parties has to involve a foreign element. According to article 1 of the convention, it only applies in civil and commercial matters. So, the convention does not apply to public law matters.⁴² Such as revenue, customs or administrative matters.⁴³

Moreover, the convention provides jurisdiction not only in the courts of contracting State, which is defendant domiciled, but also under special jurisdiction, it is permitted that the courts of more than one Contracting State could have jurisdiction.⁴⁴

⁴⁰ Dicey-Morris, [Opcit], chap. 11-07.

⁴¹ PM North, JJ Fawcett, [opcit], p 184.

⁴² Netherlands State v. Ruffer [1980], ECR 3807.

⁴³ PM North, JJ Fawcett [Opcit] p 190.

⁴⁴ Article 5 of the Brussels Convention.

Consumers are generally known the weaker party of the contract. The Brussels convention has also had protective provisions over the Consumer contract with its articles 13,14 and 15. According to article 14 of the Brussels convention,” **A consumer may bring proceedings against the other party to a contract either in the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled.**” However, the other party of the consumer contract can only sue in the domiciled of the consumer.

As far as Lugano convention concerned, application of the convention is the same as the Brussels Convention. In order to apply to the convention, the defendant must domicile in a Contracting States. However, if the defendant domiciled in a European Community Contracting States, the Brussels Convention would be applicable, or if he domiciled in an EFTA Contracting States, the Lugano Convention would be applicable.

Furthermore, a special commission of the Hague Conference on Private International Law recommended to draw up a multilateral convention on jurisdiction, recognition and enforcement of foreign judgements in civil and commercial matters in 1994.⁴⁵ Because, there are generally regional conventions, which are applicable by certain, Member States. However, according to growth of the world trade and improving relations between countries made necessary to have multilateral convention in which includes large numbers of countries around the world. On the other hand, multilateral conventions should not conflict with other conventions, such as Lugano and Brussels Conventions. It has to reach a compromise. After accepting such as multilateral convention, the other regional conventions, at the same time, should be applicable to the cases, which they were applicable before the multilateral convention came into life.

To sum up, in my opinion, according to development of civil and commercial matters between countries resulted to have the conflict of laws. This process still continues to develop. In order to accommodate the requirements of international commerce, it is

⁴⁵ PM North, JJ Fawcett, [Opcit], p 283

important to draw up the multilateral convention which includes large numbers countries and which is also compromises the needs of the countries.

On the other hand, as a result of the rapid development, the conflict of laws rules, which is applicable at the present, would not be enough and every time it will be necessary to adopt the conflict of laws rules to the new era.

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