NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF LAW

COURSE CODE: LAW 513

COURSE TITLE: Conflict of Laws I

CONFLICT OF LAWS I

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CONTENT

CONFLICT OF LAWS

MODULE 1
Introduction to Conflict of Laws
Unit 1
Historical Background of Conflict of Laws

CONTENT

1.0 Introduction

Generally speaking, application of foreign laws to foreign cases has ancient origin and foreign connotations. This law principle was not systematized or formalized until the 13th century. In fact, the technique conflict of laws at this time was very rudimentary if not totally and practically remote from knowledge.

From the point of history, the Greek city states of Hellenic era opened special courts for solving or settling cases having foreign element. That is the cases involving aliens or foreigners. Professor I. O. Agbede (Emeritus) admitted that 'the praceter peregrine of the Roman Empire administered the jus gantinum in cases involving foreigners interses or between a foreigner and a Roman citizens. It was the closest system of law to the jus natural.

2.0 Objectives

At the end of this introductory unit, students should be able to:

- know the historical background of this course
- know the course salient words such as 'foreign element and comity'
- know conflict of laws and other branches of Law.

3.0 Main Content

3.1 History of the Conflicts of Laws

In many offices and seminar room walls hangs a political map of the world or region or particular continent. Each state, even the very smallest has its own colour to identify it and its people.

Before now, precisely about 6 decades ago, the colour scheme was rather simpler: pink for the British Empire, perhaps green for the French possessions, and some other colours for the many republics which made up the defunct Soviet Union. However, the boundaries between the different colours once meant a big deal. It is remarkable to note that uncountable individuals lived and died without visiting a foreign states (of their dream). Trade and commercial patterns tended to take after the imperial colour schemes. Most a times, British companies would have their branches in the colonies under the British colonial regime, where legal rules and commercial practice followed English/British models. All these have drastically changed particularly after most of these countries/colonies had gained independence.

As most of the colonized nations attained independence, the number of colours on the world map, regional and continental maps increases. In addition, the old empires market are not spared and are replaced by regional common markets, such as those in Europe or the Carribeans. Each states at this parlance evolves its own body of laws and legal system, its own courts model, and its own legal personnel that sweet the system adopted.

As time went on, both individual and corporate across the international boundaries but there is no corpus of international law and no system of international courts to resolve any legal issues and disputes that arises. Therefore, reference have to be made to the courts of a particular nations' legal system and the rules which those courts choose to apply. These various rules by various countries are the rules of the conflict of laws that who are studying under this course (Morris, 2005).

Furthermore, an alternative model was to permit subjects of these foreign comities a degree of autonomy in the enjoyment of their local customs and beliefs. For example, Pontius Pilate of Biblical age reportedly claimed that he was mandated not to destroy but to enforce the customs of theJews

"In England, up to the 18th century, the courts of the Staples and Piepowder adjudicated over disputes involving foreign merchants while cases arising from the high seas came before the court of Admiralty. In the cases referred to, the courts applied a supposedly universal law, such as, law merchant (lex merchanteria) and general maritime law.

Furthermore, in Egypt of the Ptolemis era, it shows that the practice of establishing special courts for foreigners was no doubt in vogue. It is very clear that conflict practiced in ancient times appear to be vested on the general idea that the choice of court carries with it the choice of the law to be applied.

During the development of rules of private International Law, the authorities identified four specific periods as identified by various authors. The four periods are as stated below:

i. Statutory intent.
ii. Agreement of parties
iii. Territorial sovereignty and
iv. Location of Legal relations.

The idea of predicating choice of law on statutory intent is attributed to the medieval Italian and French jurists (Bartolus) from the universities who conceived conflicts rules purely as matter of statutory interpretation classifying statutes as concerning persons, 'statuta personalia' things, 'statuta realia' and actions 'statuta mixta'

De Moulin, a French jurist, was credited to have posited that "the intent of the contracting parties, expressed or tacit, transcends the authority of the statute in the determination of the applicable law". With this development, the jurists had uncovered new ground by discovering a novel choice of Law rule aside the purview of statutes which had hitherto applied.

Dutchian jurists were not left out, a number of them advocated a wider scope for real statute at the expense of person's statute under the 'doctrine of territorial sovereignty.

Huber made a personal landmarks when he coined three maxims for a choice of law. It is widely acceptable. The number three of the maxims according to Professor I. O. Agbede (Emeritus) had an enduring effect. He further analysed the maxim by paraphrasing it as follows: It is worth nothing that "by reason "comity", every sovereign admits that a law which had already operated in its state of origin shall retain its force everywhere provided that this will not prejudice the power or right of

another state or its subjects. 'However, these maxims are the doctrines of 'comity' "acquired rights' and 'public policy'

Sanigay, a German scholar and a jurist discovered that 'each legal relation has its natural seat that is, connecting factors, which he proposed as follows:

a. Domicile of a person which law (Lex domicile) should govern his capacity, succession to his estate and his family relations.
b. Location of legal transactions by which law/Lex situs) the right in such things shall be governed
c. Location of legal transactions by which law (lex lociactus) such transactions shall be governed e.g contract.
d. Location of courts by which law (lexfan) procedure shall be governed.

It is worth nothing that the German scholar Sanigay's discovery with refinements has provided a vital basis for modern choice of law rules.

Self Assessment Exercise

- Comment freely on the historical background of conflict of laws.
- Identity German Scholar/Juris connecting factors

3.2.1 The Course Itself and the Meaning of 'Comity'

Moris asserted that the conflicts of laws is that particular part of the private law of a particular country which deals with cases having foreign element. "Foreign element" in this perspective means a contact with some system of law other than that of the 'forum' that is the country where courts are seized of the case.

Foreign element can be established in case if a claim is made for damages for breach of contract made in Nigeria between two Nigerians companies and to be executed in Lagos, there is no foreign element at all in the scenario painted. Therefore, the case is not within the purview of conflict of laws. Such a case will be treated by the Nigeria courts applying domestics law of contract. But if the contract had been contracted in Ghana between a Nigerian company and a Ghanaian company to be executed/performed in Ghana or in Senegal. The case is within scope of conflict of law. It is now left for any of the three countries court to determine who has jurisdiction. The court will have to use its 'choice of Law' rules to decide whether to apply Ghanaian, Nigeria or Senegalese law, deciding which of the law is most significant in the matter pending before the domestic court. In Kuwait Airway Corph V Iraq Airway Co (Nos 4 & 5, 2002) UKHL, 19; (2002) AC883 @ para 15)

At this juncture, it pertinent to note the remark of Lord Nichollas of Birkenheard) in that "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 former court'

3.2.2 Meaning of "COUNTRY"

Under the conflict of laws, a case with foreign element and a foreign country mean a non –English element and a country other than England. From this analysis, Scotland and Northern Ireland are for most not all purposes as much foreign countries as are France or Germany. In other words, a state in the political sense, or as understood in public international law, may or may not coincide with a country in the sense of the conflicts of laws. 'Unitary states such as Sweden, Italy and New Zealand, where the law is the same throughout the state are 'countries' in this perspective.

Furthermore, Scotland to England and New York or California to US, although merely component parts of the United Kingdom and United States, are each a country in the sense of the conflict of laws because each has a separate system of law"

Nevertheless, for some purposes larger units these (US, Australia, Canada) may constitute countries. Therefore, United Kingdom is one country for the purposes of the law of negotiable instruments and Great Britain is one country for most purposes of the law of companies (Companies Act 1985, and CAMA 2004).

In most of Federal states, the greatest application Federal list or legislative powers has resulted in Australia and Nigeria being regarded as one country for the purposes of the law of marriage and matrimonial cause and Canada is one country for the purposes of law of divorce.

Be that as it may, a country in sense of the conflict of laws may exist without having a separate legislature. Scottish between the Union in 1707 and restoration of the Scottish parliament by the Scotland Act 1998 and Northern Ireland did not cease to be a country when its legislature was suspended originally in 1772.

4.0 Summary

With the above fact, there is no iota of doubt the sub topic has been dealt with accordingly. It is a follow up of Unit 2; It is necessary to emphasize the background and the definition of the country as an important concept in conflict of law. Country may mean the totality of a whole whereas a part or state or district or unit of country can be regarded as a country. It depends on the application of law

5.0 Conclusion

Historical background of conflict of laws is inevitable part of the course. Equally this unit discusses the subject of conflict of law which exposes the role of English Law to the establishment of the course. Most importantly, country was defined from the point of key concept to the study of conflict of law or private international law. Country which means a non-English element a country other than England. Any other country aside England is regarded as such.

6.0 Tutor Marked Assignment

1. Trace the historical background of conflict of law
2. Define the concept of 'country'
3. The course itself means?

7.0 References/Further Readings

1. **Davis Moris (2005): Conflict of** Laws
2. Agbede I. O. (2001): Conflict of Laws in Nigeria, Akoka, Lagos
3. Webb PRH (1960): A casebook on the Conflict of Laws, Butterworths, London.

Unit 2
Defining Conflict Law

CONTENT

1.0 INTRODUCTION

This lecture material is intended to help the student of National Open University of Nigeria (NOUN) and other interested readers to have indebt knowledge of the study of the rules of that branch of English Law known as Conflict of Laws. The course is also known as "Private International Law' and a branch of English Municipal Law.

It is pertinent to note that in any system of conflict of laws, it is most important that there shall be some means of linking an individual with the law of some given territory. It is incumbent upon the law of every territory in the world to be able to ascribe to any given individual a legal "centre of gravity" as Wolff has aptly named it. However, legal systems have chosen, out of nationalistic considerations to favour the lex patriae, that is, the law of an individual nationality, as the link. Conflict of laws rules are primary rule of "Lawyers law" which will be applied by judges in litigation and by legal advisers called upon to give clients legal opinions in connexion with cases with situations containing some foreign elements.

Moreover, it is important to start this course be defining conflict of law in precise manner to pave way for better understanding. The introduction aspect cannot be overemphasized and an indispensable companion particularly for those who are offering the course for the first time as you have to know the background in conflict study.

This unit no doubt will guide you through not just the introductory part of this course but also clarifies its theory and method.

2.0 OBJECTIVES

At the end of this Unit, students should be able to know and understand the meaning of the concept of Conflict of Laws and its definitions.

3.0 MAIN CONTENT

3.1 What is Conflict of Laws?

Conflict of laws or Private International Law may be described as physics of the law because it is concerned with the application of the law in space and time. It is that part of Private Law of a country which deals with cases having a foreign element (Professor Emeritus I. O Agbede (1998): It is an alternative name to Privated International Law (Osborn's Concise Dictionary 1993).

By a 'Foreign Element' is simply means a contract which involved systems of law other than the domestic or internal Law of the country (J.H.C Morris).

Furthermore, it is that branch of the Law which deals with cases in which some relevant fact has a connection with another system of land on either territorial or personal grounds. It may on this account raise a question as to the mode of application of one's own or which appreciate alternative usually foreign law to the exercise of jurisdiction by one's own or foreign courts (R.H. Graveson).

Professor R. H Graveson posited in his book Conflict of Laws "Almost every country in the modern world has not only its own system of municipal Law differing materially from those of its neighbour but also its own system of conflict of laws".

Conflicts of laws concerns those areas of law primarily with specific duties and rights of individuals with which the state is not immediately and directly concerned. For example, the law of contract, for assertion of private law rights, Wardsworth IBC v Winder (1985) AC 461 will be of very help (Curzon et al, 2007).

Public International Laws is the body of rules for determining questions of jurisdiction and questions as to the selection of the appropriate Law, in civil cases which came to Court and certain a foreign element. That is, the cause of action arose ahead or a party to a contract resides abroad. Its objects are to prescribe the conditions under which the

court is competent to hear the case, to determine for each class of case the internal system of law by reference to which the rights of the parties must be ascertained, to specify the circumstances in which a foreign judgement can be recognized as finally deciding a case and enforcement of foreign judgements through the English Courts (Concise 1993).

Simply put, it is a difference between the laws of different states or countries in a case in which a transaction or occurrence central to the case has a connection to one or more jurisdictions.

4.0 Conclusion

Now that you know the meaning of the subject matter, Conflict of Laws, it is not difficult to know other aspects of the law under discussion. This is a very important area of law which there is little focus or nothing at all. This aspect of law give a very broad knowledge on how to solve international cases or local domestic matter which involve foreign element.

5.0 Summary

With the above fact, the students have learnt above the various views of authors and writers on the basic meaning of the subject matter, the conflict of laws. To be able to grapple with this Module, other Units in this opening unit are very important to be studied, so that we can have adequate knowledge of the scope, nature, characteristics and relationship between the conflict of laws and other law courses/disciplines.

6.0 Tutor –Marked Assignment

1. Define Conflict of Law
2. Give various views of different authors you have studied.

7.0 References/Further Readings

- Morris J. H C (2005): The Conflict of Laws (Ed) Sweet & Maxwell, London.
- Agbede 1.0 (Emeritus Professor (2001): Conflict of Laws in Nigeria, Akoka, Lagos.
- Thomas on Conflict of Laws, Shanesan C. I. Limited Jersey and Lagos.
- Graverson (1974) Private International Law
- Dicey and Morris (1967): Conflict of Laws 1967.

Unit 3
Nature and Basis of Conflict of Law in Nigeria

CONTENT

1.0 INTRODUCTION

Webb PRH and Brown DJL identified three main aims of that branch of English municipal law called "The Conflict of Laws" or Private International Law" that is:

i. To indicate whether an English Court has jurisdiction to entertain a particular suit containing one or more foreign elements.;
ii. In the event of an affirmative answer to (a) to indicate which one or more of the several possibly relevant laws will be applied to reach a decision in the suit, and
iii. To indicate when, and subject to what condition an English court will be prepared to recognize and enforce a judgment rendered by a foreign court.

Linger as he then was, posited that an English court may proceed at once to apply English Law to determine a suit in line with the element of foreign issue present in such case(s) or may proceed in a suit despite the presence of some foreign element, such as the foreign nationality of one or other or both of the parties because the foreign element is irrelevant in the circumstances according to English conflict of laws. Although, it is not outright that these conflict rules have not operated at all in such suit. Unger sighted examples of cases that were decided on this ground and that English law was applied, these cases on the law of contract without prior explicit reference to conflict rules: ***Rose and Frank v Crompton (1925) AC 445 (HC),*** where

the plaintiff, were Americans; ***Hillas v Arcos All.E.R Rep 494, 147 LT 503(AL)*** where defendants were Russians.

Generally speaking, Conflict of law rules are known and regarded as primary rules of "Lawyer's Law" which is the priority of judges to be applied in litigation and opinions of legal advisers invited to give litigants or clients such in connexion with the issues containing foreign element.

2.0 Objective

At the end of this discussion, students should be able to:

i. know the nature and basis of conflict of laws in respect of:
   (a) General principles
   (b) Psychological Approach
   (c) Characteristics of the conflict of laws viz Nigeria.

3.0 Main Content

3.1 General Principles

The social and economic interest of men have never been restricted to the units which they contract to administer law and government. As a result of love for adventure and curiosity on the part of men to discover places hitherto unknown had interacted over the years beyond their own nation boundaries culminating in the need to formulate rules to govern day to day activities beyond the accidental geographical bounds. In that wise, there is the need to have we defined rules to regulates activities beyond state bands gave rise to the recognition of Private International Law. Ademola J. Yakubu (1999) put it in another perspective, that it has realized that no nation, so to speak, is an island, necessitating the need for co-operation among, various peoples and nation states. Therefore no nation is an Island to herself or live in isolation.

Agbede I. O (Emeritus) in his contribution to the general principles of the conflict of laws said "The diversity among peoples of different nations is in practice expressed by the different nations is in practice expressed by the differences in cultural outlook, religious belief, political and legal institutions obtaining in different countries". However, modern technology has to a larger extent improve means of transport and communication that the distant geo-political nations have became a mere neighbours. With this development, state and national boundaries is no more a barrier to the

conduct of our social and business affairs, most importantly these lines have legal significance.

The main purpose of the conflict of laws or private international law is to protect and ensure the peaceful interaction of private persons in difference countries. International trade/commerce may be difficult, if these did not exist legal system or method for promoting, guiding and protecting the international extension of human activities.

The need to achieve this goal of universal justice and maintaining equity to all manner of human beings world over regardless of creed, race or colour. The need to ameliorate the arbitraries that is usually attend the choice of the court. It is the private international law department of law which comes into being wherever an issue before the court contains a foreign element. It is the primary function of the department to ensure the appropriate laws among the several potentially applicable laws must be selected for the determination of an issue in the presence of competent court. Agbede I. O. concluded that the basic principle is predicated on the desire to protect the reasonable expectation of parties in their out-of-state legal transactions. Otherwise, a person will not be able to sue a Nigerian for a tort committed against him or for a contract that took place abroad.

In that wise, with the free flow and frequency in movements across the boundary lines facilitated by fast improving technology which has made the entire world a global village. The science of conflict of laws is hence desirable and practically necessary.

Self Assessment

Summarize Professor Agbede I. O's views on the subject matter.

3.2 Nature and Scope

At this juncture, Dean Posser put the problem of complexity of this course in focus where he simply put "The realms of the conflict of laws is a dismal swamp filled with quaking quagmires and inhabitated by learned but eccentric professors who theorerise about mysterious matters in a strange and incomprehensive jargon"

The complex nature of the subject matter stems from the fact that it is all embracing in the sense that it deals with any problem, no matter its source and nature, where there is conflicts of legal systems involving two or more nations may be called for determination of such particular issue before the court of competent jurisdiction.

It is essential to clarify here that, private international law has no independence or separate branch of law in a similar sense of the law of contract or tort. It can be seen as all-pervading subject. No wonder Harrison T asserted "It starts up unexpectedly in any court and in the midst of any process. It may spring like a wine in a plain common law action, in an administrative proceeding in equity, or in a divorce case, or in bankruptcy case, in a shipping case of a matter of criminal procedure. The most trivial action of debt, the most complex case of equitable claims, may be suddenly interrupted by the appearance of a knot to be United only by private international law".

The complexity of the subject matter of this course made Professor (Emeritus) Agbede I. O to argued that the term "Private international Law" is a misnomer as there is nothing international in its rules at least in the sense of being obligatory on all nations". From this perspective each nation has its own rules of private international law, although among them, there are some common principles amongst the countries. Assert this, "Conflict of laws "is not appropriate to the extent that it gives the impression of some sort of 'struggle' between legal methods. It is indeed the methodological techniques of resolving the 'struggle' in question. Some other terms employed include 'comity' extra territorial recognition of rights, "law of multi-state problems" 'international private law", 'inter-municipal law', and a 'private international jurisprudence'.

However, the concepts 'conflicts of laws' and private international law have found general acceptance among jurists and judges are hallowed by over a country of usage. Private International Law is not a separate branch of law. Agbede I. O. described it as 'a cross section, so to say of the whole law as every branch of the law has its rules of patial application. As Barty had said "There is a sweep and range in private international law which is almost lyric in its completeness. It is the fugal music of law"

Nevertheless, the Private International Law is no doubt a distinct unit of the law as it is always concerned, mostly in the common law jurisdiction, a given conflict problem usually involves three basic issues but the Professor Emeritus Agbede I. O added the fourth factor viz:

i. Choice of jurisdiction
ii. Choice of law
iii. Recognition and enforcement of foreign judgment and

iv. Time factor in the spatial application of law.

This is not to say that Private International Law finishes rules of decisions but merely indicates the applicable law. The term has been likened to “Injury office of a railway station where a passenger may learn the platform at which his train starts’’ (Chesire and North). It is as such essentially a technique.

Justice Cardogo of US Supreme Court (as he then was) described this branch of the law as ‘one of the most baffling subjects of legal science. This is in line with the view of Dean Prosser.

Self Assessment

Identify the four main factors determining or guiding the court in determining a case with foreign element?

3.3 Characteristics of the conflict of laws in Nigeria

Nigeria is one of the few countries in the world that experience conflict of laws problems, embracing as it were, conflict of laws of the following dimensions/degrees:

a. International
b. Inter-communities
c. Inter-States (including vertical and horizontal)
d. Inter-local or inter personal (both vertical, horizontal, diagonal and segmental)
e. Inter territorial

3.31 International simply means that the basic idea in the world is the existence of a number of separate independent countries with the attendant separate municipal systems of laws that differs greatly from each other in respect of the rules by which they regulate the various legal relations arising in daily life. As a result, there are frequent occasions when the courts in one country must take account of the laws that are obtained in another, when such rules relate to issues outside these areas where states acted in their sovereign capacities they are conveniently referred was Private International Law rules or Conflicts of Laws rules. Sometimes, such rules necessarily involve situations where a foreign court will abandon the law of the foreign and apply a foreign rule of law.

3.3.2 Inter-Community Legal Problems

The success achieved in transforming ECOWAS and AU into a political union with its autonomous judicial institutions or legal methods is bound to affect greatly the terms

of conflict of laws rules as well as the municipal laws of the integrating states both in the area of enforcement of judgement within the unions (regional and continental bodies). And most essentially in matters of choice of law rules as happened with the European Union.

3.3.3 Inter-State Conflict of Laws

Nigeria is a federation with 36 states excluding the Federal Capital Territory of Abuja. All these states have their own independent legal system. States and Federal enjoys Federal lists where powers and functions are shared. That is, conflicts between Federal and State Laws and between State laws interse?.

Strictly speaking the legal system of one constitution state is as much as a foreign system of law as the legal system of another country under the common law rules of Private International Law. For example, Scots law is in the eyes of English courts, a foreign system of law as German law is.

Moreover in a Federal constitution such as US, Nigeria, Canada and Australia, the constituents units/states enjoy special status in their relation to one another. These special relationships invariably influence their conflict rules. Although, on all issues within the jurisdiction of the federation the whole federation is viewed as single entity/state. In that wise, such situation must surely affect that state choice of law rules. For instance, for purposes of divorce Canada, Australia and Nigeria particularly for monogamous marriage/statutory are considered as a single legal unit.

In whatever situation, all state laws must operate in Nigeria within the purview of the constitution of the Federal Republic of Nigeria which guarantees every individual in the country the right to fair hearing and equally prohibit discrimination against citizens of Nigeria regardless of their birth, origin or religious application. Chapter 4, sections 33 to 46 captioned this principle very well.

In addition, the US, for example, inter-state conflict problems have, in many decided cases involved constitutional matters under the ‘full faith and credit clause’, the ‘commerce clause’ and the ‘immunity and privilege clause’ of the US Constitution.

Though, in Nigeria perspective, inter-state conflict of laws rules are, to some extent separate and distinct from rules of private international law.

3.3.4 Inter-Local or Inter-Personal Conflict of Laws

Nigeria is a federation with 36 States and Federal Capital Territory – Abuja, 774 Local Councils. No doubt Nigeria is the most populous nation in Africa. This is called Legal pluralism. The people are made up of 250 ethnic languages with more than 500 dialects, each group with its own distinct customary rules.

One of the important characteristic of this conflict problem is that the factor which connects a person with these customary or religious laws are according to present practice, a personal quality. It is the religion which a person professes or his membership of an ethnic group that bring about the application of the religious or customary law respectively in relation to such a person. This situation is often described as 'inter-personal conflict of laws'

More, the factor that links a person with the territorial law is founded in the territory. It is the particular place where an act is done or to be done that bring about the application of the territorial law of the place in relation to such a person. To drag this fact home, in this distinction is before the partition of Africa by the British administrator and other colonial lords, the customary and Islamic law applied in the relevant countries on a territorial basis. Afterwards, these laws have been drastically reduced to a personal system of law by the colonial judges and legislature in their efforts to exclude European nationals from their purview.

4.0 Conclusion

It is interesting to note that with the increasing mobility of population, the penetration of modern education into circles formerly traditional and resultant breakdown of ethnic and even family cohesion, a wholly new situation is arising which demands the formulation of new rules in the regulation of personal rights.

5.0 Summary

The general principles, the nature and scope and characteristic of the conflict of law rules were thoroughly discussed. This will allow students and interested reader to understand the actual issue emphasized under this unit.

6.0 Tutorial Assignment

- Identify and discuss fully features of conflicts of laws
- Highlight some common principle or terms of conflict of laws.

7.0 References/Further Readings

1. Agbede I. O. (2001): Conflict of Laws in Nigeria
2. PRH WEBB and DJC Brown (1960): A case book on the conflict of laws. Butt worths
3. Ademola Yakubu (1999): Limits to the Application of Foreign Laws. Maltose Law books, Ikeja.

Unit 4
Nature and Basis of Conflict of Law in Nigeria 11

CONTENT

1.0 INTRODUCTION

This is a continuation of Unit 3; it is the basis of conflict of laws rules from the psychological approach, sources of the rules of Nigerian Conflict of laws.

The subject of conflict of laws assumes a complexity in Nigeria not only on account of the Federal form of government with its separate and state/unit laws but more so because of the dual system of court and multiplicity of laws which exist within most of the states.

Another aspect is the general sources of the rules of conflict laws currently in force particularly in Nigeria. How these sources have assisted the court in setting issue with foreign elements in Nigeria.

2.0 Objective

At the end of this unit, students and interested readers would be able to know:

- All the sources of Nigeria rules of conflict of laws
- The effect of psychology approach to the term
- Private International laws and
- Justification of the course/basis for the term – conflict of laws.

3.0 Main Content

3.1 Psychological Approach to the Course

One need not seek long to discover a certain lack of enthusiasm, if not antipathy, towards this course (Webb PRH et al) Dankwerts J. (as he then was) said in Re Kahr's case (1952) 2 All ER? that rather difficult subject, private international law. In American case, ***North Western Mutual Co V Adams*** 155 WS 335/144 NW 1108, the subject was spoken of as "one of the most theory and difficult fields to traverse."

In a similar vein, Dean Proser posited in his treatise titled "Selected Topics on the Law of Torts" has had occasion to accord it Cinderella –like treatment, to one whose bent is the law of torts evidently "the realm of conflict of laws is a dismal swamp, filled with quacking quagmires, and inhabited by learned but eccentric professors who theorise about mysterious matters in a strange but incomprehensive jargon. The ordinary court, or lawyer is quite lost when engulfed and entangled in it".

Nussbaun described conflict of laws as an important psychological factor in the judicial approach to conflict problems.

Finally, a person wishing to embark on a study of conflict of laws should approach his task broadmindedly.

3.2 Sources of the Rules of Conflict of Laws in Nigeria

This sub topic is concerned with the main spring of authority of the rules of conflict of laws operating in Nigeria today whose validity has been sanctioned by the constitution.

By Nigeria, rules of conflict of laws is meant the aspect of the Nigeria law that comes into play when there is foreign element in a case before any Nigerian court. According to Agbede I. O. (Emeritus Professor) in his work theme on Conflict of Laws, identified the following as the sources of rules of conflict of laws in Nigeria are classified as follows under 8 headings.

i. Customary/Islamic Law
ii. English Law
iii. Decogians of courts outside Nigeria
iv. Nigerian Legislation
v. Decisions of Nigerian Courts/Case law
vi. Public International Law, International treaties and conventions
vii. International treaties, agreements and conventions
viii. Opinions of text book writers and authors

This classification according to Agbede I. O. is somewhat overlapping as most of the rules of English Law apply in Nigeria are so applicable by virtue of Nigeria Local legislation. The classification is however adopted for reason of convenience.
Dicey and Morris identified three more important sources of English Conflict of Laws as:

i. Statutes
ii. The decisions of Courts and
iii. The opinion of jurists.

While we deem it proper and acceptable to separate Nigerian legislation and case law, it is submitted that decisions of courts outside Nigeria would conveniently be discussed under Nigerian case law as long as these courts were formerly part of the Nigeria legal system.

3.2.1 Customary / Islamic Law

Prior to the British colonial Administration over the territory constituting the Federal Republic of Nigeria, these areas were made up of independence ethnic groups, each with its own customary or religious law. These independence customary laws were used, admittedly, on a territorial basis as each had its own rules and regulations that determines criminal records and punishment. All these local laws in comparative with different areas were territorially applied.

These traditional/customary or religious laws of various ethnic groups remain largely written and to a large extent rudimentary having developed in response to the request of subsistence (land tilling) agricultural system.
In a similar vein, Islamic law which is long received and accepted into the northern part of Nigeria was highly developed with detailed rules as written in the Qur'an and Hadith.

Though, the Islamic law is only applicable to only predominantly Muslim communities and observance of its rules cannot be hiding but laws becomes inoperative in non-Muslim are involved outside the public law areas.
Agbede I. O observed that, in situations of peaceful co-existence effect was given to transactions concluded under 'foreign' customary laws such as concluded marriages, legitimacy of children and ownership of property. Validity of inter-ethnic marriages was governed and still governed by the customary law of the bride under which the marriage is invariably celebrated.

As the ‘binding law’ between the parties as provided in the customary courts’ laws of the states. This assertion can be observed from customary court Law, Cap 33, Laws of Oyo State 1978.

Most of the transaction of a civil nature were governed by the place of transaction unless the parties involved both belong to the same ethnic group (or decide otherwise) in which case the law they share in common may be applied just as it is currently the practice in these jurisdictions.

In addition, all claims to the land was governed by the place where the land in issue were located and succession to real estate property was governed by the laws of the place of location. It is the tradition and observable customary law that slaves were themselves object of ownership and subject to the rules of the place of enslavement.
In addition, where some groups were conquered or under the sovereignty of a foreign conqueror, there was no room for the application of any other laws than the laws of the conqueror(s). However, there are no extent records on the pre-colonial choice of law practice.

There is also choice law rules problem, although most of the High Court Laws of the states made provisions to address these problems. For instance, there is choice of law problem between the customary/Islamic law and the received English Law. It is no doubt, that, customary and Islamic laws made little or no contribution to the development of current rules of conflict of laws in Nigeria.

3.2.2 English Law

The bulk of the rules of private international law in force in Nigeria are essentially rules of English private international law received into Nigeria in one form or the other. One may legitimately look beyond the English law to discover the ultimate origin of these rules particularly from the works of the jurists of the Italian city state of the Middle Ages. Of the various way by which the rule of English law have gained force and effect in Nigeria, three of these rules are particularly relevant to this study. They are:

i. The general reception of English rules of common law, doctrines of equity and statutes of general application in force in England on 1st January 1900.

ii. Imperial legislation passed prior to the attainment of independence and expressly extended to Nigeria.
iii. Reception of current English Law on particular topics

3.2.2 Receptions of Rules of Common Law Doctrines of Equity and Status of General Application in Force in England on 1st January.

After the official ceding of Lagos in 1861 by the English colonizers from King Dosumu of Lagos and its Island. The English laws and Equity were introduced into the colony of Lagos in 1863. This was in compliances with Ordinance No. 3 of 1863 and into the other parts of the protectorate of Nigeria in 1900 (See Supreme Court Ordinance 1914). Most of the important provisions have been repealed and re-enacted consequently on the change over from a unitary to a federal form of government.

It is important to discuss various views, but we must advert our minds to the basic philosophy of reception. No gainsaying, the colonial masters found the local indigenous customary/Islamic laws unsuitable to their occupation as a general lex loci. They therefore decided to impose their own 'metropolitan' law. Nigeria's most essentially, after the attainment of independency in 1960, the reception should serve as it has done in other areas, as a platform on which a distinctive modern Nigerian legal system would be built by the Nigerian legislative and the judiciary.

Park reasonably posited that the test of general applicability should be placed on statutes in entirety. This is usually the approach in Nigeria but on occasions, the test has placed on one section or subsection of a statute. In the same vein, there are some that are now advocating that the particular statute be generally limited in application to all parts of United Kingdom, and all parts of the colonies to be inclusive inspite of the qualifying words "in England". See ***R v Coke*** (1927) 8 NLR7, where Full Court held that the Libel Act 1843 no longer form part of Nigeria Law and went further to say that one section (86) remained in force. Re Shoolu (1932) 11 NLR 37 per ***WEBER J and Attorney General v John Holt & Co*** (1910)2 NLR 1
These news have not been generally favoured. The test that appears to have attracted a good deal to controversy is that laid down by Osborn C. J in Att Gen v John Holt & Co, where the Chief Justice said:
"No definition has been attempted of what is a statute of General application and each case has to be decided on the merits of the particular statute sought to be enforced…"

In accordance with Agbede I. O's position, "viewed against such a background it will be easy to evaluate some of the views being canvassed as to the range and contents of the received law.

3.2.2.1a Statute of General Application

The controversy on the received statutes is predicated on the meaning of "general application' Which English statute if one may ask, should qualify as one of 'general application' and therefore be in force in Nigeria?

Although, there is no controversy as to the condition that the statute must be in force in 1900.

It has been suggested that a statute in force in 1900 but which was subsequently repealed in England should cease to apply to Nigeria (Niki Tobi 1979). As has been canvassed above the idea of the reception must be viewed as providing a modern legal platform or framework for Nigeria to build a distinctively Nigerian legal system. It is pertinent to ask, will Nigeria therefore adopt the provisions of the repealed statute? Otherwise how will the vacuum be filled? A statute once adopted in Nigeria remain part of Nigeria law until repealed by the Nigeria legislature or the decision is reversed or 'overruled'

On the meaning of 'general application in England,' various views have been expressed to the effect that before a statute can qualify for adoption, it must apply:

i. to all parts of the United Kingdom and in deed to the colonies. See ***Re-Shoolu*** (Supra).
ii. to all parts of England only. See Att Gen v John Holt
iii. to all civil and cultural courts. See Att Gen v John Holt
iv. to only all members of particular group. See Labanjo v Abaka (1924) NLR 33.
v. to all classes of people in England
vi. not only to place and person but account should also be taken of the subject matter. See Young and Another V Abina and Others (1972)2UILR 21.

The overriding consideration is that the principle must be suitable for adoption in the particular receiving country (Allat A; 1960). That is, it must not be a statute addressed to peculiar local circumstance of England. It is pertinent to refer to Osborne C. J. (as he then was) in Attorney General v John Holt & Co (Supra) that "No definition has been attempted of what is a statute of General application and each case has to be decided on the merits of the particular statute sought to be enforced. Two preliminary questions can, however, be put by way of rough, but not infallible test, viz

i. by what courts is the statute applied in England? And
ii. to what classes of community in England does it apply?

… if it were applied to certain courts (e.g a statute regulating procedure) or only to certain classes of the country (e.g an Act regulating a particular trade), the probability is that it would not be held to be locally applicable".

What is relevant is that the statute must be in force in England (or beyond in various colonies) as at 1900. It need not be applied by all courts or applicable to all classes of person. What is important is that it must be a public Act suitable for adoption in the receiving country. However, the law of the receiving country must have a discretion to be judiciously exercised in determining the suitability of particular statutes to the circumstances of the receiving country bearing in mind that a legal vacuum should not be created by off-hand rejection of particular statutes.

Indeed the Western Nigeria group of statutes have repealed this provision having reenacted so much of English statutes as they considered relevant to their need. See for example, Laws of England Application Law Cap 60 Laws of Oyo States 1978 S4. It is unfortunate that other states did not follow suit. But the Nigerian Law Reform Commission recommended model law in 1990 to replace statutes of general application but the recommendation has not yet been adopted.

It must be stated that a particular or subsection of a statute may be adopted while rejecting some other parts. See Rebeiro v Chahin (1955) 14 WACA 476. Therefore, every conflict of law clauses in the relevant British statutes are likely to be adopted on grounds of test of generality and suitability.

2.2.2.2 Reception of Common Law in Nigeria

The controversy over 'the content' of the common law of England received into Nigeria remains unending. Views have been expressed to the effect that the 'common law and equity' consists of:

a. the rules of common law and the doctrines of equity in force in English from time to time.
b. the rules of common law and the doctrines of equity in force in England on January 1, 1900.
c. Nothing more than what one may conveniently refer to as the 'judicial technique' evolved by English judges as opposed to specific rules of English common law.

Clarification of these contradictory views is necessary not only for the study of the source of Nigerian law but also for the practical necessity of determining the binding force of current decisions of English courts on Nigerian law.

It is therefore crystal clear that the acceptance of one or other of these views is of major significance to the study, and to a certain extent, to the administration of law in Nigeria. It must be noted that a substantial area of legal relations is still being regulated in Nigeria by non –statutory rules. It is necessary to discuss the various argument by which each of these authors has reached his conclusion for the purpose of academic and legal administration.

For the purpose of academic and benefit of general reader, the relevant provisions of 'reception statutes' currently in force are as follows:

- Federal Law

"Subject to the provision of this section and except in so far as other provision is made by any federal law, the common law of England and the doctrine of equity together with the statutes of general application that were in force in England on the first day of January, so far as they relate to any matter within the legislative competence of the federal legislature be in force in Nigeria" Interpretation Act Cap 192 LFN 1990 S32.

Law of Western States of Nigeria

From and after the commencement of this law and subject to the provisions of any written law, the common law of England and the doctrine of equity observed by Her Majesty's High Court of Justice in England shall be in force throughout the state. See Laws of Oyo state 1978; S 4

Law of Eastern States of Nigeria

"Subject to the provisions of this section and except in so far as other provision is made by Federal Law, the Common Law of England, the doctrines of Equity together with the statutes of general application that were in force in England on the first day of January 1900, shall in so far as they relate to any matter for which the legislature of the state is for the time being competent to make laws; be in force within the jurisdiction of the court. See the following laws: Laws of England Application Law, Cap 57 Laws of Ogun State 1979, S3 High Court Law Cap 51 Laws of Cross River State 1979; S 15.

Laws of Northern States of Nigeria

"Subject to provisions of any written law and in particular of these sections i.e 26, 23 and 35 of this law.

a. the common law

b. the doctrine of equity

c. the statutes of general application which were in force in England on the first day of January, 1900 shall, in so far as they relate to any matter for which the legislature of the state is for the time being competent to make laws be in force with the jurisdiction of the court. See High Court Law Cap 49 Laws of Northern Nigeria 1963, S 26 which is reproduced in the High Court Laws of each of the northern states.

From the above facts, all these enactments: S14 of the Supreme Court Ordinance Cap 217 Laws of Nigeria 1923 which provides that" subject to the terms of this or any either ordinance, the common law: the doctrines of equity and the statutes of general application which were in force in England on the 1st January, 1900 shall be in force within the jurisdiction of the court. However, the main controversy over the interpretation of these statutes appears to have been centered on the effect of the limiting date – 1st January 1900 – on the reception of the 'common law' neither time nor space will allow further detailed explanation of the various views in this study. Nevertheless, a broad summary of the whole views may be stated thus:

3.2.4 Other Views

i. A writer is at liberty to express his/her view as to how a particular law should be interpreted but such view expressed can be no more than a statement as to what the "Law" ought to be. Such a view may carry some weight if the particular statute has not yet been judicially interpreted or if the courts have already adopted the writer's view.

ii. Those who claim that the rules of English Common law from time to time apply in Nigeria hinged their arguments on the fact that the limiting date is attached to the statute of general application and the provisions in the northern states statutes clearly separated the date from Common Law and equity. It is claimed particularly that the statutes of Western States mentioned no date whatsoever in reference to common law and equity. Indeed, it was claimed that the statutes of Eastern States refer to statute of general application" that were in force.

The adoption of this view will negate the basic philosophy and national of legal reception no nation will receive the law of another country and be deemed to have intended that whatever addition is made to that law by the judges or the legislative of the donor country will automatically become part of its own law. Although, if that were to be the intention, it would have been expressly stated by the addition of 'for the time being in force' clause (Agbede I. O. 2001).

iii. The suggestion that no specific rules of English common law have been received into Nigeria Law is contradicted by judicial practice in Nigeria. It is important to note that cases adopting English common law rules in Nigeria are countless but see particularly Supreme Court's decision in Benson v Ashiru (1967) MNLR 363. The view may consequently be dismissed as untenable.

iv. Judicial approach to the application of rules of common law in Nigeria is somewhat confused. Judges do not regularly avert their mind to the date of particular Common Law decisions of English courts when adopting them. It is difficult to deduce from this practice that the courts regard post – 1900 common law rules as part of Nigerian Law and therefore obligatory on them to apply as they sometimes adopt decisions of non –English courts,

v. There was a decided case where it was emphatically stated that the rules of English common law received into Nigeria law were those in force in England in 1900.

Conclusively, Nigeria courts can in our, modify the pre-1900 common law rules to suit Nigerian modern needs. Again post 1900 common law decisions of the superior English courts, though not binding on the courts for not being an integral part of Nigerian courts enjoy, in practice, strong persuasive authority. The result is that common law decisions of superior English courts of whatever date tend, in practice, to enjoy equal authority. In this wise, any contrary view will not only be difficult to support under the existing cannon of statutory interpretation but will also negate the very philosophy and rationale of the reception of foreign laws.

3.2.5 Condition of Application of the Received Law

The issue here is whether the Nigerian legislature or in any way modify, the received statute and whether the Nigerian courts can reject or in any way modify specific rules or common law or doctrines of equity.

S 32 of the Federal Interpretation Act, for example provides S2, such imperial laws shall be in force so far only as the limits of the local jurisdiction and local circumstances shall permit and subject to any federal law.

S3 for the purpose of facilitating the application of the said imperial laws, they shall be read with such formal verbal alteration not affecting the substance as to names, localities, officers, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances.

4.0 Conclusion

It is important to conclude here that the issue dealt with in this unit is very germane to the existence of Nigerian legal system. The English Common Law and Equity, its suitability till date particularly after independence various views of the learned authors and judicial decisions on the English statute. How workable it has been? The reflection of the English rule in the three regions of Nigerian Federation and the various states of the former regions. The conditions for the application of the Received English laws.

5.0 Summary

This unit discusses the characteristics of the conflict of laws and sources of Nigeria rules of the conflict of laws, most importantly the mode of application of the rules and its modification till date. The discussion on this particular topic, sources of Nigeria rules of Conflict of Laws continue in the next unit.

6.0 Tutorial Marked Assignment

a. Identify the major sources of Nigerian conflict of laws and discuss fully the application of the Received English Laws.

b. Enumerate the views of the jurists, judges and scholars' views on the application of Received English Law.

c. How suitable is the phrase "for the time being in force" clause to Nigeria after independence"

7.0 References and Further Readings

1. Agbede I. O. (2001) Supra
2. Ademola Yakubu (1999) Harmonization of laws in Africa Malhouse law books
3. Agbede I. O (2001) 6th Ed. Supra
4. Park W. F (1975) 6th Ed. The General Principles of English Law Welson Harap Ediburg
5. Thomas J. A. C (1955): Private International Law Hutchison's University Library, England
6. Mortcalfe O. K. (1976): General Principles of English Law 10th Ed. Domington Press England.

Unit 5
Sources of Nigeria Rules of Conflict of Laws

CONTENT

1.0 INTRODUCTION

This unit 5 is a continuation of Unit 4, units 4 and 5 are very relevant to this course, and the few statutory provisions of English Law introduced to Nigerian Law. The introduction of such statute can be found in the High Court Rule. The impact of Nigerian Local legislation, that is, Nigerian National Assembly, made laws at all the tiers of the federation since independence till dates, Edicts and degrees are not excluded. Decisions of Nigerian Courts of competent jurisdiction are of relevant source of law, public international law. The legislative powers of the federal government are not limited by public international institutional law unless they limit themselves. International treaties and conventions were also sources of Nigerian rules of conflicts of laws; opinions of erudite scholars expressed through their writings.

2.0 Objectives

The main objective of this unit is to expose the students and readers to sources of Nigeria rules of conflicts of law.

3.0 Main Content

3.1 Reception of current English Law

There are some statutory provisions of current English Law introduced into Nigerian Law in particular. Such reception for example will be found in the High Court Laws of the Northern states which mandate the courts to exercise their jurisdiction in matters of probate in conformity with the law and practice for the time being in force in England. That is, the legislative power of the crown was subject to the rule in **Campel v Hall (1774) 20 St. Tr. 239.**

The essence of this provision is to give automatic force in such states to all current British statutes on this topic. It is doubtful whether the judges can effect more than formal modification on the relevant statutes in the absence of a "modification clause," The reception equally include rules of common law and doctrines of equity on the particular topic but normally judges have inherent power to modify rules of common law as well as the doctrines of equity in response to the needs of a different environment but such powers must be exercised judiciously in the interest of justice and legal certainly.

Be reminded that until the attainment of independence in 1960 both the British parliament and the crown were able to legislate in 1960, both the British parliament and the crown were able to legislate directly for Nigeria **(Johnson v Lawanson (1972) 2UILR 21 and Haman v Kigo (1980) 8 – 11 SC 43)** under constitutional theory, such enactments prevails over inconsistent local legislation. A number of these British enactments that are still in force constitute one of the significant sources of Nigeria rules of private international law.

Interesting to note that, any of these imperial enactments can be repealed by the local legislation since 1960 and a number of such statutes has, in fact been repealed.

3.2 Decisions of the Courts Outside Nigeria

Until 1954, the West African Court of Appeal(WACA) entertained appeals from Nigerian courts and other English speaking West African countries. Consequently, so much of its decisions on Nigerian Conflict law rules as have not been reversed or overruled by the Privy Council or overruled by the Nigerian Supreme Court are part of Nigerian Law in this field of law (See S120 of the Republican Constitution 1963). The Court (WACA) made significant contribution to the resolution of conflicts between the general law and the customary/Islamic law.

Self Assessment Question

Discuss the reception of current English Law in Nigeria

Highlight the important of WACA before 1960 in West Africa

3.3 Nigerian Legislation

This is by far the most important source of Nigeria Law today after the grand norm – the constitution Nigeria being a Federation, there is a division of legislative powers between the Federal and State government. As a result, the Local legislation can be repealed by the Federal and state,likewise any parts of the English statutes currently in force within their respective area of competence.

The doctrine of constitutional supremacy is in force in Nigeria, any law made by federal or state which is in consistence with any provisions of the constitution is null and void to the extent of its inconsistency.

By local enactments or Nigeria legislation we mean Acts, Laws and other laws having affects as such. That is, Decrees, Edicts and Delegated legislations.

In matters under exclusive legislative competency interstate conflict of laws does not exist. However, state legislation is a significant source of law as there are issues of private international laws that touch on matters within state jurisdiction. It is worth mentioning that most of internal conflict of laws particularly in relation to which jurisdiction of customary law courts, which choice of laws between systems of customary law are mostly found in the state laws.

Agbede I. O noted that legislative effort at developing rules of private international law both at the Federal and State levels have few and far between this situation is regrettable particularly in few of the outdated and unconditioned pre-1900 English law on which the rules are largely based.

Self Assessment Question

Justify the general view that Nigeria legislation is most important source

3.4 The Nigerian Case Law/Decisions of Nigeria Courts

Nigerian Case Law, we are not restricted to decision of Nigerian Courts but this expression is adopted to include decisions of courts outsides Nigeria. Nigerian courts, following the tradition of the courts, in other common law countries, do not legislate

as such. They apply old rules to new situations and in some cases, they evolve new rules derived from legal principles to new combinations of circumstances.

Before the attainment of independence, in 1960 during the colonial regime, pre-october1st1960 majority of the personnel of Nigerian's superior courts were experterates. Most of the indigenous judges themselves were trained in English law in England. It is therefore natural that they should be fascinated by the decisions of the English superior Courts which in any case, are very much in line with their own way of reasoning.

Nowadays, there is currently a marked tendency of a departure from this approach. The 'home' groom/ 'home breed' Nigeria lawyers now dominate the Nigeria appellate courts. This is a good omen to the Nigeria judiciary.

3.5 Public International Law

The federal legislative list of the federal and state governments in Nigeria are restricted by public international except in so far as they have, by treaties, bond themselves. In accordance with the common law practice, Nigeria courts have always treated international Law customary law as part of the common law of the country. In that wise, they have always conceded immunity from judiciary by public international law. Agbede I. O. and Ademola Yakubu are of the view that in formulating rule, public international law, Nigeria courts and legislations are always aware of the international context within which this department of law operates. To this extent therefore, international law is one of the sources of Nigeria rules of private international law.

3.6 International Treaties and Conventions

International treaties, agreements and conventions on behalf of Nigeria was the exclusive responsibility of the British Government until Nigeria became independent. Since independence in 1960, Nigeria has been able to conclude international treaties on its own right as a sovereign nation.

The recent developments which Great Britain and Nigeria found themselves in different regional bodies constituting political union is bend to bring significant differences in their conflict rules. Most of the common legislative statutes and judicial assumption existing between both countries before and post independence is gradually diminishing. The Nigeria foreign policy is best explain in Chapter 11 of the constitution of the 1990 federal republic of Nigeria

3.7 Opinions of Writers/Scholars

Opinions of great scholars in the legal field cannot be wished away in this study. Opinion of writers have profoundly influenced the development of the law in this field more than in any other area of the law.

The opinions of Europeans continental jurists and legal luminaries are trail blazers with their doctrinaire approach to legal problems. Be that is it may, opinion of scholars constitute a significant source of Nigerian Law in this field. Justice Cardozo of U S A lad donning MR, Garretson, Maris, Agbade i.o, Ademola Yakubu, Allot just to mention view of them.

4.0 Conclusion

These sources of Nigerian rules/conflict of laws are very importance and inevitable concomitant of this course. The English Common Law, Equity, Statute of general application in force since 1990 were foundation of the Nigeria rules of conflict of laws. The others such decision of judges or case law in both Nigeria and outside Nigeria, Nigeria legislation is a vital aspect. Opinion of the erudite scholars can not be overlooked as source of rule of Nigeria conflict of Laws.

5.0 Summary

The English Law are the Laws or statutes that are predominant in the Great Britain, Nigeria is a stakeholder to the rules by virtue of her being colonized by the Great Britain. After independence, though, Nigeria and most of its states model their laws in line with the British system, they cannot be compelled to adopt the English law.

Some of these laws have paved way for Nigeria legislations, opinions of scholars, decisions of the juries and judges in Europe are also vital part of the sources of the rules of Nigeria conflict of laws.

6.0 Tutor Marked Assignment

a. Consider the views against the English laws by the judges and the opinionists, what is your own view?
b. Discuss the Nigeria grand norm in the conflicts of laws in Nigeria
c. Identify the sources of rules of Nigeria Conflict of laws and discuss vividly any 4 so identified.

7.0 References/Further Readings

1. Ademola Yakubu (1999) Supra
2. Agbede I. O (2001) Supra
3. Webb RRH et all (1960) Supra

MODULE 2
THE GENERAL PRINCIPLES OF CONFLICT OF LAWS

Unit 1: History of Private International Law (PIL)
Unit 2: Traditional Choice of Law Concepts
Unit 3: Conflict of Laws development in some Continental countries
Unit 4: Classification, Qualification & Characteristics
Unit 5: The English Principle of REVOI
Unit 6: Application of REVOI in Common Law Africa
Unit 7: The Time Factor and The Incidental Question

Unit 1
History of Private International Law

CONTENT

1.0 INTRODUCTION
This state of affairs in the early Roman Empire paved the way for an early recognition of private international law. The existence of a number of urban communities gave rise to conflicting territorial laws. Italy, Rome exempted was made up of a large number of towns then known as municipal while the rest of the empire was divided into separate provinces (Savingay v The Conflict of Laws (Guthrice's Trausl) S. 351 p 45.

The connection of every inhabitant was either to Rome or of the urban communities. The facultative element was either citizenships or domicil.

The origin of each person was determined by the place of his father while that of an illegitimate was its mother. This idea has survived up till today as the domicile of

origin of a chiled in all patrilineal societies is that of connection with an urban community which has been freely chosen as the permanent abode and thus the centre of that person's legal relations and business. This was constituted by residence in a place with the intention of making the stay permanent (Ademola Yakubu, 1999).

To this extent, the system of personal law became prominent with the fall of the Roman Empire. Personal law as opposed to territorial law became the prima facie law although each tribe, retained its tribal laws. Criminal law and Canon Law, however were of universal application (Cheshire & North, 1998). Issues like tutelage of women, dowry and the extent of a husband's authority became subject to rules of general application.

In the 11th Century, there was emergency of feudal units resurfacing. This was a direct negation of human dignity and personality. As a result, a vassal to a feudal overlord was no longer amenable to his personal law he was merely a man of his Lord and subject to this Lord's law. This system did not regard any other law except those of the feudal overload. Whatever right acquired under such a different system was regarded as extraneous.

However, in the South of the Alps, there was a substitution of territoriality for personality, for as it were, there emerge the existence of the growth of the Italian cities. The bond of the Union between men in Italy, according to Ademola Yakubu was neither race nor subjection to a common feudal overload, but residence in the city. As at the time, some big cities could be identified such as Bologua, Modena, Milan, Padua and Alps. These cities were autonomous and having their territories as well as laws which were not in consonant/variance with the generally prevailing Roman law.

These variations in municipal law as well as commerce between one city and another gave rise to the need for recognition of alien laws and the beginning of rudiment of private international law (De Nova R 1966).

At the period under discussion, Roman cannot be resuscitate because local cities that were subjected to local rules have developed autonomy/independent in certain fields aside imperial rule. Their legal provisions no doubt in is derogation from the common law of the Roman Western Empire and also differed in context ad composition both in relation to the general law among themselves. This system is called STATUTA, came

to symbolize, in a way, the growing independence of these new centres of powers within the all-embracing framework of the authority of the Empire and they were recognized as locally invalid. The consequences of this development of relationships affected citizens (domicilaries) of different commune or property situated in another commune or were executed in one town but had to be performed in another, or their enforcement was sought in a different country.

With the above historical analysis, conflict rules had therefore, to be found both as a matter of logic and practical utility. At times, to cloth the law with an acceptable garment, resort was made to the Roman Law. Form these efforts grew a body of rules and principles that achieved an impressive statement by the mid-14th century in the work of Bartolus who taught in the universities of Belgona, Pisa and Perugia.

The statute theory was originated by the post glossators. The main object of which was to settle conflicts which arose not only between the local laws of the numerous Italian cities but also between the Local laws that affected all the subjects of the Emperor of Germany and the King of Lambardy. Each statute was interrupted in order to ascertain its object and thus to fix its rightful sphere of application. To achieve this, each law was classified as relating to a person or a thing. A number of principles thus came into being, the principles could be seen from this classification.
"First, all statutes are either real, personal or mixed real statute is one whose principal object is to regulate things, a personal statute is one that chiefly concerns persons, while a mixed statute is one that concerns acts, such as the formation of a contract, rather than a person or thing.
Secondly, these three categories of statute differ in their fields of application. Real statutes are essentially territorial.

Their application is restricted to the territory of the enacting sovereign. Personal statutes, on the other hand apply only to persons domiciled within the territorial jurisdiction of the enacting sovereign, but they remain so applicable even within the jurisdiction of another territorial sovereign.
A personal statute of Florence overrides a Bolagness personal statute if the Florentine does business in Bologna, provided that the business does not relate to statute. Mixed statutes apply to all acts done in the country of the enacting sovereignty , even though they raise litigation in another country (Chesire and North).

Despite this classification, and its attractiveness proved to be highly inadequate in solving conflict of laws problem. It was difficult to determine in clear terms the statutes that were real and those that were personal.
Another fact is that, issues that were outside that above classification had to be crammed into one of the recognized categories.

To this extent, whatever may be said to criticize their effort, it is beyond doubt that the statutists set the fire of scientific discovery of private international law.
This was the beginning of a functionally said system of choice of law. This was the approach they conceived highly originated methods to resolve multistate problems by making a principled selection among competing local rules.

4.0 Summary

This unit discussed how the concept of Private International Law emerged from the ancient Rome in Italy. The concept is generally known as conflict of laws through, marris have generally rejected the interactive little as potentially misleading, as conflict of Laws is not an international system of law. Therefore, to him, public international law is a single system seeking primarily to regulate relations between sovereign states in theory. At any rate, it is the same everywhere. No doubt about the fact that, the rules of conflicts of laws differs from country to country.

5.0 Conclusion

The rules of private international law now in the use have in the main, been the product of a long historical development which merits some consideration. The story of private international law really began in the 11^{th} country in Italy, as a by –product of the revival in Roman Law we have discussed.

6.0 Tutor Marked Assignment

i. Trace the historical origin of the private international law.

ii. Conflict of law rules and the private international law can not be used interchangeabl,. Discuss.

7.0 References and Further Readings

i. Thomas J.A.C. (1955) Private International Law: Hutchinson University Library, London

ii. Marvis J.H.C. (2005): The Conflict of Laws, 6th Ed by David Mc Clean et al) London Sweet Sc Maxwell Ltd.

iii. Ademola Yakubu (Supra)

iv. Agbede I. O. (2001) (Supra).

Unit 2

Development of Conflict of Laws in Some Continental Countries

CONTENT

1.0 INTRODUCTION

As new states emerged and old states require new forms of government, subsequent developments on the continent after the impact of the Dutch have been characterized, broadly speaking, by the manifestation of nationalism in the principles adopted for matter involving foreign elements. The developments in French School, America, the Germany Scholars, Mancim, England and Nigeria.

2.0 Objective

The main objective of this unit is that at the end of the discussion, the students and readers would be able to, (1) know the development of the rules of conflict of laws in some continental countries. This will be done with full historical analysis of the selected countries.

3.0 Main Content

3.1 Development in the French School

Cheshire et al posited that, Italian scholarship declined drastically after Baldus, who outlived Bartolus by some 40 years. As a result, the statute theory was carried into France, where it was developed and refined by notable jurists like Dumoulin, D' Argentre and Gui Coquille. The presence of different pronvince with separate systems of law called Coutume or customs in France in the 16th Century, just like the 13th Century Italy. This paved way for the launching and development of rules of conflict of laws. Despite the French kings establishment of the Crown's supremacy, still, the law varied from province to province/district to district. This was so because of inter-provincial trade which were in constant conflict with each other. These are the problems the conflict of laws tend to address.

Demoulin, a French scholar, like his Italian predecessors attached his principal conflicts publication to the lex/cunctas populous much of which could be found in Bartolous commentary. This French scholar's distinct contribution was in respect of his support of the party autonomy doctrine. He was of the notion that all cases cannot be determined by the use of local laws. He posited that parties should be given the power to stipulate the law to govern their transactions in some situations.

He further stated that, the doctrine of party autonomy should cover situations where the parties had failed to specify/stipulated applicable law. This idea of a 'facit agreement' or 'an 'implied agreement" became the forerunner of the modern idea of the 'proper law' in the conflict of laws and modern refuirement of the 'closest connection' or 'most significant relationship' idea in the conflict of law.

D'Argentre played a key role in 16c Conflict of laws emphasizing territorial. He derive the Italian school's scholastic writer' and disagreed with the custom of attacking the conflict of laws to the lex cuntos populas. He was of the opinion that conflict of laws rules are creatives of local, rather than universal law. He recognized only a limited number of personal laws. He reduced the personal law idea to a mere exception. He found solace in the lex reisitae and cherished the domicilicy law. The importance of his approach lay in the fact that if the time he wrote, really and disputes about marital property and succession to immovable were the main component of wealth and the bulk of legal business. His idea favours Lex Feri Guy De Coquille was a French scholar whom is worth mentioning, his view was different from Dumonhi

and D'Argentre. Although, he wrote in the vernacular rather than in Latin. In his writing, he tried to distinguish between the Italian 'statuta' and the French 'centunes'. By this, he was able to note the essential difference between the legal amount in Batolus that of coordinate jurisdiction benefit of an over-reaching common law.

In the modern times, the approach of Gny de coquille is relevant in the sense that conflict approaches developed in Federal system such as Nigeria or US whose component states share a common legal tradition may not work in Europe where national codifications destroyed the country that the reception of Roman Law once provided. He adopted the purposeful approach to the issue of classification. He was of the view that the classification of laws as personal or real should not be based 'on the ? mere shall of words, but on … the presumed and apparent purpose of those who have enacted the statute or custom. His views made him distinguish and far from his forerunners.

Self Assessment

Identify some of the French scholars and highlight their views.

3.2 The Dutch Scholar

The 17th Century Netherland was a good ground for the development of conflict of laws. The Netherlands was organized as independent provinces but it had also become one of the major trading nations of the world. The extensive foreign commerce and political decentralization engendered conflicts problems of national and supra-national dimension.

It is important to add that, Netherlands was a cosmopolitan centre, the doctrine of territorial sovereignty propagated by Bodin in the preceding centuries and expanded by Grotius had taken root. There was a strong need to make a cause on why a foreign law had to be applied in place of the local law. This move led to coinage of the phrase "Conflict of Laws" by the Dutch jurists. As a result, it gave impression that choice of law problems are caused by the clash of sovereign commands. The Dutch jurists have different perspective, the Italian did not bother about this notion because they believed that the Justianan code made it necessary to choose between the different statute. Different approaches were adopted in this regard. Another scholar Redenbury, who was said to have coined the phrase "Conflict of law" tried to reconcile the application of foreign law with the idea of sovereignty by postulating a super-law derived from

the "very nature of necessity" of the case, which bestowed extraterritorial effect upon local rules.

Viewed critically, the explanation does not carry much weight for it does not explain in a scientific manner, the basis of the application of a foreign law in performance to a local law. Paul and Johannes Voet used the notion of 'comitas' as the basis for the application of a foreign law. This idea is traceable to Justinian Digests. He explained further that the notion of "Comitas" reflects a principle noted in enlightened self-interest and convenience.

Huber made comity the basis of theory unlike Rebengburg and the Voets who were in favour of the framework of Statutist tradition. He was against the classification of laws as personal, real and mixed. The basis of his idea of conflicts systems is characterized by two issues, sovereignty and comity. He emphasized further in his ten-page dissertation "De conflict Lagun Diversarum in Diversis Impriis sub titled in English" Origin and use of the Question, Forensic indeed, but belonging to the International rather than Civil Law.

"The solution of the problem must be derived not exclusively from the civil law, but from convenience and the tacit consent of nations. Although the laws of one notion can have no force directly with another, yet nothing could be more inconvenient to commerce and to international usage than that transactions valid by the law of one place should be rendered of no effect elsewhere on account of difference in the law"

Huber's contribution can be premised on five district heads viz:

i. He heralded the demise of the statutist theory
ii. He emphasized the need for decisional harmony
iii. He propagated the recognition of foreign rules on international law
iv. He propagated the recognition of the vested rights doctrine
v. He introduced the public policy reservation

Huber's point are not without criticisms

Firstly, the critique said it is difficult to reconcile the notion of sovereignty with the recognition of effects of multi –state transactions.

Secondly, the idea of comit as the basis for the recognition and enforcement of foreign rule is not pungent enough as the forum state may decide not to recognize the law of a foreign state.

It is common sense, to note that, there can be no decisional harmony, if each state reserves the right to disallow the application of a foreign law on the ground of public policy.

Regardless of these criticism, it is indispensable that the contribution of Humber has had an enduring effect on this subject. Harrison F. (1919), in Jurisprudence and Conflict of Laws opined of Huber's work.

"It is all printed in five quarter. to pages, in the whole history of law there are probably no five pages which have been so often quoted and possibly so much read. They are distinguished by cleanness, practical judgement and a total absence of pendantry"

Despite the comment against the book, Havison's comment speaks volume about the precisorous and scholastic quality of the book. Huber's contribution cannot be overlooked in the study of rules and establishment of conflict of laws.

Self Assessment

Critically analyse the impact of Huber's theory or his contribution to the development of conflicts of laws

3.3 Development in England

English Private International Law. It was historical conquest of Norman in 1066 Ad that led to the establishment of strong kingship in England. At this time, the political organization, the territorial and the King's court became supreme and final over decisions of local tribunals. As a result of this development, the royal courts possessed and exercised an original jurisdiction which was co-extensive with the realm and gradually evolved out of a mass of local customs, common to the whole of the realm. It is on this perception that brought about the idea of a 'common law' of England.

During the 12th century, England, the rules administered had became the national 'law of the land'. Unlike the States, Italy, France and the Netherlands where internal conflicts were unknown. At this juncture, the pertinent question which may be asked is, what became of Englishman when they travelled outside England and entered into obligations or transacted business? Even though they did travel but the common law did not take cognizance of foreign cases. For example, as early as 1280, it was held that common law courts had no jurisdiction to redress a tort committed abroad. In 1308, in the case of a writ of debt upon a document executed in Bernick in Scotland, it

was said that 'because it was made in Bernick, where the court has not cognizance, it was awarded that John took nothing by his writ' (see) and this situation continue till 17th century. (See Hughle Papa V The Merchants of Florence in London 8 -9 Edw. 1 (1280-81).

Be that as it ,may, the old rule suited England as it was in accordance with its social and economic regime which was land holding, agriculture and other occupations of a local character. To remedy the anomaly in the old rule, that is, the withholding of relief in cases, with foreign elements, English lawyers resorted to arid presumption. For instance, a tort committed in Paris, France was taken that the city was situated in England. Such a fiction had to be employed to make the matter triable by an English jury. However, a judge deciding on an instrument dated in Hamburg, Germany said in 1625.

"We take it that Hanburg is in London in order to maintain the action which otherwise would be outside our jurisdiction. And while in truth we know the date to be at Hamburg beyond the sea, as judges we do not take notice that it is beyond the sea"

He stated further that what the law had done was to invent a fiction for the furtherance of Justice and "… a fiction of law shall never be contradicted" It was therefore not necessary for the English courts to formulate choice of law rules.

Moreover, the rules of trial at common law later began to undergo substantial changes. The jury started to decide questions not only on account of his own knowledge but also upon deposition of witnesses. The initial step was to deal with 'mixed cases'. The other step, that of trying cases connected solely with a foreign country, was facilitated by the new division of actions into Local and transitory.

This issue of transestory was clarified during time of Lord Coke, where it was settled that the courts at Westminster could entertain all nations that were of transitory nature, such as actions for breach of contract or on bills of exchange, even if the relevant facts were connected with a foreign country. This was a radical departure from the old principle according to which the courts were administering their own law exclusively. In addition, all restrictions in respect of revenue have been removed by the Supreme Court of Judicature Act (1873).

It was discovered that the common law developed to suit the legal demand of the feudal system proved inadequately insufficient to deal with international trade and commercial expansionism and maritime cases. A solution established was to be

humanize with the old principles. To this extent, commercial cases were determined by the Law of merchant which was 'the law of nations' and was administered in England and as such it was regarded as a law of England.

The English commercial courts applied a common European lex mercataria and admiralty judges drew on sources widely scattered over time and space, such as the ancient sea law of Rhodes, the Consolant De Mar, the Role d'Oleion and the laws of Wisby. The common law courts however refused to apply this law as it was considered to be foreign. The treaty of Union of 1707 which preserved the Scottish legal system facilitated the recognition of foreign laws. Scotland is a civil law jurisdiction with institutions which differ from those of England. This gave rise to an early intra-British choice of law problems. As a result, the modern legal theory concerning conflict of laws was formulated in Robinson v Bland (1760) 97 ER 717 where Lord Manifested posited:

"The general rule, established Ex comitate et jure gentum is that the place where the contract is made and not where the action is brought, is to be considered in expanding 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 kingdoms"

By the 18 century, the seed of private international law had taken root. This can be said to mark the beginning of basic rules of Private International Law in England Dicey throughout his Treatise gave a good geographical account of the position of Private International Law in England.

3.4 The Development of American Conflict of Laws

United State of America is a federation of 52 states being a federation made it a fertile ground for the development of Private International Law just like the medieval Italy, pre-revolutionary France and the Dutch provinces during the Golden Age.

Before, the independence of America in 1776, all the states, except Louisiana, adopted the English common law. The powers accorded the constituent states to make laws and the judge –made laws further divergence after independence this development created choice of law problems.

To deal with this problem, the civilian literature that was made, was at first treated with disdain. For instance Judge Porter in Saul V His Creditors was the comparative research which his judgement showed spoke of the research of Livermere on

European scholarship in general as a ‘vast mass of learning’ as it would have appeared to our own understanding.

In the book written by Livermore after loosing the case, he criticizes Huber and was against the Comit doctrine and pronounced the statutist leaving. Despite the fact that the book is not popular, it provided a valuable, useful bibliography and compilation of civilian and common law sources in readily assessable form. This was judiciously used Story, an erudite Supreme Court Justice and Professor of law at Harvard shared Livermere’s work and regard to civilian literature. Professor Story, painstakingly organized and analysed the continental literature as well as American, English and Scottish cases.

Story was opposed to the unilateralist approach of Livermere and the statutist writers. He preferred Huber’s axious and the nation of comity. He was in support of unilateralist approach. His treatise has been called one of the least scientific and one of the least conclusive books and lacking a “Supreme Guiding Principle”.

Indeed, it has been opined that, Bartolous commentary expected, no other work on the conflict of laws had proved to be as influential in Anglo-American literature and except perhaps Huber’s essay.

3.5 The Germany Scholars

Carl Von Watcher, an iconoclast and a legal positivist, in a German review debunked the views of the statutists, exposed the vested right theory’s copulation reasoning and disparaged the doctrine of the comity watchers (1963) posited in his Essays on the “Collision of Private Laws of Different States” that “To claim absolute protection in the forum for a legal relationship created abroad according to foreign law is to argue from a premise that has not yet been established and presupposes something that still needs to be proved, namely that the legal relationship is to be judged according to foreign rather than forum.

For … the question whether someone was in favour of the local law and he believed that a judge in determining issues must look “no doubt to the laws to which he is subject” That is, the local law as he is instrumentally (organ) of the legislative will.

Watcher identified three “Guiding Principles” thus:

- The courts must follow any provisions of the lex that expressly designate the applicable law; deviation from such a directive , a judge faced with a conflicts

problem should as a matter fact examine whether forum law must be applied in a given case notwithstanding the foreign element contained in the issue. However, if any doubt exist on analysis of the applicable law, the judge should resolve it in favour of the lex fori.

At this juncture, a comparative analysis is essential between afore theorists before Watcher. The approach of watcher to the resolution of conflicts problem is forum centered whereas, Friendich Carl Van Savigay, whose conflicts classics was published in 1848 advocated for an international approach to solving conflict problems: (a) His conflicts classic was published as volumes eight of his system of current Roman Law. The volume contains two chapters, the first chapter was devoted to the conflict of laws while the second chapter is on interpersonal conflicts. (b) He no doubt made a decisive break with all former approaches. Sovereignty was unmistakable theoretician, he preferred to rely in hypothetical cases rather than court reports to illuminate a point. His work was translated into English by William Guthrie in 1869. He looked beyond the statutes theory as being incomplete and ambiguous and rejected out rightly the statistists, unilateralists approach and primacy of forum law advocated by Watcher.

He therefore advocated the development of general principles of choice of law by legal science, that when perfected, would assure that the same result will be reached in all places. He was in favour of identifying all legal relationship for each and an appropriate connecting factor that would tie it to a single system. The idea rule to savaging is that (law) which would be accepted by all states if proposed for inclusion in an international treaty, providing a 'common statute law of all nations'
Savinguy's approach significance lies in the fact that he suggest that each case should be decided according to the legal system to which it seems most naturally to belong:

The principle of 'connecting factors' he proposed include:

i. Domicile for the resolution of issue like capacity, succession to estate and family relations.
ii. Lex sites for the determination of location of things
iii. Lex loci actus for the determination of legal transaction's like contract.
iv. Lex fori for the resolution of matters relating to procedure/ Hitherto, Livermore had earlier compared the nations of the civilized world to one great society composed of many families between whom it is necessary to maintain peace

and friendly intercourse, Grotius used the same thought to describe the essential unity of mankind. The approach of Savinguy emphasis on 'Voluntary submission of a person to a sovereign, and his dislike of the vested rights theory and its description as 'circular' is in line with Watcher's perspective. Watcher equally used 'seat metaphor' the question – begging approach.

Be that as it may, the existence of these choice of law rules since the time of Bartohus is not in doubt, but they were organized by Savinguy who advanced a pragmatic consideration, rather than mere doctrinal musings in support of multilateralism. Despite the fact that, Savinguy's idea was cosmopolitan in outlook, his contribution to the subject matter –conflict of laws rules survived till today as could be seen in the formulation of the "proper law" approach or the concepts of the "Closest connection" and the "Most significant relationship".

His view was so respected to the extent that in the 19th Century, some German Courts allowed his views to prevail over statutory provisions (Kegel G. 1987). In the 20th Century, his teachings were very remarkable because it helped transform the unilateral conflicts provisions found in the original Introductory Act to the German Civil Code into a system of multilateral rules.

The contribution of Savinguy cannot be overemphasized to academic and particularly to solving chronic problems of conflict of laws or Private International Law. This generation and generation unborn will remain grateful to him for his concise and pragmatism in this field of law.

3.6 Contribution of Mancini to the rules of Conflict of Laws

It is remarkable indeed that Mancini introduced the principle of the Lex Patriae when he gave his inaugural address at the University of Turin entitled "Nationality as the Basis of International Law". His idea is on fundamental importance of the ties of allegiance that link individuals to their home countries. He utilized the singular opportunity that come his way in 1985, when he was appointed as a member of a Parliamentary commission that drafted the Conflicts rules of the Introductory provisions of Italian code. This gave him the opportunity of transferring his postulation into the code. He was of the view that all citizens should be governed by the law of the state whose citizens they are. This is otherwise known as the national

law. This idea was imbibed and adopted by many in all central and Southern Europe as well as in Brazil, Japan, Germany, Polish, Italy, Sweedish and many other legislations

He brought to the fore the lex patriae idea. Most importantly, he promoted and influenced the adoption of multilateral conflict treaties and participated in International projects pursuing that aim (Ademola J. Yakubu (1999). However, he attacked the principle of comity, he was an advocacy of the doctrine of equality of forum and foreign Laws. He emphasized the role which policy should play in the conflict of Laws. Like most scholars of his time, he made a remarkable enormous contribution to this subject.

3.7 Development of Rules of Conflict of Laws in Nigeria

Before the advent of Colonization, there existed in Africa and particularly in Nigeria, a number of local rules and customs by which Nigerians administered themselves (even before the naming of the geographical territory in 1914). Apart from the local customs, the people in the Northern part of this territory were in contact with citizens from other parts of Africa particularly North Africans through the historical Trans-Savanah trade. That is Islamic culture which were co-existing side by side with Hausa and other Ethnic groups in that part of the country since 14 century. Rules were formulated, though in a rudimentary form, for the resolution of disputes between them. The coastal area of the Southern part also came in contact with the European traders especially along the coaster areas.

The modern form of private international law/rules of conflict of laws in Nigeria is no doubt a by-product of the contact with the European countries. This was facilitated by colonization of Nigeria by the British government. The formal arrival of the British colonizers and the development of international trade ad intercourse with several citizens of other nations of the world. With this interaction, the recognition and formulation of conflict rules became inevitable.

Hitherto, the existing customary law systems which were basically unwritten could not cope with the municipal needs not to talk of international matters. As a result of acquisition of political power. The British introduced their legal system into Nigeria. It ushered in new practices and institutions.

According to Ademola Yakubu, the determination of the history of Private International Law in Nigeria is the common law –decisions of English Law in Private international matters? Statutes of general application, that is, the statutes that were in force in England on or before the 1st day of January 1900, in so far as those statutes are importable to Nigeria and have not been overridden by local statute and English Statutes on specific matters. For the reception of English Law in Nigeria, see S45 of the Interpretation Act Cap 89, 1958. The laws of various states except the former Western part of the country where the statutes of general application are not applicable. See also the Revised Edition of the Laws of the Federal Republic of Nigeria, 2004.

Post independence Nigeria now has the Power to make law for herself. The sources of international law in Nigeria are among the other sources, Nigeria statutes, International obligations and decision of Courts (Park supra).

4.0 Summary

It has been clearly elucidated in this unit how the Private International Law popularly known today as conflict of laws became worldwide concepts. The contributions of great scholars and jurists from various countries of the world were discussed to buttress the formation and development of the rules of conflicts of laws.

The scholars such as Maucini, Huber, Savilging and host of others who emphasized 'comity theory'. 'Statute theory' and variation of other theories which illuminates the writings of subsequent writers and equally to greater extend the bedrock where the remarkable judgment were laid to resolve the conflict of issues with foreign elements

5.0 Conclusion

The application of rules of Private International Law/otherwise known as conflict of laws is not restricted to a particular geographical area or a continent or a state, it cut across or nation of the world. No wonder, this unit diligently discussed. The issues in various jurisdictions and the concept evolved, the spread and acceptability as the basis for resolving conflictual matters without further hinderance. The conflict of laws in French, Dutch/Netherlands, England, America, Germany, Italy and Africa particularly was to a greater extent discussed for the benefit of the students and readers.

6.0 Tutorial Marked Assignment

i. Highlight the evolution of the conflict of law

ii. Briefly analyse the development of the rules of Courts in all jurisdiction.

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Unit 3
Principles of Jurisdiction and Exception from Jurisdiction of the Courts

CONTENT

1.0 INTRODUCTION

The extent of the jurisdiction of the English Courts is determined by rule of common law and by those derived from statutes. These rules may varied according to whether they concern 'actions in Personam' or 'actions in Rem'. The kind of judgment which results is characterized by the type of action in which it is pronounced. An action in Rem gives rise to a judgment in Rem, an action in personam to a judgment in personam. However, fundamentally, all jurisdiction is based on an idea of effectiveness deriving from a territorial and personal conception of allegiance. In this wise, an alliance may be temporary, such as the temporary allegiance owed to a foreign state by a resident, or even a visiting alien. In this case, per Lord Rusell C. J (as he then was) in ***Carrick V Hancock (1895) 12 T. L. R 59*** posited that the allegiance is limited but it is sufficient to found a jurisdiction over the person concerned, as the presence of a person given rise to a personal jurisdiction, so that of an object may give rise to jurisdiction in rem over the object and this even though the defendant to that action in rem be abroad ***(See Castrique V Imrie (1870) LR 4 HL 414)***.

In these cases, mentioned above were, the jurisdiction is effective because the essential subject matter is within the power of the court at the same time. In other words, the effectiveness of jurisdiction is to a large extent national rather than actual. (Webb P. R et al (1960): 85)

2.0 Objective

The major objective of this unit is to let the students and readers alike understand the following:

i. The principles of jurisdiction and its forms i.e the jurisdiction in personam and jurisdiction in rem.

ii. Secondly to discuss the exception from the Jurisdiction of the Courts

3.0 The Main Content

3.1 Principles of Jurisdiction

Principles of Jurisdiction determine whether or not a court can hear a case. It is important they identify the country or countries whose courts can approximately deal with a matter. The issue of 'appropriate forum' for the resolution of a dispute is a complex one, and is understood in different ways in different legal traditions. Although, there must be limits to the jurisdiction of the courts of any country.

It would be appropriate for an English Court to have jurisdiction over an action arising out of a dispute involving two English students in the middle of an English city. At the same time, it would be entirely inappropriate for those courts with an action arising out of a conflict between two Chinese students in the middle of Beijing.

Another principle is the time factor, if a claim is brought against a defendant now based wholly within a single country and having assets solely in that country, it may well be appropriate to have the claim heard there. That will be true even if the underlying dispute has no connection with that country and neither party had any such connection when the dispute first arose. (Morris, 2005).

The principal requirement is that the foreign court should have been competent to entertain the action, a matter which the English Court, now asked to recognize the judgement, determines for itself. English private international law is, for these purposes, the touchstone of foreign jurisdiction.

Moreover, in many continental states, the presence of property of the defendant within the jurisdiction empowers the court to hear suits against him. For instance, if R in Germany has a claim arising out of business dealings against S, whose base is in England but who has stock stored in a warehouse in Hamburg; a German Court would be, appropriate/entitled to hear R's claim and make an order against S, regardless of S's participation in the proceedings or not. In this situation, a judgement so obtained in Germany, however, would not be regarded by an English Court as the decision of a Court of competent jurisdiction, if S did not participate *(see Emmanuel V Symon (1908) 1 KB 302) (Thomas JAC 1995)*.

Having stated the above, it is pertinent to note that in federal countries, and countries which have courts operating on a regional basis, similar issues may arise in deciding how cases are to be allocated between various regions. For example in the United Kingdom, many rules give jurisdiction to the courts, but it is very necessary to decides whether the case is to be heard in England, Scotland or Northern Ireland. In a similar vein, students of legal history may recall the old rules as to "venue" which identified the English country within which a trial was to be held. However, there are some rules assigning cases to particular local Courts but they are regarded as domestic rules and not part of the conflict of laws.

The concerns of the principles of jurisdiction of action can be discussed from two perspectives. That is:

i. Jurisdiction of action in personam
ii. Jurisdiction of action in Rem

3.2.0 Jurisdiction of action in personam and Jurisdiction of action in Rem

3.2.1 An action in personam: according to Morris (2005, 6th Ed.) is an action brought against a person to compel him or her to do a particular thing, e.g the payment of a debt or of damages for breach of contract; or to compel a person not to do something, that is, when an injunction is sought. This does not include Admiralty actions in rem, probate actions, administration actions, petitions in matrimonial cases or cases concerning guardianship or custody of children, or proceedings in bankruptcy or for the widing up of companies.

Thomas JAC (1955) emphasized that "so far as jurisdiction in personam is concerned , the principal tests for foreign as for English Courts are effectiveness and submission"

It is trite law that a foreign court will be considered to have effective jurisdiction if the defendant to the action was present in the state in which the court sits, at the time that proceedings were commenced. It was decided in *Carrick V Hancock 12TLR 59,* where a person domiciled in England was served with notice of proceedings against him in the Swidish Court, while he was on a short visit to Swedish. He returned back very soon to England and took no further part in the Swedish action again, in which judgment was eventually given against him. Hence, the fact of his presence in Sweden at the commencement of the action was held to ground the jurisdiction of the Swedish court and the judgment was enforceable against him in England.
Similarly, in the case of corporations, the existence of a definite place within the jurisdiction from which the corporation is doing business would suffice to constitute presence of the corporation in that particular state (where jurisdiction is sought).

Secondly, if the disputant parties choose to submit their disputes to the courts of a state other than that which would normally have jurisdiction over them, the fact remains, their submission is universally speaking, enough to vest the court concerned with authority to determine any claim. Thus, in *Feyericke V Hubbard (1902) 71 LJK* B509, a British subject domiciled and resident in England had accepted in a contract with a Belgian company that all disputes as to the present agreement and its fulfillment shall be submitted to Belgian jurisdiction. It was held that a judgment of the Belgian court obtained by the company, in default of appearance by the English man was enforceable in England as the order of a competent court. Express submission of this type may be very rare to raise problem.

At times, jurisdiction may be implied or conferred by the conduct of the parties, upon a foreign court.
However, the case would be different if, though making an appearance in the proceedings, defendant did so only to demur to the competence of the court to hear the claim.

Self Assessment
On what grounds will the Courts assume jurisdiction at common law in actions in personam?

3.2.2 Jurisdiction of action in REM

Jurisdiction in vein is based entirely in the conception of presence or national presence of the res or quasires within the jurisdiction, and it is for this reason that it is effective. The presence of the matter see *Castrique V Invie (1870) LR 4 HL. 44*) An action, in vein is one in which the judgment of the court determines the title to property and the rights of the parties, not merely as between themselves, but as against the whole world.

The English courts have jurisdiction to entertain actions in rem in three types of cases.

i. Jurisdiction of action to determine the title or rights to possession of movable or immovable property situated in England: *Castrique V Imvie (Supra*), Actions of this nature are in vein in the sense that the judgment of the court constitutes a good title against the whole world. Similarly, the mere presence in England of property does not render an absent owner personally amenable to the jurisdiction and the court is not competent to adjudicate on matters unconnected with the property: *Emmanuel V Syman (Supra).*

ii. Admiralty actions: Admiralty jurisdiction exists to entertain "any claim for damage done by a ship" and may be in vein or in personam. Judicatir (consolidation) Act, 1925. The jurisdiction is wide enough to cover damage done by a ship to foreign land. The Tolten. The nationality of the ship is immaterial provided it is within English territiorial waters.

iii. Actions relating to status: English law regards status as a res and actions concerning it in res, binding not only the parties to it but everyone who comes into legal relations with them *per Lord Dunedin in Salvesen V Administrator of Austrian Property*. It is very clear that English courts have jurisdiction in matters of status when it fictitious res is situated in England. That is when England is the country of domicile. *Per Breth L. J. in Niboyet V Niboyet (Torrance HMB 1958).*

Although, the rule relating to the lex domicile as governing matters of status is not absolute, for example, by Matrimonial Causes Act, 1950 divorce petitions by a deserted wife may in certain circumstances be heard on the basis of residences and a judgment in rem may be given although the English Court is not the court of the domicile.

Self Assessment Question

In what circumstances does an English Court possess jurisdiction to entertain an action in rem?

3.3 Exceptions to the Jurisdiction of the Court

In certain circumstances the power of the English court to exercise its normal jurisdiction, whether in personam or in rem is limited either by reasons of personal capacity of one of the parties or by virtue of the privilege of sovereignty, immunity attaching to a defendant.

There are two ways by which jurisdiction of a particular court can be restricted:

3.3.1 a. By reason of sovereign Immunity

b. By reason of personal capacity

a. By reason of Sovereign Community

In accordance with the theory of equality of sovereigns, it has long been a part of customary international law which forms parts of the common law of England which stipulates that the courts of one sovereign may not exercise jurisdiction over another sovereign, his property or any property he actually possesses, or his principal representatives or his consults in a matter concerned with their official duties without the consent of the sovereign. This is purely a jurisdictional, not a substantive immunity.

In another perspective, if a foreign sovereign or his representative such as ambassador – found guilty of an offence he committed, for instance, a tort or incurs a debt, within the jurisdiction while possessed of his sovereign status of immunity, and the remain with the jurisdiction for a reasonable time, after the tort or debt thus incurred. See *Magdalina Steam Navigation Co (1894) 2QB 352 C.A)*

The unity to be accorded a particular sovereign whether a state or person representing that state is entitled to depends upon recognition of sovereignty by the British executive.

3.3.2 By Reason of Personal Capacity

There is no incapacity imposed on alien as such (see *Porter V Freudeuburg (1915) 1KB 857(CA)* neither does the English Court – as in practice of some foreign courts – require of an alien, because he is an alien, to give security before proceeding therein

as plaintiff. In contrast to some foreign country courts, the English court will not allow an enemy alien to commence proceeding against him.
The right of an enemy alien to sue is merely suspended and it receives when he looses his enemy posture/character.

4.0 Summary

The principle of jurisdiction of English Courts and foreign courts in matters having foreign elements are determined by rules of common law and those rules sourced from statutes. These rules are equally varies according to whether such actions concerns action in personam or action in rem. Are there exception to these principles? Exception from jurisdiction of the courts were addressed from two ways through which jurisdiction of a particular courts can be restricted. That is (a) by reason of sovereign immunity and (b) by reason of sovereign country.

5.0 Conclusion

This unit is a very important sub –topics in module 2 and the importance of the Unit can be deduced from the discussion of jurisdiction of the courts to sit on the matter with foreign elements. There are some cases that established the jurisdiction of the courts and the determinant factors and action in vein. The limitation to this exercise by the courts were also discussed. The students have a lot to benefit particularly the area being exploited.

From the general consideration laws of the question of the application of foreign law, we turn to circumstances in which English Courts will accept jurisdiction.

6.0 Tutor Marked Assignment (TMA)

i. Discuss the determinant of jurisdiction of the courts
ii. Under what circumstances does an English court possess jurisdiction to entertain an action in rem?
iii. On what grounds will the courts assume jurisdiction of common law in action in personam?
iv. Are there any limitation to the exercise of jurisdiction?

7.0 References and Further Readings

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3. Agbede I.O (1989) Themes on Conflict of Laws 6th Reprint Shanesan C.I. Limited, Akoka, Lagos.
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Unit 4
Classification: The Mechanism

CONTENT

1.0 INTRODUCTION

Characterization is variably known and called classification, categorization or qualification is better illustrated an defined (Agbede I. O. 2001). Morris JHC said the issue of characterization has been regarded by many continental and some England and American writers as a fundamental problem in the conflict of laws. According to him, it was 'discovered' independently and almost simultaneously by the Germany jurist Kahn and his counterpart Bartin, a French jurists at the end of the 19th century and was introduced to American lawyer Lorenzen in 1920s and to English lawyers by Becket in 1934.

In most cases in which there is no foreign element present, the legal advisers of either party and the judge or judges, should dispute he eventually litigated will be found to be from the outset 'on the same plane. For example, in Handy V Bazardale (1854), 9Ex 341 : 156 ER 145, what was in dispute was whether the damage resulting from the delayed carriage of the mill-shaft was too remote, nobody was attempting to suggest that the transaction in question was other than a contract or that there had not been a breach of contract.

2.0 Objective

The main objective of this unit is to let the students and readers know:

a. What is characterization? The extent to which characterize mechanism tend to address and solved the problems confronting conflict of laws in all jurisdictions over the world.

b. Decided cases and decisions taken by the eminent jurists and judges.

3.0 Main Content

3.1 Characterization As Mechanism For Solving Conflict of Laws Problems

Characterization is the process of allocating the issue raised before a court into its correct legal category for the purpose of determining the appropriate choice of law rule. It is the preliminary stage in the process of choosing the applicable law for the purpose of reaching an acceptable or just decision. The differences in the system of law and classification of legal transactions, consequence events have led to the need to determine the nature of the issue before the court. Thus the factual situation has to be determine in order to know the head of the law it falls into after which the appropriate connecting factor or rule of law for the determination of the issue has to be determined. (Ademola Yakubu, 2006).

What is it which is characterized? Many scholar have expressed widely divergent views on what is to be characterized. The factual situation , the nature of the problem presented to court for the solution, a cause of action, a claim of defence will determine the legal solution, a legal to a legal. Thus, a matter that has something to do with the formal validity of a marriage as the category or factual situation must be determined in accordance with the lex loci celebrations as the facultative element or connecting factor. Apart from the above, the determinant of an intestate succession to a movable, the connecting factor to be used by a court like the Nigerian court is the lex domicilli although theories run riot on the methods of determining this.

In these examples, succession to immovable and formal validity of marriage are the categories while situ and place of celebration are the connecting factors.

The afore said notwithstanding, where a particular conflict rule is available and the connecting factor indicated by that conflict rule is unambiguous. But even if the forum and the foreign country have the same conflict rule and interprete the connecting factor in the same way, they may still reach different results because they characterize

the question in different ways. For example, the forum may regard the question as one of succession, while the foreign law may regard the same as one of the matrimonial property. This is exactly the problem of characterization. (Morris JHC (2005).

At this juncture, illustrations will show the precise nature of the problem. Assume that State Y and State Z both refer claims in tort to the law of the place where the tort was committed and both also refer contractual obligations to the proper law of the contract. Here we have uniformity of conflict rules and consequently there should be uniformity of decisions no matter in which state court an action is brought on any of the two situations.

Assume that A brings an action in State Y against P for a breach of promise to marry her which was made in state Y and governed by the law of state A but the breach occurred in a state Z where P repudiated the agreement. Consider these 2 typical problems:

i. A woman bought a ticket in London for a train journey from London to Glassgow. She was injured in an accident in Scotland. Is her cause of action for breach of contract, in which case English law may govern as the law applicable to the contract or for tort, in which case Scots law may apply? At this level, by which law, English or Scots, is this question to be answered?

ii. A Frenchman under the age of 21 marries an English woman in England without obtaining the consent of his parents as required by French Law. The French and English conflict rules agree that the formulation of marriage are governed by the law of the place of celebration (English law) and also that the husband must have capacity to marry by his personal law (French law). The fact that the personal law means the law of the nationality in France and the law of the domicile in England is immaterial if we assume that the husband was French by nationality and French by domicile. The question to be answered now, is the French rule to be characterized as one dealing with formalities (and so in applicable) or with capacity?

Hitherto, it was this kind of problem that the German Jurist Kahn and French Bartin (a French Scholar) discovered independently which eventually had to the duo's conclusion that 'uniformity of conflict rules will not yield uniformity of decision on the face of differences in the process of characterization.

During this time, the duo scholars resigned themselves to the 'unsolved' problems and advise that each court should adopt its own characterization which approach has come to be called the lex fori Theory.

It was left for subsequent writers to come up with diverse theories ostensibly to resolve the problems (Agbede I. O. 2001).

Self Assessment Questions

Define and discuss the nature of characterization

3.2 The Subject Matter of Characterization

It is pertinent to ask, what exactly is it that we characterize? The answer to this question is the nature of the cause of action; in illustration (ii) the Relevant rule of French Law?: It is no doubt that in practice, attempts to characterize particular rules of law can produce serious difficulties.

Re Cohn (1945) Ch. 5 61 LQR 340 provided a good example to this argument

"A mother and daughter, both domiciled in Germany but resident in England, were killed in an air raid on London by the same high explosive bomb. The daughter was entitled to movables under her mother's will if and only if, she survived her mother. By the English conflict rules, succession to movable is governed by the law of domicile, but questions of procedure are governed by the lex fori. By S184 of the Law of Property Act 1925, the presumption was that the elder died first, but by Article 20 of the Germany Civil Code the presumption was that the deaths were simultaneous"

The main issue is what has to be characterized is the issue in the case, the 'question in issue'. As Auld L.J (as he then was) put it Macmillan Inco V Bishops gate Investment Trust Plc (No3 (where the issue concerned a claim viewed as either restitutionary or proprietary.

"The proper approach is to look beyond the formulation of the claim and to identify … the true issue or issues thrown up by the claim and defence. This requires a parallel exercise in classification of the relevant rule of law"

From the illustration in 3.1 above, the typical conflicts statement is that issue A is governed by rule B and the logical approach is one that stands with the issue. (Morris J.H.C 2005).

Self Assessment

Highlight with decided case(s), the main subject matter of characterization.

3.3 Various Solutions

Prior to 20th and 21st centuries, various compromise solutions have been advocated thus, there are theories like the Lex fori, lex causa, primary and secondary classification via media, enlightened lex fori, autonomous theory, analytical jurisprudence and comparative law. The principal contenders according to Morris are characterization by the lex fori and by the lex causae. All these shall be examined in the subsequent paragraphs.

It is crystal clear that, in all cases where foreign statutes of limitation have been pleaded the courts have taken a two-fold approach. First, if the particular statute merely bars access to court while the claim remains intact the statute in question will be ignored as being part of the procedure rules of the foreign law no matter how the foreign law actually classifies it. Secondly, if the statute completely extinguishes the right of action, it will be enforced as part of the substantive law of the lex causae. See Philips V Eyre (1870) LR 6QB1. It will be relevant to make a brief comment on the theories mentioned above.

3.3.1 The Lex Fori: Theory of Conflict of Law

This approach is practically conducive lo legal certainty (Agbede I. O). The great majority of continental writers follow Kahn and Bartin in thinking that, with certain exceptions (that is, one of Britain's exceptions was the characterization of interest in property as interests in movable or immovable, which he said must be determined by the lex situs), characterization should be governed by the law of the forum, the lex fori (Marvies JHC). Anony (2011) posited that the theory refuting the vested rights doctrine espoused by Baale, Walter W Cook in his lex fori theory of conflict of laws argued against the notion that any right, including a foreign right, can be vested. Instead Cook contended that Courts do not 'enforce' rights created under foreign law, but rather enforce domestic rights, which they themselves choose to create and enforce (Cook, Walter W, 1942).

It is implicit in Cook's theory that he was bias in favour of the law of the forum, or a "homeward trend" demonstrating a preference for the application by American Judge of local law.

The basis for relying on characterization by the lexi fori is that the exercise is essentially concerned with identify the relevant legal category and so the applicable English conflicts rule leading in turn to the identification of the governing law. Any reference to potentially applicable foreign law is premature until that has been done.
The continental scholars tend to base their argument in terms of characterization of rules of law rather than issues. They asserted that, the forum should characterize rules of its own domestic law in accordance with that law and should characterize rules of foreign law in accordance with their nearest equivalents in its own domestic law.

However, the main argument in favour of this view is that the foreign law were allowed to determine in what situations it is to be applied, the law of the forum would lose all control over the applicable of its own conflict rules, and would no longer be master of its own house. There is tendency for this view to break down altogether if there is no close analogy to the foreign rule of law or institution in the domestic law of the forum.

3.3.2 The Lex Causae Theory of Conflicts of Law

Some continental scholars think that characterization should governed by no any other theory than lex causae that is, the appropriate foreign law. Wolf posited that "every legal rule takes its characterization from the legal system to which it belongs". This view was applied in Re Maldonado (1954) p223 where the Court of Appeal had to decide whether the Spanish Government's claim to the movable in England of a Spain intestate who died without next of kin was a right of succession in which Spanish Government was entitled to the movable or a jus regale in which English Crown is entitled to them. It was held that this question must be decided as a matter of fact and law in accordance with Spanish Law with the outcome that the Spanish Government was entitled.

This simply means that the foreign law applies or governs, and then apply its characterization, is tantamount to not applying it at all. This argument cannot go without criticism, it is a circular argument to concludes that the foreign law governs the process of characterization before the process of characterization has led to the selection of the foreign law. Secondly argument is if there are two potentially applicable foreign law and why should the forum adopt the characterization of one instead of the other. (Morris JHC).

Furthermore, Agbede I. O. contended that the result of application of this concept "will not only be confusing but it will also be absurd". Although, to him, the basis of this approach is to avoid the parochialism and injustice inherent in the lex fori theory. Unfortunately this approach had not provided the desired antidote.

3.3.3 Analytical Jurisprudence and Cooperative Law theory of Conflict of Law.

This approach is inspired by the need to make the process of certification were enlightened and were international in its scope. Some scholars/writers think that the process of characterization should be performed in accordance with the principles of analytical jurisprudence and comparative law. Morris said, the theory has its attractions, simply because judicial procedure in conflicts matters should be more internationalist and less insular than in domestic cases.

The arguments against this view is that there are very few principles of analytical jurisprudence and cooperative law of universal application. "International agreement on analytical concept is intopia". It is no doubt that cooperative law is capable of revealing differences between domestic laws, it is hardly capable of resolving them. However, comparative study can only yield conflicting of characterization without providing any tool for the solution of the concrete problem.

3.3.4 The Via Media theory of Conflict of Law

This theory is adopted to breach gap short comings bedeviling the lex fori and the lex causae theories of conflicts of law. There is a glaring weakness in the approach. For instance, in Re Gohn (Supra) if the German rules has been found to be procedural then none of the potentially applicable rules will apply.

This will create a 'gap' which may be difficult to close. Nevertheless, if the English rule were found to be procedural and the Germany rule found to be substantive, the two will be simultaneously applicable this creating problem of 'cumulation'.

3.3.5 The Discretionary theory of Conflicts of law

This approach is rigidly an interest –oriented. The 'autonomous' theories are probably to permit the court some flexibility so as to avoid the pitfall of rigid rules mentioned above.

In other words, where there is some kind of guidance , however good or bad the court is given some direction. To give the court a free scope under the autonomous or

interest –oriented theories will lead, no matter its inherent virtues, to a chaotic assortments of irreconcilable decisions (Agbede I. O).

4.0 Summary

Characterization has been described as "one of the problematic institutions of the Private Internal Law of Conflicts" in the Private International Law study. These problems are to be solved and conflict problems are not expected however intricate.

The scholars have agreed that the main essence of characterization is involved in the task of formulating the forum choice of law rules as a primary process. The characterization according to writer is concerned with subsisting facts in issue cause of action, legal rules, legal institutions or connecting factors under particular choice of law rules so that institutions or connecting factors under particular choice of law rules so that the applicable law can be ascertained.

Characterization should remain as rule of interpretation and not as independent technique requiring a separate choice of law rules.

5.0 Conclusion

English law is relatively rich in cases rasing questions of characterization but poor in judicial discussion of the problems identified. It is however, well settled that lex situs determines the characterization of property. It cannot be rigidly said that English Courts have adopted any consistent theory of characterization in accordance with lex fori of which *Ogden v Ogden (1908 p46) is* perhaps the notorious and therefore most celebrated example or in accordance with lex causae, exemplified by *Re Maldonado (Supra).*

6.0 Tutor Marked Assignment (TMA)

1. Critically examine the concept of characterization in Conflicts of Law
2. Discuss the analytical jurisprudence and comparative law
3. Identify the theories of conflicts of law and discuss the various problems facing each of the identified theories.
4. Suggest solutions to address these problems

7. References and Further Readings

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5. Madi and Velcas (1998): The Law of Conflicts and International Economic Relations (2nd Ed.)

Unit 5
The English principle of Renvoi

1.0 Introduction

In the private international law or conflict of laws, the French term renvoi refers to the application of the conflict rules of one state by the court or tribunal of another state, in order to solve a conflict of laws problem. Renvoi was developed in the 12th century, as a reaction to the territorial theory in an effort to secure greater uniformity and equity in conflicts decisions (William Tetley).Various rules have been evolved for different situations to assist the courts to determine whether they have jurisdiction and to what legal system they should look for the principles to decide the point of issue in a foreign element case. That is, matters having foreign element.

The relevance of the doctrine of renvoi may be illustrated as follows: when the forum courts has ascertained the applicable foreign laws with the aid of the appropriate rule of selection, it may do one of the following three things.

i. It may determine the issue under the internal law of the foreign system to ascertained, excluding its conflict rules. This is also known as internal law theory. The climate of academic opinion in England favours this approach (i.e. Morris, Graveson and Cheshire just mention few).

ii. Secondly, the forum may refer the issue to the conflict rules of the lex causae. That is, such a rule may concur in the application of its internal law, where this occurs, the internal law of the lex causae is inevitably applied. At this juncture, the conflict rule of the lex causae may refer the issue back to the forum law or transmit it to a third system. Renvoi may mean to remit or transmit.

iii. Thirdly, the forum court may dispose of the issue as it would have been determined by the courts of the Lex causae. This approach has been applied in a number of High court decisions and considered to represent the current English practice.

2.0 Objective

At the end of this unit, the students would be able to

(i) Know the English principle of renvoi
(ii) Know the types of renvoi, the scope of the doctrine, advantages and critique of the Foreign Court Theory.

3.0 The main content

3.1 The English principle of Renvoi

Renvoi is by no means so important in the choice of law as scholastic literature, both by its quantity and quality, would seem to suggest. Two matters require to be considered in relation to renvoi – its meaning and the extent of its application.

Renvoi, meaning "remission" or "referring back" or to return. In legal palace, it is not confined to remission but includes "transmission" or "reference forward". Renvoi may thus be said to occur when either a reference is made from one legal system to another and that second system refers back to the first, or when the reference to the second system is followed by a reference therefrom on to a third. It results from a choice which is not confined to the domestic rules of the system selected but one which includes the conflicts of laws principles of the system chosen (Webb P.R.H, 1960).

Every rule of private international law has two parts, usually styled as the 'operative facts' and the 'connecting factor'. The former designates the type of problem raise, the latter is guide to the system by whose rules its solution is to be found. However, in the capacity rule cited above, capacity to many is the operative fact; domicile is the connecting factor. (Thomas JAC, 1955).

3.1.2 Nature of the problem of Renvoi

The problem of renvoi according to Morris, arises whenever a rule of the conflict of laws refers to the "law" of a foreign country, but the conflict rules of the foreign country would have referred the question to the "law" of the first country or to the "law" of same third country. For example, if a British citizen dies intestate domicile in Italy, leaving movables in England; and that by the English conflict rule of succession to movables is governed by the law of the domicile (Italian law), but the Italian conflict rule succession to movables is governed by the law of the nationality (English law). From this illustration, which law, English or Italian; will regulate the distribution of English movables? This is a relatively simple case of remission from Italian law (the law identified by the English choice of law rule, the lex causae) to English law (the law of the forum or lex fori); if the intestate had been a German instead of a British citizen we should have had a more complicated case of transmission from Italian to Germany law.

In the distribution of property, it is felt that the desirable thing is that the mode of distribution should be the same everywhere. According to Ademola Yakubu, by this, it's meant that no matter what national court deals with the matter, there ought to be universal agreement as to what particular legal system shall indicate the actual beneficiaries.

In other words, there are problems inherent in the renvoi idea, this could be seen from the recognition and use of theories like "rejecting" the renvoi, "partial" or "single", "imperfect", "simple", "imperfect", 'receptive', or 'continental', 'perfect', 'total', or the foreign court doctrine. **See Re-Annesley (192) Ch. D 259 @ 27**8.

Bremer V. Freeman (1957) 10 MOO PC 306
Hamilton V. Dallas (1875) 1 Ch. D. 257
Casdagh V. Casglagh (1918) P 89
Re Askew (1930) 2 Ch. D. 259
Collier V. Rivaz (1841) 2 Curt 855
Re O'Keefe (1940) Ch. Div. 124.

The law without or the law outside the frontiers of a state may determine the relevant law to be applied by the Municipal Court for the resolution of the dispute before the court. See Re Ross (1930) ACI where it was stated:

"In my view the general trend of authorities establishes that the English Courts have generally, if not invariably, meant by the law of the country of domicile the whole law of that country as administered by the courts of that country".

3.2 Types of solution to the problem of Renvoi.

3.2.1 Internal law Solution:

This method requires specific proof of domestic law rather than the choice of law rules. It is therefore recommended by two great English judges on the ground that it is 'simple and rational' Although in another case after a comprehensive review of the authorities;

The forum court applies the law specified by the foreign conflicts rules, including the foreign renvoi rules, in an effort to render the decision, which the foreign court would render if it were seized of the case (Williams Tatley). The forum court as a matter of fact, may dispos of the issue as it would have been determined by the court of the lex causae.

This approach has been adopted in a rule of High Court decisions. It is generally considered to represent the current English practice **(See Re Ross (Supra) Kentia V. Vahas (1914) AC 403 P.C.; Re Duke of Wellington (1948) Ch. D 506 in the Estate of Fuld (No 3) (1966) 2 WLR 717** Partial or Single renvoi.

3.2.2 Partial or Single Renvoi

The problem of the partial renvoi has been encountered in the common law as far back as 1841 and Civil Law System in 1885 **(see Collier V. Rivaz (1841) 2 AC 855**. It was, however, the volume of legal comentaries attracted by the decision of the French Cour de Cassation in Forgo's case (Gravezon 1974) that gave this approach its earlier impetus (Agbede O. I. 2001).

Thus, single renvoi also known as, partial, imperfect or receptive renvoi or renvoi sunpliciter is the referral by the forum court to the conflict rules of a foreign state but not to that state's renvoi rules. The outcome of this may result in reference back to the forum's domestic law or "remission" or a reference to the domestic law of a third state or "transmission. This process is technically known as "accepting the renvoi". This method requires proof of the foreign conflict rules relating to succession, but not of the foreign country's domestic rules about renvoi. It is actually the practice in many of the continental countries of Europe. These countries including, France, Germany, Australia, Switzerland and Spain; by contrast, Demark, Greece, Italy, the Netherlands and Norway reject renvoi. Although, this approach is not the latest doctrine of the English courts.

3.2.3 Double or Total Renvoi

Double or total renvoi is also regarded as integral renvoi, total reference, or the foreign court principle is the referral by the forum court to the conflict rules including the renvoi rules of a foreign state. Double renvoi approach seems to be applicable to English courts alone. No wonder, Morris asserted that, the English Court might decide the case in the same way as it would be decided by the Italian Court. If the Italian Court would refer to English "law" and would interprete that reference to mean English Domestic Law, then the English court would apply English domestic law. If on the other hand the foreign country is ready to refer and interpret that reference to mean English conflict of laws, the English Court would have no hesitation to apply foreign country's domestic laws.

3.2.4 Application of the theory/Approach.

The question is 'how this theory (3.2.3) works in practice? The effectiveness of the approach can be seen by comparing two leading cases. That is: in Re Annesley:

In this case "T, a British subject of English domicile(s) of origin died domiciled in France in the English sense, but not in the French sense she left a will that purported to dispose of all her property. By French law "T. could dispose of only one third of her property because she left two surviving children. Evidence was given that a foreign court would refer to English law as T's national law and would accept the renvoi back an T's will was only effective to dispose of one-third of her property".

In Re-Ross on the other perspective:
In that case, "T, a British subject domiciled in Italy died leaving movables in England and Italy and immovables in Italy. She left two wills, one in English and the other in Italian. By her English will gave her property in England to her niece X. By her Italian will she gave her property in Italy to her grand-nephew Y, subject to a life interest to her mother X. She left nothing to her only son Z. Z claimed that by Italian law, he was entitled to one half of T's property as his 'legitima portio'.

By this English conflict rules, the validity of T's will was governed by Italian law as the law of her domicile in respect of movables and by Italian law as the lex situs in respect of immovables. Evidence was given that an Italian court would refer to English law as T's notional law in respect of both movables and immovables and would not accept the renvoi back to Italian law. English domestic law was applied and Z's claim was rejected.

3.2.5 Application of the renvoi doctrine in Nigeria.

Agbede I.O. pointed out that it will be relevant to make two observations on the application of the renvoi doctrine in Nigeria.

i. All the cases where the renvoi doctrine were decided on adoption by the High Court Judges. This may be that:
"that when the doctrine with all its consequences is squarely presented before the Higher English Courts, they will not hesitate to reject the decisions of the court that have lent colour to renvoi in the English law".

ii. The second decisions where the total renvoi doctrine was adopted as a rule of English law were taken after the "reception-date" of English law into most common law jurisdictions in Africa. However, the courts of these countries are not bound to adopt it.

In respect of this argument some scholars have rightly observed that:

"If therefore the foreign court theory is part of the law of Australia it is not by virtue of any binding or compelling authority but simply by reason of a common judicial assumption since 1917. it would be well for Australian courts to realize this in order to prevent an automatic and unthinking application of doctrine. "(Nygn et al (1968) conflict of laws Australia).

Origin Scope and Development of the Doctrine.

3.3.1 The history of renvoi doctrine in English law is the history of a chapter of accidents. The doctrine metamorphosed as a devise for reducing the burden of rigidity of the English conflict of law rule for the formal validity of wills.

Hitherto, the passing of Land Kingdom's Act in 1861 rendered this mitigation no longer necessary, at any rate in some issues where the testator was a British subject. But the doctrine was applied in cases falling within that Act, and was extended far beyond its original context to cases of intrinsic validity of wills as to cases of intestacy. In 1962, the theory underwent a significant charges no authorities were sited or specific reason was made to the change.

Two of the decided cases that established this doctrine have been overruled or dissented from. It is therefore settled that the whole question of renvoi can be reviewed by any appellate court. **In Macmillan Inc. V. Bishops gate Investment**

Trust PLC (1995), WLR 978 at first instance, Miller .J. (as he then was) observed that the renvoi doctrine had often been criticized and noted that:

"It is probably right to describe it as largely discredited. It owes its origin to a laudable endeavor to ensure that like cases should be decided alike wherever they are decided, but it should be recognized that this cannot be achieved by judicial mental gymnastics but only by international conventions"

This case was not pressed on appeal but a later court noted Millet .J.'s observation and therefore applied the doctrine. To this extent, it is certain to state that English doctrine under discussion was already established ever before many important developments in the methodology of the conflict of laws, notable the recognition of the significance of "mandatory rules". Those developments according to Morris point to a need for the reconsideration of the nature and purpose of the doctrine.

Self Assessment Question:
Trace the historical original of the doctrine of Renvoi.

3.3.2 Scope of the doctrine

It is instructive to state that the English renvoi has been applied to the formal and intrinsic validity of wills, and to matters of intestate succession to movables (see Re-Johnson (1903) Ch .D. 821. It has been applied to the law of domicile, to question of recognition of foreign divorce decrees the law of the place where a will was made and the law of the place where an immovable was situated (lex situs).

According to Morris, outside the field succession, it seen to have been applied only to legitimation by subsequent marriage, as it affected context of child abduction. It equally affected/applied to formal validity of marriage and capacity to many. However, it is no longer applies to the formal validity of wills is cases falling within the wills Act 1963.

In his contribution, Cheshire said: The "Court cases dealing with such matters, as contracts, insurance, sales of movables, gift interiors of motis causae, Mortgages, Negotiable instrument, partnership, and dissolution of foreign company and so on.

Whenever, the English courts, when referred to the law of a foreign country, have always applied the internal law of the country".

Nevertheless, in all but exceptional cases the theoretical and practical difficulties involved in apply the doctrine outweigh any supposed advantage, it may posses. The doctrine should not be applied or invoked rulers it is sure that the object of the English conflict rule in referring to a foreign law will on balance be better served by construing the reference to mean the conflict rules of that law.

The following situations present a strong case for the application of the doctrine:

i. Title to land situated abroad
ii. Title to movables situated abroad
iii. Title to immovable situated abroad
iv. Formal validity of marriage
v. Legistimation and custody/adoption of a child
vi. Certain case of “transmission”/”remission”

In the subsequent unit, Application the English doctrine of renvoi shall be discussed.

4.0 Summary

The problem of renvoi arises when a rule of English Private International Law refers to a particular matter to the law of a foreign country, but the rules of private international law of that country refer the matter either to English law or to the law of a third country. The problem has arisen in cases of succession to movables and immovables, legitimacy and divorce jurisdiction, but not in cases of contract or commercial transaction or tort. The problem may be addressed in one of the three ways.

1. The English court may apply the domestic or municipal law of the foreign country: it is important and necessary to prove the relevant rules of domestic law of the foreign country.
2. the English court may accept the reference to English law or the law of a third country, and apply the domestic law of England or of the third country.
3. The English court may decide the particular issue as the court of the foreign country would decide it.

5.0 Conclusion

Generally speaking, a reference to foreign law has been treated by English courts as a reference to foreign municipal law. There have been case concerning succession to movables and immovables, legitimacy and divorce jurisdiction, which the English courts appears to have decided as it was sitting as a court of the relevant foreign country. In these cases, the English courts may be said to have adopted “total” or “double” renvoi, or as it is sometimes called, the “foreign court theory”.

The problem of renvoi has not yet been considered by the Hausa of lands or the court of Appeal, but only by pursue judges in the Clarricery Susan. But the “foreign court theory” appears to be the basis of the rationers decided of **Re Ross, Re Annestley and Re Askew** (all supra) and clearly supported by **Re Duke of Nellington**, decreased, where Wynn-Dary Je (as he then was) adopted the reasoning of the During of council in **Keta V. Nahea**.

7.0 References/Further Reading.

1 Turance Hmb. (1958) Conflict of Laws Sweet a Maxwell Ltd Lawlon.
2. Depty from Unit.

Tutor Marked Assignment T.M.A

6.0 i. Define renvoi?
ii. Identify and discuss the solutions to the problems bedeviling the doctrine of renvoi.
iii. State conditions for the application of the doctrine renvoi.

Unit 6
Application of Renvoi in Common Law Africa rice

1.0 Introduction

The doctrine of renvoi has been variously defined and illustrated in the previous unit to mean 'remission' or 'return'. A reference to a foreign legal system is this perspective to mean a reference to the domestic rules of that system and not to its conflicts principles. Generally speaking, in most gases, the English principle, renvoi, has no place and it is for this reason that the output of academic literature on the subject is scarcely merited.

Nevertheless, renvoi in the form of foreign court theory has actually been depended on the ground that it produces uniformity of solution among the legal systems Wolf (1950) at this juncture, applauds the doctrine on the ground that it has been effectively used to save wills which would otherwise have been held to be invalid.

Webb PRH and Brown D.J.L in their work, confined the application of the doctrine of renvoi in English conflicts of laws as limited to certain areas as pointed out in the Court of Appeal by Jenkins L.J (as he then was) in Re-united Railways of Havana (1959) 2 WLR 251 @ p 277, that is:

i. Cases dealing with succession to property on death such as the formal and intrinsic validity of wills, and whether the decreased died testate or intestate see Re Ross (Supra), Re Willington (Supra).
ii. Cases incidental to question of succession to a decrease's property-such as whether a beneficiary is legitimate: Re Askew (Supra)
iii. Renvoi may possibly be relevant in relation to the question of the validity of a marriage
iv. It might also be said to have been applied in a case where the question of choice of law was not at stake, viz, in order to determine the validity of a divorce decree. This aspect seem to be exceptional ad such Cheshire (Supra) treated it elaborately in popular work titled "Private International Law".

To this extent, the application of the doctrine of renvoi, even in English Private International Law, cannot be regarded as a closed question. Now the question is, how does this concept/theory applied in the English Common Law of Africa. This is the main concern of this particular unit.

2.0 Objective

The objective of this unit is to exposed to the students and increase their knowledge in the following areas

i. The application of the doctrine of RENVOI in the English jurisdiction
ii. The application of the theory of Renvoi in Africa common law jurisdiction.
iii. Expose the students to its critiques.
iv. And recommended suggestions to African Courts

3.0 Main Content

3.1 Application of the English principle of Renvoi in Common Law Africa.

Where are the areas regarded as common Law Appeal Law Africa? How do the doctrine of English renvoi apply to them and modus uprandi adopted their various domestic courts? This unit seeks to analyse and examine the doctrine of renvoi and its unities in an attempt to determine whether it should be adopted or rejected by the courts in Common Law Africa.

The Common Law African countries are the countries under the former Yoke of English Colonial rule before they gained independence. The English Common Law principle were brought to African-English colonized territory wholesale. It is therefore very difficult or mere impossible to totally erase English legal system from theirs.

As such, the general reception of English law into common law territory in Africa has provided the courts of these countries of common legal origin with ample rules of decision in areas where rules of statutory and customary laws do not exist. This is particularly in the view of Agbede I.O., the position in the sphere of private international law.

It is never dreamt of by the legislative bodies of these nations to legislative on the adoption and application of the English common doctrine without having recourse to their own domestic prevailing circumstances. This is the reason why most of the ‘reception-statutes’ confer authority on the courts of these states to modify these rules so as meet the requirements of local situations.

Even though the statutes have not in this circumstances conserved express authority to the courts, it is believed that the courts possesses inherent authority to effect such modifications on the foreign imported statutes based on the individual states demand. Professor Agbede I.O. (1989) emphasized that, ’the authority of the court to ‘create’ and modify common law rules under the English law does not derive from statutes. It is as previously stated, the child of judicial tradition.

At this junction, the relevance of the doctrine of renvoi may be explained as follows:

Where the forum court has ascertained the applicable foreign law with the aid of the appropriate rule of selection, it may do one of three things.

1. It may determine the issue under the internal law of the foreign system so ascertained excluding its conflict rules. This method is often referred to as rejecting the renvoi or the internal law theory. This is mostly widely accepted techniques. It has been most favored by English and American jurists, judges and scholars.

2. The forum may refer the issue to the conflict rules of the lex causa. Such a rule may concur in the application of its internal law. Where this occurs, the internal of the lex causae is invariably applied. Hence, the conflict rule of the lex causae may at the end of the day refer the issue back to the forum law or transmit it to a third legal jurisdiction. In the just case, if forum law admits the 'remission' to it and applies its internal law, it is said to accept the classical renvoi theory which is nowadays referred to variously as the 'partial', 'single', 'simple', 'imperfect', 'receptible' or 'continental' renvoi doctrine. This approach has since then remained a prolific source of legal commentaries. Thus in **Casdagh V. Casdagh**, SCRUITON L.J (as he than was) held that "we are ready to apply the law of the nationality but if the country of nationality chooses to remit the matte to us, we will apply the same law as we should apply to our subject".

3. The forum court may dispose of the issue as it would have been determined by the courts of the lex causae. This technique has been adopted in a number of High Court decisions and is generally considered to represent the current English practice. This approach requires the forum court to consider itself nationally sitting as a judge of the lex causae under the particular circumstances of the cases. This means the case having begin in the forum is notionally 'transported, lock, stock and based to the foreign country and began there again'.

Self Assessment

i. Discuss the relevance of adoption of English law rules in Common Law Africa Countries.

3.2 Origin and Rationale of the Foreign Court Theory.

The foremost English decision on problems of doctrine of renvoi appears to have provided the basis for the development of the foreign court theory.

However, the issue before the court in the case was one of formal validity of a will and six codicils of a British subject who died domiciled in Belgium. The six codicils were valid under Belgium domestic law. Though, the will was not complied with the formal requirements of English domestic law. On receiving expert evidence and opinion that the Belgian court would have pronounced in favour of the will, the court (Sir H. Jenner) upheld the validity of both the will and the codicils observing that "The court sitting here decided from the evidence of persons skilled in that law

(Belgian Law) and decided as it would if sitting in Belgium "This assertion has been relied on as authority for the foreign court approach.

Apart from the above, the development of the doctrine has been influenced by the attempts of English judges of the past two centuries to build up a body of choice of law rules for private international law with the framework of a largely medieval system of jurisdiction. This in **Re Ross**, LUXMOORE J. (as he then was).

"If the Italian had in fact dealt with the matter there would be no necessity to inquire into the law, and it would be my duty simply to follow the decision. Since there is no decision by the Italian court, I am bound to ascertain how the Italian would decide the case from the evidence of these competent to instruct me".

It must be known to all and sundry that the problem of recognizing and enforcing foreign judgement is not the same as the application of foreign law in the settlement of a legal dispute.

Another reason for the development of this doctrine can be fathered from the suggestion of the respected writings of Dicey and Morris. According to the due authors, the doctrine originated as a means for mitigating the rigidity of the English conflict rule for the formal validity of wills.

Luxmare .J. (as he then was) without hesitation, left no room for doubt when he adopted the total renvoi doctrine as a rule of general application in a subsequent decisions where Lordship stated any other thing. "In my view the general trend of the authorities establishes that the English Courts, have generally if not invariably, meant by 'the law of the country of domicile' the whole law of that country as administered by the courts of that country…"

Although, this is not the true picture of the application of the doctrine; its significance to the presence discussion is that it appears to appears to have destroyed the usefulness of the renvoi doctrine as an escape mean/root from the inconvenient result of inadequate conflict rules.

The cases where the decisions adopting the total renvoi doctrine as a rule of English law were taken after the 'reception-date' of English law into most common law jurisdictions in Africa. The 'pre-reception' cases in the partial renvoi doctrine are as follows: Ghana (Gold Coast) 1874, Sierra loan 1880, the Gambia 1888; Zanzibar (1897) Kenya 1812 Nigeria (1900)

The duo authors pointed out further that:
"If therefore the foreign court theory is part of the law of Australia it is not by virtue of any binding or compelling authority but simply by reason of a common judicial assumption since 1917. it would be will for Australian courts to realize this in order to prevent an automatic and unthinking application of the doctrine"

The impact of the doctrine has been felt in most continental countries, there is no doubt in the credibility of the concept and as such no convincing reason why it should not be adopted in these jurisdictions, at leant on the basis of a common judicial assumption. It hence believes this discussion to examine the scope, the advantages and disadvantages, the criques before one can conclude on the desirability of recommending adopting in African common law jurisdiction.

Self Assessment
Briefly summary the origin and acceptance of the doctrine of Renvoi in the common law Africa.

3.3 Scope of the English Doctrine in Africa.

It is not a matter of repetition that, the English doctrine of renvoi has hitherto be restricted in its practical application to issues and questions of formal and intrinsic validity of wills, to issues of intestate succession to movables and to questions of recognition of foreign divorce decrees. Cheshire also enumerated areas like contracts, insurance, sales of movables, gifts interiors or mortis causae mortgages, negotiable instruments, partnership, dissolution of foreign company and so on, the English courts, when referred to the law of a foreign country have always applied the internal law of that country. In that case, Iglis wrote that the renvoi doctrine has been applied 'in regard to the question whether a draft is or is not conditional, to the question of priorities among creditors, to the question which of two persons could be appointed the guardian of a child, to question of recognition of a foreign divorce decree and to the question whether a husband is liable in England for the cost of dresses bought by wife in Paris".

Although there are lot of cases that were decided against it but LUXMORE J. observation must be stressed for supporting the doctrine one of the cases adopting this doctrine were decided by the High Court Judges. "That when the doctrine with all its consequences is squarely presented to the High English Courts they will not hesitate to reject the decision of the courts that have lent colour to renvoi in the English law".

3.4 Advantages of Renvoi Doctrine

3.4.1 Advantages of the English Doctrine of Renvoi

Many writer, scholars, jurist and judges have at various times justified the adoption of the English doctrine of renvoi. These justifications are highlighted as follows:

1. The adoption of the doctrine ensures and promote harmony decisions. That is, harmony decisions avoids 'forum shopping'.
2. The doctrine of renvoi adoption ensures uniformity distribution of estate.
3. The adoption of foreign court doctrine is necessary in issues involving little to foreign land. Dicey and Morris are the advocate of this new that:
   "One reason for applying the lex situs is that any adjudication which is contrary to what the lex situs have decided or would decide would be in most cases a brutum flumes. Since in the last resort the land can only be deal in a manner permitted by the lex situs"

4. It gives recognition to foreign acquired rights. For if a man acquires a foreign domicile, so the argument gees, he attracts to himself the law of the foreign country including its rules of private international law.
5. It allows for information of foreign law in all the English common law jurisdiction.
6. Generally it was posited that the doctrine fulfills the reasonable expectation of the portions.

3.5.2 Disadvantages or critiques of foreign court theory

Various news has been expressed against the adoption of the English doctrine of renvoi. The view expressed below are summary of these criticisms:

1. The foreign theory means no more than that the forum court should abandon its conflict rule whenever it conflicts with that of the lex causae. The Policy Summer Sault of this approach is the virtually capitulation of the forum conflict rules. This is very illogical and absurd that after the forum court has exercise the right to select the applicable law, it should entertain in a second and inconsistent rule of selection. The process and involves deciding the same issue twice over and on different basis.
2. Theory of foreign court doctrine/theory is based appears somewhat fallacious. It is highly erroneous to assume that decision in one jurisdiction could correspond with decision in another jurisdiction which no doubt operate different conflict rules.
3. The foreign law is usually utilized to produce a result of which the foreign court may disapprove. The foreign court theory seems to have set for itself an objective that is impossible of attainment.
4. The doctrine creates intricate problems for the jurists adjudge adopting it in so far as the most understand not only the conception of renvoi under forum but also the lex causae theory of renvoi.
5. The general outcome of litigation under this (foreign court theory) approach will tend to depend on the double and conflicting evidence foreign experts.
6. It is paradoxical, the efficiency of the foreign court theory depends on the supposition that the lex causae does not adopt it.
7. The forum conflict rules are invariably superseded by those of the lex causae under this approach, it will have the effect, if adopted in a federation like Nigeria, of introducing all the practical disadvantages of nationality as a test of personal rights. For instance, how the personal law of a Nigerian citizen can be determined by the test of nationality is not easy to imagine.

   Despite the numerous disadvantages of the foreign court theory, almost all the critiques/opponents of this doctrine concede that it could be utilized, in some situations, to produce a result desired for its own sake.

Self Assessment

Identify the advantages and disadvantages of the foreign court doctrine.

3.6 Suggested Approach for the Courts

The suggested approach of the renvoi doctrine is illustrated as follows:

i. The courts should redefine their concept of domicile and introduce flexibility to the rigid lex situs rule.
ii. The need to invoke renvoi or the principle of alternative reference will be less frequent. This will be useful for international conflict problems.
iii. The courts should seek international harmony through international agreement on the standardization of conflict rules

4.0 Summary

The doctrine of the English renvoi has come to stay as a doctrine in the foreign court theory. It application of this doctrine is not limited to continental countries alone but spread to all commonwealth countries including U.S and African common countries. The unit equally discussed the nature, scope, advantages and disadvantages/critiques for foreign court theory and subsequent approach for the courts.

5.0 Conclusion

The unit comprised of six sub-units. That is, Application of renvoi in common law Africa, which brought to African as a result of contact with the English colonial lords. Origin and rationale of foreign court theory; scope of the English doctrine in Africa, the advantages and a critiques of the doctrine of foreign court theory; and suggested approach for the courts in the jurisdictions under discussion.

6.0 Tutor Marked Assignment (T.M.A)

1. Briefly discuss the history of application of the foreign court theory.
2. Highlight the contributions of various jurist judges and scholars on the origin and rationale for the application of the renvoi.
3. Write full note on the following:
   i. Scope of English doctrine in Africa.
   ii. Critiques of the doctrine of foreign country theory
   iii. Demerits and Merits of the doctrine.

7.0 References and Further Reading

1. Agbede I.O.89) Themes on Conflict of Laws Shanesan C.I Ltd Akeka, Lagos.
2. Webb I.R.H (Supra)
3. Torrance H.M.B (Supra)
4. Prof. Williams Tetley (Supra)

Unit 7
The Time Factor and Incidental Question

Introduction

According to Mann F.A in his article entitled "The Time element in the conflict of laws", wrote "Although the conflict rule is primarily concerned with the factor of space, the localization of legal relationships, time is frequently an important component… The problem exists of course, also in Anglo-American countries, where judges have dealt with it in a characteristically empirical fashion… It involves not only the principles of statutory interpretation and the precise definition of the conflict rule, but to a large extent it also centres on fundamental conceptions which have left their mark on many branches of the law and are common to the whole of the western world. It is the idea of the protection of vested rights that dominates the discussion of the time element in the conflict rule".

He emphasized further certain instances in which "time becomes a significant factor". The instances are

i. When the conflict rule of the court hearing the dispute has been changed
ii. Change in the identify of the connecting factors
iii. When the law of the country to which the English conflict rule refers has been changed.

2.0 Objective

The main objective of this unit is let the students and readers know:

1. The essence of time in the conflict of laws
2. The problems of time factor in the rules of conflict of laws.

3.0 Main Content

3.1 Meaning and Scope of Conflict of Laws

The rule of conflict of law generally deals with the application of law in terms of geography of place. As in most of the other aspects of the law, where time constitute problems, time factor as a problem cannot be overlooked in the study of conflict of laws' rule. That is, problems of time cannot be altogether ignored (as an important factor).

Various international authors, scholars and judges have identified some considerable time factor in the conflict of laws. These problems as might be expected, the English courts have dealt with it in a somewhat empirical fashion. The continental writers have identified three different types of factor while professor Agbede 1.0 in his popular work on 'conflict of laws, a concise text' identified for factors.

Morris analyzing the time factor may become significant if there is a change in the content of the conflict rule of the forum (known as le conflict transitoire by French writers), or in the content of the connecting factors (which the French call le conflict mobile), or most important of all, in all content of the foreign law to which the connecting factor refers.

1. Changes in the substantive law of the lex fori (made applicable by renvoi)
2. Changes in the conflict rule of the lex fori
3. Changes in the conflict rule of the lex causae (made applicable by renvoi)
4. Changes in the substantive law of the lex causae

3.2 Changes in the conflict law rule of the forum

The lex fori when changes in the conflict rule of the forum by stature it does not differ from a change in any other rule of law, the temporal scope of law is usually defined by the statute itself or by judicial interpretation of the statute inter the familiar English rules of statutory interpretation and judicial precedence.

Take note that, when the changes are brought about purely by judicial decision under judge made law such changes operate retroactively whereas, statute law is usually prospective. This in compliance with the English common law declaratory theory of judiciary decision.

However, very grave consequences sometimes follow from a retrospective alteration in a conflict rule of the forum by judicial or legislative action, particularly in the area of family relations. Hence, it is important to note the English conflict rule for the recognition of foreign divorces which was radically altered by judicial action in 1953, 1967 and by legislative action in 1971 and 1986. Karsten submitted in **Hornett V. Hernett** that "a man domiciled in England married in 1919, a woman domiciled before her marriage in France and England until 1924, when the wife obtained a divorce in France. The husband heard about this divorce in 1925. He then resumed cohabitation with his wife in England until 1936, when they parted. No children were born of this cohabitation. In 1969, the husband petitioned far declaration that the divorce would be recognised in England.

The judge-made law declared by the House of Lords in the year 1967 made it recognised otherwise it could not have been recognised.

The consequences of this retrospective alteration of the conflict rule are startling.

a. If children had born of the resumed cohabitation between the parties after the divorce, they would have been legitimate when born, but bastardized by the subsequent recognition of the decree.
b. If the husband had gone through a ceremony of marriage with another woman in 1945, and his second marriage annulled for bigamy in 1950, and his second wife had then remarked, would the result of recognizing the divorce in 1917 be to invalidate the nullity decree and also the second wife's second marriage?
c. If the husband had died intestate in 1940, and a share in his property had been distributed to his French wife as his surviving spouse, would she have had to return it when the new conflict rule declared by the House of Lords in 1967 validated her French divorce?

Self Assessment Question:
Critically assess the retrospective rule in 3.2

3.3 Changes in the Connecting Factor

The connecting factor from our study so far is a rule of the conflict of laws which may be either constant or variable. Connecting factor may be of a kind of element/character that it necessarily refers to a specific moment of time and the changes may further require new definition to lubricate the effect of such change. For example, a conflict rule which make specific reference to the issue of capacity to make a will to the law of the testator's domicile would be meaningless unless it defined the moment of time at which the domicile was relevant.

According to Webb P.R.H et al, that, if one wishes to know if a marriage contracted in Austria is formally valid, the "connecting factor" is the law of the place of celebration. That is, Austrian law in force at the moment of marriage. According them, in a simple case such as this there is no need "to define the time contemplated by the rule: the definition is inherent in the rule itself" in these cases, it is essential for the conflict rule to define the relevant moment of time.

Examples of varying connecting factors include the situs of a movable, the flag of a ship, and the nationality, domicile or residence of an individual. In most cases, it is a question of formulating the most convenient and just conflict rule, and the time factor, though it cannot be disregarded, is not the dominant consideration.

Conclusively, it is essential for the conflict rule to define the relevant moment of time and the change in the connecting factor as a problem of time in the conflict of laws.

3.4 Changes in the lex causae

When the law of the citing to which the English conflict rule refers has seen change (i.e. the lex causae). In line with writing of Morris, the overwhelming weight of opinion among writers is that the lex fori should apply the lex causae in its entirely including its transitional rules. This is certainly the prevailing practice of courts on the continent of Europe. This is subject to public policy reservation under the common law against retroactive penal legislation.

This concept have received more intensive juristic comments in the civil law system, unlike the position in the common law jurisdiction where it was lately receiving attention. This doctrine is practically unknown within the judicial circle in Nigeria. For instance, in **Odiase v Odiase**, M married D, when M was domiciled in the old Western Region of Nigeria. The Mid-Western Region was created out of Western Region. He was still in the service of Western Regional Government and resident at the capital city of the Region. The wife however, brought an action for the dissolution of the marriage in the Mid-Western Region. In this case, the court held that M was domiciled in Mid-Western Region as M was an indigene of that part of the country without giving a thought to the issue of succession rules (Agbade I. O.).

This principle was illustrated further in **Starkowski v Attorney** General by Thomas JAC in a simplified form; H and W were married in Austria in 1945; By Austria law was as it then stood the marriage was formally invalid. About a month after the marriage, a law was passed in Austria which provided for the validation of such marriages as the present one with retrospective effect. Validation was brought about by the making of an entry in a "family book" by a registrar. H and W left Austria in 1946 for England and became domiciled there. In 1949, by which time they had separated, the Austrian registrar entered their marriage in the book, thus rendering it valid by Austrian Law. The House of Lords held that the marriage was valid, so that W was not free in 1950 to marry X, a bachelor in England. In this instance, the court was prepared to recognize the retroactive effect of the Austrian law validating a void marriage.

With the increasing division of the constituent states into small units and the fragmentation of the erstwhile Soviet Republic into smaller autonomous countries the courts will be called upon on many occasions in future to determine the temporal scope of law.

Self Assessment
How would you have decided the **Starkowski case** had W married X in London before her marriage to H had been entered in The "family book" by the Austrian registrar?

4.0 Summary
Like any other areas of the law changes in applicable law in the conflict of laws sphere create problems of legal administration. The changes may take four different forms as enumerated above. Changes in this perspective affect the time variation in the conflict of laws' rule which can only be determined by the prevailing law in this respect.

5.0 Conclusion
This unit discuses the basic concept of Time factor in relation to three functional problems. It is not often that a single connecting factor will yield that will solve the

whole problem in issue as it is the case with the caution of tort that is referred to the law of place of causation of that tort in Jane jurisdiction. The change that occurs would also attract modification in the changes that occurs.

6.0 Tutor Marked Assignment

(1) Define the time factor?
(2) Identify cogent elements of Time factor.

7.0 References and Further Readings

(1) Webb P.R.H and Brown D.J.L (supra)
(2) Morris J.H.C (supra)
(3) Agbede I. O. (supra)
(4) Ademola Yakubu (supra)
(5) Wikkipedia 22/04/2011

Module 3
Incidental or Preliminary Issues

Units

1. Incidental questions / Personal connecting factors
2. Connecting factors
3. General Principles of Domicile
4. Forms of Domicile

Unit 1
Incidental or Personal connecting factors

1.0 Introduction
2.0 Objectives
3.0 Main content
  3.1 Preliminary or Incidental views or connecting factors
  3.2 Relevant contacts
  3.3 Conditions for rising of incidental questions
  3.4 Solution of the problem
4.0 Summary
5.0 Conclusion
6.0 T.M.A
7.0 Reference and Further Readings

1.0 Introduction

Conflict of laws is a technique designed to connect person, things or actions with particular legal systems with the intension of disposing of the issues involved under the legal systems so ascertained. Such legal systems are invariably the laws of particular countries but with the deluge of treaties both bilateral and multilateral in many areas of commercial and business activities, the applicable law may be the provision of such treaties which are in no way the national law of any country "Agbede I.O. (2001). From the above analysis, and the previous discussions in the units, a number of illustrations referred to "English" or "French" or "African" parties; the students and the reader will have understood those forms as referring to people who, in some sense "belong to" or are connected to England or French or Africa (Morris JHC, 2005). The relevance of this preliminary or incidental or connecting factors shall be discussed in this unit.

2.0 Objectives

The main objective to be achieved in this unit is at the end of this discuss, students and readers should be able to

(i) know the preliminary or incidental matters within the framework of this study of conflict of laws.

(ii) know the connecting factors and relevant contacts in terms of residence, ordinary residence and habitual residence.
(iii) know the relevant cases that elucidate the issues under discussion in this unit.

3.0 Main Contents

3.1 Preliminary Views or incidental or connecting factors generally speaking, international travel means that some individuals have moved between countries very frequently and while they may at all times regards themselves as English or French or Africa, they have connections, stronger or weaker in character, with a range of countries (Marris JHC 2005 supra).

It is pertinent to identify many cases where the connection reveals the law that will dispose of the entire issue such as one of the country where a tort was committed particularly, in the civil law system where the applicable law in tort cases is the law of the place where the tort was committed.

In some cases, the connection will only reveals the law that will solve just part of the problems. For instance, in determining the validity of marriage, the law of the place of celebration is invoked by the Nigerian courts to know or determine its formal validity. On the other hand the anti nuptial domiciles of each of the parties are called in aid to determine the parties capacity to enter into the marriage contract with one another (Agbode I.O. supra).

An illustration will make this idea of connecting factors more clear;
Carlalas is an Australian businesses working in the oil industry. He has dealings with Shell, which has offices in London and in the Netherlands. He flies to Europe for length negotiation with Shell executives. Assuring that his aircraft is diverted from its intended direct route to Amsterdam by an incident of "air-rage" to Health raw for the made factors to be deplaned. It stays there for 45 minutes before returning its journey. **See Liv Quraishi (1992) 780 F. Supp**. 117 where a durken passage exposed himself and urinate over some of his fellow-passengers. Or, he has two days in London, having preliminary discussions with shell executives based in London. He eventually arrives in Amsterdam and spends two months in a company flat. Or, as his brother works in the Brazilliam embassy in The Hague, he stays for those periods with his brother and sister in law.

Assuring further that he arrange to stay on in the Netherlands because of an economic downturn in Veneguela; or because he fears arrest there for some political offence, or because he wishes to marry a Dutch girl. Twelve years later, he is still in the Netherlands.

From the above illustration, each variation of the basic facts indicates a link of a certain strength between Carlalas (an Australian) and England or the Netherlands. At certain stage, the strength of these links may be such that he may no longer be thought of, by others or by himself as Australian at all. To this extent, the promotion or permutations are obviously endless. The connection has two different elements. The

first sets of elements are categories such as Tort, Contract and Marriage. In the issues of these kind, Nigerian courts employing its own law in the definition of these categories.

It is relatively important, to build on saving's localization of legal relation, modern conflicts science has evolve what is known as connecting factors for each legal relations so as to connect the cause of action within particular legal systems. In the issues of marriage, the validity of any marriage is cumulatively determined by the law of place of celebration as to formal validity and the laws of the anti-nuptial domiciles of the parties in respect of their capacity. The following connecting factors yielding of the indicated laws has been fashioned out to assist in understanding this MODULE.

- Domicile – lex domicilli
- Intention of parties – proper law
- Nationality – lex partriae
- Place where property situate – Lex rei sitae
- Place where a wrong was committed – Lex loci delicticommissi.
- Place where a contract was concluded – Lexi loci contractus
- Place where the court is sitting – Lex fori

The Nigerian courts like their common law counterpart, also invoke their own law to determine these connecting factors some of which are legal while other are factual.

Furthermore, Nigerian law determines the meaning of domicile, it equally determines the place where a person domiciled. Although, Nigerian law may give and determine the meaning of "nationality" it is therefore the law of the country of nationality that will determine whether the perquisites is indeed a citizen of the country or not.

In the case of double renvoi as discussed in the afore discussion, the applicable law (lex causae) many determine the alternative connecting factor. For instance, Nigerian Law refers matter of succession to mereables to the law of domicile. In a situation where the conflict rule of the law of domicile refers such matter to the law of nationality, it will be up to the law of domicile to determine the alternative reference, that is the law of nationality.

However, up to the present time, it is not surprising that Nigerian courts are unfamiliar with the renvoi doctrine in whatever form. The concept is not part of Nigerian Law.

In other words, it should be noted that connections that are factual like place of celebration of a marriage, place of making of contract, and place of commission of a tort may give rise to complex legal problem in their determination. For instance, can a marriage be said to have been celebrated in a country where none of the parties was physically present but merely represented by proxies?

In the words of Agbede I. O. where he put a posser that 'in cases of torts of multiple contracts such as where an act was done in one country but the injury was suffered in

another or where the tort feaser's action cuts across several states like publication of libel in several countries or where many acts done in several countries constitute a single tort or where the planning and execution of a fraud may be spread over several countries where will the tort be said to have been committed? The policies of individual state determines these issues to a greater extent. In a nutshell, connecting factors are mere issues but critical issues in conflict of laws as one of the means of reading conflicts particularly these with foreign elements.

After indicating the applicable law, the task is of conflict rule is not yet settled until the province of conflict science prescribe the parameter for the generation of the indicated law.

The problem of this Unit is illustrated by two American decisions by Webb PRH; In Re Hall (1901) 61 APP. Div 266, in this case, "a tester had died domicile in New York, so that by conflict rules of New York, the law, governing the succession to the estate, the main question before the court was the domestic law of New York. The court had to decide whether X was a legitimate child of his parents for the purpose of succeeding under the will. The mother of X had obtained a divorce decree elsewhere in the United States in such circumstances that, by the conflict rules of New York, a New York court would not recognize it. She then married in the state where she had obtained her decree a man there domiciled. X was the child of this marriage by the local law this marriage is valid. How then should the New York court view the preliminary or threshold question of X's legitimacy? Is it to say that X is illegitimate and cannot succeed because by New York conflict rules, the extra-state divorce was invalid and hence the views on the validity or otherwise of the divorce, prefer the rule generally prevailing in the US that a marriage valid where celebrated is valid everywhere, look on the marriage of X's parents as valid even in New York because, it is valid where contracted; and so hold in favour of X's legitimacy? In actual fact, what the court did was to adopt the better alternative and held X entitled to succeed."

The second American cases is in Re Degaramo's estate, where is the death of M in Ohio had been caused by the negligence in that state of Y. An action against M under the Ohio equivalent to the English Acts was brought by D, the wife of M, in the New York courts. The main question before those courts was thus one of a tort committed in another state, Ohio.

By the conflict rules of New York, this question feel to be decided by the law of Ohio as the place of the commission of tort. It appeared that D, before marrying M, had been married to another man and that this marriage had been dissolved by a decree granted in Michigan: the decree was recognized as valid by the conflict rules of Ohio but as invalid by those of New York. By reference to what law, then, are the New York courts to decide the threshold question. "Is D the widow of M?" if they apply their own conflict rule, they will say that D was not free to marry M owing to the invalidity of the Michigan decree and so cannot succeed even though it is upon an Ohio statutes that she based her claims. Consequently, if the conflict rules of Ohio are to be applied at the expense of the New York rules, then the Michigan decree must be

regarded as valid, and the result would be that D was free to marry M, and this could claim to be his widow in the New York action. Infact, the former alternative was adopted so that D's action failed."

Apart from the above facts, there are situations to be put into consideration;
(1) There are situations where inevitability recourse is not hard to foreign laws at all. That is, the connecting factors will not be invoked. These cases under Nigerian Law include divorce, nullity, separation, and maintenance proceedings; guardianship, custody and adoption cases: admirability damage actions and procedure.

(2) The second situation is, an indicated foreign law may be denied application if it has not been pleaded and proved to the satisfaction of the court, or where the foreign law is penal in character, or pertains to revenue collection or contrary to the forum stringent public policy in its incident.

(3) There are situation where domestic statutes assume overriding effect on the forum conflict rules.

Generally speaking, Nigerian conflict rules determine the condition of application of foreign laws by the Nigerian courts. These include the requirements to plead and prove the applicable foreign law to the satisfaction of the court. The means and methods of proving the foreign laws and indeed the dimension of operation of foreign laws almost on a case to case basis.

It is on this account that conflict science covers not only the area of choice of law but also the issue of jurisdiction and recognition and enforcement of judgements.

Self Assessment Questions
(1) Discuss with aid of decided cases preliminary and incidental factors in conflict laws.
(2) Highlight the contribution of Professor Agbede I. O. to preliminary issues in conflict of laws.

3.2 Relevant Contacts

It is not all 'contacts' with particular legal systems that can be taken into account in the determination of the applicable law. This principle can be illustrated as follows: "A" resident in state 'R' but domicile in state 'S' makes a marriage proposal to 'M' when they both met casually in state 'R' while 'M' was domiciled in state 'P'. Assume the engagement ceremony takes place in state 'Q' and the marriage was actually celebrated in state 'T'. Out of all the seven legal systems connected with the issue of the marriage, only three are considered relevant by The Nigerian courts for purposes of determining the validity of the marriage.

In the first place, the law of celebration, that is, law of state 'T' will be employed to determine the formal validity of the marriage, while the law of state 'S' and state 'P' will be employed to determined the capacity of 'A' and 'M' to enter into the marriage

contract. From Nigeria court perspective, relevant contract include place of action (tort), situs of property or title thereof, intention of parties contract place of domicile/domestic relations, country of nationality/recognition of divorce, decrees, place of legal action/regulation of nullity decrees, place of legal action/regulation of procedural issues. The general idea of selecting one of the several contracts and applying the law of the country so indicated almost exclusively has provoked rigorous on the part of some American jurists who are canvassing for the abandonment of this approach.

In the place of the above, they have suggested diverse approach
- Rules for choice of rule (preference principle)
- Primary of the lex feri ((basic lex fori)
- Statutory interpretation or policy analysis (governmental interest analysis)

It is worthy to note that, Nigerian constitution is pattern after the United State model. It may well be said that Nigerian courts will gradually become familiar with the American judicial practice not only in the sphere of constitutional law but also in the area of private law.

3.3 Conditions for the arising of an incidental question.

According to Morris in his contribution to conditions for the arising of an incidental question in Dicey's 'Conflict of Laws' "in order that a true incidental question may squarely be presented, it is necessary first that the main question should by the English conflict rule be governed by the law of some foreign country; secondly, that a subsidiary question involving foreign elements should arise which is capable of arising in its own right or in other contexts and has choice of law rules of its own available for its determination: and thirdly, that the English choice of law rule for the determination of the subsidiary question should lead to a different result from the corresponding choice of law rule adopted by the country whose law generous the main question".

It is very necessary to add here that the principle of incidental/preliminary question was cained by WOLFF in his book "Private International Law" (2nd Edition 1950).

3.4 Solution of the Problem

"Here, as in renvoi, the individual rules requires to be examined in the light of what they are meant to achieve. All mechanical solution of the problem must fail, simply because they will not serve the function of helping to fulful the purpose of each rule. Only individualization of a each rule will bring to light what we are trying to achieve by its application over and beyond this, there are other important and powerful factors, such as the public policy of the forum, the desire for uniformity of decision among the various forms and the principle of resjudicate. Desderate of consistency and finality may also be factors in many cases." Gotleb in "The incidental Question in Anglo American Conflict of Laws".

In addition to Gotleb contribution, Robertson has shown in "The Preliminary Question" in the conflict of laws" that far possible laws can be required to in order to solve the incidental question (which deals with problem where there is a transmission by the foreign court to the law of some third country.

(1) The domestic law of the forum;
(2) The conflict rules of the country by which the main question is governed. It seems generally to be accepted that, if a choice between these is to be made at all, it lies between the conflict rules of the forum and those of the country by which the main question is governed.
(3) The domestic law of the country by which the main question is governed.

4.0 Summary

From the above discussion, students must have learnt a lot from preliminary issues. The areas discussed covers incidental, Relevant conflict, condition for arriving at an incident or connecting the incidental matters/questions, solution identified to solve the problem.

5.0 Conclusion

Preliminary or connecting factor relates to some outstanding facts established a national connection between the factual situation before the court and a particular system of law. It varies with circumstances. The fundamental problem with conflict of law is whether the connecting factor should be determined by the lex fori or lex causae. This aspect is invariable to this study.

6.0 Tutor Marked Assignment (TMA)

(1) Identify the preliminary or connect factors from what you have studied to date.
(2) What are the relevant of contact?
(3) Identify the solutions to problem.

7.0 (1) Reference / further reading

Webb PRH (1960) A Casebook on the Conflict laws Butterworth Ltd. London.

(2) Agbede I. O. (Supra)
(3) Adewole Yakubu (supra)

Unit 2
Connecting factors: Rules of Domicile I

1.0 Introduction

In most of the systems of the conflict of laws, the notion of 'belonging to' a country in some strong sense is vital importance. That is, it is essential that there shall be some means of linking an individual with the law of a particular territory. It is incumbent upon the law of every territory in the world to be able to ascribe to any given individual a legal "centre of gravity" as WOLFF has aptly titled it. In other words, it identifies an individual's personal law, which governs questions concerning the personal relationship and proprietary relationship between members of a family.

Domicile is properly considered among the general principles in that matters of status arise in so many branches of the law and such questions are referred, in English Private International Law, to the lex domicile. Place of birth is an inadequate criterion by which to identity the personal law. In some continental European countries, the personal law is instead the law of an individual's nationality. The adoption by continental systems of lex patriae, a difference which has led, among other things, to 'double renvoi'.

However, in Anglo-American conflict of laws, the law of the individual's domicile is preferred. In Nigeria, the adoption of domicile can be justified on ground of practical necessity as Nigerian "nationality" covers a number of independent legal systems.

Non common law statutes adopting domicile include, to mention a few, Demark, Ireland, Norway, Brazil, Guatemala, Argentina, Paraguay and Nicaragua.

2.0 Objective

The objective of this unit is to imbibe the students and readers the following:

- Definition of domicile, General principles of domicile;
- Acquisition of domicile and its forms.
- and other connecting factors.

3.0 Main Content

3.1 Rules of domicile: Meaning

Domicile was universally recognized as the basis for the application of personal law. Although, this was not so until early 19th century. The idea of basing the determination of personal law on domicile is a sound one. It is seems to have been predicated on the freedom of an individual to determine for himself the specific legal system which should constitute his person law without the necessity of changing his political allegiance. (Agbede, I.O. 2001).

The idea of personal law stems from the fact that it is of utmost importance to regulate issues that are personal in an orderly manner to avoid unnecessary dislocations. This assertion was buttressed in Bruce v Bruce:

"If the lex fori is to be the guide than the court may be required in the distribution of the same estate to enquire into the different laws of many foreign nations. The same circumstances may be attended with great inconvenience to families, for it is plain that to apply different laws to every detached part of the estate is to multiply the sources of litigation in an infinite degree".

To this extent, domicile has become a rule of law recognized in private international law for the regulation of affairs of personal nature. The personal issues include, family relationships or the person or persons to inherit one's property especially movables. The idea of personal law relates to the aggregate of one's person as determine by the law which is closest to one and to which one looks up to form the determination of intimate issues or affairs as a person in the society or in a particular country. (Ademola Yakubu, 2006).

It is equally accepted that under common law, the lex domicile determines this. Though it is expected that a person's status remains the same even in his travels from are jurisdiction to another this suit the idea that one's personal law follows him from one jurisdiction to another. This suit the idea that one's personal law follows him from one jurisdiction to another is very important as the territorial law where one is temporarily based may not affect the potency or relevance of this personal law.

3.1.2 Definition of the Rules of Domicile. Meaning: All the scholars/writers mists, and judges cancerously agreed in their various writings and dear sons that domicile is probably impossible to formulate and define. (Thanas JAC); Domicile is easier to

illustrate than it is to define. The root underlying the concept is the permanent home (Morris JHC); According to Agbede I.O., the term 'domicile' has been said to be impossible of denition but a judge has defined it as the "home" the permanent have. Per Sir Gearge Jessel in **Ducet v. Geoghegan (1978) 9 Ch. Div. 441 @456** While 'home' or 'permanent home' may be its nearest equivalent in legal parlance, it is important to note that domicile and 'home' with whatever qualifying word are not cotermineous.

In accordance with Marris perspective, "By domicile we mean home, the permanent home" (Per Lord Cranworth in **Whicker v Hume (1858)7 HLC 124.160)**" and if you do not understand your permanent have, I'm afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it." The notion of home, or of permanent home, takes colour from particular facts. For instance, an English woman aged 70 years, left a widow after living all her life in semerset, goes to New Zealand to live with her married daughter; although that mere may be, in practical terms, irreversible, is she not likely to regard England as her home. Webb P.R.H, attempting a definition of this subject matter asked "what the law means by domicile"? "Is the are technically pre-eminent headquarters, which, as a result either of fact or fiction, every person is compelled to have in order that by aid of it certain right and duties which have been attached to him by the law may be determined". For example, if a married man might be found to be domiciled in the tertiary in which he lives happily, if furtively, with him mistress rather than in a different territory where he lives openly but unhappily with his wife (per Holmes J. as he then was). An individual's domicile, then, is band to be either where he makes it or where the law makes it for him, it cannot be simply in some Mecca or other where he would like it to be.

It is worthy of note to mention one greater advantage of the Anglo-American adherence to domicile is that it entirely obviates the necessarily of solving such problems as what is the national law of a citizens of the United States, of a British subject, of an individual possessed of more than one nationality or of none at all.

For practical purposes, Thomas JAC posited one may say that his domicile is the place where a person is deemed to have his habitation fixed – he has no present intention of moving from it, and when away, he intends to return to it. As Lord Crauworth simply put, the domicile is a person's 'permanent home'.

3.1.1.1Differences between Domicile and Home: Domicile cannot be equated with home, because as one can observe, a person may be domiciled in a country which is not and never has been his home; a person may have two homes, but he can only have one domicile; he may be homeless, but he must have a domicile. It is important to note that there is wide gulf between the popular conception of home and the legal concept of domicile.

Domicile is "an idea of law" (**per Lord Westbury in Bell v Kennedy**) the notion of home, or of permanent home, takes colour from particular fact. Originally domicile is

a good idea; but the one simple concept has been so overloaded by a multitude of cases that it has been transmitted into something further and further removed from the practical realities of life.

As a result, important proposals for the reform of the law of domicile made by the Law Commission in 1987 i.e. Law of Domicile (Law No 168); This is a joint report with the Scottish Law Commission; reflecting in part reforms adopted in a number of commonwealth countries overseas.

The adoption of Civil Jurisdiction and Judgement Act of 1982, has opened the concept to further complications: As a result, the Act introduced a new concept, which describes a certain type of link between an individual, or a company and a country. Although, it called "domicile", but it is quite unlike the traditional, personal law, concept of domicile developed in English law and still important in many matters of family law and succession.

Self Assessment Question

(1) Briefly define the term Domicile
(2) Differentiate between Domicile and home.

3.1.1.2There are three lands of domicile: The idea of domicile as an idea of law rested on these terms

(a) domicile of origin; which is the domicile assigned by law to a child when he is born;
(b) domicile of dependency; which is domicile which any independent person can acquire by a combination of residence and intention.
(c) domicile of choice; which means that the domicile of dependent person children under 16 and mentally disordered persons is dependent on, and usually changes with the domicile of someone else, e.g. the parent of a child.

4.0 Domicile as a concept has legal connotation which upon a thorough consideration of the circumstance of the case the law attributes to him or her at a given moment of time. In English law therefore, every person must at all times have a domicile and no person can have more than one domicile at any time. (Torrance H.M.B) Cuvareson defined it as "a place with which a person either through the exercises of own will or through the fact of dependence on other members s of his family has the closest personal connection in matter of domestic life".

5.0 Conclusion

This unit is very broad that most of the salient principles of the rule of domicile in conflict of laws cannot be exhausted. But, the issue of meaning, nature and scope of the concept was analysed. Therefore, the other part of the concept shall be discussed in the next unit.

6.0 Tutor Marked Assignment (TMA)

1. Briefly define the rule of domicile
2. "Domicile simply means permanent residence or place of abode and equally synonymous with home" Do you agree?
3. Enumerate different views of the scholars, jurists and judges on the basic connotation of Domicile?

7.0 References and further readings

(1) Ademola Yakubu (2006) An inaugural lecture titled "Within and without: The Relevance and Potency of the law beyond our frontiers" University of Ibadan.
(2) Ciravesen (supra)
(3) Morris JHC (supra)
(4) Torrance H.M.B. (supra)
(5) Agbede I. O. (supra)
(6) Thomas J.A.C (supra)
(7) Webb PRH (supra)

Unit 3
General Principles of Domicile II

1.1 Introduction

The idea of domicile is meant to be a dynamic process for the regulation of personal matters. Apart the rules of domicile stated above, it is a rule of domicile that one cannot have more than one domicile for the same purpose. In Nigeria, the only problem is the rule a married woman does not have a separate domicile. The earlier English rule to this effect has been changed by virtue of the Domicile and matrimonial Proceedings Act of 1973.

2.0 Objective

This is to teach the students and readers to
(1) understand the basic concept of general principles of domicile;
(2) to understand the characteristics of this concept.

3.0 Main Content:

3.1 General principles

Apart from the concept of characterisation of domicile discussed earlier are a few additional principles of domicile that should be highlighted. There are four general fundamental principles to the law of domicile.

(1) No person can be without a domicile. This rule springs from the practical necessity of connecting every person with some system of law by which a number of legal relationships may be regulated. (Morris JHC).

In addition, a domicile is the link between a person and his personal law under the Nigerian Law it becomes imperative that everybody must have a domicile at any point in time. However, to make the rule work, those who are incapable of acquiring a domicile of their own either for lack of age, mental capacity or for reasons of the

physical dependence on other people are assigned domicile by legal rules (Agbede O. I.).

Domicile can be adopted, thus an infant in this respect an infact takes the domicile of the parent, a wife takes that of the husband and adults of wizard mind retain their last domicile as discussed further in this Unit.

(2) Nobody can at the same time have more than one domicile, at the same purpose at any rate. This rule metamorphosed from the same necessity. If this rule lose otherwise we may be faced with several legal systems connotion governing the personal relations of an individual.

In a federal state like Nigeria, matters governed normally by domicile rules are shared between the national and state governments. In that wise, this principle had to be reformulated. Thus, the rule becomes in Nigeria; nobody can have more than one domicile at the same time for the same purpose.

(3) An existing domicile is assumed to continue until it is proved that a new domicile has been acquired. Hence the rule of procedure designed to shift the onus of proof of change of domicile of the person who asserts it.

Conflicting views have been expressed as to the standard of proof required to rebut the presumption. According to Scarman J (as he then was) the standard is that adopted in civil proceedings, proof on a balance of probabilities, not that adopted in criminal proceedings, proof beyond reasonable doubt.

Sir Jocelyn Simen P. “the standard of proof goes beyond a mere balance of probabilities” and the burden of proving that a domicile of origin has been last is a very heavy one. He added that “two things are clear: first, that unless the judicial conscience is satisfied by evidence of change, the domicile of origin persists; and secondly, that the acquisition of a domicile of choice is a serious matter not to be highly infared from slight indications or casual words”.

(4) For the purposes of a rule of conflict of laws “domicile” means domicile in the English sense. The question as to where a person is domiciled is determined solely in accordance with English law. Thus, person domicile in England may acquire a French domicile of choice regardless of whether French law would regard them as domiciled there, and English law clave determines when a French man acquire a domicile in English”.

In addition, under the renvoi doctrine, English courts at times refer to the whole law of a foreign country, including its rules of the conflict of laws and then accept a reference back to English law either because
(i) Foreign conflict rule refers to the law of the nationality, and the person concerned is a British citizen;

(ii) because the foreign conflict value refers to the law of the domicile, and foreign court regards the person as domiciled in English.

Self Assessment of Question
Identify the fundament principles of domicile in conflict of law and discuss same.

3.2 (i) Acquisition of domicile (ii) loss of domicile. The main theme of the notion of domicile is probably best understood from the rules of governing the domicile of choice. All independent person word over, that is, one who is not a child under 16 or 18 in Nigeria or a mentally disordered person can acquire a domicile of choice of any particular country through the fulfillment of combination of

(a) Residence and
(b) the intention to be remain permanently or indefinite period but not otherwise.

- Take note that, these two factors must coincide before the law can give recognition to a change of domicile.

Residence, no matter how long, in a particular only will not result in the acquisition of a domicile of choice, if the necessary and pre-condition of "intention" is lacking (from the seeker/applicant).

- On the other hand, 'intention', no matter how strong to change a domicile will not have that rebuke if the necessary residence in the new country is lacking. In **Harison v Harison (1953) 1 WLR 865** and **Willar v Willar (1954) JC. 144,147** where it said that "one cannot acquire a domicile of choice by wishful thinking." It was stated further that "A new domicile is not acquired until there is not only a fixed intention of establishing a permanent residence in some other country, but until also this intention has been carried out there". Hence a domicile cannot be acquired in where it is necessary not only to travel, hopefully or otherwise, but to arrive.

With the above explanation, it may be difficult to keep the two requirements of residence and intention in watertight compartments, but in the interest of clarity of exposition they must be considered separately as below:

(a)(i) Residence:
Judicial attempt has been made to define Residence. It could be said that residence within this context means no more than physical presence. Morris, defined it as the most basic link between an individual and a country is mere physical presence, no matter how short is the period, even if it be for 30 minutes spent wholly in an aircraft parked on an airport apron. Resident is mere question of fact, in general palace, it means very little mere than physical presence. It is not necessary to have a furnished apartment or indeed a separate placed of abode. A casual stay with a friend or relation has been held sufficient. An abode writer the Lagos bridge, if that indeed is the place habitation of the individual concerned, will seem sufficient.

The key issue here is that there must be an identifiable place of abode of the individual claimant within a legal district. It is not a matter of travelling but it is very important to arrive at the particular intended place of abode.

It is difficult to be more specific, for a great deal depends on the context in which the term "residence" is used. In a case which held that university students were "resident" in their university town for electoral registration purposes. In this wise, Widgey L. J. (as he then was) pointed out that, "in any seaside, town in the summer the population divides itself into the presidents who live there all the year round and the visitors who merely come for a period," but the visitors' hotel-keeper would expect those visitors to use a room called the "residents' large".

In another words, "residence", means different things for different legal purpose. A person may be held resident in a country if the issue is one of the jurisdiction of that country's court's, but less easily if the context is one of residence during a fiscal years. It was held in **Levene v IRC** that "even there, respectively brief visits were held to amount to residence.

(a)(ii) Ordinary Residence: Ordinary residence "connotes residence in a place with some degree of continuity and apart from accidental or temporary absences." It refers to a person's abode in a particular place or country which he has adopted voluntarily and for settled purposes, as part of the regular order of his life for the time being, whether of short or long duration.

Ordinary residence can be easily changed even in a day. There is no need to state reason why and a person must not be held to be ordinarily resident in more than one country at the same time.

(a)(iii) Habitual Residence

This type of residence has long been a favorite expression of the Haque congruence on Private International Law and appears in many Hague conventions and therefore in English statutes and giving effect to them: but it is increasingly used in other statutes as well.

For acquisition of domicile, there must be conscience of physical presence and an intention to remain animus menandi equally to loose an existing domicile, residence must be given up with an intention of no longer making an abode there / aims non-reverted. A residence for over 40 years has been held to insufficient if not coupled with the necessary intention (Agbede O.I).

(b) INTENTION

The intention which is required for the acquisition of domicile of choice, often referred to as the animus menandi is the intention to reside permanently or for an unlimited time in a particular country. Thus, it must be admitted that intention is the most elusive of the legal requirement for the acquisition and loss of domicile. As has been said not even the Devil knows the intention of man. "It must be a residence fix

not for a limited period of particular purpose, but general and indefinite in its future contemplation" for decision in **Mark v. Mark (2004) EWCA Civ 168; (2004) 3 WLR 641**.

In this case, the English court found it necessary to consider such imponderables as a person's "taste, habit, conduct, acting, ambilties, health, hopes, project and so on. All these factors are hardly suitable for judicial enquiry.

The result of these principle concepts is that, the burden of providing a change of domicile is a very heavy one. However, what is rather absurd in the whole exercise is that circumstances that are treated as decisive in one case may be disregard in another or even relied upon in support of a different conclusion. **See Casdagh v Casdagh (1919) AC 145 @ 178** where Land Atkisan posited "his movements, his actus, his motives, his fairly, his fortune and his health" must also be examined.

To this level, no circumstance or groups of circumstances appear to furnish a definite criterion of the existence of the necessary intention.

It must be pointed out that, the latitude of discretion which the courts preserve or reserve to themselves makes their decisions appear arbitrary and very often inconsistent. It is therefore necessary to view with suspicious as incapable of attainment in most cases in this modern time the requirement of intention to reside permanently. In support of this argument, Thomas J (as he then was) held in **Fonseca v Passman (1958) WRNLR 41 @ 42** that "To establish a domicile in Nigeria, the mere factum of residence here is not sufficient. There must be unequivocal evidence of animus menandi or intention to remain permanently".

In all the cases handed down by the judges, they failed to distinguish between inter-state and international situations for this purpose. Coker J (as he then was) commented that "the subject must not only change his residence to that of a new domicile, but also must have settled or resided in the new territory cun amino menandi. The residence in the new territory must be with the intention of remaining there permanently. The animus is the fixed and setteled intention permanently to reside the futum is the actual residence".

The requirement of an intention to remain permanently has been criticized by Graveson, rightly so when he said that it 'no longer fits the complexity, movement, and sophistication of modern life in which many of our best intention, became temporary through frustrating circumstances. An intention to establish residence for an indefinite period has been generally accepted in most common law jurisdictions.

Thomas JAC, in his own contribution to the requirement that, though both are necessary, intention is the more vital requirement. For Ramsay's case shows that large residence of itself is not enough; contrariwise, 'it may be conceded that if the intention of permanently residing in a place exists, a residence in pursuance of that intention will establish a domicile'.

The intention here may, moreover, exist on though the residence is known to be terminable and likely to be terminated. For example, in **Cruh v Cruh**, an alien who had came to England before the war, joined the army but was discharged for criminal offences, imprisoned and recommended for deportation – a recommendation which the Home secretary intended to implement as soon as practicalble. The alien sought a divorce and the court took jurisdiction, holding him domicile in England.

However, the intention, need not exist at the time of taking up residence in the chosen contrary. The court is concerned to know only the place of domicile at the time relevant for the question before it. And a domicile of choice can be inferred notwithstanding the fact that the individual to whom it is ascribed is not conscious at any given or any deliberate decision at any given or particular moment. (**See Gubenkian v Gubenkian (1937) 54 TLR 241)**.

(bii) The evidence as the propositus intention

(1) Evidence of intention

(2) Declaration of intention

(3) Motive and intention

(4) Intention freely formed

Self Assessment Question

Critically discus the acquisition of domicile of choice.

3.3 Loss of Domicile

The domicile being of choice, (ex hypothesis) the intention must be freely formed accordingly to give up an existing domicile of choice it is important to give up residence with the intention of no longer residing there. It is not important that residence should be established elsewhere before an existing one can be lost. It is not the law that the proposition must have no intention of ever visiting the place of residence again. Indeed the proposition may give back there the same day as in **White v Tenant (31 W.Vc 790, 1988)**. The relevant issue in this argument is that, at any particular point in time there must exist an intention of no longer making the place his abode when going up the residence or at some time after given up the residence he must form the intention of given up the place as a home.

3.4 Characteristics of Domicile

The characteristics of Domicile varies from one legal system jurisdiction to another. The characteristics depends on the domestic law of each state regardless of whether the states are from the same English common law background or members of continental countries. It is inevitable, that, there must be some elements of changes and unfairly and universality of future cannot be achieved.

Take for instance, B who lives in Nigeria with his wife and children but is also habitually resident in Togo in respect of his business concern. Under the Togolese law, he is presumably domiciled in Togo but under the Nigerian law he is domicile in

Nigeria. The question is, should a Nigerian court localize B's domicile in Togo or in Nigeria?

- Recognition and application of foreign laws
- Relevance and intention
- Nationality as concept of domicile
- None universality of rule of domicile.

3.5 Functions of Domicile

- Lex domicile governs matters of family relations and fairly property.
- Deals with legal transactions;
- Deals with validity of wills and succession to movables and immovable.
- None monogamous marriages are governed with regards to most of their personal relation customary and Islamic laws respectively.
- It is utilized as a multitude of varied and widely differing purposes.

4.0 Summary

General principles of domicile or characteristics are discussed in this unit as

(i) nobody can be without a domicile
(ii) nobody can have more than one domicile
(iii) an existing domicile centres until another is acquired.

Acquisition and loss of domicile are also discussed.

5.0 Conclusion

Domicile is an idea of law which takes three focus: (i) domicile of origin; (ii) domicile of dependence; and (iii) domicile of choice. Emphasis were equally laid on the acquisition of domicile determined by residence and intention. And this domicile can be loss through relinguishing of same. In English law, every person must at all times have a domicile and no person can have more than one domicile and no person can have more than one domicile at any time.

6.0 Tutor Marked Assignment (T.M.A)

(1) Mention and discuss the main characteristics of domicile.
(2) Can domicile be acquired and loss?

Unit 4
Forms of Domicile III

1.0 Introduction

Domicile is an important aspect of connecting factors in the study of rules of conflict of laws. That is why the discussion have taking three units of this Module. It is relevant to this unit (4) to discuss forms of domicile in addition to domicile of choice; This aspect cover domicile of origin, domicile of dependency, nationality and residence, domicility in oriental countries and other connecting factors. All these shall be discussed fully as this unit progresses.

2.0 Objectives

At the end of unit the students and readers should be able to know

(i) meaning of the forms of domicile
(ii) domicile, nationality and residence
(iii) Reforms of domicile and domicile of oriental centres and other connecting factors.

3.0 Forms of domicile

Domicile may be regarded as the pre-eminent headquarters possessed by each person for the determination or regulation of issues of personal status or nature. Domicile may be any of the three variants: domicile of origin, domicile of dependence and domicile of choice.

3.1 Domicile of Origin

"It is a settled principle" as asserted by Lord Westbury in a leading case of **Udury v Udury (1869) LRI Sc & Div 441 @ p 457)** that no man shall be without a domicile, and to secure this result the law attributes to every individual as soon as he is born the domicile of his father, if the child be legitimate, and the domicile of the mother is illegitimate." This is has been called the domicile of origin and is involuntary.

Domicile of origin, is attached to one at birth. That is, the domicile transmitted to a child at birth. A legitimate child takes the domicile of the father while, an illegitimate child or a child born posthumously take the domicile of the mother. A founding takes the domicile of the state where he was found. An adopted child takes the domicile of the adopting parents. A legitimated child presumably takes the domicile of the father **(Udury v Udury supra)** but a child legitimated by acknowledgement of paternity is treated as a legitimate child in every respect and will therefore take the domicile of the father.

Take note that, a domicile of origin is not the country where a child is born as such but the domicile of the parents at the moment of his birth. If the domicile of the parents changes what will be left or transmitted in the child as a domicile of dependence.

The domicile of origin is the domicile which the law attributes to every person at his or her birth; A domicile of origin can never be lost though it will be in abeyance during its supersession by a domicile of choice or of dependence, though, the tenacity of the domicile of origin has frequently been criticized.

The law commission in England have proposed new rules for determining the domicile of a child, under which the concept of the domicile of origin would disappear.

In addition, no person can legally be without a domicile, but a person may in fact be without a home, being for instance be a wonderer or a sailor with no home except a cabin.

3.1.1 Two major elements set domicile of origin apart from other forms of domicile
(i) Domicile of origin cannot be abandoned with ease like other domiciles. Unless the child attain the age of 21 years. Thus, it is designed to ensure that nobody will be without an operative domicile at any given time. The domicile of origin was the link that the English judges forged between the English adventurers to distance lands and English particularly for estate duty purposes. It is understandable that the American judges never embraced the idea.

(ii) The second element is that, it will require overwhelming evidence to establish its displacement. Whereas, a change of domicile can be established or balance of probability that a domicile of origin must be proved beyond reasonable doubt. This tends to defeat the basic rationale of domicile which is to enable a person choose the law that will govern his personal relations.

It is will be a kind of relief if the Law commission carry out the proposed abolishment of this favour of domicile in the United Kingdom, Australia, New Zealand and never entertained in the U.S.

3.1.2 The doctrine of domicile of origin can be said to be immical to the interest of immigrant population like the US and probably beneficial to emigrating countries.

Hence, due to inaction on the part of the Nigerian legislature the law remains unchanged

Self Assessment Question

(1) Identify the major characteristics of domicile of origin

(2) Highlight the principle of domicile of origin.

3.2 Domicile of dependency

The domicile of dependence is the domicile which the law attributes to a person while he or she is in a state of dependence; in English law, the states of dependence are infancy and lunacy for individuals of both sexes and marriage for women. It is the domicile transmitted to infants until they attain the 'age of majority or maturity, to married women until their marriages are terminated by death or divorce and to persons of unsound mind until they attain lucidity.

The rules applying to each group will be examined in turn.

3.2.1 Domicile of the Children

At common law the domicile of a child at birth is automatically transmitted to him in the pattern of transmission of domicile of origin. Generally, the domicile of an infant below the age of majority was the same as, and changed with the domicile of the appropriate parent, the father in the case of a legitimate child, and the mother in the case of an illegitimate child whose father is dead. While a female miner who married took her husband's domicile in place of her father's or mother's.

In addition, an infant carries this domicile until age of 21 except that a female infant will switch to the domicile of her husband on marriage. Desertion of the child by the parent affects this rule or the marriage of the male infant himself. In that wise, the male child is reduced to searching for the domicile of his father to enable him bring action for the dissolution of his own marriage.

In the recent time, it is interesting to know that, the age of acquisition of domicile has been reduced to 16 years in England. As a result, marriages under that age will confer on the couples capacity to acquire their own domicile. However, there is a proposal in United Kingdom that infant's domicile should be ascertained in a more liberal manner. This means, the law with which he is more closely connected.

3.2.2 Domicile of the married women

Married woman are deemed incapable of forming the necessary intention to change their domicile of origin or choice (among others – children and lunatics); the docile of the person responsible for them is attributed to them. That is domicile of their husbands, where a female infant marries, his domicile of dependence remain unchanged will he attains majority, but a female infant marries she changes her domicile of dependence from her parents' domicile to that of her husband or of his parents if he is infant.

Furthermore, married women acquire the domicile of their husband and cannot acquire a separate domicile until decree absolute of divorce, or a decree of nullity, even thought there is in fact no common matrimonial home: see Attorney General for **Alberta v Cook** in this case, the House of Lords has left open the question whether a wife can acquire a separate domicile after a decree of judicial separation. **See Dolphin v Robins; Lord Advocate v Joffrey (Thomas JAC supra).**

Thus, the wife is left to seeking out where her disaffected husband has established himself in order to bring action for divorce. It is appropriate that the rule has been described as the "Last barbaric relic of a wife's servitude".

Agbede I.O. pointed out that, the rule of dependent of domicile of the married woman was abolished in 1974 in England was not an issue but the main part is that it has been allowed to linger for so long. In Nigeria, the remains substantial unmutable.

It is very clear that, the rule is substantially repugnant to modern conception of justice and runs confer to contemporary idea of gender equality and the constituted prohibition against discrimination on grounds of sex. (**See Family Law Reform Act 1969**) which came into effect on January 1, 1970.

3.2.3 Domicile of Mentally disordered persons

It is quite impossible for a mentally unsound person to acquire a domicile of choice and, as a normal rule, retain the domicile which he or she had when becoming mentally incapable (Morris JHC).

This group of people drive their domiciles from their parents during infancy like all other infants and in the manner stated above. If the condition persists after attainment of majority, they will retain the domicile their parents had on their attainment of majority: if an adult becomes insane he will retain his last domicile before he become insane.

The law commission in England made a proposal to proscribe the law with which a person of unsound mind has the closest connection. Under an old order whereby the parents could expressly change the domicile of an infant who became insane during infancy even after attaining age of majority. (Agbede I. O.).

3.2.4 Domicile of Corporation/ Domicile of Legal persons

The English law of domicile was evolved almost entirely with totality of individuals in mind. It can only be applied to corporations with a certain sense of strain. A corporation unlike human beings can not ordinarily be born though it is incorporated; it cannot many though it can be amalgamated with or taken over by another corporation: it does not die, though it can be dissolved or wound up.

A corporation is deemed domicile in the country of its incorporation. The question of whether the corporation is a legal person and whether it has ceased to be so by a winding up order is to be determined under such a law of its domicile.

A corporation is domicile for purposes other than those of the civil jurisdiction and judgements Act 1882 and 1991 in its place of incorporation. Unlike individuals, it can not change that domicile, even if it carries on all its business elsewhere. Unlike an individual, legal persons can not fulfill the essential elements of domicile of people.

Domicile is important, for the company's status as a corporation depends upon it. All questions relating to the creation, continuance, amalgamation or dissolution of or to the succession to the company are referred to the lex domicilii: see **National bank of Athens and Greece v Metliss**.

3.3 Domicile, Nationality and Residence

Not until early 19th century, domicile was universally regarded as the personal law for purposes of the conflict of laws. The change from domicile to nationality on the continent of Europe started in France with the promulgation of the Code Napoleon in 1804. It was natural that the new uniform law should apply to French people everywhere, and Act 3(1) of the Civil Code provided that "the laws governing the status and capacity persons govern Frenchmen even they are residing in foreign countries."

When the above code/law was made for the French people, no provision was expressly or impliedly for the converse case of foreigners residing in French territory, although, the French courts held that in matters of status and capacity foreigners too were governed by their own national law. The French code was later adopted in Belgium, Luxenburg and Australia in 1811 and similarly Dutch followed suit in 1829 (with Dutch Code).

It is historical, that the change from domicile to nationality on the continent of Europe was accelerated by Mancini's famous lecture delivered at the University of Turin in 1851. In the remarkable lecture, he advocated for the adoption of principle of nationality on the ground that laws are made for an ascertained people than for an ascertained territory.

He recommended further that, a sovereign when making laws for his people should consider their habits and temperature, their physical and moral qualities, and even the climate, temperature and fertility of the soil.

As a result of this recommendations, Article 6 of the Itallian Civil Code of 1865 provided among other things that "the status and capacity of persons and family relations are governed by the laws of the nations of the nation to which they belong" Manicini's philosophy proved extremely influential outside Italy. In the second half of the 19th century the principle of nationality replaced that of domicile in code after code in continental Europe,, up till today and Norway and Demark retain the old principle of domicile.

The resultant effect is that, the nations of the world have become divided in their definition of the personal law; and it is this fact more than any other which impedes international agreement on uniform rules of the conflict of laws.

3.5.1 What are the arguments against nationality or domicile as the personal law?

The advocates of nationality claimed as follows:

(a) "that, it may require the application to a man, against his own wishes and desires, of the laws of a country to escape from which he has perhaps risked his life".

(b) That, nationality breaks down altogether in the case of federal composite state containing more than one country. For example in composite states, the common nationality covers a number of independent legal systems such as the situation in Nigeria.

(c) It results in double nationality. This is very prevalent in most advanced federal states.

(d) That the current age of globalization where nations are becoming increasingly multilateral as a result of the increasing frequency and fluidity of movement of individuals to unknown distance world to his home country. To continue to attach people to a country they had long abandoned is a sheer absurdity. The current trend will render nationality on unviable test for personal law.

(e) That the concept of Nationality is never applied in Nigeria. It only applies in the recognition of foreign divorce decrees and under the Adoption Laws.

3.3.3 Thirdly, the civil law system has always conceding argument to substitute habitual residence for domicile. Though, the concept may be attractive, it has some practical difficulties. One of these is that a person may have more than one place of habitual residence or none at all, but must have an operative domicile.

Another way out is to employ habitual residence to complement domicile in this respects.

Residence must be habitual, though it need not be permanent. If sufficiently prolonged, it may raise a presumption of domicile, which may be resulted by proof of an intention to reside elsewhere. Self Assessment Question

(1) Ellucidate the concept of nationality and habitual residence as the most suitable replacement to domicile.

3.4 Reform of Domicile

The Nigerian law of domicile is out dated and out modeled and need urgent reform it the whole idea is to make domicile approximate, as the common man's conception of his place of settlement or permanent home.

The concept of domicile dependence need to be brought closer to reality. In the present day Nigeria, a citizen of 18 years of age can expressly exercise his/her right of frachise without incidence. Why barring him from acquiring his own domicile at that particular age as dictated by his own national law?

However, the summary of the reforms/modifications advocated are as follows:

1(i) The country/state of habitual residence shall be presumed to be the intended domicile in appropriate cases.

(ii) A domicile can be acquired in a country/state where an adult is physically present with a desire to settle there or alternatively in the country with which the adult has the closest connection.

(iii) Existing domicile is last only when another has been acquired.

2(a) An acquired domicile at birth remains a dependent domicile for all proposes

(b) Infant takes at birth

i. the domicile of the father

ii. the domicile of the mother if born posthumously

iii. the domicile of the mother in a single parent family.

(c) A founding takes, at any given time, the domicile of the country with which he has the closest connection.

3. A infant takes the domicile of

(a) the parent with whom he leaves or

(b) the country with which he has the closest connection if not leaving with any of its parents.

4. The domicile of an infant ceases to depend on that of his parents if he is

(a) abandoned or

(b) not dependent on the parents

5. A dependent domicile of an infant terminates when

(a) he is validly married or

(b) he is 18 years old.

6. The domicile of a married woman is to be ascertained like that of any adult.

7. An adult of unsound mind is domicile in the country with which he has the closest connection.

8. Jurisdiction to grant matrimonial relief shall be validly exercised on one year residence within Nigeria.

Self Assessment Question

Summarise your own likely reform in the particular area of domicile law in your country.

3.5 Other connecting factors

There are other connecting factors that are worthy of discussing. These factors include:

(1) Intention of the parties: The courts were formerly applying the law of making a contract, known as Lex Loci contractious as the governing law of contracts, the court finally settled and agreed with the idea of proper law which, in effect, means the law intended by the parties or the law with which the contract has the closest connection in the absence of express intention.

(2) Lex Rei Sitae: The Law of the place where the property is situated. It is therefore a settled law that the law of situs of real estate applies exclusively in relation to title over or conveyance of such property unless recarse is had to renvoi.

(3) Lex actus: or Lex Loci actus: The law of the place where the act is done or a transaction is completed. Application of this law of the place of action to settle disputes that arises thereafter. It coverage of the law has been reduced in scope to such areas like, question of formal validity as ceremony of marriage, formal validity of wills and contract but it is still relevant in relation to transfer of chattle, choses in action, and liability for torts.

4.0 Summary

This Unit have substantially dealt with salient wishes in domicile law. This area covered the forms of domicile. That is, domicile of origin", domicile of dependency; domicile, nationality and residence; Reform of domicile and other connecting factors.

5.0 Conclusion

The idea of domicile is meant to be a dynamic process for the regulation of personal matters. Apart from the rule of discussed above, it is a rule of domicile that one cannot have more than one domicile for the same purpose. The only problem in this aspect with the Nigerian Law is the rule that a married woman does not have a separate domicile. All these and many other areas has been changed particularly by virtue of the Domicile and Matrimonial Proceedings Act 1973. The adoption of nationality as against the concept of domicile and the proposed reforms were equally discussed in this unit.

6.0 Tutor Marked Assignment

(1) Distinguish between a domicile of origin and a domicile of choice.
(2) Do you agree that acquisition of a domicile of choice depend upon the intention of the propositus/propositor.
(3) What proof is required of (a) the acquisition (b) the abandonment of a domicile of choice.
(4) Explain the nature and duration of a domicile of dependence.
(5) Differentiate between Nationality, domicile and residence.

7.0 References and Further Readings

(1) Torrance H.M.B (supra)
(2) Ademola Yakubu (supra)
(3) Agbede I. O. concise (supra)
(4) Graveson (supra)
(5) Thomas JAC (supra)
(6) Webb RHB and Brown DJL (supra)
(7) Wikkipidia 21 April 2011

MODULE 4
Public Policy

Unit 1: Public Policy I
Unit 2: Public Policy II
Unit 3: Foreign Transaction / Contracts and public policy.
Unit 4: Public Policy in Inter-state Situation.

UNIT 1
Public Policy I

1.0 INTRODUCTION

The prevailing practice of English courts seems to apply lex causae as it exists from time to time and to give effect if need be to respective changes in the law. In any system of the conflict of laws where English Common Law system is no exception. The courts retain a discretionary power to refuse to enforce and to refuse to recognise, rights required under foreign law on grounds of Public Policy. This notion is related to that of mandatory rules, analysed in this unit. The mandatory rules operate in priority to the normal conflicts process, whereas, public policy operates when that process has led to an unacceptable result. But the consequences of giving effects to respective changes in the lex causae are sometimes so extra ordinary that public policy must occasionally impose qualifications and exemption.

2.0 Objective

The objective of this unit is to let the students know:

(1) What is nature and scope of public policy?
(2) The relativity of public policy
(3) The relevance of public policy in the conflict of laws.

3.1 Public Policy

The discussion in this unit has hitherto concerned the selection and meaning of 'foreign law' in the application of private international rules. There are, however, some circumstances in which, though the case would on normal principles be

governed by foreign system-under which it would present enforceable rights and duties. The particular features of the facts before the court require that the normal rules should not prevail. This occurs when in the opinion of the court requires, it would be contrary to the policy of its own state to recognize legal consequences as flowing from the situation before it.

The nature and scope of public policy doctrine was fully examined by Lord Nicholls in **Kwait Airways Corpn V Iraq Airways Co**.

This case concerned the ceizure by the Iraq Government, it occurred immediately aftermath of the Iraq invasion of Kwait in 1990 of aircraft belonging to the claimant Company and the effect of an Iraq Government Resolution transferring the ownership of the aircraft to the defendants.

He described the normal workings of the conflict of laws which often lead to the application of the laws of another country, even though those laws are different from the law of the forum. He said further: "Exceptionally and rarely, a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirement of justice as administer by an English court. A result of this character would not be acceptable to an English court. In the conventional phraseology, such as would be contrary to public policy. Then the court will decline to enforce or recognize the foreign decree to whatever extent is required in the circumstances".

It is now settled in English domestic legal system that the principle of public policy "should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds". The exercise of the doctrine should be kept within proper limits to avoid the whole essence of the system from untold frustration. In respect of this assertion, Justice Cardozo, a distinguished American judge (as he then was) once commented". The courts are not free to refuse to enforce a foreign right at the pleasure of the judges to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep noted tradition of the common wealth".

Atkinson J. (as he then was) found a situation where he felt he could invoke the doctrine positively when he enforced a Norwegian consificatory decree in England on the ground that the object of the decree was the furtherance of the public interests of both the Norwegian and British states. He, as a rule, "there are four aspects of the operation of public policy" he identified

(i) in so far as it sets a limit upon the operation in England of certain types of foreign law;
(ii) in that it affects the enforcement of certain types of contracts;
(iii) where it actually prevents the enforcement of foreign judgement; and
(iv) in deciding the extent to which the English courts may give effect to, or even recognise foreign social institutions of a kind unknown in England.

Ademola Yakubu (1999) corroborating the afore mentioned scholars position, he posited that 'public policy is an indefinite concept which indicates those matters regarded by parliament or the courts as clearly of fundamental concern to the state and society at large'. He said that reliance on order public or public policy for application of the law of the lex fori has always been the last resort of any court faced with an over generalized rule of choice of law. It is the doctrine which metamorphosed from the court decisions.

The key difference in various legal systems in this regards lies not so much in kind as in degree. The rule of conflict use of public policy, or in continental terminology "odre public", is a word-wide phenomenon. For instance, a generally acceptable antecedent may be made as follows; in 1602 it was declared as that "against the benefit a commonwealth; in 1914 we have "acting against the commonwealth" and in 1916 prejudicial to the interests of the public"

The doctrine has been described in **Kitz v Hurringer** as the community common sense and common conscience extended and applied throughout the state to matters of public morals, public health, public safety, public welfare and the like.

The scope: In English common law, the scope of public law is very narrow, in continental system all over, it application is considerably wide, despite the fact that the rule developed earlier in Anglo-Saxon than in continental law. Martin Wolff quoting Scrutton L. J. (as he then was) as "it appears a serious breach of international comity, if a state is recognise as a sovereign independent state, to postulate that its legislation is contrary to essential principles of justice and morality, such an allegation might be well with an acceptable foreign government become a casus belli and should in my view, be the action of the sovereign through his ministers and not of the judge"

However, it is interesting to note that on the contrary, statutes of some European countries contains express provisions making reservations to the application of foreign laws in the interest of public order.

Consequently, the public policy concept has become, as put by a learned writer/scholars; "an emigmatic monster which shows he desire a being analysed and which defiled the concerted attack a professors, daring thesis writers and treaty makers".

Be that as it may, public policy seeks its justification under the common law rule of conflict of laws in allowing the judges a just determination and to preserve international relation. This is regarded as exception to the normal application of the general use of private international law.

On the other hand, judges do sometimes refuse to enforce foreign laws regardless of 'the justness' of the result where there are of a type which shock their judicial conscience or which are utterly contrary to their notion of civilize standard. Though instances of use of public policy are few and far between.

Social values changes in accordance with societal standards, from time to time, all over the place. There is the need to preserve the flexibility of approach in such a way to make the application of this doctrine respond to developments in jurisprudence a well as social condition.

Agbede I. O. declared that, flexibility as a contraction of certainty and as such, it can be achieved at the expense of the later. The end result is that the very facility of the public policy concept has become its unfortunate trait: For; "in its somewhat Cavaliar dismissal of a foreign law. It dispenses with the necessity for close analysis, for informative appraisal of the situation upon which judgement must be passed."

Graveson (1969) posited that in order to check this uncertainty, judges and lawyers alike have attempted to determine the perimeter, if not the content of this concept. The view is often expressed that judges must confined themselves to expanding as opposed to expanding 'heads of public policy'.

Morris, Graveson and other writers could not agreed on what 'the heads' (of public policy actually) are. Indeed language cannot define any particular head in so absolute a manner as to settle the range of its application for all purposes (Cheshire and North (1987).

As a result of this non consensus argument, Lord Hindson advised in **Boys v Chaplain (1971) AC 356, 378**; that "rules of law should be defined and adhered to as closely as possible lest they lose themselves in a field of judicial discretion where no secure foothold is to found by litigants or their advisers".

3.1.2 Cheshire and North identified the following as the probable classification for those situations when the English courts will refuse a foreign right and invoke public policy doctrine instead. That is,
(1) a situation where the fundamental conceptions of English justice are or disregarded. This rule has its application in two situations which come under the umbrella of natural justice. That is, in adjudication of a legal dispute in which a person is a party, that person must not sit to hear the case and (2) that a person must be heard before being adjudged against. This rule is relevant to question of recognition and enforcement of foreign judgements where any foreign judgement procured by means of any proceedings violates the above doctrine, no English court would recognize or enforce such on ground of public policy;

(2) a situation where conceptions of morality are infringe upon. An example of this is given of a contract or other transaction which tends to promote sexual immorality. Wilmot J. (as he then was) in **Robbinson v Blind** said that although an active would be maintained in many countries by a "Contesan" for the price of prostitution. English courts would not entertain such an active on ground of public policy;

(3) a situation where a transaction prejudices the interest of the United Kingdom or its good relations with foreign powers. An example of this part is the prohibition of intercourse with an alien enemy and for the second part, there are such case, as the refusal to enforce contracts whose object use to further revolt in a friendly country to break its laws;

(4) a situation where a foreign law or status offend the English conception of human liberty and freedom of action. Example of this, are disqualification arising from "slavery", ex-commutation, "heresy", "infancy", "civil death", "popish recusancy" and "nonconformity".

Other areas include foreign status such as those of spouses of polygamous or incentinous marriages and divorce decrees obtained in circumstances that are offensive to English idea of justice.

It is important to note that, this classification is neither exclusive in its range nor conclusive in its scope. The question is, at what stage, if one may ask will institution cease to be acceptable to English conception of morality and justice? On this poser, Whartun said "To stretch international law further would be to engraft on free countries, the paralyzing restrictions of despotism"

Morris and Chesire are of the view that modern judicial practice which tends to go beyond these stipulated head of public policy should be condemned. To the duo, the modern judicial practice which tends go beyond these stipulated of public policy should be condemned. They consider this to override the choice of law rules by indefinable discretion.

Besides, Cheshire's formulation are with a few exceptions, aim at rule rather than results as he was concerned with foreign laws repugnant to English public policy.

It is undesirable that judicial decisions, whether in the conflict of laws sphere or in any other field of law should exhibits arbitrariness or capriciousness.

Discretion must be regulated upon grounds that will make it judicial compliance. It is for this reason that the doctrine of relativity, is being proposed and shall be discussed in the next unit (unit 2).

4.0 Summary

In this unit, public policy is an indefinite concept which indicates those matters regarded by parliament or the courts as clearly of fundamental concern to the state and society at large. Reliance on ordre public or public policy for application of the law of the forum as always been the last resort of any court faced with an over generalized rule of choice of law. This doctrine is no doubt a creation of English courts.

5.0 Conclusion

This unit, covers the following areas: meaning, scope and nature of public policy and it classification as identified by Cheshire and North.

The duo in their book – Conflict of Laws identified 4 points as conditions to refuse application of foreign law in favour of application of Lex Fori. This doctrine was formulated by the court and can be impliedly called "court rule doctrine".

6.0 Tutor marked Assignment (TMA)

(1) Discuss the meaning, scope and nature of public policy

(2) Highlight the classification as stated by Cheshire and North on when the English court can refuse enforcement foreign rule.

7.0 References and Further Readings

(1) Ademola Yakubu (Supra)
(2) Agbede I. O. (Supra)
(3) Graveson (1969) Conflict of laws, London
(4) Cheshire and North (1987) Private International Law, 9th Edition London.

Unit 2
Public Policy II

1.0 Introduction

The proper law of a contract is that law which the England courts applies in determining the obligations under that contract: per Lord Wright in **Mount Albert, etc v Australasia etc society**. Under the Contracts (Applicable Laws) Act 1990, which given effect in English law to the Rome convention 1980, the application of a rule of law otherwise applicable by virtue of the convention may be refused if its application is manifestly incompatible with the public policy (ordre public) of the forum. Its effect is yet to be considered by an English court.

- English courts will not give effect to the results of any status existing under a foreign law which is penal, that is, discriminatory. Examples are the status of slavery or civil death, and disabilities or incapacities which may be imposed on priests, nuns.

- Apart from cases of contract and status, examples of the exclusion of foreign law on the grounds of public policy are rare. It is not contrary to public policy to recognize foreign decrees confiscating private property, but it may be otherwise if the decree is “penal” in the sense of being directed against the property of a particular company or of particular family or persons of a particular race or a particular alien nationality.

It is now well settled that English courts will not directly or indirectly enforce a foreign penal law. “The courts of no country execute the penal law of another’ said Chief Justice Marshall of the United States.

OTHER PUBLIC LAWS

English courts will not enforce other public laws of a foreign state but the scope of this principle is unclear. In **Att. General of Newzealand v Ortiz (1984) AC1.** Law cannot be enforced directly or indirectly by the forum courts. This rule probably took its roof from the view of the early English judges that criminal law should not have

extra territorial application. Historically, the English criminal sanction was predicated on the breach of the King's peace outside the King's jurisprudence.

2.0 Objective

The main objective of this unit is to let the students and the readers know

(i) the proper law of a contract and how is it ascertained
(ii) what is status under the foreign law?
(iii) what is the status of the foreign penal law and its proof?

3.0 Main Contents

3.1 Foreign Contract

A contract is an agreement between two or more persons to enter into a legal obligation. The basic requirements of a valid contract include an offer, an acceptance, consideration, intention to enter into legal relations and capacity. The municipal law or the law within may not be relevant except as chosen by the parties, since a contract is an agreement between two or more persons to enter into a legal obligation. The idea of private legislation is allowed in the area of law of contract.

The municipal law is not relevant except where the chosen law is illegal, has been fraudulently chosen or against the public policy of the forum.

Although the idea of the Lex Loci contractor or the Lex Loci solutionis were the determining factors when the classical theories of contract heldsway as the inflexible choice of law rule, the recognition of the intention of the parties as the basis for determining the choice of law between parties to a contract has given the parties the power to determine the law to resolve the dispute which may arise between them. This is now called the proper law of the contract.

3.1.1 The Proper Law Doctrine

The main issues is whether the proper law is the law intended by the parties or the law with which the contract has the closest and real connection. A balanced formulation was put forward by legal writers and the courts as "The system of law which the parties intended the contract to be governed or where their intention is neither expressed nor to be inferred from circumstances, the system of law with which the transaction has its closest and real connection".

Lord Wright supporting this statement in **Vita Food Proohets Inc. V. Unus Shipping Co Ltd held;**

"it is now well settled that by English law, the proper law of the contract is the law which the parties intended to apply. That intention is objectively ascertained and if not expressed, will be presumed from the terms of the contract and the relevant surrounding circumstances."

He said further in the same case: "where there is an express statement by the parties of their intention to select the law of the contract, it is not difficult to see what

qualifications are possible, provided the intention expressed is bonafide and legal and provided there is no reason (contradicting), the choice on the ground of public policy".

Lord Wright concluded that "connection with English law is not as a matter of principle essential".

Nevertheless, this choice of law rule has the advantage of flexibility, but it poses difficult problem for its ascertainment particularly where parties have not indicated the applicable law.

3.1.2 Specific Topics

Creation of Obligation:

The question whether a contract has come into being at all is governed by the putative proper law as objectively ascertained.

Hence, the following specific issues should be noted

(i) Fact of agreement
(ii) Reality of agreement
(iii) Consideration and other essential requirements
(iv) Formal validity
(v) Capacity
(vi) Illegality
(vii) Performance
(viii) Interpretation, and
(ix) Discharge

Self Assistant question

(1) What is the proper law of a contract and how is it ascertained?

3.2 Status

English courts will not give effect to the result of any status existing under a foreign law which is penal, i.e. descrimatary. For instance, the status of slavery or civil death, and the disabilities or incapacities which may be imposed or priests, nuns, protestants, Jews, persons of alien nationality, persons of certain ethnic groups and divorced persons. The disabilities referred to above are inabilities under some systems of law of persons, divorced for adultery to remary while the innocent spouse remains single or the disabilities imposed on Jews by the Nazi Regime in Germany.

Another form of disability is the laws of some Catholic countries of priests and nuns to marry at all (see **Sattemayer v. De Barros(No 2)1879) 5PD94, 104**). The main reason why these disabilities are not recognized in England, is that recognition would be contrary to English public policy. Under English law, public policy may sometimes requires that a capacity existing in foreign law should be disregarded in the United Kingdom.

Although, the circumstance would have to be extreme before such a course become desirable. Hitherto, English courts recognize the validity of polygamous marriage, of marriages by proxy and of marriages within the prohibited decrees of English law, in as much as they are valid under the applicable foreign law.

Though, English courts may refuse to recognize a marriage between persons so closely related that sexual intercourse between them was incestuous by English criminal law or a marriage with a child below the age of puberty (See Brook v Brook (1861) 9HIC 193 and Cheni v. Cheni (1965) p 85, 97).

The fact that a foreign status or relationship is unknown to English municipal law is a far cry ground for requiring to recognize it. For example, legitimation by subsequent marriage and polygamous marriages were recognized and given effect to in United Kingdom before it became part of English commoner law rule.

Self Assessment Question

(1) Is status rule synonymous with Penal Law?

3.3 Renal Laws

It is trite to establish principle of English private international law that foreign penal law cannot be enforced. This is equally the position in Nigeria. "The courts of no country execute the penal code of another" posited Chief Justice Marshal of U.S. The main reason for this has been explained by the privy council in the case of **Huntington v Attrill (1893) AC 150** where the privy council in referring to the rule that a penal law cannot be enforced said: "The rule has its fundamental in the well recognized principle that crimes, including in that term all branches of public law punishable by peculiary mulet or otherwise, at the instance of the state Government, or of someone representing the public, are local in this sense, that they are only cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the state, whether directly or indirectly, of punishment imposed for such breaches by the lex fori, ought to be admitted in the courts of any other country".

The rule laid down in this case has been consistently and universally accepted. Modern state practice requires some qualifications of its more expensive formulations.

This principles based on its acceptability has facilitated a number of international treaties under which states, including the U.K., provides mutual assistance in the conduct of criminal prosecutions. For example, compulsory measures may be melted out under the law of one state to be exercised at the request of a foreign state to search and seize evidence, or to freeze and confiscate the profits of drug-trafficking.

However, it must be said that international, practice is reflected in English law in Legislation such as Crime International (cor-operation) Act 2003.

A “pinal” law in this context, is a criminal law imposing a penalty recoverable at the instance of the state or of an official duty authorized to prosecute on its behalf.

Significantly, the word ‘Pinal’ has a quite different connotation from that which it bears in the contests examined earlier in the introductory part where ‘Penal’ means merely discriminatory. In this wise, it is the responsibility of the English court to determine for itself, whether the particular foreign law in question is a penal law or not. Thus, the courts are not duty bound by the interpretation placed upon the law by the courts of the foreign country.

It is important to add that, “the essential nature and real foundation of a course of action are not changed by recovering judgment upon it”. Hence, the court will not enforce a foreign judgment based upon a foreign penal law. In **Bancode Vizcaya**. V Dan Alfonso de Borban Austria a striking illustration of the rule was made as:

“The king of Spain deposited securities with the West minister Bank in London. A decree of the constituent Cortes of Spain declared the ex-king to be guilty of high treason, and ordered all his properties, rights, and grounds of action to seized for its own benefit by the Spanish State. An Action by a committee of the State to recover the securities was dismissed.” This is time with the above penal doctrine.

Self Assessment Question

“The courts of no country execute the penal laws of another “Discuss if any, exceptions to this general principle?

3.4 Other Cases

Apart from cases of contract and status, examples of the exclusion of foreign law on the basis of public policy are very uncommon, Although, it is not contrary to public policy anywhere to recognize foreign decrees confiscating private property; but it may be otherwise if the decree is “penal” in the sense of being directed against the property of a particular individual or a particular company or particular family or persons, of a particular race or a particular alien nationality.

Devlin J in **Bank Voor Handed en scheepvaart N.V. v Slarferd**, (1942) 2 KB 202 after thorough comprehensive review of the authorities, refused to give effect to a decree of the Netherlands. Government-in-exile in England which purported to transfer to the state the property in England and other pieces of persons resident in energy-occupied Holland Appeal in **Peer International Carp V. Termider Music Publishers Ltd,** (2003) EWCA Civ 1156; 2004 Ch 212, the court refused to give any weight to an argument that, because a Cuban decree was made for “benevolent” reasons, it should be treated as having effect on property in England. In this case, a Public Policy exemption, to the principle that foreign decree cannot affect property in England was rejected for a set of reasons advanced by counsel and accepted by the court of Appeal:

1. It would be subordinate English property law to that of a foreign state;
2. The rule would be fonded and would operate by reference to Public Policy which could change from time to time and could be in uncertain.

3. It would require the English courts to access the merits of the foreign legislation.
4. it would lead to intractable problems when the property was situated in a third state;
5. it would require the court to balance one Public Policy against the Public Policy that states do not interfere with property situated abroad, and
6. It would lead to great uncertainty.

On the other hand, there are ground upon which English common law court may reject or refuse to recognize or to give effect to a foreign decree, even in cases where the property was in the foreign state at the time of the decree.

It is important to note, there is no general principle that the application of a foreign law is contrary to Public Policy merely because it operates retrospectively. This was established in Kuwait Airways Iraq Airways Co (2002) UKHL 19; 2002 AC 883 that breaches of Public International law could attract the Public Policy doctrine.

Self Assessment Question
Critically assess the two decisions of the superior courts in this topic (3:4).

3.5 Other Public Laws

United Kingdom Courts will not enforce other public laws of any foreign state but according to Morris, the scope of this principle is very unclear. Lord Denring MR, an erudite scholar in his legal rethoric in **Att. Gen. of Zealand v Otiz (Supra)** defined a public law for this purpose as an exercise by a foreign government of its sovereign authority over property outside its territory. It was stated in that case:

"The defendants brought an ancient Maori carrying from New Zealand to England in contravention of a New Zealand statute which provided that historic articles knowingly exported or attempted to be exported should be forfeited to the Crown. This was interpreted to mean "shall be liable to be forfeited". The government of New Zealand brought an action in England for return and delivery up of the carrying.

It was held that the action failed, per Lord Denning MR because the New Zealand statute was a public law, per Acknor and O'Cannor L. J. J. (as then were) it was a penal law. Subsequently, the House of Lords affirmed this decision, but fails to be specific on whether it was a penal or public law.

It is best to limit the scope of 'public law' in this context to the enforcement of claim by the foreign state relating to the exercise of its governmental power. In this wise, it remains very uncertain what the approach of the English courts will ultimately be.

Self Assessment Question
Why public laws of foreign states are not enforceable in England courts?

4.0 Summary and Conclusion

This unit discussion, were divided into five sub-headings; that is Contract, Status, Penal, other cases and Other Public laws. All these are relevant titles under public policy. The role of English courts in relation to its enforcement and recognition of these foreign element related matters were as a matter of fact discussed.

5.0 Tutor Marked Assignment (T. M. A.)

(1) Write full note on any two questions from the following with relevant decided cases:

(i) Status (ii) Contract (iii) Penal laws (iv) Public laws and (v) Other case

6. References and further readings

(1) Morris PHC (Supra)
(2) Ademola Yakubu (Supra)
(3) Thomas JAC (Supra)
(4) Agbede I. O (Supra)
(5) Wikkipidia

Unit 3
Relativity of Public Policy I

1.1 Introduction

1.1 The prevailing practice of the English courts thus seems to be to apply the Lex causae as it exists from time to time and to give effect if need be to retrospective changes therein.

Relativity of public policy is one of the methods of the public policy in international private laws. It is the best way of understanding the study of conflict of laws. This method simply means two distinct notions, that is,

i. Relativity as to time and place and
ii. Relativity as to contract.

These classes of understanding the public policy in private international law shall be discussed in detail in the body of this unit.

2.0 Objective

The students at the end of this discussion shall be able to know

i. Relativity as to time, and place;
ii. Relativity as to contract and how they are applied by the foreign courts

3.0 Relativity of Policy

The doctrine relativity in the public policy area of private international law connotes two distinct notions. That is (i) Relativity as to time and place and (ii) Relativity as to "contract". It is very essential to treat each of these methods separately or independently to pave way for easy understanding by the students.

3.1 Relativity as to time and Space

The theory of relativity and it idea is meant public policy change from time to time and from place to place. It is unfortunately that, this fact seems to have been ignored by these judges and jurists, who in their desire for certainty, advocated the importation of the principle of judicial precedent into public policy area.
Lord Wright in his wisdom said:

"Public policy is a body of principles within the common law. I regard its rule as governed by precedent like any other branch of common law or equity".

What has been regarded as a comprehensive practice in one age may be accorded universal acceptance in another age. However, to stick to old pattern under such a condition is to reduce law into obscurity and disrepute. The modern age has witnessed remarkable changes in the attitude of British courts towards the institution of polygamous marriage.

The consequences of giving effect to retrospective changes in the law are sometimes so extra-ordinary that public policy must occasionally impose qualification and exceptions. Future judges must be free to decide whether changed conditions have rendered the particular public obsolete or not (see and compare British attitude towards double decker marriage as in **Ohochukwu v Ohochukwu (1960) 1 WLR)**.

No court decisions of English common law courts, of whatever date, based on public policy should be automatically adopted in Nigeria without making enquiry as to whether the basis for such a decision exists in Nigeria. Nigerian moral notions do not necessarily conclude with those of the English people. Public policy decisions may remain building as a standard but its application to particular cases must remain factual. The judicial decisions may differ in concrete situation may still consistent in principle (Agbede, I. O Supra).

Self Assessment Question

(1) Write short note on the principle of relativity as to time and space?

3.2 Relativity as to contract

Relativity as to contract is no doubt the most important aspect of this doctrine. Under this approach, the question whether to enforce or reject a force rule of law on grounds of the forum policy will largely depend on the repercussion of its enforcement on the interest of the forum state. In the dictum of Cardoso J. (as he then was) in **Lucks v standard oil co. of New York (1918) 224 NY Rep 99@110**.

"The courts are not free to refuse to enforce a foreign right at the pleasure of the judges to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevent conception of good moral some deep rooted tradition of the commonwealth".

It is observed that public policy concept is often invoked in relation to application of foreign rules, enforcement of foreign transactions, recognition of foreign status or institutions and in the recognition and enforcement of foreign judgement.

3.3 Foreign Transactions (or Contracts) and Public Policy

A foreign transaction or contract which is valid under its proper law will not be enforced under the received law by the forum courts, if it contemplates intercourse

with every alien or if its enforcement will be prejudicial to good relation with foreign friendly states. This distinction does not appear to have been clearly drawn by most writers and judges.

Based on the application of public policy as a rule of choice of law in the present context, it should be noted that the strength of a public policy argument must, in each case, be proportional to the intensity of the link which connects the case with the forum state.

This view expressed here can be found in a number of decided cases. For instance, though, it has been decided that a contract for the sale of a slave within the jurisdiction was void on grounds of public policy. **See Santos v Illudge (1860) 8 CB (NS) 861**.

Ralli Brothers v Campania Naviera Sofa Y Azna (1902) 2 KB 287. A similar contract concluded in Brazil while the same was valid was upheld in England under the Gaming Act 1845-1892.

Again, a gaming contract, under the domestic England law (**See Sexby v Tultan (1909) 2 KB 208 (CA)** is illegal nonetheless the court upheld the validity of a gaming contract which was valid under its proper law (**See Addsan v Brown (1954) 2 AU ER 213,, 1954 1, WLR 779**).

In addition, an agreement to oust the jurisdiction of a foreign court has been uphold; See the following decided cases **Coke v Coke (1898) NLR, 15; Adegbola v. Folaranmi (1921) 3 NLR, 89; Gooding v Martins (1942) 8 WACA (108)**.

Truly speaking, the justification for the forum public policy intervention in question of foreign transaction or contract should be based on the relative significance of its contact with forum state (Agbede 1.0).

4.0 Summary

This unit covered three major area of public policy. That is, relativity of public policy; relativity as to time and place; relativity as to contract and foreign transaction or contract and public policy. All these are major doctrine of the public policy in the conflict of law. Public policy decision may remain binding as a standard but its application to particular cases must remain factual. Hence, judicial decision at various nations may be differed in concrete situation but may still be consistent in principle.

5.0 Conclusion

All these doctrines discussed are very germane to the study of private international law with particular reference to public policy. The relativity of public policy means two distinct notions, that is,

(a) relativity as to time and place

(b) relativity as to ‘contact’.

Foreign transaction or contract and public policy which is valid under its proper law will not be enforced under the received English law by the forum courts if its enforcement will not be prejudicial to good relations with friendly foreign nations.

6.0 Tutor Marked Assignment

(1) Identify the doctrine of public policy in conflict of laws and discuss thoroughly any two.

7.0 REFERENCES AND FURTHER READINGS

1. Morris JHC (Supra)
2. Agbede I. O. (Supra)
3 Ademola Yakubu (Supra)

Unit 4
Relating of Public Policy II

1.0 Introduction

The negative posture of English common law courts towards polygamous marriages had found judicial expression in many Africa common law jurisdiction. In Nigeria and many African judicial system, have taken negative stance against foreigner contacting customary marriage, for instance under foreign judgement and public policy it trite to note that where the forum state has no connection in the cause of a personal action or the parties that can be no jurisdiction for the forum court to determine such cases on the forum public policy.

Public policy in inter state situation. It is the existence of differences in laws in standards of justice and of conflict of interest that constitute the main justification for the justice and conflict of interest that constitute the main jurisdiction for the policy reservation.

Under evasion of law is a common practice for people to create artificial or fraudulent links with a foreign law to avoid the inconvenient provision of the otherwise applicable law.

2.0 Objective

The students and the readers should know at the end of the unit II of public policy in private international law/conflict of laws.
The following doctrines:

- foreign status or institutions and public policy
- Foreign judgements and public policy
- Foreign rule and public policy
- Public policy in inter-state situation
- Evasion of law

All these relativities are very important doctrine/method in understanding the general concept of public policy in conflict of laws.

3.0 Main Content

3.1 Foreign status and public policy

Under English domestic law, the attitude of English courts towards polygamous institutions/marriage had equally found expression in many common law jurisdictions including African continent. Issue of polygamous marriage have been divided in some Nigeria cases particularly of the rights to share in the estate of their parents in certain situation. See **Savage v Macfay (1909) Ren 504; Fonseca v Passman (1958) NNLR 41**. It was held in these cases that foreigners even if domiciled in Nigeria cannot contact customary marriages.

The main effect of this rule in foreign policy doctrine is to give an unscrupulous foreign spouse escape matrimonial obligations towards an innocent Nigeria partner.

It is unfortunate that such approach has been adopted in a society where the vast majority of the populace was succoured by polygamous milk. The cases that left support to this approach must be considered unusual and unacceptable.
The Nigeria law have no room for application of forum public policy as regards question of recognition of foreign status. It is the exercise within the fori of its indents that should call for the forum intentional (Agbede, I. O. (Supra).

3.2 Foreign rules and foreign policy

The main essence of the public policy concept was to prevent the application of foreign rules of law which repugnant in their nature to the law of fori. It is this notion of public policy that provided the basis for the exclusion of foreign discriminatory, confiscatory and penal laws.

According to Professor Agbede I. O; outside these areas, it is doubtful whether the courts will refuse to apply the indicated foreign law on the grounds of its repruguant nature regardless of the consequence of its application in the particular case. This view was corroborated by Dicey and Merris.

In addition, a rule of foreign law cannot by its mere nature, have adverse effect on the interest of the forum state, it is the consequence of its application and enforcement that can have such a result. ‘what matter’, according to Kahn-Freund ‘is not the concept of foreign law in the abstract but the result of which its application would lead in specie’. Lhoyd posited that the courts should have regard not so much to the nature of foreign rule but to the consequences which are likely is result from it’s application.

3.3 Foreign judgement and Public Policy

Limitations on the recognition and enforcement of foreign judgements are not of particular relevance to choice of law rules. The application of Public Policy in this field call for some attentions.

It is generally said that the English courts will not give effect to a foreign judgement which has been procured by fraud are where the defendant has not been given an

opportunity to put his case. Assuming that these elemental nations of justice, it may well be that the subjects of such a foreign state are not likely to view such judicial practice as unjust. But this (Fraud) represent their own standard of justice.
Furthermore, if England has no reasonable connection with the cause of action or the parties, there can be no justification, one imagines, for the importation of English standards of justice into the issue.

Hence, the decision in **Curay V. Fomose (1963) P. 259**, though this case was adversely criticised nevertheless, it gain some support under the present analysis. In this case, by annulling a valid English marriage on the sole ground that it had not been celebrated in the presence of a Roman Catholic Priest as required by the law of Malta, the Matese decree in effect, allowed an unscrupulous Maltese husband to dulge his obligation/responsibility of matrimony towards an innocent English wife. This is no doubt that the Maltese rule in question is bound to work unnecessary hardship on foreigners and therefore provides causes for other states to protect the interest of their subjects (Agbade I.O).

Conversely, if the parties to the marriage in question have been domiciled in Malta at all material times, one would have viewed with disapproval any attempt to introduce English Public Policy into such a situation.

3.4 Public Policy in inter-state situation

Public policy in inter-state situation is one of concepts of Public Policy ‘minor morals of expediency and to questions of internal policy. For instance in the federation of Nigeria, the state laws are broadly uniform. Although, there are many independent agencies on ground which could ensure that conflict practices does not improperly or unnecessarily reflect a single jurisdictional bias. From the above fact, it would be “an intolerable affection of superior virtue “under this situation for the court of one state to pretend that the mere enforcement or recognition of the laws of another, will be repugnant to good morals or be violative of its public policy”

Hitherto, uniform protection of parties and none discriminatory expectation is desire in Nigeria not only as matter of justice but also as a necessary corollary to the constitutional obligation on the part of the several states not to discriminate against the citizens of other sister state (see 39 of 1999 constitution of the Federal Republic of Nigeria).

As a result, no state or court is obliged to give effect to the law of a sister state which is unconstitutional.

However, to refuse to apply and enforce a valid credible rule of another state on grounds of Public Policy may come perilously near to overriding the constitution.

It is quite unfortunate, that American scholars have agreed (so to say) that there should be no room for Public Policy doctrine in interstate situation. This statement

suppose to apply to Nigeria situation with great emphasy where is there higher degree of similarity among state laws and institutions.

3.5 Evasion of law:

It is a common practice for people to create artificial or fraudulent links with a foreign law to avoid the inconvenient provision of the otherwise applicable law.

The Gretna Green marriages are a typical example (where the marriage celebrated, in Gretna Green in Scotland to avoid provisions of English domestic statute). Apart from this, corporations are often registered outside the state of the principal place of business to avoid taxation and many sea-going vessels carry flay of convenience. Divorce decrees are procurable in countries that are particularly liberal in such matters.

In most civil law systems, the notion of 'fraus legi facta' have been developed by which the artificial or fraudulent links will be disregarded and the otherwise applicable law will be applied.

It is trite law in Nigeria, that all corporations doing business in Nigeria must be incorporated in Nigeria unless exception has been sought and granted. This will put an end to the idea of forum shopping to evade taxation.

4.0 Summary

With the above facts on the doctrine of Public Policy and its corrolary concept of relativity theory which has assisted in no small measure, in the understanding of this module. The discursion in the Public Policy covered two units where the methods of applying and enforcement and the otherwise of foreign laws were thoroughly enunciated by the forum courts.

5.0 Conclusion

It can be concluded therefore that the more 'repugnance' of a foreign rule, transaction, institutional or judgement whose recognition or enforcement will not in any way effect the interest of the forum should not call for the application of the forum Public Policy.

On the other hands, where the enforcement of the foreign rule or transaction will have harmful repercussions within the forum, the foreign character of the rule or transaction should not deter intervention by the forum court.

6.0 Tutor Marked Assignment (TMA)

1. Thoroughly discuss the doctrine of Public Policy in relation to its methods as mentioned in our discussion in this unit (with appropriate decided cases).

2. "Most civil law system developed the notion of 'fraus legi facta' by which the artificial or fraudulent links will be disregarded and other wise applicable law will be applied". Elucidate this statement?

3. The forum Public Policy is the bedrock of acceptability and enforcement of foreign rules, laws and judgement under common law nations and its allied nations. Discuss with decided cases.

7.0 References and further Readings

1. Agbede 1.0 (supra)

2. Morris JHC (supra)

3. Thomas JAC (supra)

4. Torrance HMB (supra).