PART I

Preliminary matters

1

Conceptual issues in choice of law

The choice of law process is often preceded or interrupted by very abstruse and highly technical questions. Prior to determining the appropriate rule for the choice of law and thus ascertaining the applicable law, a judge may have to determine the juridical nature of the question that requires decision. There may be uncertainty about the scope or reach of the category which forms part of any choice of law rule. The choice of law rule may itself be clear and well established, but it may be uncertain whether the matter disputed in a particular case falls within the category to which the rule applies. The judge may have to determine whether a given set of facts or rule of law raises a question about the proprietory consequence of marriage or succession, or whether it founds an action for breach of contract or tort. This is the domain of characterisation or classification.

In addition to the main issue, a private international law case may place a subsidiary issue before the court, which may require its own choice of law rule for resolution. This is the field of the incidental question. Furthermore, in some cases, the selection of the applicable law leads to a further question – what is meant by the applicable 'law'? Is it a reference to the internal law of the applicable law, or does it include the country's private international law rules? What if it includes the private international law rules and those rules refer the judge to the law of a different country? This potentially unending process of reference from the law of one country to the law of another is the domain of the doctrine of *renvoi*, the seed of which is sown by differences in choice of law rules. Finally, it is not every aspect of a claim involving a foreign element that is governed by foreign law – some matters are treated as questions of procedure to be governed by the *lex fori*, and others are held to be questions of substance and governed by the *lex causae*. The distinction between substance and procedure is thus important in determining the applicable law. The above issues are the subject matter of this chapter.

Characterisation, incidental question and *renvoi*

Botswana

A reference to Botswanan law in a foreign judgment recognised in Botswana is a reference to the laws of Botswana, including its private international law. In a divorce decree, a Tanzanian court directed that matrimonial property located in Botswana should be distributed in accordance with 'the law obtaining in Botswana'. Both former spouses were domiciled in Tanzania. Under Botswanan private international law, the distribution of matrimonial property (movable and immovable), in the absence of special circumstances, is governed by the law of the domicile of the parties. It was held that the reference in the Tanzanian decree to the laws of Botswana included Botswana's private international law and, accordingly, the assets of the parties located in Botswana should be distributed in accordance with the law of Tanzania, as outlined in section 114 of the Law of Marriage Act 1971.[1] It is implicit in the judgment that the distribution was carried out in accordance with the law of Tanzania, excluding its private international law.

Ghana

A reference to the *lex situs* does not simply mean the domestic law of the *situs*, but also its private international law, which may refer to some other system of domestic law.[2] In *Youhana* v. *Abboud*,[3] two Lebanese domiciled men died intestate with immovable properties in Ghana. On the issue of the law governing succession to their properties, it was held that it should be *lex situs*, including its private international law. Under these rules, the properties should devolve in accordance with the law of the domicile of the deceased. It is unclear from the judgment whether the reference to Lebanese law included its private international law, or what would have happened if those rules referred the matter back to the *lex situs*. Indeed, prior to the judgment, the properties had been distributed by a Lebanese court without any reference to Ghanaian law.

Lesotho

In Lesotho, the preferred approach to dealing with issues of characterisation is one midway between characterisation by the *lex fori* and the *lex*

[1] *Mtui* v. *Mtui* 2001 (2) BLR 333.
[2] *Akoto* v. *Akoto* [2011] 1 SCGLR 533.
[3] [1974] 2 GLR 201.

causae, with the ultimate objective of producing a policy-oriented decision. In *Mohapi* v. *Motleleng*,[4] the court had to resolve the issue of whether a widow's claim to inherit her late husband's estate rested on a right to matrimonial property, or to a right of succession. The couple were married in South Africa, the property was situated in Lesotho, and it was unclear whether they were domiciled in South Africa or Lesotho. After taking into account both South African and Lesotho law, the court held that the claim should be characterised as one relating to matrimonial property.

South Africa

South African courts have shown a preference for the *via media* approach to characterisation. According to this approach, the rules of the forum relating to conflict of laws should be construed from a cosmopolitan or worldwide point of view, so as to permit the application of foreign domestic rules. In so doing, the courts regard both the *lex fori* and the *lex causae* before characterising an issue and full attention is paid to the 'nature, scope and purpose' of the foreign rule in its context of foreign law. The first step is to make provisional characterisation in relation to both applicable systems of law. This is followed by a final characterisation, which takes into account policy considerations.[5]

Deciding a private international law issue (governed by foreign law) may involve determining a prior, subsidiary and independent private international law matter, which could be governed by the conflict of laws rules of either a foreign or domestic forum, although with potentially different results. *Phelan* v. *Phelan*[6] illustrates this. In an action for divorce and ancillary relief, the defendant raised the defence that the parties' marriage, concluded in Australia, was invalid. The defendant had previously been married. He had obtained a divorce in the Dominican

[4] *Mohapi* v. *Motleleng* [1985–6] LAC 316.

[5] *Society of Lloyd's* v. *Price* 2006 (5) SA 393 (on appeal from *Society of Lloyd's* v. *Price* 2005 (3) SA 549); *Society of Lloyd's* v. *Romahn* 2006 (4) SA 23; *Laurens NO* v. *Von Hohne* 1993 (2) SA 104; *Monokandilos* v. *Generale Des Carriers et Des Mines SA*, Case No. 11261/2001 (High Court, South Africa, 2010), but see *Laconian Maritime Enterprises Ltd* v. *Agromar Lineas Ltd* 1986 (3) SA 509, where, after providing various justifications, it was held that classification is to be carried out in terms of the *lex fori*.

[6] 2007 (1) SA 483. See also *Guggenheim* v. *Rosenbaum (2)* 1961 (4) SA 21, in which the court had to determine whether the validity of a contract to marry entered into in New York, the plaintiff having previously obtained a decree of divorce in the State of Nevada, would be recognised in New York.

Republic at a time when he was ordinarily resident in the Republic of Ireland. The defendant's contention was that, since his Dominican divorce decree would not be recognised in Australia, their marriage was invalid. Thus, to determine the validity of the Australian marriage, the court had to determine the prior, subsidiary and independent question of whether the defendant was still married to another when the marriage to the plaintiff took place in Australia. If this was the case, then the marriage could not be permitted under Australian law. The court did not expressly acknowledge that it was confronted with an incidental question, but after examining Australian law, it was held that the defendant had discharged the onus of establishing that the Dominican Republic divorce decree would not be recognised in Australia and, accordingly, the marriage between the plaintiff and the defendant was void.

Zimbabwe

It has been held that the traditional approach in private international law is for the *lex fori* to characterise according to its own law, and not the *lex causa*. The better approach, however, especially in cases of gap, is to apply a *via media* approach which allows the court to exercise judicial discretion in relation to choice of law, taking into account the consequences of deciding cases one way or the other. This enables the court to decide cases with a view to achieving international comity and a balance of justice and convenience.[7]

Comments

Problems of characterisation occur in private international law systems, such as those found in Africa, which are based on categories and connecting factors. It is a problem inherent in the application of multi-lateral choice of law rules. It has given rise to very engaging writings in which various approaches have been espoused.[8] However, it appears there have not been many African cases on the issue or, rather, it has not been seriously discussed in cases. Indeed, in some cases, courts fail to

[7] *Coutts & Co.* v. *Ford* 1997 (1) ZLR 440.

[8] C. Schulze, 'Formalistic and Discretionary Approaches to Characterization in Private International Law' (2006) 123 *South African Law Journal* 161; C. Forsyth, 'Characterisation Revisited: An Essay in the Theory and Practice of the English Conflict of Laws' (1998) 114 *Law Quarterly Review* 141.

appreciate the existence of a characterisation problem.[9] It is only recently that the Lesotho, South Africa and Zimbabwe courts have acknowledged and discussed the issue.

One of the thorniest problems in characterisation is what is actually being characterised: is it an issue, a rule of law or a set of facts? In South Africa, it has been held that it is rules of law which are characterised.[10] Another issue is whether characterisation should be performed in accordance with the *lex fori*, the *lex causae*, the *via media* approach (which pays attention to both the *lex fori* and *lex causae*) or with some other approach. In Lesotho, South Africa and Zimbabwe, the courts have preferred the *via media* approach.

The problem of *renvoi* arises when a reference to the law of a foreign country in conflict of laws rules is taken as a reference to the law of that country, including its conflict of laws rules, and the conflict rules of that country refer the issue at stake to the 'law' of a third country or the 'law' of the forum (country hearing the case). Even though there have been decisions which concede that a reference to the law of a foreign country could encompass the latter's conflict of laws rules, the courts have not provided any guidance on how they resolve problems resulting from this. In South Africa, statute has restricted the scope of problems of *renvoi* in the context of choice of law rules which rely on domicile as the connecting factor. Under the Domicile Act, if a court, when applying choice of law rules, finds that a question before it should be decided in accordance with the law of a foreign state or territory on account of a person's domicile, it shall decide the question in accordance with that law, even though a court of that state or territory, in the application of its choice of law rules, would have found South African law or any other law to be applicable with respect to the question concerned.[11]

Substance and procedure

Kenya

Kenya's law on limitation of actions, generally contained in the Limitation of Actions Act 1967, applies to actions before Kenyan courts,

[9] See, e.g., *Powell* v. *Powell* 1953 (4) SA 380; *Anderson* v. *The Master* 1949 (4) SA 660.
[10] *Laconian Maritime Enterprises Ltd* v. *Agromar Lineas Ltd* 1986 (3) SA 509 at 517.
[11] Domicile Act 1992, s. 4. Another area where *renvoi* is statutorily excluded is testamentary succession. See Ch. 15.

regardless of where the cause of action has arisen. However, in proceedings brought before a Kenyan court where a foreign law bars either the right or the remedy with respect to a cause of action arising outside Kenya, the action is barred.[12]

Lesotho

Under Lesotho law, questions of prescription are matters of substance and are governed by the *lex causae*. For example, in an application for the attachment of a *peregrinus* defendant's assets, for the purpose of founding jurisdiction, the applicant relied on an alleged unlawful detention of the applicant's vehicle in South Africa as his cause of action. This cause of action was prescribed in South Africa. It was held that prescription was governed by the *lex causae* and, as the action was prescribed under South African law, there was no prima facie case against the respondent to merit attachment.[13]

Malawi

Estimating the costs of litigation is a matter of procedure governed by the *lex fori*. The Malawi courts have found no reason in principle why lawyers litigating in Malawi should be remunerated using foreign scales and principles.[14]

Namibia

It is for the *lex fori* to decide if a right created in a foreign country gives rise to relief in Namibia. Thus, whether the rights of a foreign bond holder will be recognised and granted any relief in Namibia is a matter for the *lex fori*.[15]

[12] Limitation of Actions Act 1967, s. 40(1). See generally *Athman bin Mahomed* v. *Abdulhosein Karimji* [1917–18] KLR 5; *Shadi Ram Mohindra* v. *BC Mohindra* [1954] KLR 89; *Doshi* v. *Patel* [1953] 26 KLR 15.

[13] *Lepota* v. *Hyland*, CIV/APN/280/87 (High Court, Lesotho, 1991).

[14] *Preferential Trade Area Bank* v. *ESCOM*, Civil Cause No. 238 of 2000 (High Court, Malawi, 2003). But also see *Magennis* v. *Malawi Press Ltd* (No. 2) [1961–3] ALR Mal. 584, which held that a foreign lawyer's bill ought to be taxed on the scale of charges appertaining to the country where he or she practises.

[15] *Banco Exterior de Espana SA* v. *Government of the Republic of Namibia* 1996 NR 1, 1992 (2) SA 434.

South Africa

Under South African law, the *lex fori* governs all matters of procedure, while matters of substance are governed by the *lex causae*.[16] Whether a rule is substantive or procedural is decided by the *lex fori*.[17] It has been held that the order of priority in ranking claims,[18] quantification of damages,[19] recognition of a claim as giving rise to a maritime lien,[20] sufficiency of evidence[21] and rules relating to *res judicata*[22] are all matters of procedure governed by the *lex fori*. On the other hand, the extinction (or creation) of a right by prescription is a matter of substance and, accordingly, governed by the *lex causae*.[23]

Tanzania

The Law of Limitations Act applies to proceedings in Tanzania on rights of action arising outside Tanzania in the same way as it applies to rights of action arising within Tanzania. However, where foreign law bars either the right or the remedy in respect of a right of action arising outside Tanzania, but which is pursued in a Tanzanian court, the proceedings are barred.[24]

Zimbabwe

The remedy available to a person to recover a claim by action at law is a matter of procedure that is governed by the *lex fori*.[25] However, prescription is a matter of substance and governed by the *lex causae*.[26]

[16] *Minister of Transport, Transkei* v. *Abdul* 1995 (1) SA 366.
[17] *Kuhne & Nagel AG Zurich* v. *APA Distributors (Pty) Ltd* 1981 (3) SA 536 at 521.
[18] *MV Guzin S (No. 1) Hamburgische Landesbank-Girozentrale* v. *Fund created by the sale of the MV Guzin S* 2002 (6) SA 113; *Transol Bunker BV* v. *MV Andrico Unity* 1989 (4) SA 325.
[19] *Santam Ltd* v. *Gerdes* 1999 (1) SA 693.
[20] *Transol Bunker BV* v. *MV Andrico Unity* 1989 (4) SA 325; *Transol Bunker BV* v. *MV Andrico Unity* 1987 (3) SA 794; *Brady-Hamilton Stevedore Co.* v. *MV Kalantiao* 1987 (4) SA 250. On the nature of a maritime lien, see *Southern Steamship Agency Inc.* v. *MV Khalij Sky* 1986 (1) SA 485.
[21] *Ex p. Heinmann* 1952 (3) SA 149.
[22] *Laconian Maritime Enterprises Ltd* v. *Agromar Lineas Ltd* 1986 (3) SA 509.
[23] *Kuhne & Nagel AG Zurich* v. *APA Distributors (Pty) Ltd* 1981 (3) SA 536; *Society of Lloyd's* v. *Price* 2006 (5) SA 393 (on appeal from *Society of Lloyd's* v. *Price* 2005 (3) SA 549); *Society of Lloyd's* v. *Romahn* 2006 (4) SA 23.
[24] Law of Limitations Act 1971, s. 42(1).
[25] *Timms* v. *Nicol* [1967] RLR 386.
[26] *Coutts & Co.* v. *Ford* 1997 (1) ZLR 440.

Comments

In private international law, a distinction is drawn between matters of substance and procedure. The former is governed by the *lex causae* and the latter by the *lex fori*. The difficult task, however, is often trying to determine which matters are substantive, and which are procedural. The principles that issues of procedure are governed by the *lex fori* and matters of substance by the *lex causae* are well accepted.[27] The list of matters of procedure is not closed; the courts have not provided an exhaustive list of what they would characterise as procedural. To date, it has been held that the sufficiency of evidence, recognition of rights created abroad, remedies available to a party, quantification of damages, priority in ranking claims and the assessment of costs of litigation are all matters of procedure. It could be argued that it is important to place a lid on the scope of matters treated as procedural by the courts – an expanding list of such matters undermines the purpose of choice of law rules and conflict of laws in general. Indeed, there is arguably a move in the common law world towards restricting the scope of matters characterised as procedural.[28]

Whether limitation periods should be characterised as procedural or substantive has been subject to debate.[29] In Lesotho, South Africa and Zimbabwe, prescription has been characterised as substantive and governed by the *lex causae*. The position in Kenya and Tanzania (where foreign law which bars either the right or the remedy in respect of a foreign right of action prevails) is consistent with the approach adopted in Lesotho, South Africa and Zimbabwe. However, unlike in Lesotho, South Africa and Zimbabwe, it does not matter in Kenya or Tanzania how the *lex causae* characterises its rule of prescription (i.e. as substantive or procedural) – it just has to be applied. This avoids the gap experienced in some Southern African cases. This problem arises where the *lex fori*

[27] See also *Coal Export Corp*. v. *Notias George* [1962] EA 220, which held that questions of priorities attaching to claims for moneys in the nature of wages are to be determined by the *lex fori*; and *George Michailides* v. *Nerves Yacoub* [1900–31] 1 SLR 190, questioning whether the *lex loci contractus* prevails over the *lex fori* as to questions of procedure and prescription.

[28] *John Pfeiffer Pty Ltd* v. *Rogerson* (2000) 203 CLR 503; *Harding* v. *Wealands* [2006] UKHL 32; United Kingdom – Foreign Limitation Periods Act 1984; *Tolofson* v. *Jensen* [1994] 3 SCR 1022; *Castillo* v. *Castillo* [2005] 3 SCR 870.

[29] See generally the interesting Nigerian case of *Rhein Mass Und See Schiffahrskontor Gmbh* v. *Rivway Lines Ltd* (1998) All NLR 565, [1998] 5 NWLR 265 on the distinction between action and cause of action for the purpose of the law on limitations.