1

Introduction

1. The subject matter

The English conflict of laws is a body of rules whose purpose is to assist an English court in deciding a case which contains a foreign element. It consists of three main topics, which concern respectively: (i) the jurisdiction of an English court, in the sense of its competence to hear and determine a case; (ii) the selection of appropriate rules of a system of law, English or foreign, which it should apply in deciding a case over which it has jurisdiction (the rules governing this selection are known as 'choice of law' rules); and (iii) the recognition and enforcement of judgments rendered by foreign courts or awards of foreign arbitrations.

If the case contains no foreign element, the conflict of laws is irrelevant. If an Englishman and woman who are both British citizens, domiciled and resident in England, go through a ceremony of marriage in England and later, when they are both still domiciled and resident here, the wife petitions the English court for a divorce, no foreign element is involved. No problem of jurisdiction arises and any questions about the validity of the marriage or the grounds on which a divorce can be granted, as well as any procedural or evidential matters, are all governed by English law alone. The same is true if two Englishmen in England contract here for the sale and purchase of goods to be delivered from Oxford to Cambridge with payment in sterling in London, and the seller later sues the buyer and serves him with a claim form in England.

But if we vary the facts and suppose in the first example at the time the wife petitions for divorce the husband is domiciled and resident in Utopia, and that the ceremony had taken place in Utopia and the husband argues that it did not comply with the requirements of Utopian law so that there is no marriage to dissolve, the conflict of laws becomes relevant. The husband's absence raises the question of the court's jurisdiction, and his argument raises that of whether Utopian or English law is to determine the validity of the marriage.

Or suppose in the second situation the seller is an Englishman in England who agrees to sell goods in England to a Utopian buyer in Utopia, to be delivered in Utopia and paid for in sterling to an English bank in Utopia. The question arises as to whether the seller can invoke the jurisdiction of the English

court against the buyer, who is still in Utopia, if the seller wishes to sue the buyer for breach of contract or for failure to pay the price. The further question may also arise as to which law, English or Utopian, is to be applied to determine the parties' rights and obligations should the English court take jurisdiction.

It will be seen from these examples that a question of jurisdiction and one of choice of law may both be involved in a particular case. But they can arise independently. The court may clearly have jurisdiction, as it has in the divorce case, but it has to answer the choice of law question. Or there may be no question as to what law to apply, as would be the case in the contract example if the parties had stipulated that English law should govern their agreement, but there would be a question whether the English court has jurisdiction.

The third topic of the recognition and enforcement of foreign judgments usually arises independently of questions of the jurisdiction of the English court and does not overlap with choice of law. A foreign judgment on the facts of a case may be raised as a defence to an action on the same facts which is being heard by the courts in England. Alternatively, a person in whose favour a foreign judgment has been awarded seeks to enforce that judgment in England using the summary judgment procedure of the English courts.

These are only examples. A jurisdictional question may arise in any kind of case. There are two broad regimes dealing with the jurisdiction of the English courts in civil and commercial matters. Traditionally, jurisdiction depends upon being able to serve a defendant using the Civil Procedure Rules (CPR). The CPR provide the method of serving a defendant who is physically present within the jurisdiction (the presence providing the basis for jurisdiction under the national rules)[1] and both the grounds for the exercise of jurisdiction and a method for serving the defendant who is not physically present. The alternative Brussels I Regime[2] lays down grounds for the allocation of jurisdiction to the courts in many cases. These European rules are largely triggered by the domicile of the defendant in an EU Member State.[3] In matrimonial cases, both a European regime and statutory rules of jurisdiction exist. For reasons of space, these rules are not covered in this book. There are some occasions on which no jurisdiction exists either because a party is immune from suit[4] or because the subject matter cannot be adjudicated in the English courts.[5] A choice of law problem can arise in any civil law suit. The conflict of laws

[1] As opposed to those which apply under the Brussels I Regulation.
[2] The regime includes the Brussels I Regulation and the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (revised in 2007 [2007] OJ L339/1). The latter came into force on 1 January 2010 in the EU, Norway and Denmark, on 1 January 2011 in Switzerland and on 1 May 2011 in Iceland ([2011] OJ L138/1).
[3] See further Chapter 5.
[4] For example, sovereign or diplomatic immunity.
[5] For example, questions of title to foreign land, *British South Africa Co v Companhia de Moçambique* [1893] AC 602.

is concerned with all of the civil and commercial law but does not deal with criminal, constitutional or administrative cases.[6] It therefore covers the law of obligations (contract, tort and restitution), the law of property (both immovable and movable) whether the question arises between parties who are alive or by way of succession.[7] It is concerned also with family law, including marriage and divorce, civil partnership, and guardianship and the relations of parent and child. Recognition or enforcement of a judgment in some civil or commercial matter may be called for whether it dealt with a breach of contract or a tort (delict) or the ownership of property or concerned status, such as a decree of divorce or nullity of marriage or a custody or adoption order. However, only civil and commercial matters and not those of family law are discussed in this book.

2. The name

Two names for the subject are in common use; however, they are interchangeable. Neither is wholly accurate or properly descriptive. The name 'conflict of laws' is somewhat misleading, since the object of this branch of the law is to eliminate any conflict between two or more systems of law (including English law) which have competing claims to govern the issue which is before the court, rather than to provoke such a conflict, as the words may suggest. However, it was the name given to the subject by A. V. Dicey, when he published his treatise, the first coherent account given by an English lawyer of its rules and principles, in 1896[8] and it has been in use ever since.

Another name is 'private international law', which is in common use in Europe. This is arguably less misleading than 'conflict of laws', and each of its three words requires comment. 'Private' distinguishes the subject from 'public' international law, or international law *simpliciter*. The latter is the name for the body of rules and principles which governs states and international organizations in their mutual relations. It is administered through the International Court of Justice, other international courts and arbitral tribunals, international organizations and foreign offices, although, as part of a state's municipal or domestic law, it is also applied by that state's courts.[9] Its sources are primarily to be found in international treaties, the practice of states in their relations (or custom) and the general principles of municipal legal systems.[10]

[6] These are seen as matters falling within the sovereignty and territoriality of each state.
[7] Choice of law rules on succession have been omitted from this book.
[8] The latest edition (14th edn, Sweet & Maxwell, 2006 plus later supplements) of *The Conflict of Laws*, called *Dicey, Morris and Collins* after its more recent editors is still treated as the most authoritative textbook.
[9] The question whether international law is part of English law cannot be pursued here.
[10] Statute of the International Court of Justice, Art. 38. This also states that textbooks on the subject and judicial decisions are subsidiary means for the determination of the rules to be applied by the International Court.

Private international law is concerned with the legal relations between private individuals and corporations, though also with the relations between states and governments so far as their relationships with other entities are governed by municipal law, an example being a government which contracts with individuals and corporations by raising a loan from them.[11] Its sources are the same as any other branch of municipal law, which is to say that English private international law is derived from legislation and the decisions of English courts. A variation on this nomenclature is the Germanic 'international private law' as the title of the subject.

'International' is used to indicate that the subject is concerned not only with the application by English courts of English law but of rules of foreign law also. The word is inapt, however, in so far as it might suggest that it is in some way concerned with the relations between states (it is even more inapt if it suggests 'nations' rather than states).[12]

The word 'law' must be understood in a special sense. The application of the rules of English private international law does not by itself decide a case, unlike that of the rules of the English law of contract or tort. Private international law is not a substantive body of law in this sense, for, as we have seen, it merely provides a set of rules which determine whether the English court has jurisdiction to hear and decide a case, and if it has, what rules of which system of law, English or foreign, will be employed to decide it, or whether a judgment of a foreign court will be recognized and enforced by an English court.

3. Geographical considerations

For the purpose of the English conflict of laws, every country in the world which is not a part of England and Wales[13] is a foreign country and is foreign law. This means that not only totally foreign independent countries such as France or Russia, or independent Commonwealth countries such as India or New Zealand, are foreign countries but also British colonies such as the Falkland Islands. Moreover, the other parts of the United Kingdom – Scotland, Northern Ireland – are foreign countries for present purposes, as are the other British Islands, the Isle of Man, Jersey and Guernsey. It may be that the rules of another system are identical with those of English law, or that they are found in legislation such as the Companies Act 2006 which extends to both England

[11] See *R v International Trustee for the Protection of Bondholders A/G* [1937] AC 500, HL, where it was held that certain bonds issued in New York by the British government were governed by New York law.

[12] The rules of private international law apply between, for example, England and Scotland, which are not separate states. The English and the Scots may be regarded as separate nations but that is not why the rules so apply; it is because they have separate legal systems.

[13] Although Wales now has its own legislature, the court system is still unified with that of England and much of the law is the same. Conflict of laws issues between the two countries have yet to arise in abundance.

and Scotland. But if, say, New Zealand or Scots law falls to be applied by an English court, it is nonetheless the rules of New Zealand or Scots law which are being applied, and not English law, even though those are identical.[14]

In the case of foreign countries with a federal constitutional organisation, reference to the foreign country or law is not generally to the state in an international sense, but to one of the component parts thereof, if these are regarded by the constitutional law of that country as being separate entities having separate legal systems.[15] Thus, the reference is not usually to the United States of America, but to a state therein (such as New York or California), or to Canada, but to a province (for example, Ontario or Quebec) or to Australia, but to one of its states (such as Victoria or New South Wales).[16]

4. Glossary

Conflicts lawyers commonly employ some latin terms, which are a convenient shorthand for certain concepts that are in common use. Some of these are:

Forum conveniens – the court which is most appropriate to decide the dispute

Forum non conveniens – a court (usually the English court) which is considered inappropriate to decide the dispute

Lex causae – the law which governs an issue, alternatively the substantive law, the applicable law, the governing law or the proper law

Lex domicilii – the law of a person's domicile

Lex fori – the law of the court hearing the case. English law is the *lex fori* of a case heard in the English court

Lex loci actus – the law of the place where a transaction is concluded; in relation to the conclusion of a contract called *lex loci contractus* and to the celebration of marriage, *lex loci celebrationis*

Lex loci damni – the law of the place where the harm is suffered

Lex loci delicti commissi – the common law concept of law of the place where the tort was committed which can either be the place where the events occurred or where the harm was suffered

Lex loci solutionis – the law of the place of performance (of a contract)

Lex situs – the law of the place where the property is situated

[14] Though see *Attorney General for New Zealand v Ortiz* [1984] AC 1, HL, where certain statutes of New Zealand which were in the same terms as English statutes were interpreted by resort to English case law.

[15] For an example of the difficult overlaps in some systems between federal and state law and the problems they cause for conflict of laws see *Adams v Cape Industries plc* [1990] Ch. 433.

[16] However, it is obvious that for the purpose of determining a person's nationality, which is rarely necessary in the conflict of laws, it is the United States, Canada or Australia which must be referred to.

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Characteristics of the English conflict of laws

1. Late development

Compared with other branches of English law, a systematic body of rules on the conflict of laws only came into being at a comparatively late stage. The earliest cases appear to have concerned the enforcement of foreign judgments.[1] An eighteenth-century case, which is still of binding authority, concerned the validity of a foreign marriage.[2] Lord Mansfield who was pre-eminent in the development of the body of commercial law in the latter half of the eighteenth century, gave judgments concerning foreign contracts,[3] torts,[4] and the duty to give effect to, and sometimes deny effect to, foreign laws.[5]

It can be said with some confidence that the subject began to burgeon in the latter part of the nineteenth century, which at the same time saw the development (after 1857) of family law and the coming into existence of a coherent body of commercial law, since that period witnessed a rapid expansion of international trade and financial transactions. In those years, the courts evolved more sophisticated rules as regards domicile, the validity of marriages and recognition of foreign legitimations, formulated a doctrine of the proper law of a contract, laid down the rules concerning liability for torts committed abroad and adopted clear rules on the recognition and enforcement of foreign judgments. In order to formulate these principles the English courts had to rely more on the writings of jurists than was usual with them; Huber and the American, Story J, are notable examples. These were indeed foreign jurists, as A. V. Dicey did not publish his *Conflict of Laws* until 1896, the first English writer to set down the rules in a systematic fashion and to formulate a theoretical basis for them, extracting a coherent set of principles.

Because of this feature, it is sometimes dangerous to rely on older authorities.[6] Moreover, even decisions of those years or of the early years of the

[1] *Wier's* Case (1607) 1 Rolle Ab. 530 K 12.
[2] *Scrimshire v Scrimshire* (1752) 2 Mag. Con. 395, 161 English Rep. 782.
[3] *Robinson v Bland* (1760) 2 Burr. 1077.
[4] *Mostyn v Fabrigas* (1774) 1 Cowp. 161.
[5] *Holman v Johnson* (1775) 1 Cowp. 341.
[6] For example, *Male v Roberts* (1800) 3 Esp. 163.

twentieth century are unreliable or, to our modern eyes, confused. Some questions remain unanswered: for example, what law governs capacity to conclude a commercial contract?[7] Or, does capacity to make a will of movable property depend on the law of the testator's domicile at the time he makes a will or at the time of his death? English cases on the choice of law rules regarding restitution and constructive trusts are sparse and unclear. Other topics are also subject to considerable doubt. Partly this is due to the nature of the subject. Because of the international element in private international law, cases rarely arise on very similar facts and are therefore easily distinguishable and firm precedents are difficult to find. Any student of the subject will need to bear principles in mind to help guide them to acceptable answers in many areas.

It is also worth mentioning that over the last thirty years the emphasis of the subject has changed considerably. Before that time, choice of law questions predominated over the procedural areas of jurisdiction and provisional measures.[8] Matters of jurisdiction, in particular, have become of enormous practical importance and the number of cases has increased greatly. Considerations of the possible enforcement of foreign judgments are also critical to the practice of international commercial litigation as seen in the commercial court in London.[9] There has been a revolution in the traditional rules allocating jurisdiction to the English court and also an influx of EU legislation on jurisdiction. Both these movements have led to uncertainties in the rules which engendered more litigation. It is likely that this period of tremendous change is coming to an end, and questions of choice of law will become more prominent again. However, the rules on choice of law have undergone their own revolution, one imposed by the EU. There are relatively new Regulations providing choice of law rules for contractual and non-contractual obligations.[10] It will be some considerable time before all the uncertainties arising from this new legislation have been determined by the courts, especially by the Court of Justice of the European Union (CJEU).

[7] Rome I Regulation (Regulation (EC) 593/2008 [2008] OJ L177/6) on the law applicable to contractual obligations does not apply to capacity (Art. 1(2)(a) without prejudice to Art. 13), see further pp. 320–1 below.

[8] Such as freezing injunctions (also known as *Mareva* injunctions named after the case of *Mareva Compania Naviera SA v International Bulk Carriers SA (The Mareva)* [1975] 2 Lloyd's LR 509); and restraining orders (also known as anti-suit injunctions).

[9] Over 1,300 disputes were commenced in the Commercial Court in 2006. The combined monies in dispute were estimated at £20 billion. A significant percentage of disputes (estimated at over 80 per cent) involved one foreign party. Some 40 per cent involved no English party.

[10] Rome I Regulation and Rome II Regulation (Regulation (EC) 864/2007 on the law applicable to non-contractual obligations [2007] OJ L199/40).

2. Legislation: the increasing role of the EU

Until the latter part of the twentieth century, the English conflict of laws was characterised by a lack of legislative interference; most of the rules were judge-made. A few statutes existed, for example those on the recognition of foreign judgments,[11] but they did not contain any choice of law rules; this was also true of the divorce jurisdiction rules. There were remarkably few Acts which dealt specifically with choice of law rules.[12]

However, this halcyon period[13] is now over. Legislation, national, international and European, has increasingly affected the conflict of laws during the last fifty years. It can safely be said that the common law is supreme in very few areas. National legislation has increasingly taken account of conflict of laws issues.[14] Conventions on specific areas have been incorporated into English law.[15] In particular, the growth in European regulation of conflict of laws is remarkable. This started with the 1968 Brussels Convention[16] by which the six original contracting Member States to the European Economic Community recognised that Article 220 of the original Treaty would need implementation by a Convention determining the jurisdiction of courts and facilitating the reciprocal recognition and enforcement of their judgments. That Convention has been replaced with the Brussels I Regulation.[17] Further Regulations now deal extensively with matters of jurisdiction, recognition and enforcement of judgments in other areas such as insolvency and maintenance.[18] Other Regulations provide for procedural mechanisms such as the

[11] Such as the Administration of Justice Act 1920 or the Foreign Judgments (Reciprocal Enforcement) Act 1933.

[12] Examples include the Bills of Exchange Act 1882, s. 72 and the Legitimacy Act 1926, now repealed.

[13] The first edition of *Cheshire and North* referred to conflict of laws being 'relatively free of the paralysing hand of the parliamentary draftsman'.

[14] Recent examples include Companies Act 2006, Gambling Act 2005, Civil Partnership Act 2004, Adoption and Children Act 2002, Employment Rights Act 1996.

[15] For example, the Convention on the Law Applicable to Trusts and their Recognition enacted by the Recognition of Trusts Act 1987.

[16] The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters was enacted by the Civil Jurisdiction and Judgments Act 1982.

[17] Regulation (EC) 44/2001 on jurisdiction and the enforcement of judgments in civil and commercial matters [2001] OJ L12/1. Originally promulgated under Title IV of the EC Treaty requiring judicial cooperation in maintaining an area of freedom, security and justice for the sound operation of the internal market.

[18] Such as Council Regulation (EC) 1346/2000 on insolvency proceedings [2000] OJ L338/1 (amended [2003] OJ L236/33 and [2005] OJ L100/1); Council Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility [2003] OJ L338/1 (amended [2004] OJ L367/1); Regulation (EC) 805/2004 establishing a European Enforcement Order for uncontested claims [2004] OJ L143/15 (amended [2005] OJ L97/64, [2005] OJ L168/50); Regulation (EC) 1896/2006 establishing a European Payment Order [2006] OJ L399/1; Regulation (EC) 861/2007 establishing a European Small Claims Procedure [2007] OJ L199/1.

taking of evidence[19] or service of documents[20] within the EU. In addition, EU Regulations cover choice of law rules in contract,[21] tort,[22] maintenance and parental responsibility,[23] and in succession.[24] All aspects of private international law may be said to be subject to the harmonisation measures adopted under what was Title IV of the EC Treaty. Article 65 EC Treaty expressly permitted measures promoting the compatibility of rules of the Member States concerning conflict of laws and jurisdiction. Although there was a requirement in Article 65 for the measures to be necessary for the proper functioning of the internal market, that has not been carefully tested. It appears to be self-evident that measures to harmonise conflict of laws rules are necessary for the proper functioning of the internal market. Article 81 of the Treaty on the Functioning of the EU (ex Article 65 TEC Treaty) has further watered down this requirement.[25] However, harmonisation of conflict of laws rules within the EU could fall within the general objective of establishing an area of freedom, security and justice in which the free movement of persons is ensured.[26] These provisions are therefore justifiable within the EU.

Apart from family matters, the European Parliament and the Council act jointly under the co-decision procedure to legislate in this area.[27] By Protocol 21 of the Treaty on the Functioning of the European Union (as amended)[28] the United Kingdom is entitled to elect to participate or not in these measures, and so far it has opted in to all Regulations in this area. The EU has exclusive competence over the conclusion of external treaties in relation to rules resolving conflicts of jurisdiction,[29] on the law applicable to contractual and non-contractual obligations and some aspects of family law. It has taken over

[19] Regulation (EC) 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] OJ L174/1.
[20] Regulation (EC) 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) 1348/2000 [2007] OJ L324/79.
[21] Rome I Regulation (Regulation (EC) 598/2008 on the law applicable to contractual obligations [2008] OJ L177/6).
[22] Rome II Regulation (Regulation (EC) 864/2007 on the law applicable to non-contractual obligations [2007] OJ L199/40).
[23] Regulation (EC) 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1.
[24] Regulation (EU) 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107.
[25] Article 81 of the Treaty on the Functioning of the European Union refers to such measures 'particularly when necessary' to the functioning of the internal market; this is less powerful than the phrase in the former Art. 65 EC Treaty which is 'in so far as necessary'.
[26] Article 3 of the Treaty on European Union as amended by Lisbon Treaty (ex Article 2 TEU).
[27] Article 81(2) of the Treaty on the Functioning of the European Union.
[28] Ex Art. 69 EC Treaty.
[29] Opinion 1/03 on the competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, known as the Lugano Opinion [2006] ECR I-01145.

negotiations with, for example, the Hague Conference on Private International Law which is a global inter-governmental body developing multilateral instruments on private international law.[30] However, the Commission has indicated that it will permit Member States to enter into separate agreements with third countries subject to its prior approval.[31] Even the traditional common law rules concerning the jurisdiction of the English courts over disputes where there is no connection with the EU could have been subsumed into European rules. Lord Goff's carefully crafted towering achievement in the doctrine of *forum conveniens*[32] would then have tottered into obscurity. Fortunately, it appears from the latest proposal that this tragedy has been averted.[33]

[30] As a result see Council Decision (EC) of 26 February 2009 on the signing on behalf of the European Community of the Convention on Choice of Court Agreements (2009/397/EC) [2009] OJ L133/1.
[31] Council of Europe press release 10697/09, 5 June 2009.
[32] See further Chapter 6.
[33] Document for discussion by the Council of the European Union on 7 June 2012, 10609/12 ADD 1.