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A. W. SIJTHOFF - LEYDEN - 1976

ISBN 90 286 0026 4

Printed in The Netherlands

to Mira, Alex and Ethan

PREFACE

The present study is not a textbook or a specialized monograph on any one branch of the field with which it deals; nor is it a collection of separately written articles. It is rather a sustained argument or thesis undertaken essentially to advance a way of looking at certain problems.

While I am heavily indebted to scholars and judges of many countries and periods, my intention was to develop an argument, not to "cover the literature". References are therefore generally confined to materials directly borrowed from or commented upon, as also to cases from which facts have been taken or adapted for purposes of illustration.

There is, however, one work which calls for special mention. In the following pages I refer to Ph. Francescakis, *La Théorie du Renvoi* (1958) more than once, but not perhaps sufficiently to do justice to its direct bearing on the subject matter of the present study. As is indicated by the sub-title of Francescakis' book ("*et les conflits de systèmes en droit international privé*"), his is the work of a scholar fully alive to conflicts of entire systems. I was fascinated by the book shortly after it had appeared and it greatly enhanced my interest in "compound" conflicts.

While, in the illustrations, Anglo-American cases (at times, in modified form) predominate, and situations are occasionally regarded as if from the standpoint of litigation in England, the problems discussed are not peculiar to the law of any one country or even to any one legal family. Such expressions as "we", "our law", "our court" stand for *any* country, law or court that is not, in the context, "foreign". Foreign countries are sometimes designated by the

convenient, if imaginary, names of "Ruritania", "Eldorado", "Atlantida" and "Liechtenbourg".

This work was done for the most part during my residence in Wassenaar, as a Fellow of the Netherlands Institute for Advanced Study in the Humanities and Social Sciences (NIAS), in 1974-75. I have been thinking about these matters for a number of years, and have benefited from exchanges with colleagues and students in Jerusalem and in New Haven; but the actual work could not have been carried out without the generosity of NIAS, its congenial atmosphere and the many facilities provided by its dedicated, efficient and friendly staff led by Professor H. A. J. F. Misset and Mrs. J. E. Glastra van Loon. I am particularly grateful to Mrs. Anne Simpson and to Miss Kim Diederix for preparing a final typescript out of a difficult manuscript; and to Miss Mariana van West de Veer for her help at an earlier stage.

No less great than my debt to NIAS in its organizational or corporate aspect is my debt to my fellow Fellows. Though the overwhelming majority of them were not lawyers, I found to my delighted surprise that they were more than willing to engage in discussion of rather abstruse juridical questions, to which they contributed many insights drawn from many separate fields. It was, in general, difficult not to thrive on so much intellectual stimulation, not to learn from so many gifted teachers.

Last, but foremost, I should like to express my thanks to Professor J. G. Sauveplanne of Utrecht. I was fortunate to have at NIAS the company of this distinguished private international and comparative lawyer. He was ever prepared to set aside his own immediate concerns and to listen with patience – with constructive, critical patience – to various of the ideas and formulations which may be found in the following pages.

Wassenaar, August 1975. A. V. L.

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Chapter 1

INTRODUCTION: CHOICE OF LAW AND CONFLICT OF LAWS

There is a passage in Story's *Commentaries on the Conflict of Laws* [1] which can serve as a point of departure for this study. The author is dealing with the question whether foreign law is applied by comity or "because justice requires it"; he is also concerned to show that the name "conflict of laws" is not really very appropriate. He posits a case of which an American court "decides that it is governed by the French law", as where the "transaction ... took place in France", and he assumes that "the transaction is of a kind concerning which the French law and that of the American court are different." A little farther down comes the passage:[2]

> "In such a case as this, it is evident that there is no *conflict* of laws. There is a difference between the French law and the American law, and there is a question which of them applies to the case, but the question itself assumes that only one does apply, and there can be no conflict between a law that applies to a case and another that does not. The *question* which of the two laws is applicable cannot properly be called a conflict of the laws."

The passage, I believe, enshrines an important partial truth. But how far does it go? It appears that the writer, who had in mind cases "concerning which the French law and that of the American court are different", was thinking only of the need to choose between one

1. 8th ed., by Bigelow (1883) 38. (This is a part of an editorial note which appears to have been written by J. L. Thorndike.) For a denial of the existence of a "conflict" or "collision" see also Frederic Harrison, *On Jurisprudence and the Conflict of Laws* (1919) 128-30

2. The italics are in the text.

substantive regulation (the American) and another substantive regulation (the French). There is, indeed, no "conflict" so far (except, perhaps, in the mind of the judge, before he has decided – but such "conflict", or rather doubt, exists before *any* decision) and all that is required of the court is to decide which of the two laws to apply. It is implicit in the passage that, once this decision is made, there will be no need for any *further* choosing.

The author of the passage is addressing himself to the questions whether to refer to foreign law and, if so, to what foreign law or laws. These questions should better not be called "questions of conflict of laws", but "questions of choice of law", and the rules employed in effecting the appropriate choice should be called "rules for choice of law" (or "choice rules").

There are, however, questions (not reflected in the above-quoted passage) that arise from the existence of dissimilar rules which countries may have *for choice of law*. Were the American court to decide to apply "the French law", it could happen that that law would "refuse" to apply, would refer to some other law. Would it then still be true to say that there is "no conflict between a law that applies to a case and another that does not"? The "law that applies" to the case is presumably the law of France; the law "that does not" (according to the passage) is American law – and between these two there *is* a conflict: the "law that applies" looks beyond itself, indicates some law other than the French, does not indeed "apply"; and the law "that does not" finds itself facing the question what to do; that law is also seen not to have spent itself after choosing the "law that applies"; indeed, it is seen to go on "applying" in order to resolve the conflict between itself and the other "law that applies". Thus *two* laws "apply" – though each one of them also "does not" – and the two laws are in conflict. Questions are raised of a different order from those envisaged in the passage. *These* are the questions that should be called "questions of conflict of laws", and the rules employed in resolving such conflicts "rules of conflict of laws" (or "conflict rules").

Choice rules are, then, rules of choice of law "in the first degree", the "simple" rules of choice of law, the rules that first tell us whether to look beyond our law; and, if so, where to look. In this study I shall not be concerned with choice rules as such, but only when reference to them may be necessary in considering conflict rules. Conflict rules are

rules of choice of law "in the second degree", the "compound" rules of choice of law necessitated by the occasional co-existence of conflicting national rules for choice of law.

Conflict situations carry about them a disturbing aura of insolubility: unlike choice problems, they seem to evade the grasp of any one national law. Our choice rules have already been invoked; they have said their say – yet they have not produced a solution. It is with these conflicts problems that I shall be dealing in this study.[3]

Perhaps the best known of the conflicts problems is that of renvoi in its narrowest sense: In consulting a law other than our own, do we regard only its "substantive" (or "internal") provisions? Or should we also respect the rules that it has for choice of law? Each of these courses raises difficulties of its own.

Another difficulty is represented by the so-called "preliminary" or "incidental" question: When a matter which is subsidiary or incidental to another (principal) matter is in issue, and we have a distinct rule of choice of law for the matter which is thus incidental, should we abandon this rule of ours when we encounter a dissimilar rule of choice for the incidental matter in the foreign law to which we refer the principal issue in the case? Or should we adhere to our own rule of choice for the incidental matter?

A third problem passes generally under the label of classification, characterization or qualification. It arises from the co-existence of dissimilar ways in which two or more systems of law may regard the same issue or claim – as when our law classifies the claim as raising a question of succession while a foreign law, on which the claim relies, considers it to be one of matrimonial property. Should a court then regard the claim in the light of its own law, or in the light of the law on which the claim is based?

These puzzling problems have been haunting us for many years. They eluded, or have outlived, the various doctrinal approaches in the

3. Two situations have been described: (a) we refer to a foreign law, which is unlike ours, but which raises no "objection" to our reference; (b) we refer to a foreign law, but the foreign law "objects". There is, however, also a third situation: (c) the foreign law "objects" (has a dissimilar rule for choice of law), yet there is no conflict *in the mind of any one of the laws* that are "objectively" in conflict, since none of them looks outside itself. For this see p. 38; n. 234, below.

field. Older approaches, such as the statutist in its various forms, or, later, Savigny's emphasis on starting from the legal relationship itself (and its "seat"), rather than from the law applicable thereto, were not in the main attuned to the possibility that the foreign applicable law will not only have its own particular statutum but will also have, for that kind of relationship, its dissimilar rule for choice of law or its own discordant view on where the "seat" thereof is.[4]

For centuries there prevailed the supposition that deviations from common (in effect, Roman) law are only permissible within limits authorized, however tacitly, by the Emperor; in other words that the rules on application of particular local laws or statuta are, at least in theory, Imperial or *unified.* Indeed, the aim of the Hague Conference on Private International Law, "to work for the progressive unification of the rules of private international law",[5] is no other than to *recapture* a golden past. As a school, and on the whole,[6] the statutists were, therefore, no more alive to renvoi or to classification than Savigny was later to be. Their concern was with the legitimate territorial and personal extension of "laws",[7] not with conflicts that arise between and among autarchical, independent, "systems of law". When the statutists asked themselves whether a statute was "real", "personal" or "mixed", they did, of course, engage in classification. Yet, as their underlying supposition was that there is (or should be) *an* answer to every question of classification, they were not conditioned to an awareness of the problem of *conflicting* classifications. In fact, on the materials before them, as read by them, this problem could hardly arise.

In more recent times we find Savigny dealing with the question whether an indigent spouse's claim to an extraordinary share in the deceased spouse's estate is a claim of succession or one of matrimo-

4. See Bate, *Notes on the Doctrine of Renvoi in Private International Law* (1904) 3, and De Nova, in 118 Rec. des Cours (1966 II) 443, 485.

5. Statute of the Conference (1951, in force 1955), Art. 1.

6. The problem was not unknown to Boullenois or to Froland. See Ehrenzweig, *Private International Law* (1967), Vol. I, 141, n.2; Francescakis, *La Théorie du Renvoi* (1958) 3, n. 1. In a case before the "parliament" of Rouen in 1652 it was actually argued that "l'usage [of Mayne] *renvoyoit* le partage en question à la coûtume de Normandie".Froland commented on this case. See Meijers' *Collected Papers* (in Dutch) Vol. II, 371-73 (for which reference I am indebted to Prof. J. G. Sauveplanne).

7. Cf. Yntema, in 2 Am. J. Comp. L. (1953) 297, 303.

nial property.[8] The question that he discusses is what is (or, rather, what should ideally be) the jurisprudential nature of such a claim, particularly in the light of Roman law. He thus addresses himself to a forum which has not yet, as it were, made up its mind, which is not yet bound by national legislation or precedent, on whether to apply to such claims its rule of choice for succession or the one for matrimonial property, and he offers such (hypothetical) forum his learned advice. It would be light-headed to question the weight of this advice in considering what the nature of such a claim is[9] in the light of analytical jurisprudence and comparative law. But it would be an anachronistic lapse, and unavailing, to search Savigny's mind for an answer to a question with which he does not appear to have been dealing, viz. what is one to do when faced with a confrontation between one system of law which has already made up its mind to regard such a claim as one of succession and another system which has already made up *its* mind to regard the same claim as one of matrimonial property? What is one to do with courts hardened in their divergent views and no longer open to argument on how such a claim *should* be regarded?

The problem of conflicting classifications came up for conscious appraisal a good forty years later than Savigny's work on conflicts; and the chronology is not accidental. Romanist universalism had to be abandoned, and the espousal of divergent national legislations had to become open, before the lawyer could find himself both forced and prepared to acknowledge the fact, and the legitimacy of the fact, that a problem of choice of law does not necessarily have *a* solution.

The newer doctrines of comity and of vested rights; the several shades of the local law theory and the renewed emphasis on the role of the lex fori; the advocacy of "interest analysis" and of the comparative weighing of "significances" – all are either uninterested in, or inconclusive upon, these puzzles. Indeed, they tend to regard them as passé,[10] or as so many erudite nuisances, the "miscreant" inventions

8. See pp. 142-143 and n. 390, below.

9. In terms of the well-known thesis advanced by W.E. Beckett in "The Question of Classification ("Qualification") in Pr. Int'l L.", 15 BYIL (1934) 46.

10. While the fatigue and frustration engendered by the immense accumulation of inconclusive (and in no small measure repetitive) literature is understandable, Lepaulle does well to remind us that "ce n'est pas le problème qui est épuisé, ce sont les auteurs."

"of a conceptualism gone rampant".[11]

The puzzling problems that arise from conflicts of rules for choice of law are embedded in the very fabric of the decentralized rules of choice that we now have. Yet the conscious study of the problems is not, because it could not have been, very old. Throughout most of its history of some eight hundred years the methodical study of conflicts of laws was, as we have seen, substantially confined to questions of choice in the first degree. Nevertheless, what could have been a narrowly circumscribed preoccupation achieved a high measure of intellectual respectability, and had a "cosmopolitan" flavour, because the rules of choice of law discussed for one national forum, or for one's national forum, were supposed to be equally accepted by – or, at least, acceptable to – other fora as would-be principles of an assumed universal "science of law". Rules of choice of law were thus treated as in fact "international", and as national only in a technical or constitutional sense.

Much of the ongoing discussion in this field continues to be projected in terms of the old "conflict" of laws. There appears to be more talk of a "revolution" in conflicts *thinking* (of a vaunted escape from rigidity and conceptualism – as though the business of conflicts lawyers was to substitute their judgment of what is right and desirable for that of all others, rather than to help solve the more pedestrian but very vexing question *whose* word should be heard on these questions) than response to the very real revolution brought about by changed *circumstances*. Renvoi, conflicting classifications, the preliminary question, must now be accepted for what they are: real problems, arising out of actual circumstances. Just as the problem of environmental pollution is not an "invention" of ecologists, pollution being a "miscreant" not of some "conceptualism gone rampant" but of technology and population gone rampant, so the relatively new difficulties of conflicts between dissimilar rules for choice of law are quite real. They owe their parentage not to scholarly refinement but to the emergence of separate systems of law ("national" and other) each

(Quoted by De Nova, in 118 Rec. des Cours (1966 II) 485, n.2). And see Sohn, in 55 Hrvd. L. Rev. (1942) 978, 982 on the "fatalistic attitude" with which the "permanent war between the conflict of laws rules of all states seems to be generally accepted."

11. Ehrenzweig, *A Treatise on the Conflict of Laws* (1962) 340.

with its own separate views on, among many other matters, the subject of choice of law.

So natural has it become for each legal system to strike out for itself in forming its own rules for choice of law, so acceptable to deny the existence of a "jurisprudential" solution to the problems that arise from the co-existence of dissimilar laws, that even in a federation such as the United States each State has, subject to the federal Constitution, its own "law of conflict of laws".

Renvoi does not appear to have presented itself for systematic consideration before the eighteenth century, if then; [12] although after the forties of the last century [13] it became increasingly reflected in the case law, especially in matters of wills and succession. (The word "renvoi" does not seem to have been used in an English case before 1903.) [14] The problem of classification or qualification came into vogue following publication in 1891 of the decision in the celebrated Maltese Marriage Case [15] (of which more hereafter) and of the theoretical studies of Kahn in Germany [16] and of Bartin [17] in France, which followed. In a sense [18] the problem has, of course, been implicit from the beginning in numerous cases which turned on procedural provisions or on the nature of statutes of limitation or of interests in land. (Curiously, the problem of classification does not appear to have been mentioned distinctly in any English reported case before

12. But see note 6, above.

13. Beginning with *Collier* v. *Rivaz* (1841) 2 Curt. 855; 163 E.R. 608 – which preceded the *Forgo* case (1883) 10 Clunet 64 by some forty years. Before *Collier* v. *Rivaz*, insistence on the international competence of the courts of the domicile meant that proceedings in England would be suspended to enable a determination to be made by the courts of the domicile: *Hare* v. *Nasmyth* (1815) 2 Add. 25; *De Bonneval* v. *De Bonneval* (1838) 1 Curt. 857.

14. *Re Johnson* [1903] 1 Ch. 821, 831. Cf. *Re Ross* [1930] 1 Ch. 377, 399.

15. *Anton* v. *Bartolo* [1891] Clunet 1171.

16. "Gesetzkollisionen: Ein Beitrag zur Lehre des Internationalen Privatrechts" (1891) 30 Jhering's Jahrbücher 1.

17. "De l'impossibilité d'arriver à la suppression définitive des conflits de lois" [1897] Clunet 225.

18. I.e. in the first degree, in interpreting (applying) a rule for choice of law – not in determining what to do after this classification has been performed and it was then seen that there was a conflicting classification in another applicable law. See Chap. 5 a, below.

1947.) [19] Study of the preliminary question, as a separate problem, is even more recent.[20]

Co-ordinated legislation and international statesmanship may, or may not, bring about a reunification of the dissimilar national rules on choice of law. The jurist, however, cannot legislate unification; he cannot command countries to subscribe to the same public policies, or even to the same "technical" rules for choice of law. He can at most point to the undesirability of existing conditions, to the desirability of substituting for them others—and, perhaps, to possible ways of bringing this about. In the meantime the jurist must concentrate his main endeavours in areas which are peculiarly his, not the legislator's or the diplomatist's: he should strive to understand the new, exceedingly decentralized, condition of mankind in matters of private law and seek to penetrate some of the resulting manifestations of legal relativism. For my part, I note as a fact that separate countries subscribe to dissimilar ideas on choice of law, and hence that *conflicts* of laws do occur. I shall therefore try to offer a method for harnessing the "old" rules of *choice* of law in the service of resolving the "new" *conflicts* of laws.

With this end in view, I suggest that conflicts problems may be greatly clarified if not solved by means of a precise definition and insulation of every single question which arises for *immediate* consideration at any stage of dealing with a conflicts situation. For each such question separately our "old" rules of choice of law already tell us, or can be articulated to tell us, that it is answerable *either* by our own law *or* by some foreign law. The answer thus obtained will next be further processed—in answer to what will then be *another* question, at what will, notionally, be a different stage of dealing with the case.

19. *Apt* v. *Apt* [1947] P. 127, 137. However, just as people must have been speaking "prose" all along, so it is clear that questions of the nature of classification were in fact present in cases such as *Huber* v. *Steiner* (1835) 2 Bing. N.C. 202 or *Leroux* v. *Brown* (1852) 12 C.B. 801; and were virtually explicitly referred to in *In re Hoyles* [1911] 1 Ch. 179 and in *Re Berchtold* [1923] 1 Ch. 192. (Both *Re Cohn* [1945] Ch. 5 and *In the Estate of Maldonado* [1954] P. 223, though concerned with what where in effect questions of classification, appear to have managed without "classify" or "classification".)

20. Melchior, *Die Grundlagen des deutschen internationalen Privatrechts* (1932) 249 et seq.; Wengler, "Die Vorfrage im Kollisionsrecht" (1934) 8 Rabels Z. 148.

In the course of dealing with a case we pass from one question to another. These transitions are often made in a disconcertingly swift and unwitting manner. Thus, we pass from the question whether a claimed right "exists" under a foreign law to the distinct, but not always recognizably distinct, question whether our law will "recognize" the existence of that right, i.e. treat it (within limits which our law defines) as a right for purposes of our own system. The immediate "question", our irreducible unit for choice of law, may be the principal question of a case or a subsidiary one, raised by the claim itself or opened up by a defence, strictly essential or merely relevant.

So long as a foreign law is being considered in order to ascertain its position, the judge is engaged in studying an external reality, for which his own legal system bears no responsibility. His mood is one of interested but essentially passive observation. From here, with the foreign-created right or the foreign-maintained rule now placed before him, the judge will find himself motioned on to the performance of a very different function in the economy of adjudication. Having ascertained the existence of the foreign position, he will no longer be engaged in mere photography or recording. He will now have to make up his mind how to react to that position: to act, or to abstain from acting, on it. He will become engaged in *doing justice,* in acting not as a chronicler of things perceived but as a magistrate. *This* activity will engage the forum's own principles and its own responsibility in facing up to facts, specifically *to the fact, now established, of the existence of the right within the foreign law.* From here on the judge will be "doing right" or administering justice under law – *his* law. The facts, it is true, have already been "processed" by the foreign law. A *new* question, however, now arises with which the foreign law has not dealt, and to settle which it was not competent: What should *our* law now "do"? Our law may choose to reject the foreign answer or to modify it; it may hold some circumstance or value to outweigh the will of the foreign law. For us the foreign answer, however persuasive or suggestive, is an answer to a different (and an earlier) question, not to the question "What are *we* now to do?" We have passed from one question under immediate consideration to another one. And only for the first question was a foreign law prescribed by our rules of choice of law.

The importance of defining precisely the question under immediate