

PART 3 - CHOICE OF LAW METHOD

Chapter 7 – Choice of Law Method (General)

Choice of law are those rules that tell the court of a country or state under what circumstances it ought to decide a problem not under the law of its own state or country but under that of another, and if so, of which other, constitute the choice of law part of that state or country's law of conflict of laws or private international law.

Choice of law comes up after jurisdiction (considered, accepted, or rejected). Just because the forum court has jurisdiction does not mean it will apply its own law (the law of the forum); 'contacts' with another place or jurisdiction may mean the forum court will apply the law of that other place or jurisdiction. This is what conflicts is really about – there will only be a conflict of laws if the application of laws of different places leads to different outcomes.

Choice of law and internal rules

Choice of law rules: (...will...) "refer authoritatively to another body of rules of law which will answer this question" – basically a signpost; it is a jurisdiction-selecting rule.

- a. E.g. use the law from *here*, not *there*.
- b. E.g. in marriage cases, determine matters according to the law of the place of *solemnization* of marriage
- c. E.g. in tort cases, look to (apply) the law of the place where the tort *occurred*

The selected legal system will be called the *lex causae*

Internal Rules

These address the ultimate question in the case

- e.g. – Is this suit statute barred? Yes or no?
- Is the marriage valid? Yes or no? etc.
- Based on these facts, was a tort committed? Yes or no?

Key Steps

1. Identify a conflict of laws
2. Classify the subject matter
3. Classify substantive/procedural law
4. Identify the choice of law rule
5. Apply the law of the cause

* IF YOU'RE EVER LOST IN A QUESTION, THESE FIVE QUESTIONS SHOULD PULL YOU OUT OF THE MUD

1. Conflict of Laws

Two steps:

1. Which legal systems are possibly relevant to the case? List them.
2. What is the likely result in the case upon application of the internal rules of each of those possibly relevant legal systems?

If both relevant systems would decide in exactly the same way you will not have a "conflict of laws". Game over. If both systems give a different answer, you have a true conflict; in that case you reach for a "choice of law" rule to break the deadlock.

2. Classify the Subject Matter

Classifying the subject matter. Asking 'what are we dealing with here?' What is this case about? Enforceability of a contract? Ability to recover damages for a car accident? Succession to moveable property? Validity of marriage?

What is classified? The 'question/issue on which the parties join issue (according to the court, it is not necessarily the 'cause of action'. It's the thing the parties are really fighting about.

See **Macmillian v Bishopsgate**:

Restitutory claim for breach of trust brought in England. Sought recovery of shares (held in companies incorporated in the State of NY). Breach of trust occurred in England – normally means English law governs. The court said there were three categories into which this could have fallen:

1. The obligation to restore the benefit of an enrichment (unjust enrichment)
2. Priorities between competing assignments of choses of action
3. Rights as to property (movables and immovables)
4. Shares

Each judge considered the reach and scope of each of these relevant categories. Held that no, this was not a case about breach of trust, it was essentially about who had title to the shares. That is how we (the court) are going to characterise this. So, the appropriate choice of law rule is not one relating to restitution, nor is it about competing priorities over choses in action (for various reasons). Rather, it is about the property rules of moveables and immovables.

There are two main approaches, (1) analytical, and (2) functional:

Analytical approach

See **Apt v Apt 1947**:

How do we classify/characterise marriage by proxy? I.e. is it formal or essential? Held, formal. Valid because Argentina allowed it to happen and we're going to acknowledge that on the basis of formal validity. Analyze the 'role and judicial purpose of the rule' and base your classification on that. How did they do this? Court went with formal validity, because concerned with form of consent and not the existence of the consent.

In other words, the question of validity of proxy marriages was a matter of form rather than essence (substance) and was governed by the *lex loci contractus*. Characterization is about finding **first part** of any choice of law rule.

1. Find some legal category (e.g. "succession to moveables")
2. Identify the connecting factor (e.g. domicile/situs)

Characterization is done in accordance with the law of the forum (*lex fori*). However, there is an exception: Characterization of property as either moveable or immovable – use law of the place where property is situated (*lex situs*)

Functional approach

Classify subject matter in a way that will secure the most desirable result (according to the law of the forum); the focus is on the outcome – is it just or not?

See **Hodge v Club Motor Insurance**: arose out of a car accident with connections in two states. Was it tort or quasi-contract? Court held it was quasi-contract, thereby avoiding limits on tort recovery.

Which approach to use?

There is authority for both. The text says where the matter fits into a known category that it is easier to use the analytical approach. But to be safe, use both. If you end up with conflicting results, you can flip a coin, so long as your reasoning is sound.

Sub-issue here of which law we use to do the classifying

Local law or foreign law? In Australia, done in accord with the law of the forum (*Oceanic Sun Line v Fay*). English example – *Lee v Lau* – customary Chinese marriage took place in Hong Kong. Such marriages allowed secondary wives, but English court refused to allow this and said that was polygamous (illegal) despite being called monogamous in HK.

Sometimes, if you are too strict in applying local law, you end up in trouble – so courts sometimes will apply the foreign law. E.g. *Estate of Maldonado* – deceased died in Spain (domiciled there) but left moveable property in England. Died interstate and without next of kin. The English state claimed the property as bona vacantia – and so did Spain (by statute). What to do? How to characterise the claims of Spain and England? As a question of the law of succession, or as a question of the law of state seizure of property? If succession then Spain wins, if seizure England wins. Held – apply Spanish rule, succession, therefore Spain takes.

One small exception – moveable or immovable?

Make that decision in accord with the law where the property sits (lex situs) (*Haque v Haque*).

3. Classify Substantive/Procedural Law

John Pfeiffer v Rogerson is the case you need.

General principles of procedural law:

A. The right-remedy distinction

Classify the issue according to the law of the forum (*Hamilton v Merck (2006)*). History - substantive/procedural used to be akin to right/remedy. Now old law

B. Mode or conduct of proceedings

Mason CJ dissented in *McKain*. He held that “procedural” meant “the regulation of court proceedings”; this was a narrow view. That view was picked up and affirmed in *John Pfeiffer v Rogerson (2000)*. At the same time, the old right-remedy distinction was rejected.

So this is the rule:

Law of the forum governs procedure

In procedural or adjectival matters, the law of the forum applies. This covers those rules which are directed to governing or regulating the mode or conduct of court proceedings such as the filing, serving and form of process, the mode of trial and time for appealing.

C. Cross-vested jurisdiction

An EXCEPTION. If proceeding under the cross-vesting legislation then court can apply **any** rules of procedure or evidence that it considers appropriate – so long as they are rules applied in any superior court in Australia or an external territory. But courts do not go wild with this; they usually still just apply their own procedural rules

Particular areas:

Substantive:

- Statute of Frauds (*Tipperary Developments v the State of Western Australia (2009)*)
- Damages (Pfeiffer)
- Set off
- Limitation periods
- Rights of appeal (BHP v Schultz – some rights of appeal were substantive)

Procedural:

- Evidence (includes presumptions and burdens of proof, privilege) (*John Pfeiffer v Rogerson (2000)*)
- Parties to litigation in the forum?
- Priorities and rights of creditors (but the existence of the right is substantive)
- Notice before action provisions
- Rights of appeal (Pfeiffer)

4. Identify the Choice of Law Rule

5. Apply the Law of the Cause

Flavia and Rupert Example Question

Stage 1.1 – Identify the legal systems that could be relevant

List of “contacts”: 3 possibilities:

1. Australia (the forum; and the place of the marriage)

2. Ruritania (the place where both parties are domiciled and where Flavia is a citizen)

3. Hentzau (the place where Rupert holds citizenship)

Which of these is/are actually “relevant” to a case before the current case before the FCA? Answer: Australia and Ruritania. The forum (Australia), the place of marriage (Australia) and the place of domicile (Ruritania). Exclude Hentzau. (Why?). “The *forum* and the place(s) where a marriage is *solemnized* and the parties are *domiciled* are all **connections** used by **choice of law rules** in Australia to identify the law of the cause in a marriage case” [7.7]. Foreign nationality is of marginal relevance → so ignore the law of Hentzau. This stage ... Is designed to clear away any foreign systems which are “on any view, irrelevant” (Peter Nygh)

The legal systems that are at least within the range of consideration by the court in a multi-state case *are evident to anyone with a general understanding of choice of law rules*.

Stage 1.2 – Apply internal rules of possibly relevant systems

So, now we have a list of “relevant systems”. Next we look at the **internal rules** of those systems and ask: “If the case were **purely domestic** (in each system) **how would that system** (i.e. the **internal law** of that system) **require that the proceeding be determined?**” **Hypo:** Australia and Ruritania are relevant. **Australia:** All forms were respected and there is no “rule of affinity” preventing you from marrying your deceased wife’s sister - so the marriage would be valid in Australia if the case were heard here. **Ruritanian Law:** Well, over *there* (in the country of Ruritania) you have this rule about **affinity** – so the marriage would not be valid in Ruritania. But a **court** in Ruritania might not ever get that far – since Rupert and Flavia are not seeking an annulment or a divorce.)

Stage 4 - CHOICE OF LAW RULE

See chapters 13-22. Rupert and Flavia – both domiciled in Ruritania at the time marriage. Choice of law rule – determine in accordance with place of domicile. *Law of the cause* is therefore Ruritania; marriage therefore **likely invalid at law**.