The choice of law rules

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Three possible ways to regulate "transnational legal relationships"

- *Ad hoc* regulation
  - Domestic law: Title III of the Italian Law No. 184/1983 (international adoption)
  - International or EU law: 1980 Vienna Convention on Contracts for the International Sale of Goods or the draft European Civil Code
- Application of the *lex fori* (so-called "jurisdictional approach")
  - Conflict of laws is merely a question of jurisdiction: if a domestic court is competent, the *lex fori* applies as a matter of course (e.g. English courts' approach in relation to divorce proceedings)
- Choice of law rules
  - Opening up the doors to the application of foreign law

    Art. 4 of the Rome II Regulation (No. 864/2007): "the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur."

Why the choice of law rules?

Three concurring (and sometimes competing) rationales

1. Achieving justice between the parties
   - Giving effect to the parties' intention
   - Safeguarding the parties' legitimate expectations
2. Advancing the public interest
   - Protecting the public interest of a State other than the forum State
   - Promoting certain public goals by taking advantage of the differences among legal systems
3. Ensuring "decisional harmony" (Savigny)
   - Identifying the "seat" of the relationship
   - Limiting the "forum shopping"

The structure of choice of law rules

Art. 8(c) Rome III Regulation (No. 1259/2010)

[In the absence of a choice of law by the spouses] the divorce and legal separation shall be subject to the law of the State: […] (c) of which both spouses are nationals at the time the court is seized […]

- "divorce and legal separation" => **legal category**
- "nationality of both spouses at the time the court is seized" => **connecting factor**

Kinds of choice of law rules

A) Rules identifying the connecting factor which localizes the seat of the relationship

- **Art. 21 of the Rome IV Regulation (No. 650/2012)**

  Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death

- **Art. 4(1)(a) of the Rome I Regulation (No. 593/2008)**

  [Absent a choice of law by the parties], a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence

Kinds of choice of law rules

B) Rules adopting general clauses inspired to the "principle ofproximity"

- The criterion of "the closest connection":

  Art. 4(3) of the Rome I Regulation (No. 593/2008)

  Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in [the previous] paragraphs […], the law of that other country shall apply.

- The criterion of the "prevalent localization of the matrimonial life"

  Art. 29(2) of Italian Law No. 218/1995

  Personal relations of spouses having different nationalities or multiple common nationalities will be governed by the law of the State in which the matrimonial life is mainly located

The identification of the connecting factor(s) is ultimately referred to the judge who will decide on a case-by-case basis

Kinds of choice of law rules

C) Rules allowing the parties to a legal relationship to choose the law applicable to the latter

- Regardless of any connection with that relationship

  Art. 3(1) of the Rome I Regulation

  A contract shall be governed by the law chosen by the parties
- On the basis of some kind of connection with the relationship (or the dispute)

  Art. 5(1) of the Rome III Regulation

  The spouses may agree to designate the law applicable to divorce and legal separation provided that it is one of the following laws:

  (a) the law of the State where the spouses are habitually resident at the time the agreement is concluded; or

  (b) the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded;

  or (c) the law of the State of nationality of either spouse at the time the agreement is concluded;

  or (d) the law of the forum

Kinds of choice of law rules

D) “Result-oriented” rules which makes the identification of the applicable law conditional to the realization of a certain goal of material justice

- **Art. 11(2) of the Rome I Regulation**

  A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time

  => *favor validitatis*

- **Art. 35(1) of the Italian Law No. 218/1995**

  Conditions for the recognition of a natural child shall be governed either by the child's national law at the time of birth or, if this is more favourable, by the national law of the person recognizing the natural child at the time when recognition occurs

  => *favor filiationis* (best interest of the child?)

The connecting factor

Notion

A link between an event, a thing, a transaction or a person, on the one hand, and a country, on the other, which the legislator deems relevant for the purposes of the identification of applicable law

- In EU private international law, the most commonly used is the **“habitual residence”**
  - Autonomous notion to be distinguished from that of “residence” or “domicile” under national law
- Nationality
  - Rarely employed in EU private international law (see, e.g., art. 8(c) Rome III Regulation)

    <u>What if the concerned person has multiple nationality, is stateless or is a refugee?</u>

    EU private international law generally refers to national law (e.g. preambular paragraph 22 of the Rome III Regulation)

    <u>What does Italian law say on this matter?</u>
  - Art. 19 of the Italian Law No. 218/1995

    1. Where reference is made by this law to a person's national law and the person is stateless or a refugee, the law of the State shall be applied in which that person is domiciled or, in default thereof, resides.

    2. If a person has more than one nationality, the law of the State to which he is most closely connected shall be applied. Where the person has Italian nationality as well as others, the Italian nationality shall take priority.

The will of the parties in EU private international law

Each of the Rome Regulations contains a rule allowing private parties, to a greater or a lesser extent, to identify the law applicable to their legal relationship

- Art. 3(1) Rome I Regulation

  A contract shall be governed by the law chosen by the parties

- Art. 14(1) Rome II Regulation

  The parties may agree to submit non-contractual obligations to the law of their choice: (a) by an agreement entered into after the event giving rise to the damage occurred; or (b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.

- Art. 15(1) Rome III Regulation

  The spouses may agree to designate the law applicable to divorce and legal separation provided that it is one of the following laws: (a) the law of the State where the spouses are habitually resident at the time the agreement is concluded; or (b) the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded; or (c) the law of the State of nationality of either spouse at the time the agreement is concluded; or (d) the law of the forum

- Art. 22(1) Rome IV Regulation

  A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death.

The will of the parties in EU private international law

Connecting factor or legal transaction (*pactum de lege utenda*)?

Two Italian nationals take out a mortgage contract relating to a building located in Italy and containing a forfeiture clause, whereby the debtor, in case of default, will forfeit the building to the lender.

What if they choose US law as the applicable law?

Fraud on the law

- Art. 3(3) Rome I Regulation (see also Art. 14(2) of the Rome II Regulation)

  Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement

The will of the parties in EU private international law

Connecting factor or legal transaction (*pactum de lege utenda*)?

Mr. A, Japanese, and Mr. B, Italian, stipulates a distribution agreement containing a choice of law provision which indicates Italian law as the law applicable to the contract.

What if, in the context of a legal proceedings, Mr. A contests the validity of the that provision, by claiming that it was signed on the basis of an essential error?

The law regulating the validity of the *pactum de lege utenda*

- Art. 3(5) Rome I Regulation => reference to the rules applicable to the contract as a whole (see also Art. 6 of the Rome III Regulation and Art. 22(3) of the Rome IV Regulation)

Plurality of connecting factors

Choice of law rules may envisage a plurality of connecting factors

A) Alternative connecting factors

- They are in principle posed on an equal footing. Who chooses (and on what criteria)?
  - The **parties** (or to one of them) on the basis on their own convenience

    Art. 7 of the Rome II Regulation

    The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1) [namely the law of place where the damage occurred], unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.
  - The **judge** on the basis of a result-oriented analysis (e.g. Art. 11(2) of the Rome I Regulation regarding the formal validity of contracts)

B) Successive connecting factors

- There is a scale of preference among the connecting factors
- As a matter of principle…
  - The will of the parties always prevalis on the other factors
  - The “closest connection” criterion applies residually

The issue of classification

On 1 April 2015, Ms. C (Italian), widow of Mr. D (French), started legal proceedings before the *Tribunale di Napoli* in order to claim her right to receive some of the assets of the deceased husband. The spouses had been living in Italy since 2000.

What is the applicable law?

Under Italian law, the dispute is to be classified as concerning "succession"; according to French law, however, it relates to the proprietary relations between spouses.

If we apply the Italian classification, the relevant provision is Art. 46 of Italian Law No. 218/1995, whereby: "Succession shall be governed by the national law in force for the deceased whose estate is in question, at the moment of death"

Application of French law

If we apply the French classification, the relevant provision is Art. 30, which identifies, as connecting factors, the common nationality of the spouses or, failing that, the place where the matrimonial life is mainly located

Application of Italian law

The issue of classification

Conflict of laws provisions often employ legal terms of art, both to identify the legal category to which they apply (proprietary relations between spouses, succession, rights *in rem)* and the relevant connecting factors (domicile, place of performance)

By which law the process of classification is to be effected?

- On the basis of the *lex fori*
  - Simplicity and predictability, but…
  - Risk of a "distorted" application of foreign law
  - Problems with unknown foreign legal institutions
- On the basis of the *lex causae*
  - Overcoming of the drawbacks caused by the *lex fori* approach, but…
  - Circular argument (how can we know what the applicable law is until the process of classification is completed?)
  - Almost unworkable if foreign laws (potentially) applicable are more than one

The issue of classification

The approach (generally) followed by national courts

- Two-stage process
  - Classification on the basis of the *lex fori* for the purpose of the identification of applicable law
  - Once the latter has been identified (and in the case it is not that of the forum), recharacterization of the claim in the light of the applicable foreign law

  The Tribunale di Napoli *will therefore, in the first place, classify the dispute as concerning succession, thus identifying French law as the applicable law. Then it will re-classify Ms. C's claim in the light of French law. As a consequence, it will not apply French provisions governing succession, but those relating to the proprietary relations between spouses*
- Flexible application of domestic legal categories
  - E.g. Arts. 29-30 Law. No. 218/1995 (personal and proprietary relations between spouses) could be applied to same-sex and polygamous marriages, <u>provided that such an application does not contrast with the public policy of the forum State</u>
- Classification *ex lege causae* in a (very) limited number of cases
  - The connecting factor of nationality
  - The movable or immovable nature of property

The issue of classification

The “symplifying” role played by EU private international law

- Autonomous (and hence uniform) interpretation of EU choice-of-law rules
- Specific regulation of controversial issues
  - Art. 23 of the Rome IV Regulation (entered into force on 17 August 2015)

  1. The law determined pursuant to Article 21 or Article 22 shall govern the succession as a whole
  2. That law shall govern in particular: […] b) […] the determination of other

  succession rights, including the succession rights of the surviving spouse or partner

As a matter of principle, therefore, Ms. C’s claim would be governed, pursuant to Art. 21(1) of the Rome IV Regulation by “the law of the State in which the deceased had his habitual residence at the time of death”

Incidental questions

Mr. F, who is an English national, dies in Italy where he habitually resided. In the context of a controversy before Italian courts among his (putative) heirs, the question arises as to the *status filiationis* of Ms. H, who is Indian (as her mother).

In Mr. F’s will it is stipulated that English law will govern his succession as a whole.

What is the proper law to be applied to the incidental questions?

Incidental questions

<u>An issue not expressly regulated by choice of law rules</u>

Three alternatives

- The same law applicable to the main question

  => English law (Art. 22 of the Rome IV Regulation)
- The *lex fori*

  => Italian law
- The proper law under the conflict rules of the forum State

  => Indian law or, if it is more favorable, English law (Art. 33(1) of the Law No. 218/1995)

The latter solution is to be preferred. Otherwise, the filiation issue would be differently regulated depending on whether it arises as a main or incidental question