The application of foreign law

Summary

- The scope of foreign law to be applied. In particular, the issue of *renvoi*
- Procedural treatment of foreign law
- Limits to the application of foreign law

Mr. Smith (Canadian) dies intestate in Mexico where he habitually resided. A dispute arises before an Italian court (competent under Art. 10(2) Rome IV Regulation) regarding Mr. Smith's immovable assets in Italy.

Under Art. 21(1) Rome IV the applicable law of the place of habitual residence at the time of death, namely Mexico.

However, Mexican conflict of law rules establish

- that, in cases concerning immovable property, the applicable law is the *lex rei sitae* (hence, Italian law: "remission" or *renvoi stricto sensu*)
- but that, if the PIL of the *lex rei sitae* identifies Mexican law as the applicable law (as in the present case), the latter will apply

What law should be applied by Italian courts?

What do we mean for “foreign law to be applied”?

- The law of the country identified by the connecting factor *minus its conflict rules* (rejection of *renvoi*)

  => Mexican law

- The law of the country identified by the connecting factor *including its conflict rules*
  - …*with the exception of those regulating the* renvoi (partial or single *renvoi*)

    => Italian law
  - …*with no exception* (total, double or English *renvoi*, a.k.a. “foreign court doctrine”)

    => (again) Mexican law

Why the issue of *renvoi* arises?

Two hypotheses

- The *lex fori* and the *lex causae* use different connecting factors for the same category (e.g. domicile vs. *locus rei sitae*)
- The *lex fori* and the *lex causae* use the same connecting factor (e.g. residence), but mean different things by it

Let's get things more complicated!

What if Mexican conflict norm identified ***nationality*** *as the connecting factor (which would lead to apply Canadian law: "transmission"* or *renvoi lato sensu)?*

Would it be relevant if Canadian conflict rules identified the lex rei sitae (namely Italian law) *as the applicable law?*

Arguments in favour of *renvoi*

- Avoiding the application of a “law of nowhere”, namely a law that does not “want” to be applied to the case at hand
- Ensuring the “decisional harmony”
- Limiting the practice of “forum shopping”

Arguments against *renvoi*

- Disregard of forum State's conflicts norms (and of the policy considerations underlying them)
- Risk of *renvoi ad infinitum*
- Identification of the applicable law more complicated

Renvoi in EU law

- Relevance of the issue limited to the cases when the applicable law is that of a non-EU State

- Exclusion of *renvoi* in Rome I (art. 20), Rome II (art. 24), and Rome III (art. 11)

Renvoi in EU law

- …but Art. 34 Rome IV

  The application of the law of any third State specified by this Regulation shall mean the application of the rules of law in force in that State, including its rules of private international law in so far as those rules make a *renvoi*:

(a) to the law of a Member State; or

(b) to the law of another third State which would apply its own law [so-called "acceptance of the *renvoi*"]

NOTE: In case of choice of law by the deceased the *renvoi* will not apply (art. 34(3))

In the context of an online defamation case before an English court, it is established that the applicable law is that of Uganda, which is the place where the damage occurred (art. 4 Rome II).

In the course of the proceedings, however, the plaintiff fails to demonstrate the precise content of Ugandan tort law.

What the court is expected to do?

Procedural treatment of foreign law

Is foreign law to be treated as "law" or as a "fact"?

With what consequences?

- Foreign law as "law"

  => *jura novit curia* (the judge is expected to have knowledge of the content of foreign law)

- Foreign law as "fact"

  => the party who invokes foreign law has to demonstrate its content (the judge cannot take judicial notice of it)

Issue not regulated by EU private international law

=> Reference to national law

The Italian system (art. 14 Law No. 218/1995)

1. **The judge shall ascertain the applicable foreign law *ex officio*.** To that effect, he may use, in addition to the **instruments referred to in international conventions**, **information obtained through the Ministry of Justice**, or **from experts or specialized institutions**.
2. Should the judge be unable to ascertain the foreign law to which reference is made, **even with the co-operation of the parties**, he shall apply the law that can be determined on the basis of other connecting factors as possibly provided for with respect to the same matter. In the absence of other connecting factors, Italian law applies.

A *sui generis* version of the principle *jura novit curia*

The English system

- Foreign laws are regarded as mere facts of which judges have no judicial knowledge
- They have to be proven by the party alleging they are applicable
- In the absence of such proof, the court will apply English law
- …but Section 4(2) of the 1972 Civil Evidence Act provides that precedents by English courts, in which foreign law is construed, may be admissible as evidence, by creating a rebuttable presumption as to its content

“A question of fact of a peculiar kind”

Prakasho v. Singh **[Cairns J, 1968]**

How foreign law can be “proved”?

- Examination of expert witnesses or *affidavits*

  Who may be considered as an expert?

  – Academics (civil law tradition)
  – Practitioners (common law tradition)
- International (and EU) cooperation
  – The European Convention on Information on Foreign Law (London, 1968)
  – The European Judicial Network (Decision No 2009/568/EC)
    - The court of a Member State may apply to the Network for information on the content of the law of another Member State
    - The information provided is not binding upon the requesting court

Mr. A and Ms. B, both Iranian nationals, are married under the law of Iran where they habitually reside. In 2015, Mr. A leaves the country and moves to Milan. After a year, he lodges a request for divorce before the *Tribunale di Milano* by invoking Iranian law (which is the applicable law under Art. 8 Rome III).

According to the Iranian Civil Code, (only) the husband may unilaterally repudiate his wife at any time.

Should the Tribunale di Milano *apply this rule?*

Mr. And Ms. Rossi, Italian nationals (and habitually residing in Italy), stipulate a surrogate motherhood contract with the US-based Mama Corp., where it is agreed (art. 3 Rome I) that the applicable law is the law of New Jersey (U.S.), which is fairly permissive as to surrogate motherhood.

Since the Mama Corp. fails to perform its obligation, Mr. and Ms. Rossi sue it for breach of contract before the *Tribunale di Torino*.

Should the Tribunale di Torino *apply New Jersey's Law?*

Public policy

- The application of foreign law may be a “leap in the dark”: when the choice of law rule is adopted, there is no way to know in advance the content of the foreign laws which could be applicable

=> A safety net is needed in order to avoid that courts are compelled to apply foreign norms which are repugnant to the fundamental values of the forum State (i.e. in order to protect its “internal harmony”)

- Public policy operates both as a progressive and a conservative force (especially in family law)
  - Prevents the application of foreign laws inspired to regressive conceptions of human relations
  - Slows down the spread of new trends (e.g. same-sex unions)

Public policy

- Art. 21 Rome I (but see also Art. 26 Rome II, Art. 12 Rome III, Art. 35 Rome IV): “The application of a provision of the law of any country specified by this Regulation may be refused only if such application **is manifestly incompatible** with the public policy (*ordre public*) of the forum.”
- Art. 16(1) Italian Law No. 218/1995: “No foreign law shall be applied whose effects are incompatible with public policy.”

More restrictive approach in EU law

Public policy

- No uniform definition of “public policy of the forum” under EU private international law
- According to national case law, it includes the fundamental principles of the legal order which define the latter’s basic fisionomy at a given historical moment
- Relativity in time and space

FreeFly Corp., an Ukrainian airlines company, sues, before UK courts, Aeroflot, a Russian competitor, by arguing that the latter would have damaged two aircrafts belonging to its fleet, which were stationed in Crimea during Russia's annexation of the peninsula and were subsequently seized and transferred to the airport of Moscow.

The defendant objects that it is the legitimate owner of those aircrafts under the *lex rei sitae* (i.e. Russian law) since their property was tranferred to it by way of a Presidential Decree in September 2014.

What UK courts are supposed to do?

The increasing role of EU and International law in defining the content of public policy

- Double function
  - "Updating" and "enriching" the doctrine of public policy
  - Making its content uniform throughout the world (or the EU)
- The content of EU and (international) public policy
  - General principles of EU law
  - EU and international human rights law
  - Fundamental principles of public international law (e.g. the UN Charter principles)

Two companies - one domiciled in Austria (Alfa Corp.), the other in Italy (Beta Corp.) - stipulate a contract whereby Alfa Corp. commits itself to buying and reselling to the Armenian government a certain amount of ammunition provided by Beta Corp. They choose UK courts as competent jurisdiction and Italian law as the law applicable to the contract. A dispute arises as to the performance of Alfa's obligations.

Is it relevant that the UK is currently implementing an arms embargo on Armenia?

Overriding mandatory provisions

- Art. 9 Rome I

  1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

  2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

Overriding mandatory provisions

What is the difference with the public policy exception?

Overriding mandatory provisions contribute to determine the applicable law, by integrating the regime set forth by foreign norms.

Public policy exception corrects the conflict of law mechanism by preventing the acceptance of a certain result.

Examples of overriding mandatory provisions:

- Antitrust laws
- Protection of cultural heritage
- Embargos and other trade restrictions (e.g. for weapons, drugs)
- Provisions against bribery

Two companies - one domiciled in Austria (Alfa Corp.), the other in Italy (Beta Corp.) - stipulate a contract whereby Alfa Corp. commits itself to buying and reselling in the US a certain amount of cigars which Beta Corp. bought in Cuba. They choose UK courts as competent jurisdiction and UK law as the law applicable to the contract. A dispute arises as to the performance of Alfa's obligation.

Is it relevant that the US is currently implementing an embargo on Cuba?

Overriding mandatory provisions of a State other than the forum State

- Art. 9(3) Rome I

  Effect may be given to the overriding mandatory provisions of the **law of the country where the obligations arising out of the contract have to be or have been performed**, in so far as those overriding mandatory provisions **render the performance of the contract unlawful**. In considering whether to give effect to those provisions, **regard shall be had to their nature and purpose and to the consequences of their application or non-application**.

Restrictive approach