Conflict of Laws

J. G. Collier

Fellow of Trinity Hall and Lecturer in Law, University of Cambridge

Third edition

CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
The Edinburgh Building, Cambridge CB2 2RU, UK
40 West 20th Street, New York NY 10011-4211, USA
10 Stamford Road, Oakleigh, VIC 3166, Australia
Ruiz de Alarcón 13, 28014 Madrid, Spain
Dock House, The Waterfront, Cape Town 8001, South Africa

http://www.cambridge.org

First published 1987 © Cambridge University Press 1987
Second edition 1994 © Cambridge University Press 1994
Reprinted 1996
Third edition 2001 © Cambridge University Press 2001

Printed in the United Kingdom at the University Press, Cambridge

Set in 10/12pt Plantin [GC]

A catalogue record for this book is available from the British Library

Library of Congress Cataloguing in Publication data
Collier, John G. (John Greenwood)
Conflict of laws / J.G. Collier. – 3rd ed.
p. cm.
Includes bibliographical references and index.
ISBN 0 521 78260 0 (hb) – ISBN 0 521 78781 5 (pb.)
1. Conflict of laws – Great Britain. I. Title.

KD680.C65 2001
340.9′0941 – dc21

ISBN 0 521 78260 0 hardback
ISBN 0 521 78781 5 paperback

Contents

1 Introduction

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 the 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 an 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 upon 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 writ in England.

But if we vary the facts and suppose that in the first example at the time the wife petitions for divorce the husband is domiciled and resident in France, and that the ceremony had taken place in France and the husband argues that it did not comply with the requirements of French 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 French or English law is to determine the validity of the marriage.

Or suppose that in the second situation the seller is an Englishman in England who agrees to sell goods in England to a French buyer in France, to be delivered in France and paid for in sterling into an English bank in Paris. The question arises as to whether the seller can invoke the jurisdiction of the English court against the buyer, who is still in France, if he wishes to sue him for breach of contract or failure to pay the price. The further question may also arise as to which law, English or French, is to be applied to determine the parties' rights and obligations should the English court possess 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 court has jurisdiction. Recognition and enforcement of foreign judgments is a wholly independent matter. Choice of law does not arise in combination with it.

These are only examples. A jurisdictional question can arise in any kind of case; it usually does so because the proposed defendant is not in England when the claimant tries to serve him with the process of the English court.[1] A choice of law problem can arise in any civil action. The conflict of laws is concerned with all of the civil and commercial law. (It is not concerned with criminal, constitutional or administrative cases.)[2] It covers the law of obligations, contract and tort, and the law of property both immovable and movable, whether a question of title arises *inter vivos* or by way of succession. It is concerned also with family law, including marriage and divorce, 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 was for breach of contract or a tort (delict) or dealt with the ownership of property or concerned status, such as a decree of divorce or nullity of marriage or a custody or adoption order.

[1] This is not true in matrimonial cases, where statutory rules of jurisdiction exist; see pp. 319–20, 321 below. In some cases the English court may not have jurisdiction even though the defendant is in England, as where, for example, he is a foreign ambassador or consul. The jurisdictional immunities of foreign diplomatic and consular agents, as well as foreign states or governments, now rest on statute. They will not be dealt with in this book; reference should be made to works on public international law.

[2] But questions of, for example, validity of marriage or recognition of divorces may be involved in matters of British citizenship, immigration and social security.

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 appear to suggest. However, it was the name given to the subject by A. V. Dicey, when he published his treatise, the first coherent account by an English lawyer of its rules and principles, in 1896[3] and it has been hallowed by use ever since.

Another name is 'private international law', which is in common use in Europe. This is even more 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 organisations in their mutual relations. It is administered through the International Court of Justice, other international courts and arbitral tribunals, international organisations and foreign offices, although, as part of a state's municipal or domestic law, it is also applied by that state's courts.[4] 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.[5] 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.[6] Its sources are the same as those of any other branch of municipal law, which is to say that English private international law is derived from legislation and decisions of English courts.

[3] The latest, 13th edition, *The Conflict of Laws*, called Dicey and Morris (Morris being one of its most distinguished editors) was published by Stevens (London) in 2000. It is still the most authoritative textbook.

[4] The question whether international law is part of English law will not be pursued here.

[5] Statute of the International Court of Justice, Article 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.

[6] 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.

'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).[7] The relationship between public and private international law will be discussed more fully later.[8]

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

Geographical considerations

For the purpose of the English conflict of laws, every country in the world which is not part of England and Wales is a foreign country and its 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 and 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 1985 which extends to both England and Scotland. But if say, New Zealand or Scots law falls to be applied by an English court, it is nonetheless New Zealand or Scots law which is being applied, and not English law, even though these are identical.[9]

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

[8] Ch. 23 below.

[9] 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. This case is discussed at pp. 366–7 below.

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 in the constitutional law of that country as being separate entities having separate legal systems. 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.[10]

Glossary of terms employed

Conflicts lawyers commonly employ some Latin terms, which are a convenient and short way of saying certain things which are in common use. Some of these are:

Lex causae – the law which governs an issue. The following are examples:

Lex actus – the law governing a transaction, such as the applicable law of a contract.

Lex domicilii – the law of a person's domicile.

Lex fori – the law administered by the court hearing the case. English law is the *lex fori* for an 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 a marriage, *lex loci celebrationis*.

Lex loci delicti commissi – the law of the place where a tort is committed.

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

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

[10] 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. In the case of Canada and Australia a person would probably be regarded as domiciled there rather than in a province or state for the purpose of recognition of divorces granted there, since the divorce laws of those countries refer to divorces of persons domiciled in Canada or Australia. See p. 38 note 4 below.