

# Conflicts of Laws / Private International Law– PRELIMINARY YEAR

- I. LEX FORI – LAW OF THE LAND WHERE CASE HEARD
- II. LEX CAUSE - LAW OF THE LEGAL SYSTEM APPLICABLE TO THE CASE
- III. LEX LOCI CONTRACTUS– LAW OF THE LAND WHERE CONTRACT FORMED
- IV. LEX LOCI DELICTI – LAW OF THE LAND WHERE THE DELICT OCCURRED
- V. LEX SITUS – LAW OF THE PLACE WHERE PROPERTY SITUATE
- VI. LEX DOMICILE – LAW OF A PERSON’S DOMICILE

- a) Where parties have expressly chosen a law almost invariable that choice will be upheld. (TRUE)
- b) The issue of ‘title’ to land situate in a foreign country can be tried by a foreign forum (FALSE)
- c) The burden of proving foreign law falls on the parties.(TRUE)
- d) Domicile always means ‘actual’ residence. (FALSE)
- e) Foreign law is always treated as a question of fact. (TRUE)
- f) Where the proper law of a contract is foreign law, such foreign law will generally apply to procedural aspects of the litigation. (FALSE)
- g) Where a contract requires the performance of an act which is unlawful under the laws of the place where the contract is to be performed, such contract will not be enforced. (TRUE)
- h) The validity of a transfer of a moveable property is not the ‘lex situs’. (TRUE)
- i) The capacity to make a will with regard to moveable property is not governed by the testator’s domicile. (TRUE)
- j) Prior to identifying the applicable law, the dispute has to be characterized. (TRUE)
- k) If foreign law is the proper law it will be generally applied as it is at the date of the action (TRUE)
- l) Where the foreign court is the country of the Defendant’s residence then the English Court will not consider the foreign court as having international competence. ( FALSE)
- m) Where the contract requires the performance of an act which is unlawful under the laws of the place where the contract is to be performed, such contract will not be enforced. (TRUE)
- n) A local court has jurisdiction to try issues of ‘title’ to land situate a foreign country. (FALSE)
- o) Everyone has a domicile of Origin. (TRUE)
- p) Foreign penal laws are sometimes enforceable. (TRUE)
- q) A foreign court will not recognize an implied choice of law in a contract.( TRUE)
- r)

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- s) The common law does not permit a foreign judgment for an injunction or specific performance that will be enforced by a local court. (TRUE)
- t) “Submission” is the only basis for exercising jurisdiction in personam , over a foreign defendant.(FALSE)
- u) The allegation of fraud in the original court is not a factor that could prevent the recognition and enforcement of foreign judgments( TRUE)
- v) A divorce granted by the court of the domicile will not be recognized in most other parts of the world. (FALSE)

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“A CONTRACTUAL OBLIGATION CANNOT EXISTS IN VACCUM,’IT MUST BE DRAWN ITS EXISTENCE FROM A LEGAL SYSTEM” Discuss with reference to the common law rules applied to ascertain the proper law of the contract?

The current English law regarding this can be found in the Contracts Applicable Law Act 1990. The general principles are a contractual obligation cannot be exists in a Vaccum (absence of matter), it should come into existence from a legal system which recognizes circumstances and area of the contract, should be bound under a specific legal system, not straight forward ,the court apply the law chosen by parties.

In the case of ***R v International Trustee for the protection of Bondholders A.G*** held that the intention of the parties will be ascertained by the intention expressed in the contract, if no intention expressed in the contract intention will be presumed by the court using the terms of the contract and relevant surroundings. The parties’ intention could be gathered from the expression of the parties, terms of the contract, relevant surroundings and circumstances.

Express choice of law means where parties have expressly chosen a law it will be applied, but there are limitations for this freedom of choice. First choice should be bona fide and legal (even if chosen law has no connection to the contract that will apply if bona fide and legal), second foreign law cannot override the imperative statutes of the lex fori., third English court incorporate will not enforce a contract which will be unlawful under the law where the contract is to be performed.

Parties could incorporate particular provisions of foreign law into a contract, if foreign law is the proper law it will be applied as it is at the date of the action, If foreign law is merely incorporated then it will be applied as it was at the date entered into the contract.

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Where parties have not expressly selected a law, so court will try to ascertain the intention of the parties by implying or inferring the choice of law. English court would grant a leave a severe claim from outside the jurisdiction if the contract by its term or implication governed by English law.

In *Amin Rasheed Shipping Co v Kuwait Insurance Co Ltd* where a contract was an issue, contained no express term that says English law is applicable so English court have to see whether parties have chosen English law as the proper law of the contract. Some argued parties had in mind Kuwait law as the law governing contract because the policy issued in Kuwait,

Others argued that it's the English law is the proper law because contract is in English, payment is in Sterling Pounds, contract was made following the English form. However these factors are not enough to determine that English law should be applied.

Thus the court looked at the surrounding circumstances and terms of the contract and held that these above factors indicate that the intention of the parties was to apply English law of Maritime Insurance, at the time of the contract there were no laws in Maritime Insurance in Kuwait, the terms and policies in contract would make sense only if the English law of marine insurance apply.

According to these factors the court held that English law should apply. When there is no expressed or implied choice, when parties expressly or impliedly not have chosen a proper law, the courts have to choose a law to govern the subject matter.

Further there are 2 principles used by the courts to determine the proper law when parties have not chosen a law. First is imputed intention, there the courts have to impute an intention or to determine for the parties the proper law to govern the contract, second is the law to which the transaction had its' closets connection.

In the case of *Amin Rashid* court found that the system of law with the closets connection rather than the country. Generally system and country are the same but could differ at times. Other important facts to be taken into consideration are, place of performance, place of residence of the parties, place of business of the parties, nature of the contract, subject matter of the contract.

When there is no proper law expressly indicated in the contract, no one knows the proper law until the judge decides. To determine formation of a contract the place where the contract has ended taken into consideration. If the contract has not ended

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the putative proper law (law which could have been the proper law if the contract was validly concluded).

Will be taken into consideration.

Concepts of offer and acceptance differs according to the legal system. Classic example is the case *Albeko v Kumborian* according to the law in Switzerland acceptance of a letter take place when the letter of acceptance was received by the offeror but according to English law acceptance take place when the offeree posts the letter of acceptance.

Certain forms need to be followed to create a valid contract, procedural formality and nonprocedural formality, it is the personal law of the parties when matters to the capacity. In proper law contract capacity to contract is objective proper law. Actual law that would be apply by judge. Duress, done at a different place not under lex loci contractus, anyways as proper law contract was voidable. Contract is discharge according to proper law. For performance proper law matter lex fori to decide. Interpretation of proper law or allow parties agreements, English courts will never enforce a contract if it is illegal, It is void.

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CRITICALLY EVALUATE THE COMMON LAW RULES PERTAINING TO CHOICE OF LAW IN TORT, WITH REFERENCE TO RELEVANT CASE LAW?

Generally most legal systems allow for recovery for any loss, harm and personal injury, But different approaches were taken by the courts about the instances of damages can be claimed nature of damages and size of damages awarded.

In *Phillips v Eyre* claimant imprisoned by the defendant. Governor of Jamaica during a rebellion on the island. After the rebellion the Jamaican legislature passed an Act of indemnity against the governor for wrong he had done in suppressing the rebellion. Claimant instituted an action against the governor in England on the ground of false imprisonment.

Wills. J laid down 2 conditions need to be fulfilled in order to be sued in England , First that the tort must be actionable in lex fori, secondly not justifiable in lex loci ( must not be legal action justifiable under the law of the other country). What is not justifiable is, conduct must be tort by lex loci, claim must be actionable lex loci and lex fori, conduct is wrong by lex loci in civil and criminal matters.

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In the case of *Machando v Fontes* claimant claimed damages in respect of a libel published in Brazil. Defendant was not under any civil liability. Learned judge said it was not enough for defendant who was arguing that the claimant had not surmounted 2<sup>nd</sup> rule in *Phillips v Eyre* to allege that the publication of the libel was not a damage could be claimed in Brazil. He had alleged in addition that the publication was not criminal under the law of Brazil. So justifiable appears to be mean something wider than what actionable means.

Lopez. J stated that for the defendant to be succeed the act must be innocent in the country where it was. It must be recognized as a wrongful act under the law of that country.

The case *Mc Clean v Pettigrew* is also another good example there the defendant has been given a lift to the claimant in his car, D had driven negligently and met with an accident where claimant was injured. Both were domiciled in Quebec (State in Canada), So action happened there, but appealed to the supreme court Canada, but the accident occurred in Ontario (State in Canada), and according to law of Ontario state, “owner or driver not liable for bodily injury or death of a person being carried in the motor car”. Question was whether the defendant’s negligent driving justifiable and prevent claimant from succeeding. Court held even though there was no any civil liability to the defendant, there was a traffic offence under the Ontario state law, Therefore the act was not innocent.

Later *Tolfson v Jenson* overruled the decision given in the case of the *Mc Clean v Pettigrew*. This is also an accident, where proceedings commenced lived rather than where accident occurred, It was held *Phillips v Eyre*’s double actionable rule could work injustice.

Further in the case of *M’Elroy v M’Allister* the claimant was a Scottish widow, of a man killed in a motor car accident in England, Claimant and the defendant were both residents in Glasgow(Scotland), according to Scottish law at the time no action for personal injury can be filed if the injured party dies. However according to the English law the deceased’s claim for the loss of expectation of life survived and the state could be sue for damages accordingly, claim was actionable in English law so claim failed, only funeral expenses were awarded.

In *Boys v Chaplin 2* British servicemen, residents of England, but statehood Malta had been in a motor accident, Claimant was the injured passenger and the defendant was the negligent driver, as per law of Malta the claimant can only recover expenses of loss of earnings, If the law of England was followed general damages for pain and suffering could be claimed, according to the law rules establish by *Phillips v Eyre* damages for pain and suffering was not actionable in Malta,

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However House of Lords in this case agreed that damages for pain and suffering should be actionable, but 3 judges rejected, of *Machando v Fontes* case decision and held for actionable in lex loci rather than mere wrongfulness is required.

The double actionable rule was to be more flexibly applied. According to general rule stated that if the claimant can't prove liability in tort under the English law as the lex fori he fails. If he proves then he will succeed unless defendant shows he has a defense under lex loci. The claimant to be succeed, he has to show nevertheless, he can recover under the lex loci to win (wrongfulness in lex fori +actionable in lex loci).