The *Renvoi* Debate

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Introduction

'Much of the discussion of the ***renvoi*** doctrine has proceeded on the basis that the choice lies in all cases between its absolute acceptance and its absolute rejection. The truth would appear to be that in some situations the doctrine is convenient and promotes justice, and that in other situations the doctrine is inconvenient and ought to be rejected'.[469]

Conflicting views and different approaches seem synonymous with the doctrine of *renvoi*. It has been regarded by some as a distortion of choice of law principles, while others praise its merits and advocate its 'absolute acceptance'.

The ambivalent attitudes that surround *renvoi* reflect the ambiguity of the subject which the doctrine strives to address – how one is to understand the reference to a foreign *lex causae*. As *Dicey and Morris* point out, the term 'law of a country' can mean, in its narrower and more usual sense, the domestic law of any country; alternatively, it can refer in its wider sense to all the rules, including the rules of the conflict of laws, which the courts of a country apply to a particular case. This ambiguity of expression gives rise to the very problem of *renvoi*.[470] This attitude is mirrored in the development of the concept, which has neither been steady nor principled.[471]

[469] Collins L. et al., Dicey and Morris: The Conflict of Laws, 13 ed., London:: Sweet and Maxwell, 2000
[470] As above
[471] Bremer v Freeman (1857) 10 Moo. P. P. 306, being used as authority both for and against the doctrine.

Broadly speaking, there exist two divergent approaches to the subject. A somewhat absolutist approach would entail accepting or rejecting the doctrine in its entirety. On the other hand, the more moderate stance would recognise the worth of the doctrine by focussing on areas of the subject wherein it may be put to optimal use, while, at the same time, showing up the areas where the doctrine would do best not to intrude.

It is proposed to deal with both approaches and conclude that a proper understanding of the doctrine of *renvoi* requires an understanding of how the various parts of the conflict of laws fit together and that *renvoi* is an essential part of an integral whole – with the logical conclusion that its complete eradication would in effect cause the conflicts edifice to fall like a pack of cards.

Renvoi is, as *Briggs* states, the 'subject's principal tendon';[472] but - if I may extend the metaphor slightly further – tendons, though essential, are not put to use all the time and for all the activities of the body of which it forms part, – such is the case with *renvoi*: its constant use and application in every part of the subject will be just as disastrous as its total annihilation.

The aim of renvoi *can be seen as striving to achieve a measure of international harmony amidst the contextual environment of private international law. In cases involving a foreign element, it is clearly desirable that the issue will be determined in the same way in any of the courts of the States which are connected with it. However, the fact that different connecting factors are used in different systems militates against this ideal solution. This is the state of affairs that* renvoi *addresses and provides an argument for supporting its application.*

[472] Briggs A., 'In Praise and Defence of Renvoi', International and Comparative Law Quarterley 47 (1998), 877 – 884.

The Theories of *Renvoi*

The 'internal law theory'[473] *rejects the doctrine of* renvoi *and it is this that in some authors' opinion is 'in general correct and desirable'.*[474] *The reference to the 'law of X' is interpreted as being a reference to the internal law of X, without reference to its conflicts rules. This method therefore requires proof of the domestic law of the foreign country, but does not require proof of its conflict rules.*[475] *It seems that if this rule were adopted everywhere, each conflicts system would* in itself *be perfectly consistent, but the diversity of connecting factors would have an injurious impact on international harmony.*[476]

Moving forward along the doctrinal journey, the approach of adopting single or partial *renvoi*, involves construing the reference to the foreign law as a reference to the whole of that system's law. Further on still, one finds the doctrine of Total *Renvoi*, also known as the Double *Renvoi* or Foreign Court Theory, which dictates that the forum judge who is referred by his own law to the legal system of a foreign country must apply whatever law a court in that foreign country would apply if it were hearing the case. This involves a reference to that system's entire law, including not only its conflict rules but also the policy with regard to *renvoi* itself, in order to arrive at the very same conclusion as the judge sitting in the other forum would arrive at. The forum judge therefore steps in to the shoes of the foreign judge and decides the case. For this reason it is also known as 'Impersonating the Foreign Judge'. This approach involves accepting the foreign country's rules as to *renvoi* and doing whatever the foreign judge would do. In this way, if the

[473] Also referred to as the Simple, Rational or Internal Law Theory.
[474] See for example, North P.M. and Fawcett J.J., Cheshire and North's Private International Law, 13th ed., London: Butterworths, 1999
[475] This approach has been adopted in two early English decisions: Hamilton v Dallas (1875) 1 Ch D 257 and Bremer v Freeman (1857), above at note 3. This approach was also directed to be used by the Law Commission in most recent reforms to the English conflict of laws.
[476] Kahn-Freund O., General Problems of Private International Law, Aspen Publishers, reprint of 1976 the edition, 1981

foreign law refers to English law and rejects the *renvoi* doctrine altogether, the result is that the forum's domestic law is applicable, while if the foreign law refers to the law of the forum, and adopts the doctrine of single *renvoi*, the result is that the foreign domestic law is applicable.

It is perhaps this latter theory which has been subjected to most criticism which would strive to argue that 'in all but exceptional cases the theoretical and practical difficulties involved in applying the doctrine outweigh any supposed advantages it may possess.'[477]

Criticism

It has been stated that the contention of those who favour the doctrine of *renvoi* is that it ensures that the same decision will be given on the same disputed facts irrespective of where the case is heard. However, *renvoi* does not necessary entail uniform decisions. Apart from the problems which arise should the foreign court also adopt the total *renvoi* theory, another obstacle to uniformity is that the forum judge cannot don the mantle of the foreign judge without reservations since a matter classified as procedural according to the law of the forum will be submitted to the forum's internal law, even though the foreign judge may have regarded it as substantive; moreover, a rule may not be able to be applied on grounds of public policy or because it is a penal, revenue or other public law matter. In such case, the application of the rules of foreign law will be excluded.

The total *renvoi* doctrine is simply very difficult to apply. Not only must the judge ascertain the precise decision the foreign judge will give but he must ascertain as a fact the precise position that prevails in the foreign country with regard to single *renvoi*.

[477] Dicey and Morris, The Conflict of laws, and Cheshire and North, Private International Law, above at notes 1 and 6 respectively.

Another criticism levelled against the doctrine is its unpredictability of result since it makes everything depend on 'the doubtful and conflicting evidence of foreign experts'.[478] It must be borne in mind that foreign law is a question of fact and has to be proved by evidence in each case; if the evidence is inadequate, no issue of *renvoi* may be said to arise. This in itself may lead to conflicting decisions – depending on the strength of the evidence in each case. Moreover, *renvoi* requires proof not only of the conflict rules of the foreign country, but also of the foreign rules about *renvoi* – an even harder issue regarding which to obtain reliable information.

In the ultimate analysis, it may just be fanciful for the forum judge to think that he is impersonating the foreign judge – apart from the issues of procedure and public policy mentioned earlier, he cannot even be expected to know the substance of the foreign applicable law.

Morris held that *renvoi* was a thoroughly bad thing.[479] He was of the opinion that the English choice of law rules were historically devised without any thought to *renvoi,* so that they would effectively operate as selective rules for the application of foreign *domestic* laws alone. Accordingly, it amounted to a subversion of the English choice of law rules if the judge chooses a particular law but then allows a foreign judge to apply his own choice of law rules to 'jettison' the English choice of law rule. However, this objection may be met by conceiving of two types of choice of law rules – one set does indeed comprise of a framework of reference to domestic law; but then, in other areas there can be seen to be rules which make reference to foreign jurisdictions, in the sense that the rules do not point to a particular law but provide a mechanism for finding it.

[478] Re Askew 1930 2 Ch. 259
[479] McClean J.D., Morris: The Conflict of Laws, 5th ed, London: Sweet and Maxwell, 2000

Indeed, with regard to the rhetoric of *renvoi*, most of the objections levelled against the doctrine boil down to the allegation that the forum court abandons its own choice of law rules and defers to the superior authority of a foreign choice of law rule. Through this two-stage process, the forum's choice of law rule is overridden and displaced, thereby representing a loss of control by the domestic court.

However, these objections fade if we conceive of the issue as a one-stage process; that the choice of law rule of the forum is – to choose the law which a foreign judge would apply; for example, 'that the English choice of law rule for capacity to marry is that it is governed by that law which would be applied to the case by a judge sitting at the place where the *propositus* is domiciled.' In this way, the court would be choosing the law 'by formula rather than by immediate geographic designation'.[480] This approach does away with any considerations of preference and superiority accorded to a foreign choice of law rule because it is the forum's choice of law rule that directs the forum judge to whatever law the foreign judge would apply. Still, universal and constant use of the *renvoi* doctrine cannot be the ideal position; an equilibrium must be found.

Finding the Equilibrium

It is recognised that *renvoi* is inapplicable in many cases. Amongst these areas are those such as contract and tort – can this be said to be correct in all cases? A look at the English experience may clarify things somewhat.

Starting from the concept of tort, section 9(5) of the *Private International Law (Miscellaneous Provisions) Act,* 1995 excludes any reference to *renvoi*:

[480] Briggs, above at note 4, 882

'The applicable law to be used for determining the issues arising in a claim shall exclude any choice of law rules forming part of the law of the country or countries concerned'.

With regard to matters falling outside the Act and governed by the Common law, there is no direct English authority; however Scottish and US authority indicate that *renvoi* is inapplicable to tort cases.[481] Clearly, while the commission of a tort is unexpected, the contingency is not unforeseen; the aim of excluding *renvoi* is accordingly, to prevent the frustration of any action which may have been taken to provide for such possibility. Therefore, the justification for this is that in many cases, such as insurance, were the English court to apply anything other than the foreign domestic law, this could amount to contradicting the assumptions upon which the policy was taken out.

Nevertheless, the exclusion of *renvoi* in this field of the conflict of laws has had the result of limiting, if not preventing altogether, the English court from controlling forum shopping. There seems to be no doubt that Lord Wilberforce's reference in **Boys v Chaplin** *(1971)*[482] to the *lex loci delicti* was intended to prevent forum-shopping. He sought to construct a choice of law rule by preventing the parties from evading the operation of the proper law. The concern was with the possibility of a Maltese citizen suing another compatriot in England for damages for pain and suffering. Only if the reference to the *lex loci delicti* was held to include a reference to the conflict rules of the foreign country would the English judge be empowered to decide the case in the same way as a Maltese/Ontarian judge would decide it – and thus discourage forum-shopping.

[481] M'Elroy v M'Allister (1949) S.C. 110; Haumschild v Continental Casualty Co (1959) 7 Wis. 2d 130
[482] (1971) A.C. 356

Shortly after, another method through which the English courts could control forum shopping came with **Spiliada**[483]. Control of forum shopping did not need to depend solely on choice of law, but could be dealt with directly – through the jurisdictional solution: the doctrine of *forum non conveniens*.

However, within the English context, it may be persuasively argued that the *Brussels and Lugano Conventions on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*[484] has severely limited the court's powers to stay proceedings on *forum non conveniens* grounds. Since the jurisdictional solution is no longer available, the choice of law solution becomes all the more attractive as it allows the court to fabricate the doctrine *forum non conveniens* by reference to its choice of law rules.

The relationship between *renvoi* and principles of jurisdiction is demonstrated by reference to the decision of the High Court of Australia in **Breavington v Godleman** where three judges held that the case should be decided as if it had been tried in the courts of the Northern Territory (the *lex loci delicti*).[485] This reliance on choice of law rules to discourage forum shopping was probably connected to the fact that the Court had just rejected the English version of *forum non conveniens* in **Oceanic Sun Line Special Shipping Co. Inc. v Fay**, and therefore was less able to prevent forum shopping by use of jurisdictional rules.[486]

In the face of this, the Law Commission's decision to exclude *renvoi* from the law of tort appears to be misguided; as does the approach taken in the Foreign Limitation Periods Act 1984 (where under section 1(1) one applies conflicts of law rules to arrive at the

[483] Spiliada Maritime Corporation v Cansulex Ltd (1987) A.C. 460, HL
[484] Consolidated version published in 1998 (Official Journal, 27,26.02.1998). The Lugano Convention has been incorporated into Maltese law by the Legal Procedures (Ratification of Conventions) Act, Cap 443 Laws of Malta.
[485] (1989) 169 C.L.R. 41
[486] (1988) 165 C.L.R. 197

law governing the issue, and then under section 1(5) it is the domestic law of that country which is applicable).

This is also the position with regard to the law of contract under article 15 of the Convention on the Law Applicable to Contractual Obligations.[487] The general refusal to apply *renvoi* to contracts is based on the view that a contract specifying a particular law would always mean the domestic law as otherwise the parties' expectations would be defeated.

However, what is the position where the parties have expressly made *not* a choice of law, but a choice of court? The generally assumed position is that this constitutes a strong presumption that the domestic law of chosen court will apply; the Rome Convention takes a similar approach, as is noted from the Giuliano and Lagarde Report.[488] This does not seem to necessarily accord with the parties' expectations: if they wanted litigation to take place in a particular court, it seems to follow that they would have opted for the law which would have been applied by a judge sitting in that court – this undoubtedly would include that forum's conflict rules. *Renvoi*-reasoning would ensure such conclusion; however, the dogmatic exclusion of the concept militates against such an approach with the result that the parties' intentions cannot be given effect to. It is for this reason *Briggs* states that whilst the unsupervised administration of a doctrine of *renvoi* may be capable of upsetting the sensible intentions of commercial men, a principled use of the technique may be the only way of giving effect to them.[489]

Renvoi *is clearly an integral part of the conflict of laws. This is further seen in the characterisation exercise: acceptance of* renvoi

[487] Rome Convention (1980) OJ L266 of 9 October. Consolidated version found in (1998) OJ C27/47. This does not form part of Maltese law but is part of English law, for example. The relevant domestic provisions in this regard are found in the Contracts (Applicable Law) Act (1990) c. 36, Schedule 1. Renvoi is also excluded in the common law of contracts, as is seen from Amin Rasheed Shipping Corpn v Kuwait Insurance Co, the Al Wahab (1984) AC 50 and Re United Railways of Havana and Regla Warehouses Ltd (1960) Ch 52.
[488] (180) OJ C282/17
[489] Briggs, above at note 4.

explains the different approaches taken in this area. In cases where renvoi *operates, we are not to tie the foreign judge's hands binding him to the forum's characterisation of the issue; for example, whether (in a case of marriage without obtaining the requisite parental consent) the marriage is formally valid. The correct approach is to ask the judge to whose law we are referred whether or not the marriage is valid by reason of the lack of parental consent. This is clearly not necessary in cases where* renvoi *does not operate; here there is no concern with what a foreign judge would do and there is not reason why we cannot first characterise the issue according to the rules of the* lex fori *and then, frame the question in these terms.*

A *renvoi*-type reasoning is also perceived in the Incidental Question in the sense that the subsidiary issue is referred to the law governing the main question for its determination.[490]

Dicey and Morris state that the doctrine should not be invoked unless it is plain that the object of the English conflict rule in referring to a foreign law will, on balance, be better served by construing the reference to mean the conflict rules of that law.[491] This contention neither advocates its total exclusion, nor its absolute acceptance. However, the ideal solution need not lie at either of the two extremes; rather, in order to provide the necessary flexibility and justice, it appears essential that the doctrine of *renvoi* applies only in those situations where such goal can be achieved. This is why it may seem misguided to argue for its non-application in all cases in certain issues such as contract and tort. Regarding it as an irritant will necessarily detract from its worth in weaving a net over many issues in the conflict of laws and contributing to its consistency and coherence.

In this respect, as *Briggs* points out that 'it operates not as a refinement or complication to rules for choice of law, but the

[490] Schwebel v Ungar (1963) 42 D.L.R. (2d) 622 (Ont. C.A.); Lawrence v Lawrence (1985) Fam. 106.
[491] Dicey and Morris, above at note 1.

mechanism which supplies the intellectual harmony, or co-ordination, between rules on jurisdiction and rules on choice of law.'[492] In fact, this argument is taken as far as to state that while this does not mean that the doctrine should be applied at all times and in all cases, its application should preferably be regarded as the rule, rather than the exception, thus departing somewhat from *Dicey and Morris's* contention.[493]

In the ultimate analysis, *Kahn-Freund's* concluding point seems to address the ideal approach – whatever attitude academic writers choose to adopt, the solution to the application of the doctrine should not depend on any *a priori* principle, such as that of the 'inherent' nature of a reference to a foreign law as a reference to internal law only or as a 'total' reference including conflicts of law rules.[494] It is advisable therefore to approach the question pragmatically rather than dogmatically, proceeding on a case by case analysis and providing for the application of *renvoi* when it promotes justice, without being hindered from so doing by 'no-*renvoi* clauses' and the like, since such blatant rigidity can hardly be the key to a just conclusion in any case.

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[492] Above at note 4
[493] Above at note 1
[494] Above at note 8