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June 10, 2008

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The concept of Renvoi in the Conflict of Laws: An Analysis

INTRODUCTION: Conflict of laws or Private international law constitutes the legal principles and rules governing international private relations. It thus gives rise to that branch of law which deals with cases where some relevant fact has a geographic connection creating a "foreign element", and that raises a question regarding jurisdiction and which law applies i.e. arises when there are one or more legally relevant foreign elements, resulting in two or more different laws competing relative to a person, act or fact, or to a single thing and there is doubt about which law should apply.

Being one of the most theoretically challenging concepts in private international law, generations of conflict-of-laws scholars have debated the question and concept of Renvoi. It is the instant topic under study in the due course of the research paper. Renvoi is a French term which literally means sending back. In precise terms, when the choice of law process points a forum court to another jurisdiction's law, the question that arises is: how much of that other jurisdiction's laws should apply? Does the reference to the other law include that jurisdiction's choice of law principles, or, alternatively, does it include only the jurisdiction's "internal law" principles? If the reference includes both internal law and conflicts principles, the foreign conflicts principles may point the inquiring court back to the forum's law or to a third jurisdiction's law. This question--whether a forum should consult the choice of law rules of other jurisdictions--is called renvoi.

Authors and experts like P.R.H.Webb,.Brown, Morris and Dicey, however have suggested in their work that the concept of Renvoi is not an important and significant concept as far as its quantity and quality goes and have elaborated it by saying that in relation to Renvoi only two matters are required to be considered namely- its meaning

and the extent of its application.[1] To get a deeper understanding and a critical analysis of the concept of renvoi and its place in the private international law , the researcher proposes to look into the aspects like Doctrine and Approaches of renvoi[2], its specialized forms of single and multiple renvoi, judicial responses pertaining to the concept of renvoi from the courts of United Kingdom, United States of America and France .the judicial responses have special importance as the position before the courts can be looked into through the decisions only. The research paper is limited to the extent of focusing on the doctrine of renvoi only and not other concepts of choice of laws involved in the private international law. Thus a critical and descriptive analysis of the doctrine will be done in the due course of the research paper.

[1] P.R.H.Webb and D.J.L.Brown,(London: Butterworth Publications,1960) P.60
[2] Here in after referred as doctrine.

"The paper and ink devoted to the renvoi problem had already been so great a number of years ago that one author recorded in despair that 'Juristic speculation has been almost infinite." Dean Erwin Griswold commented in 1938.

DOCTRINE OF RENVOI AND DIFFERENT APPROACHES.

The theory of the renvoi was formulated fifty years ago by continental writers and courts, and caused a considerable discussion. Wherever the statutory theory is accepted, and the laws of the two states concerned differ as to whether the law of the nation or the law of the domicilee shall be applied, a troublesome doubt appears. Where the law of the forum provides that a juridical event shall be governed by a certain foreign law, and that foreign law in turn remits it to the law of the forum to determine by its law, the situation arises which has been termed as renvoi. Here, it can be seen that a probability of a situation of "choice of law rules" appear it, at least on occasion, will direct the application of some law which might be some law other than the law of the forum. That, after all, is the point of choice of law. When they do, the forum court might in the process decide what it means to apply the law of another state.

As hinted in the course of the introduction, generally it is the Court who is in charge to determine which of several different jurisdiction's laws applies to the case before it. The question of what law applies is a question the court answers by consulting the law of its own state; that is, it is a question of forum choice-of-law doctrine. If the forum's choice-of law rules direct the application of forum law, the court proceeds to apply the forum's substantive or internal law: the tort, contract, or other law that determines the parties' substantive rights. The forum's choice-of-law rules might also direct the application of

another state's law. And at this point a question arises. Should the court, when instructed by forum law to apply the law of another state, apply that state's internal law, or should it apply the state's entire law, including its choice-of-law rules? The latter might seem the obvious choice—applying a state's law, after all, presumably means reaching the same results that the courts of that state would reach—but it opens the door to an alarming possibility. Now, the researcher at this point wants to submit that the doctrine that a reference to the law of another state is a reference to the entirety of that state's law is the doctrine of renvoi, and the question of whether it should be followed—whether, in choice-of-law terminology, the renvoi should be accepted or rejected—stands out even among the great jurists of conflict of laws.[3]

In an illustrative form if explained, what is meant by 'law' when a reference is made to foreign law; for example, does a reference to 'Indian law' mean Indian internal law, or the whole of Indian law, including its conflict of laws rules? The word 'law' is ambiguous and a number of approaches have been suggested in this regard. Different models of renvoi therefore have to be looked into to avoid further confusion and ambiguity regarding the concept under study.

The theory of the renvoi as stated by Professor Schreiber is as follows: "*When the Conflict of Laws rule of the forum refers a jural matter to a foreign law for decision, is the reference to the corresponding rule of the Conflict of Laws of that foreign law, or is the reference to the purely internal rules of law of the foreign system; i.e., to the totality*

[3] Joseph M. Cormack, "Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws", 14 *S. CAL. L. REV.* 221, 249 (1941)

of the foreign law minus its Conflict-of-Laws rules?"[4] In the course of its development and towards finding a solution the doctrine of renvoi has been off late understood internationally on the basis of two approaches namely: The Traditional Approach and The Modern Policy-Oriented approach.

- ***The Traditional Approach**:* The traditional jurists are of the opinion that axiom of territoriality, the principle that "the law of a state prevails throughout its boundaries and, generally speaking, not outside them. They believe it impossible, in fact, for the law of one state to operate as law within the borders of another state. From this premise flows the conclusion that only the law of the state where an event occurred can attach legal consequences to that event, and choice of law becomes largely a matter of determining the place of occurrence. The traditionalists in this sense are therefore concerned with establishing "localising" rules to determine where, for example, torts are committed or contracts formed. This theory of territoriality, as propounded by the traditional thinkers, might seem to offer an easy answer to the renvoi problem. If foreign law can never apply within the forum state, then obviously the forum cannot apply foreign choice-of-law rules. But this answer, as should be immediately apparent, has been criticized by many jurists related to different schools including the realist or modern approach school as it comes at the price of scuttling the whole choice-of-law theory: if the forum can never apply foreign law, how is it to adjudicate cases dealing with events that occurred in other states?

[4] Ernst Otto Schreiber, "The Doctrine of the Renvoi in Anglo-American Law", 31 *Harvard Law Review* p. 525 (1917).

- **<u>The Modern Policy-Oriented Approach</u>**: The controversy concerning the renvoi has abated in recent past, as scholars seem to have working hard on the claims related to the doctrine of renvoi. In this regard, the Modern policy jurists or realists are of the opinion that in choice of law foreign choice of rules can be ignored as the legislative jurisdiction should be allocated based on the policies which mainly underlie the substantive laws at issue, and general choice-of-law rules were not developed with these policies in mind. Regarding this approach the experts have said that the fundamental insight of modern theory is that the applicability of a law is a pure question of interpretation. As most legislation does not specify its territorial scope, it hints at filling the gaps by reference to a law's purpose. But states are free to adopt any different approach to interpretation if they deem it appropriate and in total accordance.[5]

Here the researcher wants to point out that, it can be clearly seen that the modern or realist approach and the traditional approach, are quite similar, each relies primarily on rules of scope and has at best a rudimentary conflicts rule. The solutions advanced by the policy-oriented approaches are essentially the same as those offered by the traditionalists, and they suffer from the same defects and thus the doctrine has not been able to get a conclusive shape and structure.

[5] Larry Kramer, "Return of the Renvo"i, 66 *N.Y.U. Law. Review*. 979, 980 (1991).

F O R M S O F R E N V O I

After looking into two main approaches related to the Doctrine of renvoi, the researcher in this part of the research paper proposes to analyze the main forms of renvoi, namely single renvoi and double renvoi or multiple renvoi. However, in certain cases there exists a situation when there is no renvoi also.

Single renvoi is when the court of the forum has a choice to apply the foreign choice of law rules, accept the remission to its law by the foreign law and apply the law which it would have applied had the case been entirely domestic to the forum, or in the case of transmission, the domestic law of the third country. This requires proof of the choice of law rules of the foreign country but not of the foreign rules about renvoi. This is called single renvoi.

Double or Multiple renvoi is when the court of the forum may resolve the issue in the same manner as a court of the legal system selected by its choice of law rules might resolve it had the foreign court exercised jurisdiction in the same case on the same facts.

This method requires proof not only of the choice of law rules of the foreign country but also the foreign rules about renvoi. This is called double renvoi.

There can also be a form of renvoi which is known as no renvoi.

All these forms of renvoi can be best explained with the help of illustrations and best illustration as given in the class by Professor. Jayagovind is of an English Citizen who dies intestate domicileed in Italy, leaving movables in England. The English conflict rule refers to the law of the domicilee (Italian law) but the Italian conflicts rule refers to the national law which is English law. At last it becomes a conflict of conflicts rules.

(a) Court might apply the domestic rule of the foreign country that is the law of the foreign country applicable to a purely domestic situation arising therein.

The English Court would thereby apply Italian law. Estate would go down according to Italian law. This method requires proof of the domestic law of the foreign country but not its conflict rules. This will be known as no renvoi.

(b) If the conflict rule of the foreign country refers back to the law of the forum or on to the law of a third country, the court might accept the reference and apply the domestic law of the forum or the domestic law of the third country.

So we need to know Italian conflicts rules.

The English Court would thereby apply the domestic rule of English law, disregarding the fact that the intestate was domicileed in Italy. This method requires proof of the foreign conflicts rules relating to succession but does not require proof of the foreign rules about renvoi. This method will be known as a single renvoi.

(c) The court might decide the case exactly as it would be decided by the foreign court.

If the Italian Court would refer to English law and would interpret that reference to mean English domestic law, the English Court would decide using English domestic law.

If the Italian Court would refer to English law and look at domestic law plus the conflict of laws rules, it would "accept the renvoi" from English law and apply Italian domestic law, then the English Court would apply Italian domestic law.

This method requires proof of Italian domestic law, conflicts rules from that country, and renvoi rules. This is known as total or double renvoi or multiple renvoi.

Thus the researcher wants to submit that, the above situation represents the present doctrine of the English courts and thus English Judicial response to the problem of renvoi, at least in certain contexts.

INTERNATIONAL JUDICIAL RESPONSES AND THE MAJOR DILEMMAS PERTAINING TO THE DOCTRINE

In order to analyze the judicial and thus legal position of the doctrine of renvoi in international context, it is important to first see the Application of the doctrine, the doctrine has been applied to:

- formal and intrinsic validity of wills
- cases of intestate succession
- legitimation by subsequent marriage.

However, there are indications by the courts and the jurists that it might apply to:

- formal validity of marriage
- Capacity to marry. [6]

The Major Dilemmas and Judicial responses:

The main difficulties in the application of the doctrine as highlighted by the judicial responses and various conventions curtailing its scope are as follows:

The Convention on the law applicable to contractual obligations in a way has curtailed the scope of doctrine of renvoi for the European continent at least as this convention is an European Community Convention. The Article 15 of the convention clearly excludes the operation of the renvoi by stating that "*the application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law*".

[6] *Supra* Note 1 at pp.64-65

Experts like Dicey and Morris have highlighted a major difficulty in the application of the renvoi[7], according to them the major difficulty is the unpredictability of outcome as also highlighted in the case of *Re Duke of Wellington*[8] where Wynn-Parry Justice also commented that the doctrine makes everything dependant on the evidence of foreign experts. It requires proof not only of foreign choice of law rules, but of foreign rules about renvoi. Also, such unpredictability is due to the reason that in the continental nations, the decided cases of the court of first instance are not considered as authorities

and are not binding as authorities to be followed and the doctrine has a tendency to change according to times.[9]

Also, there may be an inextricable circle. The effect of applying the doctrine of renvoi is to make the decision turn on whether the foreign court rejects the renvoi doctrine or adopts a theory of single or partial renvoi. But if the foreign court also adopts the doctrine of total renvoi, then logically no solution is possible unless either, in the case of English court for instance, the English or the foreign court abandons its theory, for otherwise a perpetual *circulus inextricabilis* is constituted. As Dicey and Morris remark[10], 'It is hardly an argument for the doctrine of total renvoi that it is workable only if the other country rejects it' and also hinted in the case of *Re Askew*[11]

[7] Dicey and Morris, *Dicey and Morris on Conflict of Laws* (London: Sweet and Maxwell publications ,2000) at pp.76-77
[8] [1947] Ch 506, 515.
[9] Dicey and Morris, *Dicey and Morris on Conflict of Laws* (London: Sweet and Maxwell publications ,2000) at pp.76-77
[10] *Ibid* at p. 78
[11] [1930] 2 Ch 259,276.

In the famous case of *Collier* v. *Rivaz*[12], One person named Ryan, a British subject, died domiciled in Belgium. He left certain testamentary papers executed in accordance with the formalities required by English law, but not in accordance with those required by Belgian local law. It was proved by the necessary expert evidence that the Belgian courts if called on to decide the question of validity would uphold the testamentary documents, on the ground that they were valid according to the testator's national law. Sir Herbert Jenner in his judgment observed that the whole basis of decision is that the court sitting England to determine the question must consider itself sitting in Belgium, that is, the court is only concerned to see what view the Belgian court would take of the English law, and it was never suggested that it was the duty of the English court to consider what its own view of the English law ought to be.

Here the researcher wants to submit that, the result in *Collier* v. *Rivaz* could not have been arrived at if the English court had refused to take into account the rules of private international law applied by and recognised in the Belgian courts, and had merely applied the ordinary local law of Belgium applicable to Belgian nationals.

This case was however disapproved in *Bremer* v.*Freeman*[13], where, a British subject died domicileed de facto in France. She had made a will in France in English form; the will dealt with movables, the bulk of which were situate in England. The testatrix had not obtained from the French government an authorisation to acquire a French domicile. Sir John Dodson admitted the will to probate on the ground that, though the testatrix had her domicile \de facto in France, yet that it was necessary in order to establish a domicile in

[12] (1841) 2 Curt. 855
[13] (1857) 10 Moo. P C. C. 306

France such as would affect her succession and the mode of making her will that her domicile should be by authorisation of the French government. The judge, Sir John Dodson, expressly said he was following *Collier v. Rivaz*. The decision was reversed in the Privy Council. The judgment was delivered by Lord Wensleydale where he observed that "On the whole, then, on a review of all this evidence of the law of France, their Lordships are clearly of opinion, that it is not established, that for the purpose of having a domicile which would regulate the succession, any authorisation of the Emperor was necessary; that a legal domicile for this purpose was clearly proved, and that consequently, if the testatrix had a power to make a will at all, the will in this form was invalid". Therefore privy council refused to probate the will of British subject who died domiciled in France in English sense and in England in the French sense on the ground that it was made in English but not in French form. The reasoning of court is thus ambiguous as it presents a case for and also at the same time against the doctrine.[14]

Next in line is the case of *Re Johnson*[15], where the doctrine was applied in a case of partial intestacy , is the first case in which the word "renvoi" appears to have been used. The facts are shortly as follows. In 1894 a British subject - one Mary Elizabeth Johnson - whose domicile of origin was Maltese, died intestate and domiciled in Baden. She was not naturalised there, and the evidence in the case established that by the law of Baden the succession to her property was governed by the law of her nationality. She left movable property in England and Baden. Farwell, J., directed the movables in England to be distributed according to Maltese law. The decision was based on two alternative

[14] Dicey and Morris, *Dicey and Morris on Conflict of Laws* (London: Sweet and Maxwell publications ,2000) at p.68
[15] [1903] 1 Ch. 821

grounds: First, that it is impossible according to English law for a person to acquire a domicile of choice in a foreign country unless that person has also acquired a domicile there according to the law of the foreign country; therefore, in the particular case, as the law of Baden refused to recognise domicile as having any legal effect on the status of Mary Elizabeth Johnson, the succession to her movable property must he determined according to the law of her domicile of origin; that is, Maltese law. This view of the English law as to domicile is not consistent with other decisions, The second group of the decision is based on the assumption that Mary Elizabeth Johnson was at her death domiciled in Baden, and that the law of Baden governed the succession to her movable property. It was found by the certificate which was binding on the parties in the case that, according to the law of Baden, the legal succession to that part of her property which she had not disposed of by her will was governed by the law of the country of which she was a subject at the time of her death. Thus, this decision was considered to be inconsistent with the well settled rule under English law which says that for the purpose of an English conflict rule domicile means domicile in the English sense.

Also, in the case of *Re. Annesley*[16] Russel,J. introduced the concept of Total or Double renvoi for first time and applied the French domestic law as the law of the domicile on the ground that a French court would have applied the same logic by the way of renvoi from English law. The facts of the case in brief are that one Mrs. Sybil Annesley lived in France for 60 years. She didn't treat her children equally in her will, daughters probably

[16] (1926) Ch. 692

getting cut out. She made a couple of wills where she stated that her domicile was England. She had visited England in 1892, 1903, 1907, 1911, 1913. The Immoveables were in France only and the movables were in both France and the U.K, she may have been trying to leave corpus of estate in England due to heavy estate duty in France . In Nov. of 1919 she made holograph French will, then in Dec of 1919 she made an English form will. The issue thus was - was her domicile in England or France? The question was also asked about the validity of English will? If domicile was France, testatrix could only dispose of 1/3 of personal property because 2/3 would go to daughters under French law, due to forced share to issue law of France. It was held that the Domicile was French.