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# Examiner's report 2009

## 2670014 Conflict of laws

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### Introduction

The 2009 **Conflict of laws** paper examined a range of issues. There was a general question (on *renvoi*), questions on jurisdiction and on device of law. Conflicts questions range across areas of law, and not every one can be examined every year. The 2009 exam was typical in ranging broadly.

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### General remarks

Too many answers were very general and did not display evidence of reading. Too little attention was given to the cases. Too many candidates failed to spot what questions are about: an example was Question 7 which many candidates answered as if it were a domicile question.

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### Specific comments on questions

#### Question 1

**Does *renvoi* have a part to play in the conflict of laws decision-making process, or should it be abolished?**

An understanding of the issues in this question can be found in the **Conflict of laws** subject guide at 2.4. Briggs' article, which referred to these, should be read to give a critical appreciation of the problem.

Candidates were expected to understand the different approaches to *renvoi*, in particular that adopted by the English courts. Why is recourse to *renvoi* in decline: there are specific directives against its use in contract and tort? Candidates are expected to know where it applies and its value in these areas. Does it have any value today? If so, what is it?

This is not a question to answer without good understanding of the debates about the value of *renvoi*.

## Question 2

Mr Adams wants to sue the following three defendants in the English courts. Can he do so? If not, where (if at all) may he sue?

- (i) Bertrand, a French domiciliary. Mr Adams was injured when a car driven negligently by Bertrand knocked him down when he was crossing the street in Madrid. Mr Adams was off work for three months and lost several thousand pounds salary.
- (ii) Karim, the governor of a Saudi prison. Mr Adams alleges he was tortured when detained in this prison on a blasphemy charge last year. He believes this was done on the orders of Karim. Karim is currently in London at a prison governors' congress.
- (iii) Dieter, a German national who lives in Austria. Mr Adams rented a holiday villa in Portugal from Dieter last year. When he arrived at the villa it was in a bad state of repair, and Mr Adams was forced to book a hotel instead. Mr Adams estimates his loss at nearly £2000.

This is a question about jurisdiction. Part (ii) raises issues of immunity from jurisdiction as well. The **Conflict of laws** subject guide discusses the issues at 4.1 (a general introduction), 4.2 on immunities, and 5.

- (i) Candidates were expected to spot that the French courts had jurisdiction because the defendant was a French domiciliary, and the Spanish courts because the accident was in Spain: see Article 5(3). Whether the English courts also had jurisdiction is dependent on whether the damage suffered in England constitutes a harmful event in England. There is case law to discuss, such as *Henderson v Jaouen* (2002) 2 All E.R. 705. The guide discusses the issue at 5.2.2.
- (ii) Candidates should have noted that the potential defendant was present in England and that this was enough to confer jurisdiction (see the guide at 4.3.1). But the case is against a governor of a Saudi prison. Does he have immunity and, if so, does this extend to an act of torture? The impact of the European Convention on Human Rights Article 6 has to be noted, as should the recent case of *Jones v Minister of Interior of Saudi Arabia* [2007] AC 270. Candidates will find a good discussion of these issues in Cheshire, North and Fawcett *Private International Law* (fourteenth edition, 2008) pp.494–96. On the case law Mr Adams is unlikely to succeed.
- (iii) This question raises issues relating to jurisdiction under the Brussels Regulation over immovable property. The guide discusses these at 5.3. Candidates were expected to work out whether the Portuguese courts had exclusive jurisdiction or whether the defendant could be sued in Austria.

### Question 3

**Article 5 (1) of Brussels 1 Regulation provides:**

**'In matters relating to a contract [the defendant can be sued] in the courts of the place of performance of the obligation in question.'**

**Discuss critically the concepts involved in this provision, and the interpretational difficulties the courts have faced.**

This is a straightforward 'bookwork' question. The guide assists at 5.2.1. What are 'matters relating to a contract'? There are many cases and this question can only be answered by candidates familiar with them. For example, a good knowledge of the *Kleinwort Benson* case (see guide at 5.2.1) was expected. And what is 'the place of performance of the obligation in question'? Similarly, a good knowledge of the case law was expected. This is not a question to attempt if you only have superficial knowledge.

### Question 4

**Mr Brown is asking an English court to enforce two judgments given in his favour.**

**The first was made by a court in Los Angeles; the second by a court in Paris.**

**He has been warned that his attempts to enforce these judgments will be strenuously resisted.**

**Advise Mr Brown as to what defences may be available, and explain to him how any differences in the outcomes of the two claims might be justified.**

This is a question on the enforcement of foreign judgments. It requires knowledge of the traditional rules and the Brussels Regulation rules. It assumes that candidates know where Los Angeles and Paris are located – a few did not know this! Chapter 7 of the guide would help answer this question.

The question specifically asks about defences. The guide assists at 7.2.1 on the Los Angeles judgment and at 7.3 on the Paris one.

Candidates were asked also to explain any difference in outcome. This is asking, in effect, why it is so much easier to enforce a Paris (or a Sofia) judgment in England than one from Los Angeles. This requires an understanding of the impact of the European Union on conflict of laws questions.

### Question 5

**Has the introduction of Rome II Regulation effected an improvement in the jurisprudence on choice of law in tort?**

While this question cannot be answered by referring to the guide, there was a full discussion in the *Recent developments* from 2008. An up-to-date textbook should also be consulted. Cheshire, North and Fawcett *Private International Law* (fourteenth edition, 2008) is recommended (see Chapter 19; there is a very full discussion on pp.770–858). Too many candidates attempted to answer this question using the rule in *Philips v Eyre*, now of historical interest only.

This was a straightforward question, but it expected detailed knowledge of the Rome II Regulation and the ways it changes English law and practice.

#### Question 6

**Does an English court have jurisdiction to hear the following cases?**

**(a) What law governs capacity to enter into a commercial contract?**

**(b) What law governs capacity to enter into a marriage or civil partnership?**

This question asked about capacity in two contexts. Many candidates who answered this question only knew one of the parts – very foolish since the maximum mark such candidates could get was 50 per cent!

(a) is about capacity to enter such a commercial contract. Rome I Regulation only deals with this in part, so that knowledge of the common law is required. The guide explains this at 8.6. The common law is not entirely settled. The different possible laws needed to be explained. Knowledge of the case law was expected.

(b) is about capacity to enter into a marriage or civil partnership. The subject of marriage is described in the guide at 13.2. On civil partnership Cheshire, North and Fawcett *Private International Law* (fourteenth edition, 2008) may be consulted (see pp.937–39). The case of *Wilkinson v Kitzinger* [2007] 1 FLR 295 should also be consulted.

#### Question 7

**(a) Mr Barrett, who is domiciled in Oceania, insured his life last year with Trustus, an English insurance company. He has recently assigned the policy to his wife in Oceania. By the law of Oceania the assignment is invalid because donations between spouses are not permitted. Can Mrs Barrett claim on the policy in England, by the law of which such an assignment is valid?**

**(b) Diana, whose domicile of origin was in England, married Pierre, a wealthy French property developer, with a domicile in France, in 1978. By the law of France, unless parties agree to the contrary, there is community of property between married couples. There was no such agreement. The matrimonial home was set up in France where they lived until 1990. In 1990, by which time Pierre was worth 20 million U.S. dollars, they moved to England. Pierre's property development continued to prosper. He died in 2007 worth 40 million U.S. dollars. He also had a chateau in Switzerland and an expensive yacht in Southern Spain.**

**By the law of France Diana is entitled to half of Pierre's property. Pierre's brother is contesting Diana's claim.**

**Advise Diana.**

This posed two questions drawn from different parts of the syllabus.

(a) is addressed in Activity 11.3 in the guide, and discussed in 11.3 generally. This is **not** a question on domicile. Many candidates thought it was.

(b) is a question in matrimonial property. The guide offers guidance on the issues involved at 11.6.

#### Question 8

**What is the applicable law of the following contracts, all of which were made in 2006?**

- (i) **A contract between Allfruit plc, a jam producer in the East of England, and Wodski, a Polish strawberry grower, under which Wodski supplies Allfruit with strawberries. Payment is to be in US dollars at a Polish bank in London upon delivery of the strawberries. Nothing is said about the applicable law, but previous contracts were expressed to be governed by English law.**
- (ii) **A publishing contract between an English author, domiciled and resident in England, and a publisher with a central administration in the Netherlands. The contract states 'Disputes must be referred to the District Court in Rotterdam'. The publisher is refusing to pay the author her royalties because the book is considerably larger than that contracted for.**
- (iii) **A contract between Jose of Jerez, a Spanish sherry producer, and a consortium of English off-licences to supply 20,000 bottles of sherry a month, payment to be in Euros at a branch of a Spanish bank in London. The contract stipulates 'In the unlikely event of a dispute arising, we will choose the law to govern our contractual relationship'. A dispute has now arisen, and the parties cannot agree a law to govern it.**

This is the contract question. As ever, candidates are asked to work out the applicable law of several contracts. The law is explained in the guide in Chapter 8.

The contracts were made in 2006. This was made very clear, though some candidates investigated the pre-1991 law.

- (i) There is no express choice of applicable law. The question is whether one can be inferred (see guide 8.3.1) How significant is a previous course of dealing? And the currency and the bank?
- (ii) There is a choice of jurisdiction clause. On the effect of this see the guide at 8.3.1.
- (iii) There is no express choice. Does the clause represent a floating choice of law and, if so, what is the effect of this? See the guide at 8.2.2. If the applicable law is not identifiable at the time the contract is made, reference has to be made to Article 4 (discussed in the guide at 8.3.2).