THE RELEVANCE OF TIME FACTOR IN TRANSNATIONAL AGREEMENTS

Abibu, Akinyemi Akintunde & Ojobaro, Ololade Victoria
Department of General Studies, The Federal Polytechnic Ilaro.
akinyemi.abibu@federalpolyilaro.edu.ng; ololade.ojobaro@federalpolyilaro.edu.ng
+2348035643398; +2347030746059

Abstract

Time is usually of essence in business transactions. However, in multinational business arrangements, where several elements of a business transaction cut across many jurisdictions time and location becomes even more important. The country where a contract is formed may differ from the countries of execution, and in turn the jurisdiction selected for resolution of conflict arising therefrom could also be exclusive. The nature of a business activity may be radically altered after a contract is consummated. This could occur where there is a change in the law of the country of performance after the contract was made.This paper seeks to consider the problems of time factor in line with various time questions identified above. For example, if relevant events occurred before the change in law, a court is likely to hold that the rights arising under the earlier law have "vested" and is 'not to be undone', unless the law changed was merely of procedure or remedy rather than substance. It also examines how courts navigate the delicate intricacies in enforcing private international law. The research concludes that individual cases should be treated on its merits in the overall interest of justice.
Keywords: Time factor**,** forum,lex fori, conflict mobile, connecting factor.

Introduction

At a glance, the problem of time factor in Conflict of Laws might seem unreal or less noticeable. This can be fuelled by a hasty assumption that the court would consider a spatial question as at the date of action. However, even though the court considers the 'problem' at the date of the action, it would not necessarily apply the content of a foreign law or that of the forum's choice law rule at the date of the action.

Different types of time questions arise in Conflict of Laws, some of which has been identified by J. K Grodecki in the British year book of international law[1] he wrote "the primary function of private international law is to fix limits of different municipal laws in respect to one another. It is thus concerned with the application of laws in space. Yet legal rules may collide on the plane of time as well as that of space". The conflict of law in relation to time in the strict sense arises in two instances:

1. Where there has been a change in the content of the private international law of the forum
2. Where there is a change in the domestic rule of the foreign legal system selected under the choice of law rule of the forum.

   He added that a third case in which time element appears significant is;

3. Where there is an alteration in the localization of the connecting factor.

He stated that the failure to expunge the 3rd instance which is sometimes referred to as conflict mobile from the conflict of law in relation to time is responsible for the confused thinking of the subject.

J. K Grodecki also argued that conflict of law in time should not arise as a result of the co-existence of law but from their succession. He further argued that the succession of law must occur within a legal system: he emphasized that in the case of 'conflict mobile' the court is dealing with a matter of dispute extending over to several legal boundaries. He concluded by saying the change in the localization of the connecting factor from one country to another gives rise to a new problem of private international law.

[1]J. K Grodecki in the British year book of international law (35 Brit. YB. Int'l L.58 (1958) "Conflict of Laws in Time" pg 1)

Changes in Content of the Conflict Law Rule of the Forum

The change in the conflict rule of the law of the forum is similar to a change in their rule of law. The extent of the change or alteration is usually determined by the statute itself or by judicial interpretation.

A change may occur in the following ways;[2]

I. a statute may alter an earlier rule of judge-made law

II. a statute may alter an earlier statutory rules

III. a judicial decision may reverse an earlier judicial rule or declare a new one.

A judge made law is retrospective in its operation while it is an elementary learning in law that there is a strong but rebuttable presumption of law that a statute is not intended to have retrospective effect. The main questions raised under this heading are in relation to the operation of the new rule concerns previous acts or actions/circumstances and its relationship to the old rule.[3] The problem of conflict of law under this heading is usually in relation to the retrospective alteration of a rule of law by the forum. This is because obligation, roles, status of a person might be greatly altered by the retroactivity of the law.

This problem has been brought to fore in the case of Hornett V Hornett (1971) p.225 where a man domiciled in England married in 1919 a woman domiciled before her marriage in France. They lived together in France and England until 1924 when the wife obtained a divorce in France. The husband heard about this divorce in 1925. He then resumed cohabitation with his wife in England until 1936 when they parted. No children were born of this cohabitation. In 1969 the husband petitioned for a declaration that the divorce would be recognized in England. Although it could not have been recognized before 1967 the divorce was recognized under new judge made rule declared by the House of Lords in that year in the case of Indyka V Indyka[4]

The possible consequences of the retrospective rule in relation to above case have been identified as follows:

a. If the children had been born of the resumed cohabitation between the parties after the divorce, they would have been legitimate when born but bastardised by the subsequent recognition of the decree.

b. If the husband had gone through a ceremony of marriage with another woman in 1945 and the second marriage had been annulled for bigamy in 1950, and his second wife had then remarried, would the result of recognizing the divorce in 1971 be to invalidate the nullity decree and also the second wife's second marriage?

c. If the husband had died intestate in 1940 and a share in his property had been distributed to his French wife as his surviving spouse would she have to return it when the new conflict rule declared by the House of Lords in 1967 validated her French divorce?

Some writers have suggested that solution to this problem should not be found in transitory rules of the forum but in those of the legal system to which the new conflict rules refer.[5] It however observed that the above suggestion itself is no solution to the problem because it is just a mere referral to a foreign law with her own inherent problems. The Michael Pryles observed that English or Australian courts are unlucky to look beyond its own transitory rules to construe a domestic conflictual principle.[6]

WHERE THERE IS A CHANGE IN THE DOMESTIC LAW RULE OF THE FOREIGN LEGAL SYSTEM SELECTED UNDER THE CHOICE OF LAW RULE OF THE FORUM (CHANGE IN THE LEX CAUSAE)

Most writers and the decision of courts in Continental Europe are in consonance with the fact is that the lex fori should apply the lex causae in its entirety including its transitional rules. This is however subject to public policy reservation under the common law against retroactive penal legislation.[7]

2.3 ALTERATION IN THE LOCALIZATION OF THE CONNECTING FACTOR

[2] J.O.A. Akintayo, 'Conflict of Laws' course materials 2012/2013 session pg. 20 University of Ibadan

[3] Micheal Pryles, The Time Factor in Private International Law (Monash University Law) Vol. 6, 1980 pg 236 (hereinafter referred to as Micheal Pryles)

[4] Indyka V Indyka (1969) I.A.C. 33

[5] Dicey & Morris, The Conflict of Laws (9th Edition, London, Stevens and Sons, 1973) pg 40

[6] Michael Pryles, Op.cit pg 237

[7] Lynch V Provisional Government of Paraguay (1871) L.R.2.P&D268

The connecting factor in conflict of laws may either be constant or variable. The problem of time localization in constant connecting factors cannot arise because they are invariable. The question of time localization of a connecting factor arises only in varying connecting factors. A connecting factor may refer to a specific moment of time and the changes may further require new definition to give effect to such change. A good example of this is where a conflict rule makes specific reference to the issue of capacity to make a will to the law of the testators' domicile would be meaningless unless it defined the moment of time at which domicile was relevant i.e. whether it relates to domicile at the time of execution of the will or at the time of death. It is important for the conflict rule to state the appropriate moment of time and the change in the connecting factor as a problem of time in the conflict of laws. The highly unsettled and controversial aspect is where there is no statutory guidance as to the time of localizing the connecting factor, which is left for the courts to settle.[8] When the time to localize a connecting factor is known, another underlying question is that should a court look at factor and circumstance which existed at the time of the event or subsequent facts and circumstances should be taken into account in localizing a connecting factors. There are judicial decisions to the effect that in ascertaining the domicile of a person at a particular time, regard may be had not only to conduct and acts before and at the time but also to conduct and acts after the time. In Bell V Kennedy[9]

> "…***it was held that the person concerned had not acquired a domicile of choice in Scotland at the relevant time, his wife's death, because it was uncertain whether he would purchase an estate in Scotland, England or elsewhere. But their Lordships were in no doubt that after his wife's death, when an estate was purchase in Scotland, he did acquire a Scottish domicile of choice."***

Other varying connecting factors are the sites of a movable, the flag of a slug, the nationality and domicile of an individual.

3.0 Conclusion

Several commentators have urged for the adoption of the American rules of transition in conflict of laws which provides constitutional limitations to inter temporal legal problems?[10]

The constitutional limits make a new law operate in and through time according to the implied or express intent of its creators and the transitional rules employed by those who apply the law. For example, if relevant events occurred before the change in law, a court is likely to hold that the rights arising under the earlier law have "vested" and is 'not to be undone', unless the law changed was merely of procedure or remedy rather than substance.

This view have been given support by STIMSON in his book[11] "Conflict of Laws" where he stated that "in any choice of law affecting the result of a law suit, the court should select the law to which the parties or property were subject at the time of the conduct of the event, the legal effect of which is in question, and not the law to which they or it are subject at the time of the trial". He further stated that if all the law in effect at time of trial and only that law was applied, forum shopping-inter-territoriality and inter-temporally would present a serious problem.

4.0 Recommendation

Stimson's proposition has been criticized on the strength of the fact that to compel the courts of one state to apply the law to which the parties or property were subject at the time of the conduct or event whose legal effect is in question; would mean that a state (the fori) would not be able/free to apply the later law of the state (lex cause) of the governing law even if that state would do so.

The implication of this rule is that the lex cause would be obliged to apply the law of the lex fori as it was even through the lex fori would have applied its law in current form to a similar case involving only domestic facts.

It is argued that if temporal boundaries of a new law are viewed as territorial borders, then one can speak in terms of an inter-temporal conflict of laws/conflict of laws in time. The advantage of thinking of inter-temporal problem in terms of choice-of-law is that it promotes consideration for options rather than mechanical formulas.[12]

He suggested considerations of;

1. Simplicity

[8] Michael Pryles pg 240

[9] Supra Michael Pryles pg. 241 (1868) L. R. 1 Se. & Div. 307

[10] John K. McNulty 'coperations and the inter-temporal conflicts of laws, California Law Review (1967) Vol. 55:12 pg 14

[11] supra John K. McNulty Fole pg 17 supra

[12] John K. McNulty Supra Pg 10

2. Expectation of interests
3. The accomplishment of the purpose of the new law rule
4. Relevant facts and policy considerations in deciding whether to apply the new statute to the earlier Acts.

The question of time factor arises on a different plane and gives a second dimension to private international law and perhaps no general rule can be laid down. It is recommended that each case or incident should treated in its own right in other not to occasion a miscarriage of justice by formulating general principles especially in the area of localizing the connecting factors.

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