Renvoi: a dying doctrine

Jenny Bird reflects on how relevant the 200-year-old regulation is today.

Some of us will be relatively familiar with the doctrine of renvoi in relation to cross-border succession issues, but whether or not the doctrine should be applied in this and other areas of law is perhaps something that we do not necessarily consider.

What is renvoi?

When English and Welsh choice-of-law rules (used here in the sense of private international law (PIL) rules for deciding the applicable law, rather than a *professio juris*) point to the application of foreign law, should that include the foreign state's PIL rules? Alternatively, should only the foreign state's internal substantive law apply?

"If the purpose of renvoi is to achieve harmony in decisions, this could be better achieved by the harmonisation of PIL rules"

The current English and Welsh doctrine of total renvoi operates to apply a foreign state's choice-of-law rules, as well as its substantive law, to better reflect how that state would resolve the issue. As such, the use of total renvoi aims to promote harmony in decisions across different jurisdictions and, arguably, should be used more widely. By applying the foreign state's choice-of-law rules, the English or Welsh court is effectively mimicking the decision of a court of that state.

It is desirable for English and Welsh courts to reach the same decision as foreign courts for two principal reasons. First, where the foreign state has control over the subject matter of a dispute, the English or Welsh court must reach the same decision as the foreign court or the judgment is likely to be unenforceable. This is perhaps clearest when considering disputes over title to immovable property. Second, in certain circumstances, it is critical, for policy reasons, for the English or Welsh court to reach the same decision as the foreign court. However, the doctrine of renvoi is not applied by the English and Welsh courts in all areas of law.

When is renvoi not applied?

In general, the doctrine of renvoi is not applied to issues involving title to movable property. In *Blue Sky One v Mahan Air*[1], the court reasoned that the doctrine was not suitable because it involved the English court preferring a foreign state's choice-of-law rules to its own, it was difficult to apply, and it was unlikely to lead to greater uniformity of decisions across jurisdictions.

The doctrine of renvoi is also expressly excluded in the choice-of-law rules for contract and tort issues by the Rome I Regulation and Rome II Regulation. Given the rejection of the doctrine in property, contract and tort, surely the arguments against renvoi apply equally to

[1] [2010] EWHC 631

other areas of law and, as such, there should be no place for the doctrine in English and Welsh law?

However, Mr Justice Eady, in *Iran v Berend*[2], neatly summarised the English and Welsh stance on the doctrine of renvoi by stating that, although renvoi was not part of the choice-of-law rules in property, 'the modern approach towards renvoi is that there is no overarching doctrine to be applied, but it will be seen as a useful tool to be applied where appropriate'.

When is renvoi applicable?

The doctrine of renvoi is still alive and well in the realm of succession issues so that, when the English and Welsh choice-of-law rules provide that foreign law should apply to the succession that also includes that foreign state's choice-of-law rules. The classic example is that of *Re Annesley*[3], where, in accordance with the English and Welsh test for domicile, an English lady died domiciled in France. The English choice-of-law rules provided for succession to her movable property to be governed by French law, as the law of the place of her domicile. However, under French law, the succession to her movable property should be governed by the law of her nationality (i.e. English and Welsh law). The English court held that a French court would apply the doctrine of renvoi and, as such, apply the English and Welsh choice-of-law rules, which provided for French law to govern the succession.

Similarly, in the family law courts, renvoi has been embraced even when it leads to less than satisfactory results. In *R v Brentwood Superintendent Registrar of Marriages*[4], the English courts refused to recognise the validity of the marriage between two single people in Switzerland, in order to ensure that their decision was consistent with that of the Swiss courts. The policy consideration leading to the application of the doctrine of renvoi in those circumstances is clearly to avoid what is known as a 'limping marriage': one that is valid in some places and invalid in others.

Section 212(2) Civil Partnership Act 2004 expressly provides that, where a foreign law is applicable to determine the validity of an overseas relationship, this includes that state's PIL rules.

But the application of the doctrine is unpredictable. A court may only apply it if one party expressly pleads its use, which adds to the expense and complexity of the litigation. Even then, the court has the safety net of public policy to invoke if the result of applying the doctrine offends English and Welsh concepts of justice or morality. Renvoi thus may be seen as another discretionary tool available to English and Welsh law that enables justice to be achieved in the particular circumstances. This lack of certainty is one reason why renvoi is not seen as appropriate in commercial disputes. Further, the discretionary and flexible nature of the doctrine is contrary to the traditional concept that conflict-of-law rules should not be influenced by potential outcomes.

Renvoi or harmonisation of PIL rules?

The arguments against renvoi are well documented. In particular, although renvoi is often applied to achieve policy objectives (such as to avoid limping marriages), the English and

[2] [2007] EWHC 132 (QB)
[3] [1926] Ch 692
[4] [1968] 2 QB 956

Welsh choice-of-law rules provide for a particular connecting factor for policy reasons too. For example, English and Welsh law uses domicile as a connecting factor when assessing the material validity of a marriage and does so because, as a matter of policy, it has been decided that domicile is the preferable connecting factor. However, by allowing the doctrine of renvoi to operate when assessing the material validity of a marriage, alternative connecting factors such as nationality are favoured surreptitiously. Renvoi essentially allows the court to favour a different set of choice-of-law rules and, if they should be favoured, would it not be better to change the English and Welsh rules?

If the purpose of renvoi is to achieve harmony in decisions, this could be better achieved by the harmonisation of PIL rules. The choice-of-law rules relating to contract and tort have already been harmonised in the EU, and the EU Succession Regulation, which will come into force in August 2015, will further this.

It should also be remembered that, while achieving harmony in decisions is an important objective of PIL, it is not an overriding objective. Having consistently incorrect decisions is no better than inconsistent decisions.

It is, therefore, hoped that the doctrine of renvoi will be adopted less frequently as PIL rules become increasingly harmonised.

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