

GUJARAT NATIONAL LAW UNIVERSITY
GANDHINAGAR

Course: Private International Law
Semester-IX (Batch: 2016-21)

End Semester Online Examination: December 2020

Date: 19th December, 2020

Duration: 8 hours

Max. Marks: 50

Instructions:

- The respective marks for each question are indicated in-line.
- Indicate correct question numbers in front of the answer.
- No questions or clarification can be sought during the exam period, answer as it is, giving reason, if any.
- Answers should reflect clear elucidation of legal concepts wherever referred.
- If required for the purpose of answering the question, you can make certain factual presumptions, if necessary.
- If your argument or part of your analysis require a source to be cited, you may refer it in bracket followed by details of the source and year.
- For Question 2, the true print of judgment is also provided as part of the paper.

Q.1 Answer the following questions

Marks

(Convention of 25 October 1980 on the Civil Aspects of International Child Abduction hereinafter referred as 'Hague Convention')

(4+4+

2+4)=

14)

a) Compare the reasoning of Supreme Court of India in *Surya Vadanani v. State of T.N.*, (2015) 5 SCC 450 : (2015) 3 SCC (Civ) 94 : 2015 SCC OnLine SC 189 and *Nithya Anand Raghavan v. State (NCT of Delhi)*, (2017) 8 SCC 454 : (2017) 4 SCC (Civ) 104 : 2017 SCC OnLine SC 694 on the legal principles to be applied in India for International parental child abduction disputes. (4 Marks)

b) Do you think, legal philosophy of Hague Convention and Supreme Court of India's reasoning in International parental child abduction disputes converge or diverge? Justify your answer backed by strong legal arguments. (4 Marks)

c) What is the age of child as provided under Hague Convention for its application? What was the reason to cap the age as provided under Hague Convention? (2 Marks)

d) Compare and analyse the reasons given by two Law Commission of India Reports and Justice Bindal Committee Report to sign or not sign the Hague Convention. What is your opinion in this matter that Whether India should sign Hague convention? Give reasons. (4 Marks)

Q.2 Read the following excerpts from Richard Garnett, *Substance and procedure in private international law* (Oxford private international law series, 1st ed. Oxford University Press 2012).

(6x2=
12)

Where an issue of conflict of laws arises, characterization is the first step in determining the appropriate choice of law rule to apply. The first stage of characterization is that the forum court must characterize the cause of action, that is, assign the set of facts to the appropriate legal category, whether it be tort, contract, etc. This process is conducted

according to the principles of the law of the forum. Once this process is complete the forum court must then apply the relevant choice of law rule to determine the law of the cause of action. Once this law has been identified, the forum may have to make a further characterization to ascertain whether a rule is substantive or procedural. This process only arises when a foreign law is the law of the cause of action, since if forum law is the law of the cause of action there can be no conflict between substance and procedure as the law applicable to both is the same. Where, however, foreign law is the law of the cause of action, the conflict can arise in two distinct ways. First and most commonly, a party may argue that elements of the foreign law are procedural and so cannot be applied in the forum or alternatively a party may seek to rely on provisions of forum law as a defence, with such provisions only being applicable to the action if they are considered procedural. While the majority of writers and the decided cases proceed on the assumption that the forum characterizes a *rule of law* of the foreign country, or the forum, some writers have argued that this technique is flawed and that courts should characterize *the issue in dispute* between the parties. The distinction between the two schools of thought is said to have practical significance in particular cases. If a rule of law approach is adopted, the forum may face a difficulty if confronted by conflicting rules under forum law and foreign law, such as in the famous *Re Cohn* case. The first problem which may arise is where the foreign rule is procedural and the forum rule substantive, in which case no rule is applied—there is a ‘gap’ in the applicable law. Alternatively the situation may ensue that the forum rule is classified as procedural and the foreign rule substantive, in which case both rules apply—the problem of ‘cumulation’. While in reality courts would strive to avoid such absurd results, the potential nevertheless exists under the ‘rule of law’ method. Under the ‘issue’ approach these problems are said to be avoided since the forum court only has to identify the matter in dispute and then apply a single law to it. It must, however, be acknowledged that at times it will be difficult and arbitrary to identify the precise ‘issue’ for determination; at least with rules of law the material to be classified is clear.

As you are aware that the characterization process is not unique to private international law and is, in fact, inherent to all legal reasoning and judicial determinations. However, what is unique to private international law is the conflict of characterization, which arises when the legal orders involved do not offer similar classifications. In view of the above excerpts written by author (emphasis supplied), answer the following questions:

- a) Explain the problem of characterisation in private international law with clear elaboration on the process, scope of characterisation and the challenges that the court has in the process of characterisation with probable solutions to address the problem of characterisation in private international law disputes. (6 Marks)
- b) Analyse the case *Alcon Electronics (P) Ltd. v. Celem S.A. of France*, (2017) 2 SCC 253 : (2017) 1 SCC (Civ) 618 : 2016 SCC OnLine SC 1444 (*Material provided*) from private international law aspects. Examine the elements of characterisation that you can identify in the judgement. Can you hypothetically analyse the situations where the Court would have arrived at different conclusion if they

would have characterised in a different way than what they did in the judgement?
(6 Marks)

Q.3 You have to analyse this factual problem with indications mentioned and logically explain different approaches from the conceptual understanding of private international law disputes. (10)

Jacqueline was born on 1970, a Country A National and has domicile of origin as Country A. Ever since 1975 Jacqueline has lived continuously in Country B unless for a month's visit to Country C in 1980 and about a fortnight's visit to Country D in 1995.

In 2000, Jacqueline in Country B, contracted a monogamous marriage with a Country B national, Ralph in a church.

In 2005, in the Court of Country B Jacqueline filed a civil divorce petition and the court divorced Jacqueline from her husband Ralph, who remarried in Country B in 2006.

In 2010, the applicant, Amani, a Country C National gave due notice to Marriage Officer of Country D of his proposed marriage to Jacqueline

The Marriage Act of Country D provides,

"Where a notice of marriage has been received by a Marriage Officer, then, the Marriage Officer, on the request of the person by whom the notice was given, shall issue a certificate and a licence in the prescribed form unless any lawful impediment to the issue of the certificate has been shown to the satisfaction of the Marriage Officer"

Accordingly, Marriage Officer issued no certificate or licence to Amani as there exist a lawful impediment on Jacqueline to be married.

A month later, Amani has formally appealed to the Court of Country D stating that (a) no Country D's court will recognise a restriction on remarriage imposed on one party only and (b) the impediment must be one imposed by Country D Law not by Country B Law

Consider the relevant legal facts to solve the above-mentioned problem

1. As per Country D's Law, a person's capacity to enter a further marriage is determined by the law of domicile at the time of marriage.
2. Country D recognizes Country A and Country B's Divorces by reciprocal agreements
3. Country A and Country C does not recognize civil divorces of Country B
4. Marriage Separation Act of Country B under Section 10 provides that divorce decree that is valid according to the laws of the country of nationality of parties should be recognized here
5. As per Country A's Law: Jacqueline is domiciled in Country B with domicile of origin as Country A
6. As per Country B's Law: Jacqueline has not acquired domicile in Country B
7. As per Country C's Law: Jacqueline is domiciled in Country B (applies common law domicile test and does not adopt revival of domicile of origin doctrine)
8. As per Country D Law: Jacqueline is domiciled in Country B (applies common law domicile test and adopts revival of domicile of origin doctrine)
9. Country D is a *double Renvoi* country
10. Country B and C is *single Renvoi* country
11. Country A is a *no Renvoi* country

As Court of Country D, enumerate different ways in which the Court can take different approaches for *incidental questions* and application of *renvoi* involved in the above stated problem. Explain the legal concepts wherever referred in your answers.

(For the sake of clarity and brevity: divide your answer in two parts, one, when court takes up this issue/s as incidental question and in the second, when the court applies renvoi)

Q.4 Nisha and Harsh got married at Gandhinagar on 14 Feb 2013 as per customary Hindu rites and their marriage was registered at Sub Registrar Office at Ahmedabad. By profession, Harsh was an international journalist and was already working in USA. After marriage Nisha went to USA on 21 July 2013 where both settled their matrimonial home and lived together. (4+3)
=7)

In August 2018, Nisha and Harsh moved to Australia as Harsh's company offered him the post of Managing Director in a new branch office opened in Sydney, Australia. In early Jan 2019, Nisha and Harsh executed a post-nuptial agreement and decided to obtain divorce from each other as marriage has been irretrievably broken. Later on, Harsh filed a divorce petition before Family Court Australia on 27 August 2019. However, Nisha had come back to India in March 2019 to permanently reside with her parents.

The Family Court in Australia allowed the divorce petition and had passed decree of divorce on 20 December 2019 without Nisha appearing before the Court.

In Jan 2020, Nisha was informed that Harsh entered the second marriage with his classmate Sneha.

Nisha has approached you with the following questions:

- Whether decree of divorce given by Australian Court is binding on her as the Court which passed the divorce decree took the jurisdiction based on the temporary residence of husband and passed the divorce decree based on Australian Law? Whether she is estopped from challenging the foreign decree? Write a legal opinion expounding the legal position in India for recognition of foreign divorce decrees. Strategically advise her on legal options or recourses that she can take in India. (4 Marks)
- Presuming that Nisha had approached you in between the period of 27 Aug 2019 to 20 Dec 2019, can Nisha approach the Indian court for Anti-Suit Injunction as India is a forum convenient to her? Briefly advise Nisha on the law of Anti-suit Injunction in India. (3 Marks)

Q.5 English courts have noted that "the court will be even slower to invoke public policy in the field of conflict of laws than when a purely municipal legal issue is involved, and have accepted the need for "commonsense, good manners, and a reasonable tolerance" "the greatest circumspection", and "judicial restraint" noting that "the law proceeds charily where grounds of public policy are invoked" (7)

- Alex Mills, *The Dimensions of Public Policy in Private International Law* (2008) 4 *Journal of Private International Law* 201

In view of the above statement, examine how Supreme Court of India has relied on conceptual idea of private international law limiting the application of public policy while interpreting public policy under the Arbitration and Conciliation Act 1996.
