PBL3010 INTRODUCTION TO PRIVATE INTERNATIONAL LAW

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MALTA

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Introduction to Private International Law

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Introduction to Private International Law

Topic list:

1. Definition, Nature, Scope & Historical Development
2. Sources of Private International Law
3. Classification
4. Renvoi
5. Incidental Question; Substance & Procedure
6. Public Policy
7. Proof of Foreign Law
8. Domicile and other connecting factors

You must know the private international law because it is an overarched body of law because each area would have rules of private international law of each area. It is an overarching system and so you are bound to need to know your private international law pretty much in any area of private law one may work in.

However, there is one feature which makes private international law what it is, this feature is the foreign element. You will realise that whatever area of private international law, this kind of system of law or body of rules kicks in when you have a foreign element. This means that in the case or in the facts there is a feature which is not purely local. This foreign element triggers one of these rules of PIL. The subject where there are 3 areas in which we get these triggers:

1. **Jurisdiction:** Why is jurisdiction in PIL? Those rules because they prescribe which elements allow a local court to take jurisdiction on the defendant, so can I sue you in Malta? If I have a dispute with a Japanese person and he comes on holiday in Malta, can I sue him? The rule of jurisdiction tells you who can be sued where in particular circumstances, and the foreign element is there.
2. **Choice of law:** Contrary to the other 2 areas which are procedural, these are the substantive part of PIL, so you will find rules for example which say if there is a foreign will which needs to be recognised and implemented in Malta, what are the requirements of that will to be recognised, or if there is a marriage which rules govern which of the rules make the marriage formally valid. These choice of law rules they tend to be very granular. These rules trigger in when the local system has to face something born from another legal system and it has to deal with it.
3. **Recognition and enforcement of foreign judgements**. - If one gets sued in Italy, assuming the Italian court has jurisdiction over one, but one does not pay, obtaining a judgement in one's favour is the beginning because if the debtor does not pay one has to enforce, and so this applies in a purely local context. There is a foreign judgement and there is a cross border enforcement, so the local system is going to recognise and enforce a foreign judgement as if it was a local one. It will be enforced in Malta as if it were a Maltese one.

There is not one PIL throughout the world. PIL is a local legal system, each legal system has its own PIL system because it is one legal system how it looks at something coming from another legal system, so this is why each legal system has its own because each legal system needs a way to interact with each legal systems, and it's the fact that there are many legal systems which leads to international private law. each municipal legal system has its own PIL system. It is a body of rules which live at the border of a legal system, it is the place where you interact with another legal system, so through the PIL rules of one system you are interacting with another. Usually, it is a case of two legal systems trying to interact with each other, but it may also be three or more.

Choice of law

When a case has a foreign element and it is sitting before the Maltese court, first, the court shall examine whether it has jurisdiction, then there could be a foreign element which requires the local court to apply a foreign system of law. One has to do this because PIL stipulates as such. If a case arises in Malta on the validity of a trust formed in the British Virgin Islands, the court has jurisdiction here, Maltese PIL will say if the if the allegation is whether the trust was formally valid, one must then look at the rules of the BVI. Therefore, it gives one an indication, it tells one to listen, as one needs to apply a foreign law, but it is the Maltese law stipulates that this be done. One needs to adopt the foreign law, import it into the legal system and base the judgement on the grounds of that law.

When we refer to the local court, and the law of the local court we refer to it as the *lex fori,* the law of the forum, so the law of the forum is the law which because it is the local law it has control over certain things, e.g., the PIL of the of the forum. The other character is the *lex cause,* the applicable law of the substance of the case. In all PIL cases you have these 2 cases. When Maltese PIL is telling you to apply a foreign rule and it gives you the tools to use it and it stops there, the PIL does not give you a solution, it leads you to how to get the solution.

When we say the foreign legal system, we are not speaking of country, there are countries or political units like the US or UK, where in the political territory there is not one system of law but there are various. You have for e.g., English law and Scots law, so PIL looks at the legal system, so if the issue we have is in Scotland, we look at Scots law and not English law.

The name of the subject

It is traditional also to look at the **name of the subject.** There isn't one PIL, each legal system has its own, whether its private or public is has elements of both. Another name which they use for the subject is 'conflict of laws', its misleading because it suggests that there is a real conflict between different legal systems, but the conflict only exists in the mind of the judge in the coming decision. The fact remains that the system is by its nature, it needs to be international in some form, so the international element is that your legal system is finding a way to be international, to be receptive to other legal systems. A lot of work has been done to make PIL international, there are two ways one can do this:

1. Either unify internal laws- so if the law of Malta and the law of Italy on contract is exactly the same word for word, if a contract happens in Malta or Italy, it is going to be the same.
2. To unify private international laws- to have PIL law rules which are common to many countries.

There were attempts at unifications of internal laws, but these were all done through treaties. Unifying internal laws is challenging, so the other way you can do it is to have PIL rules in different countries, and for this they established the Hague convention of international law, its purpose is to churn out conventions to try and unify different PIL rules of different countries.
The European union is an example of both unification of internal law and unification of PIL. There is the work of the EU has increased exponentially. The EU creates uniform community law, you have common rules on jurisdiction and the enforcement of foreign judgements. You have applicable law in the case of contracts and torts, there are a large number of European legislations which created this commonality of rules, because if you want a single currency, free movement of everything, you can't cross the border and the rules change. So without borders there was a lot of work done through these instruments of unification, which have given a lot of certainty.

History of PIL (refer to slides)
PIL rules were born when there were different political divisions and countries in the legal system in the world. The roman empire did develop citizenship, the concept of domicile.

There is not a code or act in Malta of PIL.

Lecture 2

Every type of law has a source, there is a statutory source. However, laws are interpreted by judges along the years, Malta has a very old legal tradition and even if you do criminal, there are judgements which will interpret the provisions of the criminal code, say with companies act which interprets the companies act. In Malta unlike in England we don't have the doctrine of precedent which means that in England if the house of lords say something you cant go against it. a lower court can't supervene this. The doctrine of precedent is not something which happens in civil law systems, like legal systems that came out of roman law, a lower court can go against a ruling of a higher court.

We have **statutory sources.**
The ordinances that went up to make up the civil code were written by sir Adrian Dingli and he used to do a lot of different ordinances, and in there we already had something, we have 4 private international law rules that existed in the old ordinances. These are:

Art 682 – formal validity of a will

Art 1316 – marriage in Malta produces community of acquests - The foreign element is what makes PIL kick. If I have a persona from Italy and a person from Germany

decide to take a holiday and get married in Malta, unless they do something else, the act that they celebrated the marriage in Malta, kicks Malta jurisdiction and the community of acquest applies.

Art 1852 – interest rate capping 8%- along the years it was always interpreted in the sense that even if it is a foreign contract, if they're going to come and enforce it in Malta, the Maltese courts will say no it can't be more than 8% even if your contact is more. There is the possibility of the foreign element kicking in Art 1931 – surety had to be domiciled in Malta- domicile is one of the connecting factors because domicile, nationality, habitual residence, is disconnecting a person with a legal system, so whenever you see that kind of word in Maltese law then there is this connection.

When sir Adrian dingli came up with these rules of PIL, we weren't alone, the great codification of laws happened mainly in the late 19th and 20th century. So, over the years we also got some more rules, so when we did the code of organisation and civil procedure we put in rules of recognition and foreign judgements, so there was also an evolution in that sense. When you see what little private international law we have, but the cases used to happen so cross border marriages and wills and contracts, aren't a phenomenon of today, but they used to always exist so issues with a foreign element used to happen before the courts since the olden days. So, since we said we have statutory sources, when you have a code the judge will interpret a code, if she or he has nothing, what do they do? So, you have to get your inspiration from somewhere and this is why judicial sources are more important because the judges were faced with a situation that they needed to fill in gaps which the code didn't have.

Judicial Sources

The modern starting point was the code de Rohan. This code, which was based on the roman law tradition, at the time the bases of most European laws was roman law (Not in England) and the legislator of the code de rohan put in a rule in there which was intended to help the judges deal with certain issues, it was how to fill in the lacuna (gap). The knights knew that they couldn't write everything in the code so they thought, what should the judge do if there is a gap? The rule was quite simple, it told the judge listen if you don't find the solution to the case in this code, you should refer to the *leggi comuni* when you refer to it, then refer to the decisions of the most important tribunals. *Leggi comuni* at the time for Malta, Europe, this was Roman law. what we today refer to as common law, generally, is the common law of England. When they said the most important tribunals around you, it is the most important tribunals that came from your family of law. you used to look at the tribunals in Italy, France, because they came and used and were trained in the same legal petition that we had in Malta which is Post roman law codifications and post roman law interpretations, and this is what they did.

Historically if you look at the judgements that had PIL issues, the judges used to interpret and look for inspiration at what other judges in continental Europe used to do. Along the years this changed, the next big thing was British rule. Legally the French occupation was illegal, from a legal perspective. Most people thing that when the British intervened they thought the whole legal system changed, because we were a British colony, even from a English law perspective, we were a special because we weren't a country where the British crown invaded us and took us over, we weren't

conquered, we weren't settled. We were different, we offered ourselves to the British crown and what they used to say is that all existing laws remain in place.
So we had the:

1. Code de Rohan
2. Napoleon
3. British rule

The judges kept on doing the same thing as when there was the code de rohan. Then the legislative power moved over to the British crown and governor, so if they enacted laws which specifically applied to the colonies then those laws were under the colony. However, as the British crown enacted more laws and it congressed over the years, we had the reorganisation of the courts and Sir Adrian Dingli, and the Code de Rohan itself started being dismantled piece by piece. Every time an ordinance was enacted, it replaced the corresponding provisions of the Code de Rohan, however not all of it and in fact this rule was never specifically abrogated, and we had judgements even in the 1900's which used to refer to it, but it became less mainstream.
As time progressed there was this inclination to fill the lacuna in a different way, it didn't happen overnight, it happened gradually, but you could say that by 1936/37 you had solid pronouncements, even of the court of appeal in Malta which wrote the lacuna rule in a different way, and the way they reasoned it out is that listen, we don't have any PIL and so using various reasoning, and this was a revolution at the time. First of all it came out of nowhere and historically there was nothing which made us do that, but at a point in time, this theory that because we don't have PIL law rules of marriage, we use English PIL rules, and from there onwards it took over the entire system and so today, when you are studying PIL, when you look at the judgements of the Maltese courts, the base concepts such as domicile, the absolute certainty of the judges is that he will not pick up his French PIL book to see if there is a rule, but he will pick up his English law, because of the change in tradition. If you stop and think, what they did was that they took an inherently civil law system and tried to create a border of English common law, it worked, and the modern tradition is to get inspiration on PIL concepts from English common law. anything done between 1802 and independence would only apply to Malta if the English act of parliament directed that it would apply to the colonies. We have the colonial laws validity act which says this.

Statutory sources today
You would think that modern legislators in Malta, someday would have come up with the idea of having a Maltese PIL law code, It never happened and this is because the system worked.

Judicial sources

The judicial sources kept evolving and the tendency was to try and use these English rules like succession maintenance, domicile, and proof of foreign law. National law is used very rarely, however there is one instance when it comes to maintenance where they still look at the law of that

Statutory Sources Today

Chapter	Title	Article	Subject
12	Code of Organisation and Civil Procedure	742	Jurisidiction - General
12	Code of Organisation and Civil Procedure	811	Recognition Foreign Judgments
12	Code of Organisation and Civil Procedure	826	Recognition Foreign Judgments
12	Code of Organisation and Civil Procedure	827	Recognition Foreign Judgments
16	Civil Code	682	Will - Formal Validity (applies to deaths until 16 August 2015)
16	Civil Code	1316	Marriage - Community of Acquests
16	Civil Code	1852	Contract - Interest Rate - Foreign Law
16	Civil Code	1931	Suretyship
16	Civil Code	1712l	Contract - Life Insurance
16	Civil Code	257A	Status - Change in Sex
16	Civil Code	43(7)	Foundations - Maintenance
16	Civil Code	66N	Jurisidiction - Divorce
16	Civil Code	958G	Trusts - Capacity
52	British Judgments (Reciprocal Enforcement) Act		Recognition Foreign Judgments
255	Marriage Act	18	Marriage - Formal Validity & Capacity of Parties
255	Marriage Act	33	Recognition Foreign Judgments
410	Child Abduction and Custody Act		Recognition Foreign Judgments
530	Civil Unions Act	6	Same-Sex Marriage - Formal Validity & Capacity of Parties

nationality. Also, when it comes to domicile there were some judgements which referred to National law.

We shall consider the principles of international law which the courts use to assist them when the case has a foreign element as they apply a foreign rule in the local court. One of the starting points in this judicial toolkit, so to speak, and the first is classification.

Classification is used at the stage in the case where it is established that the court has jurisdiction over it, but this foreign element presents itself. As such, the court enters a process of classifying what the case is truly about as before this is established the private law rule cannot be chosen. The choice of law rules, if broken down, all have two particular features: first, legal category; second, connecting factor (which law need be applied). All choice of law rules has these two parts. Take, for example, the formal validity of a marriage. The Marriage Act states that the formal validity of a marriage is governed by the law of the place of separation. If, before the judge, the issue is about

the formal validity of a marriage celebrated in Malta the judge shall apply Maltese law. but if before the same court the issue is about the formal validity of a marriage celebrated in Japan, this rule tells the judge that he must consider the law of Japan to determine this issue. With respect to capacity to marry, the Marriage Act stipulates that the capacity to marry is governed by the law of each spouse's domicile. Therefore, if the case involves the capacity to marry two spouses, both domiciled in different States, the judge shall consider the local laws of the respective States. therefore, the legal category would be the capacity to marry, and the connecting factor would be the law of the spouse's domicile.

The legal categories refer to the specific area of law involved, e.g., marriage, succession, contract, tort, etc. Before the legal category can be established, the court would not know which choice of law rule needs to be applied. These tend to be quite granular and generally come in two forms: issues of capacity and issues of formality. There is no choice of law rule on the succession only, but it must be about the capacity to write a will and/or the formality of the will.

It is not always simple to determine the legal category. This is because the local category may be unknown to the local court, e.g., polygamous marriage, movables/immovables distinction, etc. Another case which may lead to difficulty is where the law of the forum and the chosen foreign law have different or even opposing views on the correct legal category. A classic case is that of ***Anton v. Bartolo***, decided in French Algiers. In this case, a husband and a wife were domiciled and married in Malta before moving to France and acquiring a domicile there, with the husband even purchasing the land on which they lived. After he died, the wife started a case in France to claim the usufruct of one-fourth of the land, as at the time spouses could not inherit each other totally. This raised the question as to whether this case was one of succession, in which *lex situs*, i.e., French law, applied, or was it one of matrimonial rights, in which the *lex domicilii* at the time of marriage, i.e., Maltese law, would apply. Here, we see how the legal category could determine the outcome of the case entirely. The court eventually classified it as an issue of matrimonial rights and applied Maltese law.

In the case of ***DeNicols v. Curlier*** a French couple moved to England to live there. When the husband died, the wife claimed half of his property acquired during the marriage, including property in England, basing her claim on the French matrimonial property regime of equal shares in their community of acquests. English law has no such system, where the community of acquests does not and has never existed. The House of Lords felt that the French law should control their matrimonial regime and, in so holding, recognised a foreign institution which did not exist in England by considering it as equivalent to a contract. Therefore, classification by the *lex fori* does not always mean the strictly internal law of the forum, but a wider concept which needs to be worked out for the purposes of PIL.

The connecting factors are the link between the legal category and the legal system that is chosen to govern that legal category. These come in three forms: first, physical (e.g., the place where a property is found, AKA *lex situs*, or the place where a contract is signed, AKA *lex loci contractus*, etc.), which connect one to a legal system; second,

personal (e.g., domicile, nationality, habitual residence, etc.), which link an attribute of a person to a particular legal system; third, procedural (e.g., the law of the place where the court sits, AKA *lex fori*), as there are some things which, irrespective of the choice of law rules sending things to be governed by the law of a particular State, refers to procedure which is always governed locally.

With respect to the connecting factors and issues emanating thereof, is it the forum's interpretation and meaning of, say, domicile? Or is it that of country X, whichever it may be? Different laws have different definitions of domicile, such that no uniform definition exists amongst legal systems. Take, for example, the Robertson hypothetical where because of the differences interpretation of domicile between legal systems, one could end up with country Y saying one is domiciled in country X which in turn classifies the person as domiciled in the former country.

Various jurists have developed a number of methods of classification to remove the possibility of confusion:

1. ***Lex fori*:** This may make a foreign rule inapplicable when the foreign law would apply it. Also, it may apply a foreign rule when the foreign law would not apply it, and the issue may be one unknown to the forum. In the case of ***Ogden v. Ogden***, a husband and wife married in England with the husband being a French domiciliate. France has a rule which stipulates that until one is 21 years old, one needs one's parents' consent to marry. The issue on the validity of the marriage arose before the English courts. In this case, the English rule on the capacity to marry would have been the *lex domicilii* would have been France, whilst the English rule on the formal validity of the marriage, i.e., the *lex loci celebrationis*, would have been England, making it void. The court classified the French rule as formal validity and therefore held the marriage to be valid, even though under French law it would have been invalid (creating a 'limping marriage').

   In the case of **Maldonado's** estate, a person died intestate whilst domiciled in Spain with no heirs. The case arose in England about what to do with his estate and the English rule which is the governing law for intestate succession for immovables was *lex domicilii.* The Spanish rule was that the State becomes the heir, but the English law considered such a law as confiscatory in nature and the State could not be considered as an heir. Nevertheless, Spanish law was applied, and the Spanish State was allowed to succeed to the movable assets located in England.

   In the case of ***Huntington v. Attrill*** the issue arose as to punitive damages. The approach taken by English courts is that when enforcing foreign judgements even though one does not have the institute of punitive damages in local law, one should be receptive to foreign concepts in other legal systems.

   In case of ***Re Cohn*** a mother and daughter domiciled in Germany but taking refuge in England during the Second World War perished during an air raid. The court had to decide who succeeded to the estate of the mother, i.e., who

died first? Under English law, the presumption is that the older of the two died first, whereas under German law the presumption was that they died simultaneously. Therefore, was this a question of succession to be governed by German law or a question of evidence (the presumption) to be governed by English law? Here, the judge applied German law.

2. ***Lex causae*:** This is the substantive law of the case, stating that if one's choice of law rules refer one to a foreign legal system to be applied, one must determine everything by the foreign legal system. this is a circular argument, as the classification is intended to choose the correct local choice of law rule.

In fine, the classification process appears simple but is deceptively so. Issues arise due to the following: first, the very specific and granular nature of choice of law rules; second, differences in choice of law rules in different legal systems; third, different connecting factors used in different legal systems; fourth, classification of rules of law in different legal systems; fifth, the distinction between substantive and procedural rules. Although the *lex fori* is the starting point for classification, foreign rules should never be applied out of their natural context in a way which would lead to conclusions which are opposite to what the foreign rule intended.

Renvoi

What meaning is given to a foreign law once a judge holds that it is applicable? The acceptance of a foreign law could mean one of three things: first, when one refers to a foreign law, the judge using the proof of foreign law procedure will apply the internal foreign law only (what typically happens, i.e., no renvoi); second, that the judge considers the foreign internal law as well as the foreign PIL rule (i.e., a single renvoi); the third possibility is what is called double renvoi which means that the judge views the internal foreign law, as well as the choice of law rule and theory of renvoi of the same foreign jurisdiction.

No Renvoi

This is generally the preferred method of approaching it as one has applied one's PIL which led one to a foreign law, meaning only the foreign internal law should be applied as if the foreign PIL is applied it would be as if one were doing the choice of law stage twice. This is the general position at law both in Malta and to a lesser extent England.

Single Renvoi

A single renvoi one applies a foreign law and any choice of law rule of the foreign law. When this is done one can have two results: first, remission; second, transmission. Say we started with the choice of law rule and a foreign law was applicable, and we applied their choice of law rule which states that the Maltese law is applicable, that is what is known as a remission, as it was 'sent back' to Malta, so to speak. In single renvoi transmission we started with the choice of law rule, we were directed to a foreign rule, we followed their internal law and their choice of law rule, and that stated that the law of third State is applicable, thus transmitting applicability.

Double Renvoi

Also known as total renvoi or foreign court theory, the judge, who is referred by his own law to the legal system of a foreign country, must apply whatever law a court in that foreign country would apply if it were hearing the case. One looks at the foreign law and their choice of law rule, and if they have their own theory of renvoi we use that too. The judge, although he is

sitting in Malta, because he has to apply a foreign law and uses their theory of renvoi it is as though he is sitting in a foreign court such that he is doing all which the foreign judge would have done had the case arisen there. For this to work, the doctrine of single renvoi must be applied by the particular foreign law to which the judge is referred. Single renvoi, for instance, used to be repudiated in Italy (until 1995) but is recognized in France.

Take, for example, the validity of a will made in England by someone domiciled in Italy. The reasoning which is done is as follows: the judge does his classification and determines the matter to surround the intrinsic validity of a will, the English choice of law rules states that the intrinsic validity of the law is the *lex domicilii*; an Italian judge sitting in Italy with the same facts, because the Italian PIL states that the validity of the will is governed by the national law of the person doing the will, would refer the matter back to English law (Italian law did not have a single renvoi theory at the time); the judge will then apply English law because the Italian law told him to do so (case of Re Ross).

If we change Italy with France the result would be different as a court sitting in France (because of their own choice of law rules) would apply French internal law (because it has a single renvoi theory itself) and so French law would be applied.

What happens depends a lot on what the PIL of the foreign law says, but if one uses the foreign court theory one will use all the foreign law, including any theory of renvoi. However, this theory has been criticised:

1. Does not necessarily ensure uniform decisions.
    a. The doctrine will produce uniformity only if it is recognized in one of the countries concerned and rejected in the other - not if it is recognized in both.
    b. A single renvoi theory in the foreign state but not in the other is required for double renvoi to work.
2. Involves the capitulation of rules for choice of law.
    a. The doctrine involves nothing less than a substitution of local choice of law rules with foreign choice of law rules.
3. It is difficult to apply.
    a. Judge must ascertain what rule prevails at the moment in the foreign country with regard to the doctrine of single renvoi.
    b. The question may yet be undecided by the courts of the foreign country in whose shoes the judge is expected to adjudicate.
    c. How can, for example the law of nationality be applied when this comprises several systems of territorial law, as the USA or UK?

In the case of ***Collier v. Rivas***, a British person was domiciled in Belgium when he passed away and he left in Belgium one will and six codicils. The will and two of these codicils were drawn up regularly according to the formalities required by Belgian law. The remaining four codicils did not follow Belgian internal law when they were drafted but from a purely English law perspective, which is very liberal with wills, they were all valid. To make matters worse, although according to English law this person was domiciled in Belgium, according to Belgium he was not. The English judge used the foreign court theory and declared that he must sit as if he was a judge in the Belgian court. The will and two codices which were valid according to Belgian law were deemed okay, but he also said that the remaining four codicils were also valid because a judge in Belgium would test the formal validity of the will by English law because the person was according to them domiciled in England not Belgium. He therefore admitted all six to probate. The judge was very magnanimous as he decided that a will should be valid both if it satisfies internal law and even if it satisfied PIL because as can be seen he

applied a bit of both. This case is criticised for this kind of inconsistency but sometimes judges feel what should be the right conclusion and work backwards.

There are various similar situations where judges use double renvoi, such as the essential validity of a will (Re Annesley (Davidson vs. Annesley)), intestate succession to movables: Re O'Keefe (Poingdestre vs. Sherman), entitlement to foreign immovables (Re Ross (Ross vs. Waterfield)), the recognition, at common law, of legitimation by subsequent marriage (Re Askew (Marjoribanks vs. Askew)), formal validity of marriage (Taczanowska vs. Taczanowski), and essential validity of marriage (R. vs. Brentwood Superintendent Registrar of Marriages, ex p Arias).

Italy traditionally had no theory of renvoi but when they codified their law in 1995, they said that whenever, pursuant to Italian PIL, a foreign law is applicable, the renvoi made by the latter's conflict rules is admissible only in two cases:

a. if the renvoi is possible under the law resorted to by the foreign conflict rules, or
b. if the renvoi is back to Italian law.

Renvoi also allowed if applied by an international convention.

In Malta, only one case uses renvoi theory, that of ***Fiumara v. Newby*** (Commercial Court, 27/11/1900) as decided by Judge Pawlu Debono. Here, Mrs Newby was Maltese but married an Englishman. Whilst in Italy she signed a bill of exchange in favour of Fiumara. Mrs Newby did not pay the bill when it was due and Fiumara sued her in Malta as her place of domicile. The issue which needed to be decided by the Commercial Court was the capacity of Mrs Newby as a married woman to conclude a bill of exchange. The court considered that both English and Italian law confer the husband's nationality on the wife (at the time nationality was transmitted upon marriage), making her a British national. He therefore held that the capacity to conclude the bill of exchange was to be determined by the *lex domicilii* (the local choice of law rule), meaning he considered English law. English law regulated the capacity of the wife by the law of the place of conclusion of the contract (Bills of Exchange Act 1882), which was Italy. The Italian Civil Code, Articles 134 and 135, provided that the wife cannot contract debts without the authority of the husband if she is not either legally separated from him due to his fault or she is a trader of her own right.

The Court concluded that Mrs Newby as a wife was unable to enter into a contract without the authorisation of her husband – meaning the obligation was null under Italian law and, hence, the demand for payment was rejected. Therefore, the judge decided the case just as an English (or Italian) judge would have decided it. Merits of double renvoi in cases of capacity: case would have had the same result in Malta, England, and Italy. The judge could have easily not used renvoi at all and applied Maltese law as the *lex fori* because at the time the Maltese rule was also that the wife could not enter into contracts without the authorisation of her husband.

In fine, there are clear situations where renvoi cannot be used, and the meaning of "foreign law" is "the internal law" only. There are specific cases where renvoi is not used at all, such as in the case of contracts and torts, pursuant to Article 20 of the Rome I Regulations and Article 24 of the Rome II Regulations, respectively.

Incidental Question

This incidental question is another issue which arises in the case which is related and this tool of PIL. After the law to govern the main question has been ascertained by the application of

the relevant rule for the choice of law, a further choice of law rule may be required to answer the subsidiary question affecting the main issue. For example, the validity of marriage may depend on the validity of a previous marriage or a previous divorce. The Court may deem validity of the marriage as the principal question and the validity of the previous marriage or divorce as the subsidiary or incidental question. Similarly, validity of a marriage may be incidental to the main question of the legitimacy of an alleged heir in a problem of succession.

As long as the main and subsidiary questions are governed by the same private international law rule, there is no issue. The problem arises when the two questions are governed by different private international law rules, and so there are different results. As such, the choice of law rule of the main question and that of the incidental question have different connecting factors pointing to different foreign laws. Therefore, the point of the incidental question is to reduce confusion. The problem is whether one should apply in the case of the incidental question the same private international law rule of the principal question, or whether one should apply the private international law rule of the incidental question itself.

The elements of the incidental question are as follows:

1. The main issue should, under the rules of the local private international law, be governed by a foreign law.
2. There should be a subsidiary question involving a foreign element, which could have arisen separately, and which has its own independent choice of law rule.
3. The latter choice of law rule would lead to a conclusion different from that which would have been reached, had the law governing the main question to be applied.

Applying two foreign laws is confusing and counterintuitive, so jurists have found a variety of solutions to determine the law governing the incidental question:

1. Some support the law governing the main issue (e.g., Wolff): The incidental question gets absorbed into the main issue.
2. Others support the choice of law rules of the forum and classify them (e.g., Falconbridge)
3. Others consider that the determination of the problem will depend on the nature of the individual case and the policy of the forum (e.g., Dicey & Morris)

Generally speaking, the idea here is to absorb one issue into the other to apply only one choice of law rule and only one foreign law. In the case of ***Lawrence v. Lawrence***, as decided by the English courts, a husband and wife married and were domiciled in Brazil. The wife obtained a divorce in Nevada, USA, and married the next day. The Nevada divorce was not recognised in Brazil under the English rules of PIL. The second husband asked the English court to declare that the marriage was valid, notwithstanding ghat the divorce itself was invalid. Under the English rules of PIL the capacity of the wife to marry was governed by the *lex domicilii.* Brazil did not recognise the Nevada divorce even though the English courts did. The decision of the English court was that the second marriage was indeed valid, even though the law of the domicile did not consider it as such. What they did was that they considered the issue before them not to revolve around the capacity to marry but classified the validity of the divorce as the main question, notwithstanding the fact that the *lex domicilii* did not recognise it.

In ***Schwebel v. Ungar*** a Jewish husband and wife domiciled in Hungary decided to settle in Israel. When they were in Italy en route they decided to divorce by *gett*, an extrajudicial form of divorce which allows the husband but not the wife to divorce. Under Hungarian law, the law of their domicile, and under Italian law, where the *gett* was pronounced, this divorce was invalid, but it was effective according to Israeli law. They then acquired an Israeli domicile, and

whilst so domiciled, the wife visited Ontario and married a second husband. Schwebel (2nd husband) petitioned the Ontario court for a decree of nullity on the ground of his wife's bigamy. The Canadian court had not only to consider the question of the wife's capacity to marry governed, under the Ontario choice of law rule, by Israeli law, but also the validity of the wife's divorce by *gett*. Divorce by *gett* in itself was not recognised in Ontario (it was extra-judicial) but the *gett* was recognised under Israeli rules. Capacity was regarded as the main question, to which divorce recognition was incidental. The divorce was valid under the law of Israel, the law governing capacity to marry, and this was made to prevail over the other Ontario rule which would deny recognition of divorce. The Canadian Court held *"to hold otherwise would be to determine the personal status of a person not domiciled in Ontario by the law of Ontario, instead of by the law of that person's country of domicile".*

This is one of the areas in which the incidental question is used in Malta as the result of the Marriage Act which has two sections, one on divorce and one on the recognition of foreign marriages. The former is determined by the *lex domicilii* whilst the second is determined by either the *lex domicilii* or the law of the nationality. It is a possibility that a person is domiciled in one country, but a national of another country, and his/her divorce is recognised by the law of the country of his nationality, but not by the law of the country of his domicile. So according to the law of nationality, such person is considered to be divorced, but according to the law of his domicile, he is considered to be married. According to the law of nationality he is considered divorced, but the law of the domicile does not recognise it. The solution to such a situation is to use the method of the incidental question. if the question is whether the spouse has capacity to remarry, *lex domicilii* will reveal that he is already married. If the question is whether he/she is single because validly divorced, the Maltese divorce recognition rules, by reference to his law of nationality will reveal that he is single, with the corollary that he/she ought to be free to remarry. Conflict arises because articles 18 and 33 Marriage Act use different connecting factors to two interrelated situations. Solution: capacity to marry is the main question and the law of domicile should prevail (compare with *Lawrence vs Lawrence*). This conflict also existed under English law - solved by Family Law Act 1986, section 50, which provides one clear straightforward rule to the effect that if the divorce is recognised by the English rules on recognition of foreign divorces, either spouse has capacity to contract marriage, irrespective of the fact that that divorce or annulment is not recognised elsewhere.
A landmark case in this area is that of ***Khan v. Marriage Registrar***. Khan, an Indian doctor working in Malta, wanted to marry a Maltese woman. However, the Marriage Registrar refused to allow the plaintiff to marry in Malta, on the basis that a divorce by *talak* cannot be recognised in Malta. But Indian law, the law of the domicile of the plaintiff recognises divorce by *talak*. Plaintiff filed a case before the Second Hall of the Civil Court which was eventually withdrawn as the couple married outside Malta. The expert opinion in the proceedings however, held that the divorce is not from a court of his domicile. Foreign divorce or annulment was recognised by *lex domicilii*, but not under article 33 Marriage Act (in this case, extra-judicial divorce). Solution: main question is capacity to marry under section 18 Marriage Act. The recognition of the extra-judicial divorce is the incidental question. The fact that by itself the extrajudicial divorce is not recognised in Malta does not mean that from the point of view of the capacity to marriage he was unable to be married.

Substance and Procedure

When a foreign law is applicable, the idea is that the foreign law is applicable to the substance of the case, i.e., the rights of the parties. however, even if the local law as a choice of law rule applies a foreign law, there are some things in the process of deciding the case which are still governed by the *lex fori.* If one is a judge sitting in Malta, there are certain aspects of the law of procedure which always apply as one cannot be expected as a Maltese judge to apply foreign procedural law and proceed as if he were a foreign judge. When one is applying to a

court in Malta he must play by the rules of the procedure in the court in Malta. Therefore, it should not be too difficult to say what is procedural and what is substantive, but this difficulty does indeed arise. This also feeds into the larger issue of pacification, as the test to use to decide whether a rule is substantive, or procedural is paramount.

In the case of ***Leroux v. Brown*** two people entered into a verbal contract in France and there was an action for damages for failure to fulfil the contract instituted in England. The action to enforce this verbal agreement instituted in England was done more than a year after the agreement took place. Both were enforceable under French law. In England, they had a statute which said that one cannot bring an action on a verbal agreement if more than one year has passed since the agreement. By French law, the applicable law to decide the despite according to the *lex fori*, and although he could have sued in France and the French courts would have allowed it, the English courts ruled that the extinctive prescription was a rule of procedure and refused to enforce the contract. The issue which arises is that there is no clear-cut line between what is substance and what is procedure. However, the line must be drawn somewhere.

We know clearly that if a foreign law is applicable, we cannot follow certain procedures thereof. Where a judge draws this dividing line, the issues come in two forms: first, in classifying one's own rules to allow for one's own procedure; second, when the foreign law is applicable but the judge in the local court has a doubt whether aspects of the foreign law are substantive or procedural. In this case, one needs to be sure about what one's procedure is as the *lex fori* must be applied, and one must make sure that one does not apply foreign procedural rules because one should be applying one's own.

There is no doubt that certain matters are purely procedural, where the *lex fori* takes precedence. How the case is presented, who needs to be notified, in which court it must be filed, which witnesses can be summoned, the role of the judge in the procedure, possibilities of appeal, the *lex fori* needs to be followed notwithstanding if a foreign law applies. With most other aspects there are still doubts. One such area of major doubt over the history of PIL was the issue of time limits (i.e., extinctive prescription). In fact, in looking at it how English courts approached it, until they amended the law in 1984, if an action could still be done under the foreign applicable law but the English time limit had expired, the action could not be brought in England, where they applied their own time limits *mutatis mutandis.* They were extremist to this view and held that if the foreign limit was shorter than the English one, the action would be able to be brought before the English courts. English judges would consider the context of the foreign law and consider whether it was a time limit to institute an action or one to extinguish an obligation and hold that if it was purely the former the English would take precedence, whilst if it was the latter, they take the matter under consideration. This was contrary to the general view in Civil Law jurisdictions where the tendency was that if a foreign law was applicable, limitations in the foreign law should also be applied. In fact, the Convention on the Law Applicable to Contractual Obligations 1980, which went on to be the Rome I EU Regulation, states clearly that the law which governs the validity of a contract is to govern the various ways of extinguishing obligations, the limitation of actions, and prescription. The underlying reasoning behind this was to prevent forum shopping. In 1984 the English passed the Foreign Limitation Periods Act which abandoned the Common Law approach on this matter and established a rule similar to that Convention and aligned themselves with the notion that prescription and extinction of obligations of the *lex causae* should be followed. However, this concerned only contractual obligations, not tortious ones where it still had not developed. This did eventually happen when the EU promulgated the Rome II Regulations, the applicable law for non-contractual obligations.

In Malta, we had a similar evolution in the field of tort. In fact, we began with the English Common Law position, which stated that the *lex fori* always applied. Later, we took the complete opposite approach saying the foreign law would apply fully, even on matters of prescription, and we even had cases where the court created a formula which said that they would choose the shorter of the two prescriptive periods. Malta spent many years in this jurisprudential limbo until she joined the European Union where Rome I and Rome II made the matter certain.

The issue of evidence is also another contentious one. How evidence is presented is a matter for the *lex fori.* However, if one his presenting a foreign document before a Maltese court, the interpretation of the foreign document is to be governed by the law of that foreign jurisdiction, but the method of presenting it is to be governed by the *lex fori.* Another area where the distinction could be difficult to draw is with respect to presumptions or burdens of proof. Take, for example, one who disappears from Malta for ten years and no one has heard from one, another could institute an action to declare one dead. This doubt was removed both in the Rome I and II Regulations which made it clear that if one is applying a foreign law, one should also apply the presumptions and burdens of proof of the foreign law. In other areas which are still not harmonised at the EU level, such as matters relating to marriage, the general view is that issues of presumption and burden of proof should also be governed by the foreign law.

Proof of Foreign Law

In a local court, proving a foreign law is a question of fact, that is to say, evidence. The local judge is not expected to know any other law except his own, and if a foreign law is applicable, it must be pleaded and proven. If this is not done, there is nothing before the judge to lead him to apply anything other than the *lex fori.* Unless one pleads and proves the foreign law to the satisfaction of the court and following its rules, the judge will apply his own law. This has always been the case in a multitude of legal systems. The fact that the burden of proof is always on the party alleging is pursuant to article 562 of the COCP. Naturally, even though it is an issue of fact, it is an issue of fact of a particular kind. Ultimately, underlying it is a question of law, but the rules of the *lex fori* on procedure and evidence must be applied. Also, this is not proven by simply referring a judge to another local judgement which followed foreign law, but it must be proven through witnesses. Since this is of a technical nature, a particular kind of expert witness is required. This is essentially what happens in other technical areas. If one wants to present a proof about the architectural soundness of a building, and architect testifies. If one wants to prove that the accounts of a company are fraudulent, an auditor testifies. This is why proof of foreign law falls into this category.

There was a slight evolution in this area. The English laws of procedure always had the concept of the *ex parte* expert witness, i.e., they did not have a system where the witness was appointed by the court, but the parties pleading to a fact and to the contrary thereof bring their own expert witnesses. Therefore, there was no single expert witness appointed by the court, as has been traditionally the case in Malta. Eventually, we also introduced the concept of *ex parte* expert witnesses in Malta and no have both possibilities. Therefore, we could either have the parties produce their own witness, or they could agree on one witness who is appointed by the court, or the parties could have their own expert witnesses whilst the court appoints its own. We also have a rule that the court is not bound to adopt the reports of the judicial referees against its own conviction. The type of expert witness required to proof foreign law, traditionally (in the English legal system), needed to be a practicing lawyer in the legal system about which one is called to testify on, or one follows a calling (e.g., a former judge). If one was merely an academic and never practiced in the legal system, one was not considered an expert. Eventually, in 1972 this was changed in England. In Malta the change was made in the 1995 amendments to the COCP, till which point we did not have any rule on proof of foreign law in

Malta. What used to be done, without the possibility of *ex parte* witnesses before 1995, is that a party pleads that a foreign law is applicable, and the court nominates an expert of its own choosing according to its understanding of whether or not it is an expert. The rule in the COCP, pursuant to article 563B, follows the position as adopted by the English in 1992 and states that:

> **563B.** (1) *A person who is suitably qualified on account of his knowledge or experience, is competent to give expert evidence as to the law of any other foreign state, irrespective of whether he has acted or is entitled to act as an advocate, or in any judicial or legal capacity in that state.*
>
> (2) *The provisions of article 563A (3) shall mutatis mutandis apply to the provisions of this article.*

Take, for example, different interpretations of the foreign law, where there could be a situation where an expert takes a view of the state of the foreign law which one of the parties does not like, and there may be a more advantageous interpretation of the said law that is more advantageous to one's client. As strange as it may sound, the judge may end up with multiple reports on foreign law with qualified experts, each with a different conclusion. The judge must then evaluate these pieces of evidence just as he would evaluate any other witness using his skills as a judge to try and choose the opinion which he thinks best reflects the foreign law. Naturally, this is not an easy task. Typically, the parties would agree on a single expert or leave it in the hands of the court, as they command massive fees.

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Public Policy

This is a kind of self-defence mechanism of the forum which, when faced with a foreign applicable rule, the judge, basing himself on this doctrine of public policy, refuses to recognise or enforce that rule in the case. It is essentially an escape route of the forum which states that the foreign law offends a basic principle of the forum which the judge decides is too important for the forum to give up. This also applies to foreign judgements. Although the concept of public policy as a self-defence mechanism is there, the discussion revolves around how wide or narrow it should be. If one adopts a concept of public policy which is too wide, the entire purpose of PIL is destroyed. On the other side of the spectrum, one could be giving effect in their legal system to things they normally would not give effect to if the case was purely local. The concept, in Civil Law states, is traditionally wide, referring to it as public order. Alternatively, they are referred to as mandatary rules of the forum, with this concept extending to EU Regulations. In Civil Law jurisdictions there is this tendency to have these overarching rules protecting public welfare which the forum must defend at all costs. In Common Law jurisdictions it tends to be slightly narrower. One of the examples often given is that if the foreign judgement or rule is of a penal nature, or a kind of expropriation (especially without compensation), where public policy does not enforce them as they are considered as an exercise of sovereign power and, as such, should have effect only in the territory where the State has sovereign power.

Other than that, there is a broad sphere where the debate as to why public policy should not be wide continues. On one end, the example given is a judge called to

recognise a foreign contract which is valid, but does not have consideration, and the forum does not allow such contracts. Should a judge on the basis of public policy refuse to recognise it? During its development, judges distilled jurisprudence into five heads of public policy:

1. Penal and expropriation,
2. Where the fundamental concepts of English justice are disregarded,
3. Where the English concepts of morality are infringed,
4. When the matter prejudices the interests of the UK or its relations with foreign countries,
5. When a foreign law or status offends the English conceptions of human liberty and the freedom of individuals.

Substantive Justice

Here, the Courts of England determine that the foreign rule is not how English Courts conduct justice. This developed out of a conflict with Maltese law and judgements. The underlying cause of which was the fact that in the past the only form of marriage available in Malta and to Maltese, wherever they may be, was the Canonical form. Therefore, any marriage not in that form for a Maltese was automatically null. There were a series of case where Maltese people would marry validly in England before the husband returns to Malta, asks for an annulment, and the Courts would declare the marriage null. Then, the husband would return to England with the Maltese judgement, usually to avoid maintenance. The English courts began to reject this on the basis that it offends their understanding of substantive justice.

English Morality

One of the cases mentioned in this context is that of ***Lemenda v. African Middle East Co. Ltd.*** (1988). This case had to with oil in Qatar, where a national oil corporation supplies oil to other States. The company had contracted to supply oil to the defendant company for six months at a particular price. The contract provided for a renewal for a further six months if both parties agreed. When the first six months were expiring the defendant company heard that the Qataris would most likely not extend the contract. They entered into an agreement with Lemenda which said that if Lemenda used its influence on the Minister of Oil in Qatar to get the contract renewed, then it would pay the plaintiff a commission of 30USD per barrel. It was therefore a decision to trade in influence. The contract was in fact renewed. However, as from the 1st of August. The defendant company wanted the renewal as from the 1st of April. As the defendant company was claiming that the renewal was late, they refused to pay the commission. Lemenda sued for breach of contract with the agreement being governed by English law. The issue here was whether the agreement should be enforced or whether it was against public policy. The English Courts refused to recognise the contract as it felt it would corrode the morality of the English legal system.

Another case which is often quoted was decided not entirely on public policy in the main judgement, but it featured in orbital judgements. In the case of *Vervaeke v. Smith*, plaintiff was a Belgian woman who married Mr. Smith in England. The idea behind the marriage was for plaintiff to obtain British citizenship so she could leave Belgium where she faced the risk of deportation on account of her being a prostitute. Naturally, it was

a marriage of convenience and the two never lived together. Roughly eleven years after, plaintiff moved to Italy with a Mr. Messina, a wealthy man. Vervaeke married him in the morning, and he died later that evening. Vervaeke would inherit him if their marriage was valid. Realising that she was married to Smith, Vervaeke went to the English courts to annul her prior marriage to prevent her marriage with Messina from being bigamous. The English Courts refused to do so. Vervaeke then returned to Belgium and got a Belgian decree of nullity of the English marriage. She then returned to the English Courts with the Belgian judgement for it to be recognised and enforced. This matter made its way to the House of Lords who held the marriage to be valid, refusing to recognise the Belgian decree of nullity. In reaching its decision some of the Law Lords referred to the matter of public policy.

Malta and Public Policy

Generally speaking, because of the legal history of the development of law in Malta, one could say that we tend to follow the English model. However, if one considers a few cases, one will think that public policy is far wider than Malta, possibly as extreme as public order in France and Italy. Public policy changes in time because of shifts in attitude and in the legal framework because what was unheard of a century ago is probably legal today. One such area is that of marriage and divorce. Apart from this, the Maltese Courts did not recognise foreign divorces of any shape or form. So long as one of the parties was domiciled in Malta, one could only be married in the Catholic form, anything else is annulled, one could not be divorced, and if one got one would not be recognised. Following the introduction of the Marriage Act of 1975 the recognition of both foreign marriages and were recognised if it were from a Court from which one of the parties was domiciled. When we entered into the EU things changed again. The rule in the Marriage Act is still there, but within the EU there is the automatic recognition of judgements, although the exception of public policy remains in the EU Regulation as well.

Today, issues where public policy would need to be invoked in cases of marriage and divorce. In divorce there are some jurisdictions where in passing judgement the Court takes a view on the guilty party where some even allow the Court to impose a ban on future marriages. This ban on remarriage was the centre of a case before the ECHR (*F. v. Switzerland*) in a Swiss judgement as the Swiss Civil Code allows for such bans of not less than one year and of not more than two years. The foreign rule cannot restrict or reduce the very essence of the right to marry so this provision was rejected under the Convention.

Another issue is that of extrajudicial divorces, various forms of which exist in jurisdictions across the world. If one refuses an extrajudicial divorce, is it discrimination? And if a unilateral one is recognising, would that constitute discrimination as well? This point has not been decided as of yet. However, the Constitution does contain a prohibition of discrimination in matters of divorce if the discrimination is on the basis of sex.

The area of interest rates is also linked to public policy. As we know, since the inception of the Civil Code and those before it, there has always been a cap on the maximum rate of interest to be charged. Traditionally, the Courts have always reduced

any contract governed by a foreign law or foreign judgement which awards more than 8%, down to the accepted maximum. This changed from a blanket prohibition when, in 1983, the Minister of Finance with respect to certain loans in local banks, allowed more than 8% to be charged. Today, 8% can be exceeded if certain conditions are met: first, that one is a designated entity; second, if the borrower is not a natural person; third, if the contract is governed by a foreign law and it is an acceptable market condition. The Maltese Courts kept on insisting on capping it at 8%. *Vide* the American Express case. The rule is also that the Courts would not entertain an action for the enforcement of a foreign penal or public law. Public policy is a wide spectrum and jurisprudence shows a difference in interpretation between civil and common law courts. Take, for example, the total nationalisation of Russian industry in 1921 which was considered valid by the English Courts but not by the French ones. Even if we say that we will not recognise a foreign act of State, there are still exceptions in that one could indirectly recognise that something which is illegal from a public law perspective, whether one should give or not give effect to that in Malta. One of the areas where this happened traditionally was on stock exchange transactions. Brokers in Malta would conduct transactions on foreign stock exchanges and the rules of the exchange was that the transaction must be carried out on the exchange itself. Some Maltese brokers found a way to carry out over the counter transactions which was illegal under French law. Whenever there was an attempt to enforce payment in Malta, Maltese lawyers would argue that the transaction was illegal and so it cannot be enforced by the courts. Another case where this can happen is on the foreign exchange market. The tendency lately has been towards tolerance of foreign rules and judgements, and the yardstick seems to be that the foreign rule or judgement is manifestly contrary to fundamental principles in Europe or Malta. There is indeed a movement to limit public policy.

Domicile

[INSERT]

In the course of its development in England, the law relating to domicile has acquired certain vices, namely:

a. The exaggerated importance attributed to the domicile of origin, coupled with the technical doctrine of its revival, may well ascribe to a man a domicile in a country, which by no stretch of the imagination can be called his home.
b. An equally irrational result may ensue from the view, that long residence is not equivalent to domicile, if accompanied by the contemplation of some uncertain event, the occurrence of which, will cause a termination of the residence.
c. The ascertainment of an individual's domicile depends to such an extent upon proof of his intention, the most elusive of all factors, that only too often it will be impossible to identify it with certainty, without recourse to the courts.

There are three similarities between the common law and Roman law concepts of domicile:

a. Domicile is constituted by the fact of residence and the requisite intention;
b. At birth, children acquire the domicile of the father;

c. Married women acquire the domicile of their husband.

These three rules have been undoubtedly accepted by the Maltese courts, and this is so irrespective of which of the two concepts has been generally adopted.There are the following four differences between the two concepts of domicile:

a. The common law does not admit the possibility of a person having more than one domicile, while this is accepted by Roman law;
b. Likewise, the common law, contrary to Roman law, does not allow a person to be without a domicile, since the domicile of origin is always in abeyance, ready to revive as soon as the domicile of choice is abandoned.
c. A greater degree of evidence is required for the abandonment of the domicile of origin in the common law than is required in Roman law, and this precisely because the common law does not admit that a person can be without a domicile.
d. The element of intention has both a positive and negative sub-element in the common law, whilst in Roman law intention is a positive element. In other words, the common law animus is comprised of the intention to acquire a new domicile (the positive sub-element) together with the intention never to return to the previous domicile (the negative sub- element). On the other hand, the Roman law animus is that of acquiring a new domicile: the fact whether the propositus desires to abandon his pre-existing domicile is irrelevant, since he may possess two simultaneous domiciles.

Domicile Under Maltese Law

Historically, the Maltese concept of domicile was more akin to the Roman or continental law concept of domicile. Roman law was the Maltese "common law", to be referred to both for interpretation purposes and for filling in any lacunae in Maltese law. The Maltese courts have slowly substituted this concept of domicile with the common law concept of domicile. Subject to certain fundamental rules of Maltese procedural law, it is the common law concept which is applied wholesale by the Maltese courts. The Code de Rohan (1784) referred to "forestieri domiciliati a Malta". This shows that Maltese law had a concept of domicile independently of any reference to English law, and therefore the concept was, without doubt, derived from our own special "common law", i.e., Roman law.

Section 1316 of the Civil Code states that the community of acquests shall apply automatically apply if the spouses `establish themselves in these Islands'. "Establish" seems to require a lower level of proof than the common law concept of domicile. "Establishing a home" is not equivalent to the common law notion of a permanent residence, and furthermore, it does not require the intention by the spouses to establish themselves in Malta permanently. In his Notes, Sir Adrian Dingli says that Section 1316 is of his own doing, but he refers to the Code de Rohan Book 3 Chapter 1 Articles 27 and 28. So Sir Adrian Dingli tried to reflect into the Civil Code what had obtained in the Code de Rohan, which already contemplated a concept of domicile based on Roman law. In fact, Article 28 dealt with "il matrimonio dei forestieri domiciliati in questo dominio”.

It is important to distinguish between domicile as a jurisdictional factor and domicile as a choice of law factor. As a basis for jurisdiction, domicile is invoked in Section 742(1) of the Code of Organisation and Civil Procedure in order to establish the jurisdiction of the Maltese courts over:

1. citizens of Malta, provided they have not fixed their domicile elsewhere;
2. any person as long as he is domiciled or resident or present in Malta

Section 742 as a whole was directly inspired from Article 4 of the Italian Codice di Procedura Civile, which adopts the Continental or Roman law and not the common law concept of domicile. The role of domicile is also as one of the bases of jurisdiction, meaning if one is a citizen of Malta the government has jurisdiction *unless* one has made one's domicile elsewhere. This concept was inspired by the Italian Code of Civil Procedure.

The old §742(1)(d) also referred to "any person who, having fled from the country in which he was domiciled, has not fixed his domicile elsewhere, and is present in Malta". This was one of the few cases at the time where presence alone was the basis for jurisdiction. So, it used to admit the possibility of a person having no domicile - a possibility which is as totally alien to the common law concept of domicile as it is natural to the Roman law counterpart. However, it did not contemplate the doctrine of the revival of the domicile of origin since it is referring to a situation of a person having no domicile after he has abandoned his previous domicile.

The Permanent Law Reform Commission, while noting that the common law interpretation of domicile has had a limitative effect on the jurisdiction of the Maltese courts, had suggested that this paragraph should be deleted if residence is introduced alongside domicile in Section 742(1)(a) as an alternative basis for the exercise of jurisdiction. These recommendations were adopted by means of Act 24 of 1995.

Domicile is also invoked by Section 827(3) of the COCP which deals with the recognition and enforcement of foreign judgments (non-EU) in Malta and provides that the Maltese court should analyse the jurisdiction exercised by the foreign court according to the defendant's domicile, residence, or voluntary submission. Should neither one of these criteria subsist (for example, the defendant was only a national of the country wherein the judgment was delivered) then the foreign judgment would not be enforced in Malta.

At EU level, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast, originally Regulation 44/2001, which in turn was based on the Brussels Convention of 1968) also called Brussels I uses domicile as the main connecting factor to establish the jurisdiction of EU courts. Art.4 stipulates that, subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. The rules on jurisdiction are contained within the Brussels Regulations based on the 1968 Brussels Conventions on jurisdiction.

Art. 60(1) stipulates that in order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law. Art. 60(2) stipulates that if a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of *that* Member State. Brussels does not offer a uniform definition of domicile for individuals, but merely relies on Member State national law. If, for example, according to a German court the individual is domiciled elsewhere, then one needs to apply the definition of domicile of that State. The definition follows the actual place of domicile, i.e., the definition according to the *lex fori.* If the Court needs to determine whether the person is domiciled elsewhere, it uses the definition of that State.

Art. 63(1) For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

a) statutory seat;
b) central administration; or
c) principal place of business.

To establish the domicile of a corporation, the law offers three different options.

Art. 63(2) For the purposes of Ireland, Cyprus, and the United Kingdom, 'statutory seat' means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place. Unfortunately, Malta did not ask to be included here (Cyprus was included in the recast of 2012) even though we also follow the rule that a company is domiciled where it is incorporated. Art. 63(3) stipulates that in order to determine whether a trust is domiciled in the Member State whose courts are seised of the matter, the court shall apply its rules of private international law.

Most judgments of the 19th and early 20th Century used to apply the Roman law concept of domicile. The shift to the English common law concept started to occur in the late 1930s. Prior to the wholesale adoption of the common law concept of domicile, the Maltese courts had developed several principles, without the slightest reference to the common law concept of domicile and with a clear favour for the Roman law concept. The following Roman Law concepts remain relevant:

1. The intentional element in domicile was defined as "intenzione di fissarvi il proprio principale stabbilimento". This echoes the Roman law element of intention and makes no reference to the added element, required by the common law, of not wanting to return to the previous domicile.
2. The acquisition of a domicile of choice must be perfectly voluntary.
3. A presumption of change in domicile after prolonged absence. This rule has no counterpart in either Roman law or the common law. This is a uniquely Maltese development.
4. The court has jurisdiction when the object of the action regarded several persons, some of whom were domiciled in Malta and others not so domiciled, when such object was indivisible.

5. A child acquires the domicile of his father if he is legitimate, the domicile of his mother if he is illegitimate, and the domicile of the place where he is found if he is a foundling.
6. A person who is of age can chose his own domicile and place of residence independently from his father.

Carmela Smith v. Ugo Muscat Azzopardi et (04/02/1936) was the first time in Maltese jurisprudence the principle was enunciated that "in the absence of provisions of private international law in our Code, it is usual for our courts to have recourse to the principles of English law". Such a principle, if it refers to the historical attitude of the Maltese judges to private international issues, is incorrect. Firstly, the cases which referred to English principles of private international law are outnumbered by those which did not, making the word "usual" too strong. Secondly, four years before this dictum, *Saliba v. Lawson* had decided that the sources of Maltese private international law are Roman law and the judgments of the most important tribunals.

Smith v. Muscat Azzopardi also introduced the English concept of domicile to interpret the element of "establish themselves in Malta" with respect to the community of acquests in Section 1316 of the Civil Code. Contrary to the historical origins of this section as shown through Sir Adrian Dingli's Notes, this judgment and others which followed it required that the husband must have established his domicile (in a common law sense) in Malta, and it is from that date that the community of acquests applies.

Giovanna Saliba v. Dr Joseph Micallef et noe (1990) has dispelled this interpretation. Section 1316 does not mention domicile and neither makes any exceptions, and a situation in which there could be two property regimes regulating different periods of time in the same marriage should be avoided. The Court concluded that the community of acquests applies to any marriage celebrated in Malta irrespective of the husband's domicile.

Conflicting principles of *Saliba v. Lawson* and *Smith v. Musca Azzopardi* was resolved with the confirmation of the English private international law reference principle in ***Giovanna Spiteri v. Enrico Soler et*** (22/10/1937). The Court of Appeal stated that

> *"fil-ligi taghna ma jinsabux disposizzjonijiet li jirregolaw id-dritt internazzjonali privat, u fi kwistjonijiet li jaqghu taht dan id-dritt il-Qrati taghna jimxu fuq ir-regoli tad-dritt internazzjonali privat kif huma maghrufin u applikati fil-Qrati ta' l-Ingilterra".*

Still, in *Spiteri v. Soler*, the Court did not define domicile in the English sense. It used a definition which referred merely to the animus manendi and not to the animus non reduendi:

> *"... meta wiehed ihalli pajjizu u jistabilixxi ruhu f'iehor biex jista' jitlaq id- domicilju tal-post fejn twieled, li jigi msejjah ta' l-origini, u jakkwista domicilju gdid, huwa necessarju li*

> *mhux biss jirrisjedi fil-pajjiz li ghazel, izda li huwa jkollu l-intenzjoni joqghod - animus manendi - hemm"*

Smith v. Muscat Azzopardi and *Spiteri v. Soler* had a permanent effect on Maltese jurisprudence. From 1936/37 to date, in contrast to the position prior to 1936/37, the Maltese courts were inclined to adopt the common law concept of domicile wholesale. This was especially the case when the courts were concerned in preserving their jurisdiction over emigrants. This was probably even the principal motive why the negative element of intention was introduced in the earlier cases, as a substitute for, or sometimes even together with, the dual domicile approach.

A recent clear example of how the Maltese Courts stick to the traditional common law concept of domicile is ***Salvina Xerri et v. Dr Richard Sladden et*** (Court of Appeal, 15/12/2015). The case dealt with the determination of domicile of Michael Cassar, a Maltese national from Gozo who emigrated to Australia, had an Australian will and lived there for 20 years until his death. The Court found that he retained some property which he had inherited in Malta and retained his Maltese citizenship. The Court argued that although his wife did not want to return to Malta, he possibly might have returned to Malta if his wife passed away. The Court emphasised the presumption of continuance of the domicile of origin and found that there was no proof that Mr Cassar did not want to return to Malta and therefore concluded that he was still domiciled in Malta.

Some light was shed on the intentional and probative elements in domicile in ***Saviour Chircop et v. Dr Rene' Frendo Randon noe*** (12/10/1979) where the Court of Appeal established that:

1. Although there is a presumption in favour of the continuance of the existing domicile, the standard of proof required in civil cases, i.e. that a fact is to be established on a balance of probabilities, is equally applicable to a change in domicile;
2. The intentional element required is better defined as the intention to reside in a place for an unlimited time, rather than permanently; and;
3. Although residence raises a presumption of domicile, this is merely prima facie evidence of domicile, and the length of such residence is not essential for the acquisition of a new domicile.

At Maltese law, there is also authority for the proposition at English law that domicile can be attributed a special meaning by special legislation. Cases dealing with the interpretation of "domicile" for the purposes of section 6 of the Succession and Donations Duties Ordinance (since repealed). It provided that property not situate in Malta would be taxable in Malta if the person in whose favour the devolution takes place is domiciled in Malta at the time of the transfer, and that for this purpose, persons born and residing in Malta and persons habitually resident in Malta are presumed to be domiciled in Malta and the burden of proving a different domicile lies on the person alleging it.

Other Uses of Domicile

Maltese courts have generally used domicile as the personal law of a person in order to determine questions relating to his status. The most popular application of the law of the domicile occurred in those cases which declared the nullity of the marriage of a Maltese Roman Catholic domiciliary when it was not celebrated according to the law of his domicile, i.e., Canon law.

In ***Giorgina Ethel Cooper noe v. Not. Alfred Page noe et*** (11/01/1918) the First Hall stated that: *".. per regola lo stato e la capacita' giuridica delle persone [sono] governati dalla legge del domicilio"*. The same principle was confirmed by the Court of Appeal in ***Emilia Valentini v. Carlo Valentini*** (19/10/1923). The application of a foreign domiciliary law to regulate the capacity of a married woman to contract obligations without her husband's authorisation was also upheld in various cases.

In the case of ***Maria Antonia Resta v. Mario Resta*** (19/10/1988): since in questions of domicile the Maltese courts have always referred to English law, then the Domicile and Matrimonial Proceedings Act 1973, in virtue of which the married woman could acquire an independent domicile, should also be applied in Malta. This argument is legally unfounded, since, at least since Malta acquired independence in 1964, English Acts of Parliament have no effect whatsoever in Malta.

In the case of ***Ray Calleja v. Dr Raymond Pace et noe*** (21/04/1995) it was declared that *"il-posizzjoni llum hija li mara tista' takkwista jew tbiddel id-domicilju taghha indipendentement minn zewgha".*

Although domicile features prominently in a very large number of Commonwealth jurisdictions, it is also true that in these jurisdictions there has also been a considerable retreat from domicile. In ***Shah v. Barnet London Borough Council*** (1983) Lord Scarman has referred with evident exasperation to *"the long and notorious existence of this difficult concept in our law, dependent on a refined, subtle and frequently very expensive judicial investigation of the devious twists and turns of the mind of man".*

Only one Commonwealth jurisdiction – Nauru - has replaced domicile completely by the concept of habitual residence. Other countries have, however, reformed their concept of domicile to a significant extent, in order to remove certain artificialities such as the doctrine of revival, the negative element of non reduendi in intention, the difficulty of displacing a domicile of origin and the domicile of dependence of married women; e.g. the New Zealand Domicile Act 1976 and the Australian Uniform Domicile Act 1981. In Malta there is still no legislation which has defined or reformed the concept of domicile.

Nationality

Nationality represents a man's political status, by virtue of which he owes allegiance to some particular country. Nationality depends, apart from naturalisation, on the place of birth and on parentage. It follows that a person may be a national of one country but domiciled in another. During the time when Malta was a British colony, the courts applied the nationality rules of English law in the absence of local legislation on nationality.

Nationality has been used as a connecting factor in certain circumstances. The Maltese courts have resorted to the law of the nationality of the husband at the moment of marriage as the governing law in questions both of paternal authority and minority. The obligation to maintain is substantively governed by the national law of the person bound to administer such maintenance - ***Biasini vs. Stagno Navarra et*** (27/10/1920); principle was confirmed by the Court of Appeal in ***Maria Antonia Resta v. Mario Resta*** (15/01/1992).

Nationality, when compared with domicile, enjoys the advantage that normally it is easily ascertainable, by reference to the law of the state of nationality concerned. Nationality and citizenship are used interchangeably and refer to a political allegiance to a country and one becomes a citizen of a place usually by inheriting it from their parents or by virtue of being born in that country.

Nevertheless, it is objectionable on at least three grounds:

1. It may be a country with which the person in question has lost all connection, or with which perhaps he has never been connected.
2. Nationality is sometimes a more fallible criterion than domicile. If one accepts the principles of English law that no man may be without a domicile and no man can have more than one domicile at the same time, then, in nationality, a person may be stateless or may be simultaneously a citizen of two or more countries.
3. Nationality cannot always determine the internal law to which a case is subject in the case of a federal state.

Many countries have a process of naturalisation, by virtue of which one becomes a citizen after having spent years living in the country. Citizenship can also be purchased through government schemes. Because of the way citizenship laws work it is immediately obvious that one could be a citizen of one country and domiciled in another, possibly even a habitual resident of a third.

Maltese courts usually interpret nationality by virtue of referring to the English position. Traditionally, Malta did not use nationality as a connecting factor, even in terms of jurisdiction. However, there are areas where, perhaps strangely, the Maltese courts do have a record of using nationality as a connecting factor, mainly in the area of parental authority and the issue of when one is considered a minor or a major at law and branching out of these the obligation of maintenance.

Nationality is beneficial as it is usually easy to determine, whilst domicile is typically a highly technical concept with differing definition between States.

Habitual Residence

Dissatisfaction with both nationality and domicile as connecting factors has led to an increasing tendency to reject them as a connecting factor, in favour of habitual residence. Sir Otto Kahn-Freund, a distinguished authority on comparative and private international law, described domicile in 1964 as being "a superannuated concept" International legal instruments, especially the conventions produced by the Hague

Conference on Private International Law have made use of a different concept, "habitual residence".

The first use of habitual residence, or *"residence habituelle"*, appears to have been as a translation of a technical concept of German law, *"gewöhnliche Aufenthalt"*, in a Franco-Prussian treaty of 1880. It was first used in a Hague Convention, that on Civil Procedure, in 1895, and has since been used frequently both in Hague Conventions e.g., Hague Convention on the Protection of Minors 1961. More recently it has also been used as the main connecting factor in several EU Regulations. Habitual residence also found use in the following:

- Regulation on the law applicable to contractual obligations (Rome I)
- Regulation on the law applicable to non-contractual obligations (Rome II
- Regulation on the law applicable to divorce and separation (Rome III)
- Regulation on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility; and
- Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

According to a recent report, over 12 million EU citizens live in a different Member State than that of their nationality. They are often integrated into the social environment of their country of residence. Therefore, determination of their capacity to marry or to make a will according to the law of the Member State of their nationality is considered inappropriate. In particular, it could lead to discrimination of EU citizens who are residents but not nationals of a given Member State.

It has repeatedly been presented as a notion of fact rather than law, as something to which no technical legal definition is attached so that judges from any legal system can address themselves directly to the facts. However, this has not prevented judges and commentators from attempting to analyse and define the scope of the new concept. German courts considering the Hague Convention on the Protection of Minors 1961, have interpreted a child's habitual residence as the "centre of gravity of its life". In Dutch private international law "domicile" (*"woonplaats"*) refers to the notion of habitual residence and it refers to the country with which the life of a person is factually connected to such a degree that there is reason to apply the law of that country to his personal status.

Habituality means a person's life is connected to a particular State to such a degree that it is most reasonable to use the law of that State to regulate their life.

The English Law Commission commented as follows:

> *"It is clearly distinguishable from domicile, a necessary element of which is a particular intention as to the future. Such an intention is not needed to establish habitual residence; it can be proved by evidence of a course of conduct which tends to show substantial links between a person and his country of residence. This does not mean*

> *that evidence of intention is irrelevant; it may throw light on particular facts and emphasise a person's degree of connection with a country. To be habitual, a residence must be more than transient or casual; once established, however, it is not necessarily broken by a temporary absence".*

The European Union began to favour the concept of habitual residence as it better reflected and promoted the mobility of European citizens afforded the freedom of movement. This concept allows people to freely move which does not correspond with the technicalities of the concepts of domicile and nationality. Even based on principles of non-discrimination, the EU could not allow Member States to deal with people on the basis of nationality.

The Court of Justice of the EU has shed some light on the notion of habitual residence in the context of child abduction. It underlined the importance of the integration of a child into his/her social and family environment; habitual residence is a question to be decided by the national court in light of the specific factual circumstances. Factors may include the duration, regularity, conditions, and reasons for the child's stay in a given place and the family's move there, the child's nationality, the place where they attend school, what languages they speak, as well as their family and social relationships.

Within the sphere of social security, the Court underlined that habitual residence has an autonomous meaning under EU law. It indicated that it corresponds to the habitual centre of interests of a person, adding that in order to assess where someone's habitual residence is located, the length of residence, the length and purpose of absence, as well as the person's apparent intention must be taken into account. Under the Staff Regulations of EU officials, the CJEU has ruled that the place of habitual residence is the place where one has established a permanent centre of interests with the intention of giving it a lasting character.

The merits of habitual residence as a connecting factor have sometimes been overstated. It is not a self-defining concept, but on the other hand it has several major advantages over the traditional, or even the reformed, concept of domicile. The main advantage is that there is nothing equivalent to either a domicile of origin or a domicile of dependence, so that the technical rules which surround those concepts, are swept away. Furthermore, the element of intention is of much less importance to habitual residence than to domicile, and therefore the uncertainties as to the formulation of the animus manendi are removed. It is also more flexible than nationality which usually remains fixed.

Private International Law

Topics:

1. Definition, Nature, Scope, and Historical Development
2. Sources
3. Classification
4. Renvoi
5. Incidental Question
6. Public Policy
7. Proof of Foreign Law
8. Domicile and other Connecting Factors

Introduction:

The Term 'Law'

One would think that this is another aspect of Public International Law, however, this is not the case. In the US, Private International Law is known as Conflict of Laws. One would also think that the term 'law' has the same meaning as in the general concepts, but again, this is not the case.

The question of whether law is actually law is aimed at the enforceability of Public International Law, seeing that in many cases it does not have an enforceable character. This is contrary to other areas i.e. civil and criminal. In Public International Law, the term 'law' is very soft law, if it is a form of law at all.

In Roman Law, it was held that ***ubi jus ibi remedium*** which means wherever there is law, there is a remedy. This holds for areas of law such as civil and criminal. But in Public International Law, where are the remedies?

These questions will be dealt with under Private International Law. It is contrasted with Public International Law because it is seen that there is one Public International Law across the whole board, and any issues are solved at the ICJ at the Hague (State v State according to Common Rules of Public International Law). In this case, both the plaintiff and the defendant are quoting from the same laws, and the judges are asking questions and evidence according to the same rules and will pass a judgement quoting rules from the singular Public International Law. This was usually based on custom, now codified to a remarkable extent in the Treaties.

By having it in writing with definitions, it makes discussion and challenges and disputes clearer, and this also holds for the judgements since the judges can rely on the written texts of law.

This particular feature of Public International Law is the same as for Civil Codes, Commercial Codes, and Criminal Codes.

The word law in Public International Law is not the same as under Private International Law. This is because **There are Private International Laws as many as there are jurisdictions in the world** and there are potentially Codes of PIL in each of these jurisdictions in the world, whether written or unwritten. Additionally, there is no single Court to adjudicate, like the ICJ for Public International Law.

The world is divided by Roman Civil Law Countries and the Common Law Countries. Each country has its own jurisdiction. For example, Scottish Law is much more based on Roman Law, and English Law is based on Common Law. They both have their own Private International Law. In PIL, there are many different Private International Laws.

PIL arises in a domestic Court, and not in an International Court. There is no ICJ as a superior ultimate appellate Court in disputes between States. Public International Law issues

cannot be brought before a domestic Court. Each jurisdiction, not state, has its own set of Private International Laws. The Laws in the latter are strongly enforceable, unlike laws in Public International Law, which are hardly enforceable.

In the absence of a Super Court above States, PIL remains essentially domestic law, unless it is unified into a regional Union i.e. EU. The EU is pulling together and unifying the different PIL in MS into an EU Regulation. This is the most advanced form of unification. With the EU, there is an exception to the rule that there are many PIL as there are jurisdiction since the EU made it its task to unify the PIL rules in its MS to create one EU PIL administered by the ECJ. At the EU Level, EU PIL is adjudicated upon by the ECJ in a final determinate manner.

The Term 'International'

Public International Law seeks to resolve disputes between states, hence the term 'international' is very well used. The same as in the legislative level, when multilateral treaties are concluded, to legislate and regulate relations between States. In more recent years, there is also the individual becoming a subject of Public International Law with Human Rights becoming a set of International Human Rights, but again, with hardly any enforceability. States still remain the main subjects.

Why is the term used in PIL, when in PIL it is not usually the States who have their disputes resolved? It is mainly an individual in a Civil Law issue with a cross-border dimension. States can also, as a judicial entity (not as a State), be subjects of a dispute covered by PIL. When there is a foreign element in a case, that is where PIL will try and regulate the cross-border dimension of the Civil Court Case.

The judge first checks whether he has jurisdiction to be able to pass judgement.

The word 'international' does not apply in the scenario of PIL. Hearing go on in one Domestic Court with Civil Issues and cross-border dimensions. The judge can dismiss a PIL reference, subject to appeal.

N.B. The US calls this Conflict of Laws, and even this is a misnomer. However, there is no real conflict. This is merely an imaginary concept in the mind of the judge.

The Procedure:

- Phase 1: Jurisdiction Question which by each country's procedural rules arise.
- Phase 2: If the Court has jurisdiction and there is a foreign element in the case, the Court has to decide upon the applicable law i.e. domestic or foreign (this is the basic element of concept)

PIL will lead to a different destination and consequence of the case, and this depends of the applicable law. The applicable law can sway the outcome, and is an enormous tipping factor. From a client's perspective, one must do his outmost to pul the best punches in terms of PIL.

- Phase 3: Recognition and Enforcement of Foreign Judgement means that there will be rules on when and how to recognise a foreign judgement and turn it into a local one.

Out of these three phases, the first one is arguably the most importance. Jurisdiction can be pleaded upon at the very outset of the case, in order to get a yes or no. There may be a second PIL element popping up with regard to the choice of law.

Another competitor for the name of PIL or Conflict of Laws was Comparative Law. This is only a scholarly exercise, and it is not law, even in the softest sense. It is an academic exercise comparing two different legal systems, but this is only theoretical. It is not positive law, and does not lead to a judgement. There would be no plaintiff and defendant. What arises in Court in a PIL Case will be evidence of a foreign law. The expert evidence would not be a matter of law, but just a matter of fact, subject to counter-factual evidence.

There is no real competition between two disputants in comparative law. Only the author carries out an exercise of comparing and contrasting, but this does not change the position of the parties before a Court of Law.

PIL arises in a Court room during an ongoing lawsuit. One of the parties, upon convenience, will bring up the issue of PIL and the cross-border element. This is arguably unconstitutional because one would be applying foreign law into a national court.

Definition, Nature, Scope, & Historical Development

Whichever area of private area of national law one is going to practise, it is important to have an understanding to the rules of private international law. The country would have a system, but each area can still be related to private international law rules. It is an overarching system.

One is bound to know the Private International Law System petty much in any area of national private law. There is one feature of PIL which makes it stand out. This is the **foreign element.** One will realise that whichever area, this kind of body of rules kicks in in the presence of a foreign element. In the facts, there would be a feature which is not purely local. This foreign element would trigger one of the rules of PIL. There are three areas in which one gets such triggers:

I. Jurisdiction

This is essentially an issue of procedure. The rules in terms of Maltese Law are found in the COCP. Those rules prescribe which elements allows a local court to take and exercise jurisdiction on the defendant. If there is a Japanese in Malta, can one sue him? The rules of jurisdiction would answer this question.

II. Choice of Law

This is essentially present to determine for each class of case the particular municipal system of law by reference to which the rights of the parties must be ascertained. This is contrary to the other two areas, because it focuses on the substantive part of PIL whereas (I) and (III) deal with procedure.

For example, where there is a foreign will which needs to be recognised and implemented in Malta, what are the requirements? If there is a marriage, which rules govern the rules to classify that a marriage is valid in Malta?

III. Recognition and Enforcement of Foreign Judgements

If one gets sued in Italy, assuming the Italian Court has jurisdiction on the relevant person, but one does not pay. The creditor would want to enforce the judgement. Obtaining a judgement in one's favour is the beginning of the process, and this is followed by enforcement if the debtor does not pay. This applies in a purely local context. There is a foreign judgement with a cross-border enforcement in this scenario. A foreign judgement would be enforced as if it was a local one i.e. the creditor can get the judgement from Italy and enforces it in Malta against the debtor.

These rules trigger in when a domestic system has to face something born within another legal system from another State. PIL gives us the tool to deal with the aforementioned.

There is no one Private International Law in the world but there is one Public International Law in the world. The former is a local legal system, not in the strict formal sense. Each legal system has its own PIL system. This is because it is a legal system looking at something coming from another legal system.

Each legal system needs a way to interact with another legal system. In fact, this is based on the fact that there are multiple domestic legal systems. The raison d'être of Private International Law is the existence in the world of a number of separate municipal systems of law - a number of separate legal units - which differ greatly from each other in the rules by which they regulate the various legal relations arising in daily life. However, it is a state of fact that there are frequent occasions when the courts in one country must take account of some rule of law that exists in another.

PIL is at the border of the legal system. For example, Maltese PIL interacts with English PIL and English Law. This is a situation with two legal systems. But there might be instances in which the situation involves more than two legal systems.

The Choice of Law

If the local court possesses jurisdiction, the question arises which system of internal law, local or foreign, is to govern the case. Local Private International Law directs which system of internal law shall constitute the applicable law, by reference to which a solution must be reached.

A case would have a foreign element, while one is sitting in the Maltese Court. The first step is to determine whether there is jurisdiction. If there is, there could be a foreign element in which the Court would need to apply a foreign system of law. This is per the domestic PIL system.

If a case arises in Malta on the validity of a trust done in the British Virgin Islands (BVI) and the Court has jurisdiction relating to this matter. Maltese PIL will tell us that if the allegation is whether the trust was formally valid, regard is to be made to the rules of the BVI. If the issue is about a b reach of the trustees duties, one would look again at the law of the BVI. It gives one pointer: one would need to apply a foreign law as per Maltese Law.

This does not mean that only one legal system is applicable because there might be cases in which different aspects may be governed by different laws. For example, a marriage is regulated as regards formal validity by the law of the place of celebration, as regards capacity to marry by the laws of the domicile of the parties.

When one refers to the law of the local court, one refers to the ***lex fori.*** This is the law, because it is the local law, which has control over certain things i.e. PIL of the forum. The other character in the scenario is the ***lex cause.*** The latter is the applicable law for the substance of the case. For example, a marriage celebrated in Germany between a French and a British, and come to Malta to annul a divorce. This is regulated by Maltese PIL.

Again, when Maltese PIL is telling us to apply foreign rules, it gives you rules to prove it, but stops there. It does not provide a solution, but leads one to get to the solution necessary.

The Foreign Legal System

One is not speaking of country as such. There are countries or political units where in the political territory there is not one system of law, but there are various. For example, in the UK one has English Law and Scots Law. The PIL looks at the connection. If the issue is with Scotland, one looks at Scots Law, not English Law. With the US, there are different States which have different laws.

The Name of the Subject

The term 'PIL' is confusing because in its strict sense, it is not international. There is a debate as to whether it should really fall under private law. Again, there is no one PIL, each legal system has its own, and whether it is public or private, probably it has elements of both.

In the USA, this is considered as **Conflict of Laws.** This is misleading because it suggests that there is a real conflict between different legal systems, but the conflict only exists in the mind of the judge in coming to a decision. So there is really a conflict of choice of law rather than a conflict of laws.

Some other authors tend to consider it as **International Procedural Law.** However, some aspects of the subject are procedural (e.g. recognition and enforcement of foreign judgments) but other are substantive (e.g. choice of law rules).

The fact remains, that the system remains by its nature International in some form. A legal system would be finding a way to be international and receptive to other legal systems. A lot of work has been done to make PIL really International, extending from its mere tendency.

There are two ways:

1. One can unify internal laws - if the law of Malta and Italy relating to contracts are exactly the same, internal law can be unified. There has been attempts to undertake this i.e. Warsaw Convention, the Carriage of Goods/Persons by Sea. A substantive law would become the same in many countries. This is still pretty challenging.
2. One can unify PIL - common to many countries. For this, in 1951, this was developed through the Hague Convention. Its purpose is to churn out Conventions to try and unify different PIL rules of different countries. It has been successful in a number of areas.

The **EU** is an example of both of the aforementioned. It creates uniform Community Law spanning across wide areas including PIL. In the EU, one has common rules on jurisdiction, on enforcement and recognition of foreign judgements, on applicable law, on choice of law, and much more. This has created a sort of commonality. If one wants a Single Market, a Single Currency, Free Movement, one cannot cross the border and suddenly there is a change in the rules. In a Europe without borders, there was a lot of work done which have given a lot of certainty.

History

PIL rules were born because of political divisions and legal systems in the world. In the Roman Empire, there was no PIL. There was the Law of the Romans and the Jus Gentium. However, they did develop concepts of citizenship and domicile which are interlinked with PIL.

The tribes had a system of personal law, but some laws did have a universal application. Slowly, this broke down and countries started being formed. It was important to take note of other legal systems. This led to theories of PIL, which served as the basis for PIL systems to start and develop.

By the 19th and 20th Century, the shape of the world was pretty much clear. This is where the most work relating to PIL started to build up. Reference has to be made to **Savigny** who wanted to create law principles, including the ingredients of what a PIL system should have. Theories and ideas he wrote about still influence element of PIL i.e. he had the Theory of the Seat.

From the 19th to the 20th Century, there was a wave of codification of PIL. For example, the French Civil Code of 1804, the Austrian Civil Code of 1811, the Italian Civil Code of 1865, the Spanish Civil Code of 1889, and the German Civil Code of 1900 each contained a handful of broad choice-of-law rules. These became the models for similar rules in other countries. For example the Japanese Horei of 1898 was primarily based on German law.

N.B. There is no Code or Act in Malta, not even in the UK.

Sources

Maltese PIL does not have an established Code, unlike many other countries. If one is studying Criminal Law, the source is the Criminal Code, and the same is for other fields of law and their relevant legislative sources. These are Statutory Sources.

However, law can also be interpreted by judges. There are judgements which interpret the law. Typically, in all areas of law one would speak also of Judicial Sources.

In Malta, unlike in England, we do not follow the doctrine of precedence. While judgements are authoritative, they are not binding on other following cases. The Doctrine of Precedence is not something catered for under Civil Law Systems. These would have come out from Roman Law, unlike Common Law systems. In the case of a Civil Law System, a Lower Court can go against a ruling of a Higher Court.

The Statutory Sources

There are some PIL Statutory Sources, but not a Code: still there is not much, unlike when compared to other areas of law.

Our Ordinances were written by Sir. A. Dingli, which were eventually codified into a Civil Code. In this, there was already references to PIL. For example, in the old Ordinance, reference can be made to:

i. **Article 682**: formal validity of will

If a will is drawn up in accordance with the rules of place in which it was written, it is recognised and valid in Malta.

ii. **Article 1316**: marriage in Malaya produces in CoA

Marriage if celebrated in Malta, by default, creates a system of Community of Acquests between the spouses. These rule was interpreted in relation to domicile. One could feel that there could be a foreign element included in such a scenario. This is what makes PIL thick. If two people from another country celebrate marriage in Malta, they are regulated by this Article.

iii. **Article 1852**: interest rate capping at 8%

Along the years, this was interpreted in the sense that even a foreign contract, or a contract between foreigners, if it is enforced in Malta (or even an action is brought before a Court of Law), the 8% rule is upheld.

iv. **Article 1931**: surety had to be domiciled in Malta

This is of least importance, but still can produce a foreign element relating to domicile in Malta. Domicile is one of the connections factor and connects a person with a legal system.

These Ordinances were written at a time when codification of PIL in Europe was still at its infancy. Other provisions relevant to choice of law issues were added over the years and through development and evolution.

Historically, there is little statutory PIL. However, practical cases still occurred, and are not a modern phenomenon. Issues with a foreign element used to happen before the Courts since the olden days, and so, when there is no statutory provisions to follow, inspiration of the judge has to come from something. Hence, the judges under Maltese Law had the important duty of filling the gaps.

The Code de Rohan was not the first Code done by the Knights of St. John, but it was a bit improvement on the Code Manuel. It is considered as a very advanced Code for its time. This Code served as a starting point for the Judicial Sources. The basis of law in Europe was Roman Law. The legislator in the Code de Rohan put a rule which intended to help judges deal with certain issues: *how one can fill the lacunae*.

If one did not find a solution in the Code, one would refer to ***leggi communi,*** and after, the decisions of the most important tribunals. The *leggi communi* translated as being Roman Law (common law at the time, and not Common Law of England). The next step was to look at the Tribunals, mainly those in Italy and France, since they were trained in the same legal tradition as in Malta (*post-Roman Law codifications and interpretation).*

If one looks at the judgements that had PIL issues, this was the process undertaken. There was no PIL in Roman Texts, however, so the judges use to interpret and look for inspiration.

Along the years, this changed and the next major change in Maltese Legislative History after the Knights left Malta was the British Rule. The French Occupation was arguably illegal according to the Maltese Courts and International Community, so anything which came out after it was inapplicable.

The Maltese later asked the British to intervene, which they did. Most people think that when this happened, the whole legal system changed. Even from an English Law perspective, the Maltese was a special case. This is because the British Crown did not invade Malta, but the Maltese asked for help and offered themselves to the Crown.

In fact all existing law remained in place. Therefore, the judges continued to do the exact same thing prior to the British Crown. The legislative power then was undertaken by the Crown, meaning that enacted laws specifically applying to the Colonies were applicable to Malta. Other than that, the core remained. The British Commissioners also said this in their reports.

As the British rule progressed, the Code de Rohan started to be dismantled piece by piece. Every time an Ordinance was enacted, it replaced the corresponding provision of the Code de Rohan. However, this was not for all of the Code. The Source of Law rule was never specifically abrogated. Some judgements in the 1900s still referred to it, but it became less mainstream.

In time, there was an inclination of the Maltese judges to fill in the lacunae in a different way. By 1936, there were solid pronouncements which wrote the **Lacunae Rule** in a

different way. ***There is no PIL, and thus, using various reasoning, the judges said that Lacunae were to be filled in by English Law.***

Historically, there was no legal compulsion for this to reasoning to be upheld. However, the theory was still adopted, and is still used today. The modern tradition is still to get PIL inspiration from English Common Law. Anything in a British Act of Parliament since Independence does not apply in Malta. Anything between 1802 and Independence would only apply if an English Act of Malta directed that it is to apply to the Colonies.

Examples of Judicial Sources:

i. Succession: immovable by law of *situs*, movables by law of Domicile (**Smith v Muscat Azzopardi)**
ii. Maintenance: national law of the person obliged to provide maintenance (**Fernandez v Pace)**
iii. Domicile: various nuances in the local interpretation of the traditional common law concept.
iv. Proof of Foreign Law (**Micallef v Le Peuple)**

The Sources of Statutory Sources:

Chapter	Title	Article	Subject
12	Code of Organisation and Civil Procedure	742	Jurisidiction - General
12	Code of Organisation and Civil Procedure	811	Recognition Foreign Judgments
12	Code of Organisation and Civil Procedure	826	Recognition Foreign Judgments
12	Code of Organisation and Civil Procedure	827	Recognition Foreign Judgments
16	Civil Code	682	Will - Formal Validity (applies to deaths until 16 August 2015)
16	Civil Code	1316	Marriage - Community of Acquests
16	Civil Code	1852	Contract - Interest Rate - Foreign Law
16	Civil Code	1931	Suretyship
16	Civil Code	1712l	Contract - Life Insurance
16	Civil Code	257A	Status - Change in Sex
16	Civil Code	43(7)	Foundations - Maintenance
16	Civil Code	66N	Jurisidiction - Divorce
16	Civil Code	958G	Trusts - Capacity
52	British Judgments (Reciprocal Enforcement) Act		Recognition Foreign Judgments
255	Marriage Act	18	Marriage - Formal Validity & Capacity of Parties
255	Marriage Act	33	Recognition Foreign Judgments
410	Child Abduction and Custody Act		Recognition Foreign Judgments
530	Civil Unions Act	6	Same-Sex Marriage - Formal Validity & Capacity of Parties

Classification

There are principles of International Law which the Court uses to assist them in the *journey* when a case involves a foreign-element. The starting point is the aspect of classification, otherwise termed as characterisation or qualification. One is at the stage where the Court has jurisdiction over the case, and the foreign-element is established. Within the classification process, there are other techniques which shall be focus upon in upcoming lectures.

The Court would classify what the case is about. Before it knows what it is dealing, the correct Private International Law rule cannot be chosen.

These **choice of law rules** all have two particular features:

1. The Legal Category
2. The Connecting Factor

i.e.: marriage validity governed by the law of the place of celebration of the marriage

Our Act says that marriage validity is determined upon the law of the place of celebration. The legal category relates to the formal validity of the marriage, while the connecting factor is the place of celebration of the marriage.

i.e.: capacity to marry is governed by the law of the spouse's domicile

The aforementioned is again established under the Maltese Marriage Act, and thus, the legal category relates to the cavity to marry, while the connecting factor is the law of the spouse's domicile.

All choice of law rules follow this theme.

The Legal Category

One knows that all laws can be classified in different legal categories. The different institutes which make up the law are the legal categories. This can be anything legal: marriage, succession, contract, tort, procedure.

One would first need to determine the legal category. Before this is done vis-a-vis the issue, the choice of law rule cannot be determined. Choice of law rules are usually quite dragging, and can either have issues of capacity and issues of formality. They are also quite granular. There would not be a choice of law rule on a validity of marriage as a standstill rule. One would need to make reference to relevant provisions. Importance of precision is important in this aspect.

The Connecting Factors

This is essentially the link between the legal category and the legal system that is chosen to govern that legal category. Connecting Factors can be:

i. Physical

These usually relate to a place where the property is (*lex situs*) or where a contract is signed (*lex loci contractus*).

ii. Personal

These are usually related to laws of domicile and nationality. However, personal connecting factors are very wide-ranging. They look at an individual's attribution which links such person to a particular legal system.

iii. Procedural

This is because there are some things which irrespective of the foreign-element and the choice of law rule, reference is being made to the substantive limb. Procedural Issues are to be spoken of vis-a-vis the *lex fori,* and serves as a link.

Issues with Legal Categories

It is not always simple to determine the legal category. There are cases where the local court ends up facing an issue on an institute of law or contract which the forum does not know. An example of this relates to polygamous marriages i.e. most countries in the West do not cater for this. Another example is the distinction between movables and immovables. Some jurisdiction treat all properties as the same. In the case of Malta, there is a distinction between the two categories.

There is another issue when the *lex fori* and the chosen foreign law have different or even opposing views on the correct legal category.

Anton v Bartolo - this is a classical case of an example of the issue relating to legal categories. The case was decided in Algiers which was part of France at that point in time. In this case, there were a husband and wife domiciled and married in Malta. They moved to France and acquired a French domicile. The husband even bought land in France. After the death of the husband, the wife initiated a case in France to claim usufruct of 25% of the land. The question was whether there was a case of succession or matrimonial rights.

If it was the former, the *lex situs* would have applied which is French Law, but if it was the latter, the *lex domiciii* at the time of marriage would apply, meaning that Maltese La would apply. Depending on where the issue is placed, an outcome is based accordingly. In this particular case, the Court classified it as a matrimonial right and applied Maltese Law.

DeNicols v Curlier - this was a case relating to a French couple who went to live in England. The wife claimed half of the husband's property upon his death, including property in England, basing her claim on the French matrimonial property regime. The case arose in England, but no such property regime was known to the internal English Law, where a contract between the couple was needed. The case went all the way up the House of Lords who decided that the Institute of Community of Acquests was not known to them, but considered it as a contract. They therefore applied the French Law to the issue at hand. When one is classifying, one would need the *manica larga*.

Issues with Connecting Factors

The starting point is this: if a choice of law rule holds that a matter is governed by the law of domicile of a particular country, the term 'domicile' has to be interpreted in the light of

which country? Different laws have different definitions of the term domicile, meaning that there is no one meaning attributed to it.

What if the chosen foreign law has a rule which refers the issue to be regulated by the law of another country due to a different connecting factor? This is an issue to be tackled in terms of *renvoi*.

The Methods of Classification

1. Lex Fori

This has issues because it may make a foreign rule inapplicable when the foreign law would apply it, a rule may be applied when the foreign law would nor apply, and there might be issues which are unknown to the law of the forum.

2. Lex Causae

This theory says that if the choice of law rule refers one to a foreign law legal system, everything would have to be determined by such system. This is criticised because a classification is intended to choose the correct local choice of law rule.

There is another middle ground, in which there is a sort of balance between the aforementioned two theories.

3. Analytical Jurisprudence/Comparative Law

4. Falconbridge's via Media

Ogden v Ogden - this is referred to as a landmark case. A husband and wife got married in England, but the husband was a French domicile. France ha a rule stating that until one is 21 years old, consent from parents is needed to get married. The issue of validity of marriage was brought forward in England. The English Court had to decide of the validity of the marriage. England does not require the parent's consent. Would the French Law be considered as a rule of substance or a rule of procedure? The Court classified the French rule as formal validity and thus held the marriage to be valid, even though French Law considered this same marriage to be null.

This leads to a **limping marriage.** This is a marriage considered as valid in one country, and invalid in another. The issue of limpness is not only dealt with in marriage validity issues.

There has been various suggested solution of the problem of the aforementioned case. Beckett would give effect to all French provisions, though relating to formalities abroad, for the reason that they are matters of family law and intended for the protection of family interests. Cheshire and Falconbridge insist that the qualification of the French requirement must be according to the *lex fori*.

Maldonado Case - Maldonado died intestate domiciled in Spain with no heirs, and the case arose in England. The English Rule on the matter said that the law of the domicile should be

applied. Spanish Law maintained that if one died without heirs, it is the State who inherits the deceased. Another part of English Law says that this would be expropriation, and this would be considered as an Act of State. If the issue arose without the need of a connecting factor, the English Court would never take property without compensation. However, the Private International Law rule had to apply the Law of Spain. The Spanish state was allowed to succeed to the movable assets located in England.

Huntington v Attrill - many American decisions that a statute which gives plaintiff damages in excess of the amount of his loss, or without reference to such amount or the cause of the loss, is a penal statute (punitive damages). United States Supreme Court and the English Privy Council have held, that, for purposes of PIL, an international test should be adopted, restricting the definition of a penal law to a law punishing a person for the infraction of a public law.

The approach taken in this case by English Courts was that when there is an enforcement of a foreign judgement, although there's no institute of punitive damages, one would still be receptive of such on an international level.

Re Cohn Case - a mother and daughter were domiciled in Germany but escape in England during WWII. Both of them got killed in an air raid which happened in England. The issue was with regard succession of the estate of the mother. English Law had a presumption that the older of the two died first. Under German Law, the presumption was that they did simultaneously. This traces the issue of classification: is it a question of succession to be covered by German Law, or is it a question of evidence covered by English Law? The Judge applied German Law.

Many of the issues in the classification process arise because of very specific nature of choice of law rules i.e. substantial/formal, differences in choice of law rules in different legal systems, and different connecting factors used in different legal systems. Moreover, there is a problem with classification of rules of law in different legal systems and there is a distinction between substantive rules and procedural rules.

Although the *lex fori* is the starting point for classification, foreign rules should never be applied out of their natural context in a way which could lead to conclusions which re oppose to what the foreign rule intended.

During the last lectures, we were discussing the concept of Classification. In summary, classification of facts was distinguished from classification of rule of law. In between, if one shows the Court that the matter should be classified as procedure, then the Court will simply apply local law and not foreign law:

i. Classification under a Legal Category
ii. How a Legal Rule is classified (Maldonado Case)
iii. Show the Court *convincingly* that the matter is procedural in terms of its nature

Ogden v Ogden - there was a French man domiciled in France. The nationality is the connecting factor, alongside domicile. He was married in England, to an English women domiciled in England. He did this without obtaining consent from one of his parents as per the law at the time. His father started proceedings to annul the marriage, and got an annulment by the Court of First instance. Mrs. Ogden married Mr. Ogden at a Lancashire parish church, describing herself as a widow. Two years later the person she married sued for nullity based on the grounds of bigamy. The wife denied that she was still married to the French man, producing her French Court judgement of annulment. The Court gave a favourable judgment to the husband because it classified the marriage taking place in England as a question of formal validity to be ruled by English Law, the place in which the marriage is taking place in contrast to clarifying the lack of parental consent as a matter of essential validity of marriage which would be ruled by the place of domicile, which is this case would have been France.

The Court, in declaring that the marriage was still valid, and the second one was bigamous, classified parental consent as a **matter of formal validity**, which English Law did not recognise. If parental consent was classified as an **essential validity of marriage**, it would have been ruled by the domicile of the person i.e. French Law.

In France, the wife was considered to be married to an English man who does not want her. In England, she is married to a French man who does not want her.

Another problem in PIL is the **incidental question**. This presumes that there is a main question to be regulated by one law and that there is an incidental question regulated by another law. The problem is how to decide which should prevail over the other, or whether two different conclusions are determined. This is a complex situation.

There are basically two known cases:

1. **Lawrence v Lawrence**

There was a First husband and wife, married in Brazil, and lived together there till the 1970s. The wife later goes to Nevada and got a 24hour divorce, but Brazil did not recognise divorce. The next day she marries her second husband in Nevada. He petitioned to the COA for the invalidity of the marriage.

There is a question of validity of the marriage as a main question, and underlying it the incidental question of the wife's capacity to marry. The capacity to marry, being a a question of essential validity is regulated by the law of the wife's domicile i.e. Brazil who did recognise divorce. English PIL points to her domicile, which was Brazilian and therefore she had no capacity to marry someone else. The English Courts went right up to the House of Lords, distinguishing between the two questions put forward.

They came up with reliance on an English Statute of Recognition of Divorces oversea, which recognised divorces in Nevada. This married was therefore recognised, and ignored the incidental question of whether she had capacity to marry which they would have had to follow through with the place of domicile of the wife.

The judges have quite a task to identify which one of the two questions should are recognised, and how to resolve and reconcile this internal conflict in the same matter at dispute. The Court said that one is bound with the proper theory of PIL, and such proper law gives a general guidance to lawyers that in case of doubt, one should always apply the law with which the parties have the most close and real and substantial connection. This is the proper law of the case. There is a search for the roper law of the case at hand to find the most real and substantial connection to the proper law.

One of the judges was arguing that since both of them came to England, after the divorce and marriage, and it was clear that they strongly desired to make England their permanent home, English Law should be the proper law vis-a-vis the case in question.

Another judge created a novel set of arguments by saying that divorce is a right, because there is a fundamental right to remarry. He said that in England, one is looking at divorce as a right to remarry, and that based on this, the wife had such right.

A different judge said that when in doubt, one should apply the *lex fori,* without referring to the main and incidental question. This is a usual default in PIL. Thus, there is a strong hint that as rules of evidence, it is he who alleges that a foreign law should apply, he must prove that. The PIL tours in a sense of concession by the forum. If it is not proven clearly, the default is to apply local law. One has to look at the asymmetry: the burden of proof in a PIL case is on the shoulders of he who alleges that a foreign law should apply, in sharp contrast to who alleges that local law applies. Applying a foreign law is to be seen as an exception to the rule. This is the strongest argument. ***The lex fori prevails as a default position.*** This helps also insofar as enforceability is concerned.

2. <u>Schwebel v Ungar</u>

A Jewish husband and wife were domiciled in Hungary, and decided to go and settle in Israel, travelling overland. While being in Italy en route to Israel, under Judaic Law, a divorce can be carried out through *Ghet*. This was not recognised in Italy, because of its form, and also based on the fact that Italian Law did not recognise divorce in general. This form of divorce was not even recognised in Hungary. Although the both ended up in Israel, the wife did not want to stay in Israel, although she had domicile. She later flew to Canada and got married in Ontario. The second husband petitioned for a Court decree of nullity because the wife was still validly married to her first husband.

There is an inversion to the prior case, because the main question was the capacity, and the incidental was the validity of the *Ghet*. Canadian Law did not recognise the verbal form of divorce. In regarding the capacity to marry, the judges held that the marriage was valid because it was according to Canadian Law and in any case it was also according to the essential validity of the marriage which is determined by the wife's domicile. Israel recognised *Ghet* and therefore the second marriage was valid.

There was also **Khan v Marriage Registrar**, but the case was eventually withdrawn. Khan was married to his wife, both being Pakistanis in Pakistan, and both were Muslims. Under Islamic law, the husband can divorce his wife with *Talaq*. This is not recognised under Maltese Law. He wanted to remarry in Malta, believing he had a perfect divorce, but the Registrar did not accept this on the basis of the Marriage Act. A divorce has to be granted by a Court judgement. From this case, this *Talaq* divorce is only recognised if recognised by a foreign Court who has jurisdiction over either party vis-a-vis domicile or nationality.

i.e. wife claims rights over intestate succession of husband's immovable in Italy. Through English Law, she was classified as a widow, unlike under Italian Law which at the time did not recognise divorce. Can she succeed to her husband's estate, where English Law is pointing us to Italian Law? The subsidiary question is: the question on the validity of marriage. Would her second marriage be valid? It is valid under English Law but not Italian Law.

Renvoi

An issue in PIL is known as the **Question of Renvoi.** The English term for this is 'remit' or 'transmit'. When in PIL we have a connecting factor, in a law suit arising in a Court where a foreign element arises, which prevails to link us to a foreign law. If we were speaking of immovables, one would say that we are linked to the law relating to the location of such immovable. When speaking of marriage, we look at where the marriage was celebrated. This is the basic structure of PIL.

Through the connecting factor, we are referred to a foreign law to apply. We are doing this in order to suit our client's convenience. PIL is used to improve the outcome for the client. Pleading PIL is a way of improving one's position. It is defence which usually makes a PIL claim.

Once it is decided that a Court has jurisdiction, how the issue before it is to be characterised in terms of PIL rules, and what choice of law rules are applicable, what is left for the judge is to apply the chosen law. The function of PIL is purely selective: ***it is a reference system.*** If the *lex causae* ends up to be internal law, the case has no foreign complexion. If, however, the *lex causae* is a foreign law ,the issue is to determine the sense in which the *lex causae* must be understood.

Foreign Law

This could mean three things:

i. When one refers to a foreign law, the judge, using the relevant procedure, will apply the internal law of the country in question.

A particular provision would be applied. However, why, when we refer to law in foreign law, do we only refer to substantive law and not own PIL rules? In this case, we refer to a foreign law and delve internally into a substantive law i.e. **no renvoi**.

ii. This might be Internal Law of a Country in addition to PIL Rules of that same country. This is termed as being a **Single Renvoi.**

This is referring to substantive law and the PIL Rules. The latter may redirect us, either to a new law, or remit us back to the origin i.e. lex fori. This is termed as being a Single Renvoi. This was criticised because why should we utilise the PIL rules of a foreign State, when own PIL rules can be used? The critics said Single Renvoi shouldn't exist because PIL would be used twice over.

iii. This is the **Double Renvoi** which means that one would look at the internal law, at the choice of law rule, and at the theory of renvoi of the relevant country.

This is the most complicated. The judge imagines he is sitting instead of a foreign judge in a foreign court. From that position, he checks what the outcome of the case would be and then applies it as the Maltese Judge in the domestic courts. There is a double case. It all depends on whether the other party i.e. jurisdiction being referred to, accepts single renvoi. Double

Renvoi operates only if the other party accepts the renvoi. If such other party also follows a double renvoi theory, one would get a vicious circle which never ends.

No Renvoi

This solution is in general correct, and mostly desirable. It is the general position at law, both in Malta and England. This happens where there is only an application of internal law. According to Baty taking the law of a country to mean that country's internal law inclusive of its choice of law rules; ***is absurd and otoise: a rule for the choice of an appropriate law has already been applied, namely our own. To proceed to adopt a foreign rule is to decide the same question twice over.***

Single Renvoi

This doctrine demands that a reference to the law of a country shall mean a reference to the whole of its law, including its choice of law rules. This can lead to:

i. Remission

The judge in country **A** is referred by his own rule for the choice of a law to the "law" of country **B**, and the rule for the choice of law in **B** refers back such a case to the "law" of country **A.** There is a sort of a 'send back'.

ii. Transmission

The judge in country **A** is referred by his own rule for the choice of a law to the "law" of country **B**, and the rule for the choice of law in **B** refers such a case to the "law" of country **C.**

Double Renvoi

This is also termed as being Total Renvoi or Foreign Court Theory. In this case, the local law would say a foreign law is applicable which is looked at, alongside the choice of law rule. If there is also a Theory of Renvoi, this is used as well by the local judge. This would mean that a local judge would be as if he is siting in a foreign court, doing all what the foreign judge would have done. This only works where there is a Renvoi Theory.

Example 1:

If the issue in England is the intrinsic validity of a will made by a British subject domiciled in Italy, the judge will reason as follows: An Italian judge would refer the matter to English law, as being the national law of the *propositus*. English law remits the question to Italian law as being the law of his domicile. Italian law (at the time) does not accept this remission, since it repudiates the single renvoi doctrine. Therefore, an Italian judge would apply English internal law (**Re Ross**).

If Italy is changed with France, the answer would be different. A Court sitting in France, owing to their choice of Law rules would apply its French Internal Law since it has its Single Renvoi Theory. What happens is dependent on the PIL system of the foreign law. In fact, A French domicile, however, would produce the opposite result, since a court sitting in France would accept the remission from England and would ultimately apply French internal law (**Re Annesley**).

Objections to the Double Renvoi Theory

1. Does not ensure uniform decisions

The doctrine can only produce uniformity only if it is recognised in one of the countries concerned and rejected in the other - not if it is recognised in both.

2. Involves the capitulation of rules of choice of law

The doctrine involves nothing less than a substitution of local choice of law rules with foreign choice of law rules.

3. It is difficult to apply

The Judge must ascertain what rule prevails at the moment in the foreign country with regard to the doctrine of single renvoi. The question may yet be undecided by the courts of the foreign country in whose shoes the judge is expected to adjudicate. How can, for example the law of nationality be applied when this comprises several systems of territorial law, as the USA or UK? When one is proving foreign law, the situation is complex.

Collier v Rivas - this case involved a British Citizen domiciled in Belgium upon his death. He left, in Belgium, one will and extra codicils. The will and two of such annexes were drawn up regularly, according the necessary requisites of Belgian Law. The remaining four codicils were not drawn up in the required manner. However, from a purely English Law perspective, given its liberal nature, all codicils were valid. To make matters worse, although according to English Law, this person law was domiciled in Belgium, this was not the case as per Belgian Law.

The English Judge decided to use the Foreign Court Theory, and thus, sat as if he was a Belgian Judge. He admitted that the will and two codicils to probate (*opening of succession)* because they satisfied the formalities of the internal law of the country in which the testator was domiciled in the English sense. However, he still accepted the other four. In fact, he also also admitted the remaining codicils on the ground that, since the testator had not acquired a domicil in Belgium in the Belgian sense, a judge in Brussels would apply Belgian PIL, under which the formal validity of the instruments would be tested by English internal law. The judge held that a will should be valid both if it satisfies internal law, and even if it satisfies PIL.

Situation in England

There are various similar situations were English Judges use Double Renvoi:

i. Essential Validity of a Will
ii. Intestate succession to Movables
iii. Entitlement to Foreign Immovables
iv. Legitimation by Subsequent Marriage
v. Formal Validity of Marriage
vi. Essential Validity of Marriage

Situation in Italy

There was no theory in traditional Italy. When PIL was codified, they said that when a foreign law is applicable, had renvoi, and if the renvoi is remission, it is accepted. Renvoi is also accepted if mandated by an International Convention it forms part of.

Situation in Malta

There is only one case within which the Theory of Renvoi is used. This is **Fiumara v Newby (1900).** Mrs Newby was Maltese, married to an English-man. She had money to give to the plaintiff, who was Italian, and while being in Italy she signed a bill of exchange for such money due. When the bill became due, she did not pay, and thus, the plaintiff sued Newby. The issue to de decided upon is the capacity of Newby as a married woman to conclude a bill of exchange.

The judge said that both English and Italian Law confer the husband's nationality on the wife. Nationality, at that time, was transmitted upon marriage, thus, Newby was British. The capacity to regulate a bill of exchange is regulated by the law of the domicile. Thus, English Law was looked at. English law regulated the capacity of the wife by the law of the place of conclusion of the contract (Bills of Exchange Act 1882). In this case, the place of conclusion was in Italy. The Italian Civil Code, more specifically Article 134 and 135, provided that the wife cannot contract debts without the authority of the husband if she is not either legally separated from him due to his fault or she is a trader of her own right.

Because of this, the Court concluded that wife was unable to enter into contract without authorisation of her husband - the obligation was null under Italian law, and hence the demand for payment was rejected. Therefore, the judge decided the case just as an English (or Italian) judge would have decided it.

Surely, this case is one of renvoi, but its classification is unclear.

With the reasoning undertaken, the case would have had the same result in Malta, England and Italy. The judge could have easily not used renvoi at all and applied Maltese law as the *lex fori* because at the time the Maltese rule was also that the wife could not enter into contracts without the authorisation of her husband.

There are clear situations where renvoi cannot be used, and the meaning of "foreign law" is "the internal law" only. There are other situations, notably issues of personal capacity, where renvoi can contribute to consistent results in different jurisdictions. This leaves a large grey area where the courts have discretion whether to apply some form of renvoi.

Evidence and Proof of Foreign Law

The proof of content of foreign law is a matter of fact and not law. The facts can be contested as facts, and this is important to keep in mind. When we look at foreign law, it is not as if such law has a force of law in Malta. It is merely a fact which provides rights which the judge can entertain to provide for justice. Proof of foreign law is a proof of fact which is rebuttable. Facts are always rebuttable by other facts.

PIL depends on getting proof of foreign law. An expert is needed vis-a-vis foreign laws. With Renvoi, if we are going on the first track, referred to i.e. Spanish Law, we'd need an expert on Spanish Law. For it to be applied it needs to be accepted by the parties and Court.

In the second case, we'd need experts on the Spanish Law and PIL of Spain. This is to be submitted, and only upon acceptance it becomes part of the conclusion.

In the third case, you'd have to also have an expert relating to the principles of Renvoi acceptance.

Under Italian Law

Under the Italy Code of PIL, when there was a reference to a foreign law, the Italians would refer to such law and apply it, without taking into consideration the PIL rules of such foreign country. This has now been amended but is important for academic purposes. There was an exclusion of taking notice of PIL of other jurisdictions. In 1995, this was amended. Under Article 13, Renvoi is now taken into consideration. Before it was no Renvoi, and now it says that Single Renvoi is adopted. If the foreign law's PIL refers to another foreign law, that is what is used.

Forgo Case (1883)

This arose in a French Court where you had a Bavarian National who was domiciled in France, died in France and left intestate there. However, since he was illegitimate, the French State took everything. In the French Court, there was a link to Bavaria i.e. *lex patriae*. When they followed the law of Bavaria, the followed its substantive law and its PIL rules. The latter referred to the *lex domicilii* i.e. France. This meant that all property when to the French State. This is a case of remit. From the French Court to Bavarian Law, and Bavarian Law remitted back to the French Law.

Case 2: ??

German domiciled in France and dies intestate there, leaving movables in England. The case arises before the English Court which used domicile as the connecting factor, and so reference was made to France. French Law refers onwards to the German Nationality that he had. You can have a remit and a transmit.

The criticism is why one stops there. It is foolish to proceed to apply a foreign PIL rules which decides a fact twice over. From England to France to German. There is strong criticism of the single renvoi theory. It decides the question twice over, and why is this? The criticism is, why do we come back or go forward again? Is there a justification to keep going on? Logically, it can be used a *contrario senso*. Single Renvoi does not explain why it stops. It appears arbitrary. There is no legal justification for the double PIL exercise.

There is also a sovereignty argument. Utilising the first PIL rule is a manifestation of the sovereignty of the Court of the *lex fori*. Resorting to the second PIL rule is obnoxious. Why

should a sovereign state utilise a foreign PIL rule? In effect, this amounts to abandonment of sovereignty. A local court should also follow its own procedure.

The third argument is that by adopting the second PIL rule after first referral, one is abounding sovereignty for a procedural rule of a totally different jurisdiction. The defendants usually bring up the argument of enforceability.

Before the Brussels Conventions and the followings, which allow for mobility of judgements and enforcement within the EU, it was difficult to enforce one judgment from another MS. The defenders of Single Renvoi said that this system of thought allows enforceability in the final country. This has sway, because we are looking for enforceability. If you have a judgement which cannot be enforceable, it can be rendered practically useless.

Some have argued that single renvoi enables enforceability at the end. It may sound labyrinthine, but at the end it is very useful. It justifies going over twice over. There are pros and cons to single renvoi.

One famous case for Double Renvoi is **Re Ross of 1930.** A British national was domiciled in Italy for 51 years. Domicile has a double layer: animus and fact. The degree of animus has varying calibration, unlike the facts. Domicile was duly acquired in this case as per Italian Law and even as per English Law. She draws up a will and excludes her son from the will. She was substantially wealthy i.e. movables and immovables. The case arose in England where the son held that this was invalid, Italian law applied and thus, he had a legitimate portion of his mum's wealth i.e. one third.

The judge said that regarding the movables, English PIL operates through domicile at the moment of death of the *de cujus*. In Italian Law, with its PIL and Renvoi Rules (at the time was not accepted), the British Judge imagined he was sitting in the Italian Court. The Italian Court would have referred through the connecting factor of the *patriae*. This would refer the Italian Judge to England and England would then, with its PIL rule refer back to Italian Law, and Italian Law does not accept renvoi (at that time).

On the immovables, under English Law it is the law of the location of the immovable property, being Italy. Again, he has to imagine he is an Italian judge, which would refer to English Law. English law would refer to Italy again, and Italy does not accept renvoi. The son's claim would also quashed in terms of immovables.

This breaks down if the Italian Legal system accepts the Renvoi, because a vicious cycle would be created. This is an extremely peculiar theory, because it only holds if the other country does not accept the theory of renvoi.

Duke of Wellington Case

Up till now, all the judges in Malta have avoided referring to Renvoi because it is complicated. There is only **Fiumara v Newby.** The defendant was the Maltese wife of a

British husband. While in Italy, she was shopping and signed a bill of exchange in favour of the plaintiff. The defendant did not pay when the bill can to be protested, and the plaintiff sued her in Malta.

The issue before the judge can and revolved on the question of her capacity to conclude a bill of exchange on her own. The court considered that both English and Italian law confer the husband's nationality on the wife. Therefore, the wife was a British national. English law regulated the capacity of the wife by the law of the place of conclusion of the contract (Bills of Exchange Act 1882). The place of conclusion of the contract was Italy. The Italian Civil Code, Articles 134 and 135, provided that the wife cannot contract debts without the authority of the husband if she is not either legally separated from him due to his fault or she is a trader of her own right.

The Court concluded that wife was unable to enter into contract without authorisation of her husband - obligation was null under Italian law and hence the demand for payment was rejected. Therefore, the judge decided the case just as an English (or Italian) judge would have decided it. The Merits of double renvoi in cases of capacity: case would have had the same result in Malta, England and Italy. The judge could have easily not used renvoi at all and applied Maltese law as the *lex fori* because at the time the Maltese rule was also that the wife could not enter into contracts without the authorisation of her husband.

The Maltese Judge could have used another route by applying Maltese Law, because the rule at the time was that the wife could not enter into a contract without husband authorisation.

In all and every reference we make to a foreign law, one has to remember that there is an overriding criterion called Public Policy. If applying a foreign law in a law suit in Malta goes against Public Policy, our Public Policy should and would prevail.

Public Policy changes with times. There were many cases (**Gray v Formosa**) where divorce was said to be against the Public Policy of Malta, and therefore, even maintenance was not recognised. This is obviously no longer the case.

Lord Simon, in **Verveke v Smith**, there is authority that England would not recognised a foreign rule of law, even when applicable, when it goes against English Public Policy.

Against Public Policy:
- Verbal Divorces
- Usury
- Rights of Jews from Holocaust
- Polygamy

Incidental Question

This is still in the area of the choice of law process, there is an exploration on the parameters of the foreign law. An additional issue that crops up during the classification process deals with was is termed as being an *incidental question*.

After the law to govern the main question has been ascertained by the application of the relevant tule for the choice of law, a further choice of law rule may be require to answer the subsidiary question affecting the main issue. As long as the choice of law rule of the main question and the ancillary incidental question are the same, there is no problem.

To decide, for example, whether a marriage is valid, reference might be made to a previous divorce. The Court may deem validity of the marriage as the principal question and the validity of the previous marriage or divorce as the subsidiary or incidental question. Similarly, validity of a marriage may be incidental to the main question of the legitimacy of an alleged heir in a problem of succession.

The problem arises when the two questions are governed by different private international law rules, and so there are different results. The problem is whether one should apply in the case of the incidental question the same private international law rule of the principal question, or whether one should apply the private international law rule of the incidental question itself.

Elements of the Incidental Question

There are three elements for the question to arise:

1. The **main issue** should, under the rules of the local private international law, be governed by a foreign law.
2. There should be a **subsidiary question** involving a foreign element, which could have arisen separately and which has its own independent choice of law rule.
3. The latter **choice of law rule would lead to a conclusion different** from that which would have been reached, had the law governing the main question to be applied.

There are three ways of solutions:

i. One can either only apply the foreign law applicable to the main issue, and generally speaking, this is the main idea.
ii. Another theory refers to the choice of law rules of the forum.
iii. Others consider that the determination of the problem will depend on the nature of the individual case and the policy of the forum.

Lawrence v Lawrence - this was a case decided by the English Courts. In this case, the husband and wife got married and were domiciled in Brazil. The marriage failed, and the wife decided to get a divorce in Nevada (*quick process)*. Since it was under Brazilian Rules of PIL, that type of divorce was considered as sham and not recognised by itself. English Law recognised the Nevada Divorce. The wife married another husband the next day, and such husband asked the English Court to declare the marriage valid. The wife did not have capacity to marry the second husband as per the law of the Domicile, which was Brazil. The

English Court of Appeal decided that the marriage between the wife and the second husband was valid. The Recognition of divorce was the main question, capacity to marry the incidental question.

Schwebel v Ungar - a Jewish husband and wife were domiciled in Hungary, but decided to settle in Israel. Transportation was only possible via train, thus, it was a long journey. However, while passing through Italy, en route to Israel, the husband used the Jewish formula of divorce by *gett*. This allowed the husband to divorce the wife in a non-formal and verbal manner (extra-judicial form of divorce).

Under Hungarian law, the law of their domicile, and under Italian law this divorce was invalid, but it was effective according to Israeli law. Many countries, till today, do not recognise this form of divorce. They then acquired an Israeli domicile, and whilst so domiciled, the wife visited Ontario and married a second husband.

Schwebel, who was the second husband, petitioned in the Ontario Court for a decree of nullity on the ground of his wife's bigamy. The Canadian court had not only to consider the question of the wife's capacity to marry governed, under the Ontario choice of law rule, by Israeli law, but also the validity of the wife's divorce by *gett*. *Gett* was nor recognised as a form of divorce by itself in Ontario, Canada, although recognised under Israeli rules.

The main question was that of Capacity, to which the Divorce Recognition was incidental. The Capacity to Marry had to be spoken of vis-a-vis rules of the domicile. What happened here was contrary to what happened in **Lawrence v Lawrence**. They absorbed the issue of *gett* into the issue of capacity.

The divorce was valid under the law of Israel, the law governing capacity to marry, and this was made to prevail over the other Ontario rule which would deny recognition of divorce. It was held that ***to hold otherwise would be to determine the personal status of a person not domiciled in Ontario by the law of Ontario, instead of by the law of that person's country of domicile.***

Under Maltese Law

Under Maltese Law, there are separate provisions for capacity to marry and recognition of foreign divorces.

Article 33 of the Marriage Act holds that a divorce judgment recognised in Malta if delivered by country of nationality or of domicile (N.B. today this rule is limited to judgments outside EU).

Article 18(b) of the Marriage Act deals with the capacity to marry which is determined by the law of the domicile.

There is a possibility that a person is domiciled in one country, but a national of another country, and his/her divorce is recognised by the law of the country of his nationality, but

not by the law of the country of his domicile. So according to the law of nationality, such person is considered to be divorced, but according to the law of his domicile, he is still considered to be married.

Practical Uses

If the question is whether the spouse has capacity to remarry, *lex domicilii* will reveal that he is already married. If the question is whether he/she is single because validly divorced, the Maltese divorce recognition rules, by reference to his law of nationality will reveal that he is single, with the corollary that he/she ought to be free to remarry.

Conflict arises because Articles 18 and 33 of the Marriage Act use different connecting factors to two interrelated situations. The Solution is this: *capacity to marry is the main question and the law of domicile should prevail,* as in **Lawrence v Lawrence.**

This was a problem which also existed under English law, solved by Family Law Act 1986, Section 50, which provides one clear straightforward rule to the effect that if the divorce is recognised by the English rules on recognition of foreign divorces, either spouse has capacity to contract marriage, irrespective of the fact that that divorce or annulment is not recognised elsewhere.

Khan v Marriage Registrar - Khan was an Indian Doctor working in Malta, and he wanted to marry a certain Maltese woman. They went to the Marriage Registrar, to follow procedure to perform a Civil Marriage. However, such Marriage Registrar refused to allow the plaintiff to marry in Malta, on the basis that a divorce by *talak* cannot be recognised in Malta. The law of domicile, being India, recognised such form of divorce. This is one of the few cases that the Second Hall of the Civil Court has jurisdiction on a litigation matter as per the Marriage Act. The case was eventually withdrawn as the couple decided to marry outside the country. The solution would have been that the main question is the capacity to marry under Article 18, while the recognition of the extra-judicial divorce is the incidental question.

The incidental question may arise during the classification process. The issue arises because of the variety of rules in the private international law system governing different legal categories and due to several legal categories which are inter-linked. There are no hard and fast rules on what is the principal question and what is the incidental question.

Public Policy

Essentially, this is a kind of self-defence mechanism of the forum which, when faced with a foreign applicable rule, the judge, basing himself on public policy refuses to recognise or enforce the rule in the case. It is an escape route from the application of the relevant choice of law rule, or to deny recognition of a foreign judgement which would otherwise be entitled to be recognised.

The reason to negate the applicability of a foreign rule can also be used to negate the applicability of the foreign judgement. The question which comes up is with regard to the extent to which the concept of public policy should be stretched. Although the concept is there against offending foreign rules and judgement, it is to be seen as a last defence.

If the concept is too wide or too vague, it may be interpreted to embrace such a multitude of domestic rules as to provide a fatally easy excuse for the application of the *lex fori* and thus, to defeat the underlying propose of PIL.

There is a difference between:

1. Civil Law Countries: *Ordre Public*/Mandatory Rules - any domestic rule designed to protect public welfare must prevail over an inconsistent foreign rule. The forum must defend these at all costs.
2. Common Law Countries: Public Policy - withholds all recognition of any foreign law or judgement which is repugnant to the distinctive policy of the forum, and refuses to enforce any foreign law which is of a penal, revenue or other public law nature. Furthermore, foreign expropriatory laws will, in some circumstances, not be recognised and in other scenarios, although recognised, will not be enforced.

Revenue and Penal Laws reflect the exercise by a state of its sovereign power, so they should only have an effect in the State where the sovereign has power. Other than that, there is a broad sphere where the debates ranges on.

i.e. one is called to recognised a foreign contract which is valid, but is a contract without consideration. The forum might not allow contracts without consideration. Should one not accept on the basis of public policy? If the answer is yes, this is too wide.

The Heads of Public Policy

1. Where the Fundamental Conceptions of English Justice are Disregarded
2. Where the English Concepts of Morality are Infringed
3. Where a Transaction Prejudices the Interests of the UK or its good relations with foreign powers
4. Where a Foreign Law or Status offends the English Conceptions of Human Liberty and Freedom of Action

Substantive Justice

This is an English Head of Public Policy which was developed because of a conflict with Maltese Law and Judgements. The underlying cause was the fact that back in the day, the

only form of marriage available in Malta and to the Maltese, wherever they may be was the Canonical Form of Marriage. Any marriage not in this form was automatically null and void under Maltese Courts. There were a series of cases which concerned Maltese Catholics who married in an English Registry and then, upon their return to Malta, succeeded in annulling that marriage. The man would usually go back to England asking the Courts to recognise the annulment of the English Marriage. The English Courts said that this offended their idea of substantive justice.

Notwithstanding, the notion of substantive justice must not be extended too far because a huge would end up by refusing to apply a foreign rule just because he would disagree with it.

Lemenda Ltd v African Middle East Co (1988) - this deals with a situation where English concepts of morality were infringed. The national oil corporation of Qatar had contracted to supply oil to the defendants for a six-month period at a particular price. The contract provided for a renewal for a further six months given both parties agree. It became clear to the defendants that they would have difficulty in getting the oil company to agree to renewal. They therefore entered into another agreement with the plaintiff, with the contract saying that if the plaintiff used its influence of the Minister of Oil in Qatar to get the contract renewed, then they would be paid a commission fee of 30US per barrel.

In fact, the contract was renewed from the 1st August of 1985, but the defendants wanted the contract to be renewed by the 1st of April of the same year. The defendants held that since the renewal came at a later date, they should not pay the commission fee to the plaintiff. The Agreement was governed by English Law.

The issue was whether the Agreement should be enforced. The English Courts did not allow this because if it did, it would corrode the principles of morality of the English Legal System.

Vervaeke v Smith (1983*)* - this case was not actually decided on Public Policy, but it is still relevant. The plaintiff was a Belgian woman who got married in England with the defendant. The main purpose of her marriage had been to enable her to acquire British nationality and practise her profession of prostitution in the UK without running a risk of deportation. This amounted to a Marriage of Convenience. Around 11 years later, the plaintiff went to live in Italy with Messina (*another guy)* who was a very wealthy guy. She married him on the same day he died, and would have ended up inheriting him given the marriage was considered valid. She went to the English Courts to annul the marriage with Smith, because by so doing her marriage with Messina would have been valid. The English Courts did not allow this to happen.

In 1971 she sought and obtained a Belgian decree of nullity of the English marriage because of the marriage because termed as being a ‘mock’. Her capacity to enter into the marriage was governed by Belgian Lae because at the time she was a Belgian national domiciled in Belgium. The Belgian Court, therefore, held the marriage to Smith to be void *ab initio*.

Some of the Law Lords invoked the doctrine of public policy as well since it would be intolerable if the law of marriage could be played with by people who thought fit to go to a register office and subsequently, after some change of mind, to affirm that it was not a marriage because they did not regard it.

Public Policy in the Maltese Courts

The Maltese Concept of Public Policy has been inherited from the English Concept. However, Maltese decisions have sometimes stretched the concept to its extremes, giving it an interpretation which would be more akin to the continual concept of public order. Public Policy changes in time because of the society and also changes in the legal framework. One of the areas is, again, that of Marriage and Divorce.

Apart from this, the Maltese Courts did not recognise foreign divorces of any shape or form. As long as one of the parties was domiciled in Malta, one could only get married in the Catholic Form and everything else would be annulled. These were solved through the 1975 Marriage Act. Once Maltese Law introduced divorce in Internal Law, public policy changed. Regulation No.1347/2000 provides for an automatic recognition of all EU judgements within the EU, but recognition may still be refused if to do so would be manifestly contrary to public policy.

Under English Law, a foreign *lex domicile,* that governs the capacity of the parties to a marriage, will not be recognised if it is repugnant to public policy. The English Court has a discretionary power to repudiate a capacity or an incapacity on the ground that to give effect to it would be unconscionable, such as incapacity to marry at all, or inability to marry other than according to the tenets of a particular faith, or incapacity to marry outside one's caste or race. This discretion is exercised sparingly.

Some foreign decrees, though purporting to dissolve the marriage provide restrictions or prohibitions on remarriage by one or both of the parties.

F v Switzerland - the ECHR declared that the rule in Article 150 of the Swiss Civil Code, was in violation with the right to marry in the European Convention of Human Rights. Although Article 12 of the Convention subjects the right to marry to the national laws of the contracting states, the limitations thereby introduced must not restrict or reduce the right in such a way or to an extent that the very essence of the right was impaired.

Another issue is in the case of extra-judicial divorces. There are various forms in many legal systems in the world. There are two main issues:

i. Whether the non-recognition constitutes discriminatory treatment against the party seeking its recognition.

ii. Whether the recognition of a pertly unilateral form of extra-judicial divorce constitute sexual discrimination against the other party to the marriage, usually the wife.

One other area is that of Interest Rates. Maltese Law prohibits the charging of interest at a rate higher than 8%, as this would constitute usury. The Maltese Courts decided that they

would not recognise and enforce a foreign judgement which allows for an interest rate of more than 8%, even if the transaction in question is totally foreign in nature as seen in **Mercieca v Cole**.

Dr. G. C. Demajo noe v Bruce Dowling - upon proceedings for the direct recognition of an English judgement under the British Judgements Reciprocal Enforcement Act the Court disregarded the 12% interest rate as well as further interest thereon imposed by the English Judgment.

However, there are now some exceptions to the rule as seen through **Article 1852(4) of the Civil Code** which allowed the Minister responsible for Finance to authorise a higher rate with respect to loans made by licensed banks or loans raised by the issue of bonds, debentures, or other securities.

Today, the 8% usury rule is no longer absolute. This is with regard ti designated entities and obligations under contract governed by the law of a country other than Malta and the interest rate is in accordance with international market conditions. Unfortunately, the Maltese Courts seem to have forgotten Parliament's intervention in this area and have continued applying the old limitation in interest even though the obligation arose under a contract governed by a foreign law.

The American Express Case -

Penal, Revenue, or other Public Law

Dicey and Morris' rule 3 has received widespread recondition with Common Law systems. It provides that the English Courts have no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state or founded upon an act of state.

However, the authors acknowledge that ***indirect enforcement is however, easier to describe that to define*** and the Rule ***relates only to enforcement, but it doe snot prevent recognition of a foreign law of the type in question, and it is sometimes difficult to draw the line between an issue in involving merely recognition of a foreign law and indirect enforcement of it***. Again, the doctrine of the Continent was wider.

Enforcement of Foreign Public Policy

There are a number of judgements handed down by the Maltese Courts in the late 19th Century and early 20th Century which dealt with transactions in securities listed on the Paris Stock Exchange which were concluded without the intervention of a licensed stockbroker. These transactions were consistently considered as null in Malta since they were null under French Law which was the governing law of the transaction.

Malta has been a member of the IMF since 1968, and under Section 7 of the Malta Membership of the IMF Act, ***the first sentence of Section 2(b) of Article VIII of the Fund Agreement shall have the force of law in Malta***. While the IMF Agreement affects Malta's

International Obligations on the Public International Law Level, Article VIII 2(b) is enforceable in Malta as part of Maltese LAw.

On this basis, a Maltese Court should find that a transaction which breaches the exchange control regulations of an IMF Member is not enforceable in Malta.

Domicile

There is a Widespread agreement that in PIL questions affecting the personal status of a human being should be governed by one and the same law, irrespective of where he or she may happen to be or of where the facts giving rise to the question may have occurred.

Equal widespread disagreement is found in another two matters:

i. The scope of this personal law
ii. Whether criterion should be domicile, nationality, habitual residence or some other connecting factor.

Although domicile is a predominantly common law concept, its origins can be traced to Roman law, where however, it did not develop to the extent it did in common law. Since Maltese law in general has been historically influenced first by Roman law and later by English common law it is not surprising that the local courts started by applying a Roman law concept of domicile, and later switched to the common law counterpart. Still there are a few Maltese "home grown" adaptations to the English common law concept of domicile due to procedural rules.

Domicile is the place where one has the centre of his activities, interests, and fortune. Changing residence does not involve a change in domicile if centre of activities is not established in that place. It is essentially a matter of free will made up of **the fact of residence and the intention to make that place one's principal residence until there is a reason for change.** This is relevant in terms of jurisdiction and choice of law. Both of these elements have to be present for one to speak about domicile. Intention was inferred from the daily living practices and from the conditions and qualities of the person. Therefore, the fact that a person possesses property in a particular place is a fact from which intention can be inferred, unless there is evidence to the contrary. A voluntary and express declaration made by a person of his intention to make a particular place his domicile is the paramount evidence of such intention.

Under Roman Law

Although in Roman law emphasis was laid on the voluntariness of domicile, certain persons had their domicile fixed independently of their will - domicilium necessarium:

i. The child acquired domicile of father
ii. The wife of her husband
iii. A widow retained her husband's domicile until she acquired a new one voluntarily or through new marriage

Thus, every person had domicile fixed upon birth.

Roman jurists debated whether it was possible for a person to be able to have more than one domicile, or to have no domicile at all. Two of the most eminent Roman jurists, Paul and Ulpian, considered this to be perfectly possible since a person can certainly have two places to which his life in general is attached with a sufficient degree of intensity, or, on the contrary, to have no place to which he is sufficiently connected. The domicile conferred on birth could be replaced by a fresh domicile of choice, and this could in turn be abandoned with a view towards the acquisition of a new domicile of choice. The fact of abandonment

of a domicile, whether this be the original domicile or any subsequent domicile, left a person without a domicile until he acquired a new domicile.

Under Common Law

At Common Law, questions affecting status are determined by the law of the domicile of the *propositus*. Broadly speaking, such questions are those affecting status, family relations and family property. Here, we are speaking of a person's permanent home. The test which determines a person's domicile must remain constant, no matter what the nature of the issue may be before the court. There are five general rules governing domicile under Common Law:

1. **Nobody shall be without a domicile**

In order to make this effective, the law assigns what is called a domicile of origin to every person at his birth. This domicile of origin prevails until a new domicile has been acquired. If a person leaves the country of his origin, his domicile of origin adheres to him until he actually settles in some other country, with an undoubted intention of never returning to his country of origin again.

2. **A person cannot have two domiciles at once**

This was mainly intended to establish a definite legal system by which rights and obligations may be governed. Since a person's life may impinge upon several countries, the rule is necessary on practical grounds. Domicile signifies connection with what is called a "law district", ie, a territory subject to a single system of law.In federal states i.e. USA, there is no USA domicile, but a domicile in one of its states.

3. **The fact that domicile signifies connection with a single system of territorial law does not connote a system that prescribes identical rules for all classes of persons**

For example, in India, different legal rules apply to different classes of the population, according to their religion, race or caste. Nonetheless it is the territorial law of India which governs each person domiciled there, notwithstanding that Hindu law may apply to one person and Muslim law to another.

4. **There is a presumption in favour of the continuance of an existing domicile**

The burden of proving change lies in all cases upon those alleging that a change had indeed occurred.

5. **The domicile of a person is to be determined by the English concept of domicile**

Requiring a Fresh **Domicile of Choice:**

1. **Factum:** residence in another territory
2. **Animus:** the intention of remaining there permanently

These two elements must concur, but it is not necessary for there to be unity of time on their concurrence. The intention may either precede or succeed the establishment of residence. Residence and intention are separate but interrelated concepts, in that, strictly speaking, residence is a fact from which intention may be inferred.

The length of the residence, although a material consideration, is hardly decisive. Everything depends upon the surrounding circumstances, for they alone disclose the nature of the person's presence in that country. To constitute domicile, a residence must be voluntary; a matter of free choice, not of constraint.

A clear example of constraint preclusive of this freedom is imprisonment in a foreign country, and there is no doubt that a prisoner, except perhaps for one transported or exiled for life, retains the domicile that he possessed before his confinement.

The acquisition of a domicile of choice requires an intention to remain permanently in the territory of residence. Intended residence must not be for a limited period, whether the limitation is expressed in terms of time or made dependent upon the occurrence of a contingency, such as the accomplishment of a definite task. In cases where the termination of residence is dependent upon the occurrence of a contingency, this will not prevent the acquisition of a domicile, unless the contingency itself is unambiguous and realistic i.e. the end of a job.

If a contingency is not sufficiently clear, than it cannot operate to prevent the acquisition of a domicile of choice. On the other hand, if the contingency can be identified, it has to be asked whether there is a substantial possibility of the contingency happening; if there is, this will prevent the acquisition of a domicile of choice. However, the English courts have not always invariably accepted the fact that a contingency must be something more than a vague possibility if it is to prevent the acquisition of a domicile in the country of residence.

To construct a formula which describes the precise intention required by the common law for the acquisition of domicile is an impossibility, but perhaps the most satisfactory definition was that offered by Kindersley VC, in **Lord v Colvin** (1859): ***That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a permanent intention of making it his permanent home, unless and until something (which is unexpected or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home.***

Other Rules

The burden of proving a change in domicile lies squarely on the person alleging it since there is a presumption in favour of the continuance of the domicile of origin. Far stronger evidence is required to establish the abandonment of a domicile of origin in favour of a fresh domicile, than to establish a change from one domicile of choice to another domicile of choice.

Domicile of Dependence

Certain persons have their domicile fixed by law i.e. children, mentally ill-persons, and up till 1973 in England, even married women. A child, if legitimate and born in his father's lifetime, acquires the domicile of his father. If illegitimate or born after his father's death, child would take the domicile of the mother. A foundling is domiciled in the country where

he is found. If a child is born illegitimate, but later is legitimated, his father's domicile will be communicated to him from the date of the legitimation, but it is probable that the domicile of origin remains that of his mother.

A domicile of origin once acquired remains constant throughout life. The domicile of a child automatically changes with any change that occurs in the domicile of the parent, on which the domicile of the child is dependent, irrespective whether that child has also changed his residence or otherwise.

The domicile that a child acquires by reason of his father or mother moving to another country is a domicile of choice, or rather of quasi-choice, and the domicile of origin continues to be that imposed upon him at birth. This rule may become important at a later stage of his life. As a general rule, upon the death of his father, a child acquires the domicile of his mother.

It is generally agreed that the domicile of a mentally disordered person cannot be changed either by himself, since he is incapable of forming an intention, or by the person to whose care he has been entrusted.

In accordance with the general principle applicable to children, the domicile of the father will be communicated to a child of unsound mind during the childhood of the latter.

The common law attributes the husband's domicile to the wife upon marriage. This rule was much criticised in England as "the last barbarous relic of a wife's servitude". In fact, it was abolished by the Domicile and Matrimonial Proceedings Act 1973. By means of this Act, for all purposes, a married woman is to be treated as capable of acquiring a separate domicile as any other individual. Notwithstanding, in the vast majority of cases she and her husband will, independently, acquire the same domicile.

<u>The Issues</u>
Domicile is equivalent to the Common Law concept in its original form, but over time case-law changed and tweaked such concept.

Critics came up with a list of vices:
1. There is an exaggerated importance attributed to the domicile of origin, coupled with the technical doctrine of its revival, may well ascribe to a man a domicile in a country which he can never call home.
2. An equally irrational result may ensue from the view, that long residence is not equivalent to domicile, if accompanied by the contemplation of some uncertain event, the occurrence of which, will cause a termination of residence.
3. The ascertainment of an individual's domicile depends to such an extent upon proof of his intention, the most elusive of all factors, that only too often it will be impossible to identify it with certainty, without recourse to the courts.

<u>The similarities between the Roman Concept and the English Concept</u>

There are three main similarities between the two concepts:

1. Domicile is constituted by the fact of residence and the requisite intention
2. At birth, children acquire the domicile of the father
3. Married women acquire the domicile of their husband

These three rules have been undoubtedly accepted by the Maltese courts, and this is so irrespective of which of the two concepts has been generally adopted.

The differences

1. The common law does not admit the possibility of a person having more than one domicile, while this is accepted by Roman law
2. Likewise, the common law, contrary to Roman law, does not allow a person to be without a domicile, since the domicile of origin is always in abeyance, ready to revive as soon as the domicile of choice is abandoned.
3. A greater degree of evidence is required for the abandonment of the domicile of origin in the common law than is required in Roman law, and this precisely because the common law does not admit that a person can be without a domicile
4. The element of intention has both a positive and negative sub-element in the common law, whilst in Roman law intention is a positive element. In other words, the common law animus is comprised of the intention to acquire a new domicile (the positive sub-element) together with the intention never to return to the previous domicile (the negative sub- element). On the other hand, the Roman law animus is that of acquiring a new domicile: the fact whether the propositus desires to abandon his pre-existing domicile is irrelevant, since he may possess two simultaneous domiciles.

Under Maltese Law

As happened in most areas of PIL, the Court started by applying a Roman Law basis which was eventually substituted by a Common Law concept, especially in the case of domicile. Subject to certain fundamental rules of Maltese procedural law, it is the common law concept which is applied wholesale by the Maltese courts.

Code de Rohan (1784) referred to "forestieri domiciliati a Malta". This shows that Maltese law had a concept of domicile independently of any reference to English law, and therefore the concept was, without doubt, derived from our own special "common law", i.e. Roman law.

Article 1316 of the Civil Code states that the community of acquests shall apply automatically apply, if the spouses `establish themselves in these Islands'. "Establish" seems to require a lower level of proof than the common law concept of domicile. "Establishing a home" is not equivalent to the common law notion of a permanent residence, and furthermore, it does not require the intention by the spouses to establish themselves in Malta permanently.

In his notes, Sir A. Dingli says that the aforementioned article is his own doing, but he still referred to the Code de Rohan. Sir Adrian Dingli tried to reflect into the Civil Code what

had obtained in the Code de Rohan, which already contemplated a concept of domicile based on Roman law. In fact Article 28 dealt with "il matrimonio dei forestieri domiciliati in questo dominio."

It is important to distinguish between domicile as a jurisdictional factor and domicile as a choice of law factor. As a basis for jurisdiction, domicile is invoked in Section 742(1) of the Code of Organisation and Civil Procedure in order to establish the jurisdiction of the Maltese courts over:

1. citizens of Malta, provided they have not fixed their domicile elsewhere
2. any person as long as he is domiciled or resident or present in Malta

Section 742 as a whole was directly inspired from Article 4 of the Italian Codice di Procedura Civile, which adopts the Continental or Roman law and not the common law concept of domicile.

The old Section 742 also referred to "any person who, having fled from the country in which he was domiciled, has not fixed his domicile elsewhere, and is present in Malta". It used to admit the possibility of a person having no domicile - a possibility which is as totally alien to the common law concept of domicile as it is natural to the Roman law counterpart. It did not contemplate the doctrine of the revival of the domicile of origin since it is referring to a situation of a person having no domicile after he has abandoned his previous domicile.

The Permanent Law Reform Commission, while noting that the common law interpretation of domicile has had a limitative effect on the jurisdiction of the Maltese courts, had suggested that this paragraph should be deleted if residence is introduced alongside domicile in Section 742(1)(a) as an alternative basis for the exercise of jurisdiction. These recommendations were adopted by means of Act 24 of 1995.

Domicile is also invoked by Section 827(3) of the COCP which deals with the recognition and enforcement of foreign judgments (non-EU) in Malta. It provides that the Maltese court should analyse the jurisdiction exercised by the foreign court according to the defendant's domicile, residence or voluntary submission. Should neither one of these criteria subsist (for example, the defendant was only a national of the country wherein the judgment was delivered) then the foreign judgment would not be enforced in Malta.

In such procedure, the Maltese Court tests whether the foreign Court had jurisdiction. We should not recognise and enforce a judgement if the foreign court did not exercise jurisdiction in a way which the Maltese court does not feel it was appropriate.

<u>The European Union</u>

At EU level, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast, originally Regulation 44/2001, which in turn was based on the Brussels Convention of 1968) also called Brussels I uses domicile as the main

connecting factor to establish the jurisdiction of EU courts. Article 4 states that ***Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.***

The issue arises here: do all Court of MS of the EU understand the concept of docile in the same way? The Brussels Regulation does not define domicile for individuals. It defines it only for corporate or other entities.

Art. 60(1): In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law.

Art. 60(2): If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State.

Art. 63(1): For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:
1. Statutory Seat
2. Central Administration
3. Principal Place of Business

Corporates also have a concept of domicile.

Art. 63(2): For the purposes of Ireland, Cyprus and the United Kingdom, 'statutory seat' means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place.

Unfortunately Malta didn't ask to be included here (Cyprus was included in the recast of 2012) even though we also follow the rule that a company is domiciled where it is incorporated.

Art. 63(3): In order to determine whether a trust is domiciled in the Member State whose courts are seised of the matter, the court shall apply its rules of private international law.

There might be situations where under EU Law, Maltese Courts could not exercise jurisdiction on a Maltese Company just because it is not domiciled in Malta as per EU definition.

Most judgments of the 19th and early 20th Century used to apply the Roman law concept of domicile. The shift to the English common law concept started to occur in the late 1930s. Prior to the wholesale adoption of the common law concept of domicile, the Maltese courts had developed several principles, without the slightest reference to the common law concept of domicile and with a clear favour for the Roman law concept.

Principles:

1. The intentional element in domicile was defined as "intenzione di fissarvi il proprio principale stabbilimento". This echoes the Roman law element of intention and makes no reference to the added element, required by the common law, of not wanting to return to the previous domicile.
2. The acquisition of a domicile of choice must be perfectly voluntary.
3. A presumption of change in domicile after prolonged absence. This rule has no counterpart in either Roman law or the common law.
4. The court has jurisdiction when the object of the action regarded several persons, some of whom were domiciled in Malta and others not so domiciled, when such object was indivisible.
5. A child acquires the domicile of his father if he is legitimate, the domicile of his mother if he is illegitimate, and the domicile of the place where he is found if he is a foundling.
6. A person who is of age can chose his own domicile and place of residence independently from his father.

Smith v Muscat Azzopardi - was the first time in Maltese jurisprudence the principle was enunciated that "in the absence of provisions of private international law in our Code, ***it is usual for our courts to have recourse to the principles of English law***". Such a principle, if it refers to the historical attitude of the Maltese judges to private international issues, is incorrect. Firstly, the cases which referred to English principles of private international law are outnumbered by those which did not, making the word "usual" too strong. Secondly, four years before this dictum, **Saliba v Lawson** had decided that the sources of Maltese private international law are Roman law and the judgments of the most important tribunals.

The aforementioned case also introduced the English concept of domicile to interpret the element of "establish themselves in Malta" with respect to the community of acquests in Section 1316 of the Civil Code. Contrary to the historical origins of this section as shown through Sir Adrian Dingli's Notes, this judgment and others which followed it required that the husband must have established his domicile (in a common law sense) in Malta and it is from that date that the community of acquests applies.

Saliba v Dr. Micallef - has dispelled this interpretation. Section 1316 does not mention domicile and neither makes any exceptions, and a situation in which there could be two property regimes regulating different periods of time in the same marriage should be avoided. Concluded that the community of acquests applies to any marriage celebrated in Malta irrespective of the husband's domicile.

Conflicting principles of Saliba vs. Lawson and Smith vs. Muscat Azzopardi were resolved with the confirmation of the English private international law reference principle in **Spiteri v Soler.** The Court of Appeal stated that "*fil-ligi taghna ma jinsabux disposizzjonijiet li jirregolaw id-dritt internazzjonali privat, u fi kwistjonijiet li jaqghu taht dan id-dritt il-Qrati taghna jimxu fuq ir-regoli tad-dritt internazzjonali privat kif huma maghrufin u applikati fil-Qrati ta' l-Ingilterra*".

Still, in Spiteri vs Soler, the Court did not define domicile in the English sense. It used a definition which referred merely to the animus manendi and not to the animus non reduendi: "*... meta wiehed ihalli pajjizu u jistabilixxi ruhu f'iehor biex jista' jitlaq id- domicilju tal-post fejn twieled, li jigi msejjah ta' l-origini, u jakkwista domicilju gdid, huwa necessarju li mhux biss jirrisjedi fil-pajjiz li ghazel, izda li huwa jkollu l- intenzjoni joqghod - animus manendi - hemm*".

Smith v Muscat Azzopardi and Spiteri v Soler had a permanent effect on Maltese jurisprudence. From 1936/37 to date, in contrast to the position prior to 1936/37, the Maltese courts were inclined to adopt the common law concept of domicile wholesale. This was especially the case when the courts were concerned in preserving their jurisdiction over emigrants. This was probably even the principal motive why the negative element of intention was introduced in the earlier cases, as a substitute for, or sometimes even together with, the dual domicile approach.

A recent clear example of how the Maltese Courts stick to the traditional common law concept of domicile in **Xerri et v Dr. Sladeen et**. The case dealt with the determination of domicile of Michael Cassar, a Maltese national from Gozo who emigrated to Australia, had an Australian will and lived there for 20 years until his death. The Court found that he retained some property which he had inherited in Malta and retained his Maltese citizenship. The Court argued that although his wife did not want to return to Malta, he possibly might have returned to Malta if his wife passed away. The Court emphasised the presumption of continuance of the domicile of origin and found that there was no proof that Mr Cassar did not want to return to Malta and therefore concluded that he was still domiciled in Malta.

Some light was shed on the intentional and probative elements in domicile in **Chirchop v Dr. Frendo Randon** in which the CoA stated:

1. although there is a presumption in favour of the continuance of the existing domicile, the standard of proof required in civil cases, i.e. that a fact is to be established on a balance of probabilities, is equally applicable to a change in domicile.
2. the intentional element required is better defined as the intention to reside in a place for an unlimited time, rather than permanently.
3. although residence raises a presumption of domicile, this is merely prima facie evidence of domicile, and the length of such residence is not essential for the acquisition of a new domicile.

At Maltese law, there is also authority for the proposition at English law that domicile can be attributed a special meaning by special legislation. Cases dealing with the interpretation of "domicile" for the purposes of section 6 of the Succession and Donations Duties Ordinance (since repealed). It provided that property not situate in Malta would be taxable in Malta if the person in whose favour the devolution takes place is domiciled in Malta at the time of the transfer, and that for this purpose, persons born and residing in Malta and persons habitually resident in Malta are presumed to be domiciled in Malta and the burden of proving a different domicile lies on the person alleging it.

Maltese courts has generally used domicile as the personal law of a person in order to determine questions relating to his status. The most popular application of the law of the domicile occurred in those cases which declared the nullity of the marriage of a Maltese Roman Catholic domiciliary when it was not celebrated according to the law of his domicile, i.e. Canon law.

Maria Antonia Resta v Mario Resta: since in questions of domicile the Maltese courts have always referred to English law, then the Domicile and Matrimonial Proceedings Act 1973, in virtue of which the married woman could acquire an independent domicile, should also be applied in Malta. This argument is legally unfounded, since, at least since Malta acquired independence in 1964, English Acts of Parliament have no effect whatsoever in Malta.

Ray Calleja v Dr Raymond Pace et noe: it was declared that "*il-posizzjoni llum hija li mara tista' takkwista jew tbiddel id-domicilju taghha indipendentement minn zewgha*".

Although domicile features prominently in a very large number of Commonwealth jurisdictions, it is also true that in these jurisdictions there has also been a considerable retreat from domicile. In **Shah v Barnet London Borough Council** (1983) Lord Scarman has referred with evident exasperation to "the long and notorious existence of this difficult concept in our law, dependent on a refined, subtle and frequently very expensive judicial investigation of the devious twists and turns of the mind of man".

Only one Commonwealth jurisdiction – Nauru - has replaced domicile completely by the concept of habitual residence. Other countries have, however, reformed their concept of domicile to a significant extent, in order to remove certain artificialities such as the doctrine of revival, the negative element of non reduendi in intention, the difficulty of displacing a domicile of origin and the domicile of dependence of married women; e.g. the New Zealand Domicile Act 1976 and the Australian Uniform Domicile Act 1981. In Malta, there is still no legislation which has defined or reformed the concept of domicile.

Nationality

This represents a man's political status, by virtue of which he owes allegiance to some particular country. Nationality depends, apart from naturalisation, on the place of birth and on parentage. It follows that a person may be a national of one country but domiciled in another. During the time when Malta was a British colony, the courts applied the nationality rules of English law in the absence of local legislation on nationality.

Nationality has been used as a connecting factor in certain circumstances. The Maltese courts have resorted to the law of the nationality of the husband at the moment of marriage as the governing law in questions both of paternal authority and minority. The obligation to maintain is substantively governed by the national law of the person bound to administer such maintenance - **Biasini v Stagno Navarra e**t (27/10/1920); principle was confirmed by the Court of Appeal in **Maria Antonia Resta v Mario Resta**.

Nationality, when compared with domicile, enjoys the advantage that normally it is easily ascertainable, by reference to the law of the state of nationality concerned. Nevertheless, it is objectionable on at least three grounds:

1. It may be a country with which the person in question has lost all connection, or with which perhaps he has never been connected.
2. Nationality is sometimes a more fallible criterion than domicile. If one accepts the principles of English law that no man may be without a domicile and no man can have more than one domicile at the same time, then, in nationality, a person may be stateless or may be simultaneously a citizen of two or more countries.
3. Nationality cannot always determine the internal law to which a case is subject in the case of a federal state.

Habitual Residence

Dissatisfaction with both nationality and domicile as connecting factors has led to an increasing tendency to reject them as a connecting factors, in favour of habitual residence. Sir Otto Kahn-Freund, a distinguished authority on comparative and private international law, described domicile in 1964 as being "a superannuated concept". International legal instruments, especially the conventions produced by the Hague Conference on Private International Law have made use of a different concept, "habitual residence".

The first use of habitual residence, or "residence habituelle", appears to have been as a translation of a technical concept of German law, "gewöhnliche Aufenthalt", in a Franco-Prussian treaty of 1880. It was first used in a Hague Convention, that on Civil Procedure, in 1895, and has since been used frequently both in Hague Conventions e.g. Hague Convention on the Protection of Minors 1961. More recently it has also been used as the main connecting factor in several EU Regulations:

1. Reg. on Law applicable to Contractual Obligations
2. Reg. on Law applicable to non-contractual Obligations
3. Reg. on Law applicable to Divorce and Separation
4. Reg. on Jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility
5. Reg. on Jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations

According to a recent report, over 12 million EU citizens live in a different Member State than that of their nationality. They are often integrated into the social environment of their country of residence. Therefore, determination of their capacity to marry or to make a will according to the law of the Member State of their nationality is considered inappropriate. In particular, it could lead to discrimination of EU citizens who are residents but not nationals of a given Member State.

It has repeatedly been presented as a notion of fact rather than law, as something to which no technical legal definition is attached so that judges from any legal system can address themselves directly to the facts. However this has not prevented judges and commentators from attempting to analyse and define the scope of the new concept.

German courts considering the Hague Convention on the Protection of Minors 1961, have interpreted a child's habitual residence as the "centre of gravity of its life". In Dutch private international law "domicile" ("woonplaats") refers to the notion of habitual residence and it refers to the country with which the life of a person is factually connected to such a degree that there is reason to apply the law of that country to his personal status.

The English Law Commission said: it is clearly distinguishable from domicile, a necessary element of which is a particular intention as to the future. Such an intention is not needed to establish habitual residence; it can be proved by evidence of a course of conduct which tends to show substantial links between a person and his country of residence. This does not mean that evidence of intention is irrelevant; it may throw light on particular facts and emphasise a person's degree of connection with a country. To be habitual, a residence must be more than transient or casual; once established, however, it is not necessarily broken by a temporary absence.

The Court of Justice of the EU has shed some light on the notion of habitual residence in the context of child abduction. It underlined the importance of the integration of a child into his/her social and family environment; habitual residence is a question to be decided by the national court in light of the specific factual circumstances. Factors may include the duration, regularity, conditions and reasons for the child's stay in a given place and the family's move there, the child's nationality, the place where they attend school, what languages they speak, as well as their family and social relationships.

Within the sphere of social security, the Court underlined that habitual residence has an autonomous meaning under EU law. It indicated that it corresponds to the habitual centre of interests of a person, adding that in order to assess where someone's habitual residence is located, the length of residence, the length and purpose of absence, as well as the person's apparent intention must be taken into account.

Under the Staff Regulations of EU officials the CJEU has ruled that the place of habitual residence is the place where one has established a permanent centre of interests with the intention of giving it a lasting character.

The merits of habitual residence as a connecting factor have sometimes been overstated. It is not a self-defining concept, but on the other hand it has several major advantages over the traditional, or even the reformed, concept of domicile. The main advantage is that there is nothing equivalent to either a domicile of origin or a domicile of dependence, so that the technical rules which surround those concepts, are swept away.

Furthermore, the element of intention is of much less importance to habitual residence than to domicile, and therefore the uncertainties as to the formulation of the animus manendi are removed. It is also more flexible than nationality which usually remains fixed

Dr. A. Trigona
Introduction to Private International Law

The Term 'Law'
One would think that this is another aspect of Public International Law, however, this is not the case. In the US, Private International Law is known as Conflict of Laws. One would also think that the term 'law' has the same meaning as in the general concepts, but again, this is not the case.

The question of whether law is actually law is aimed at the enforceability of Public International Law, seeing that in many cases it does not have an enforceable character. This is contrary to other areas i.e. civil and criminal. In Public International Law, the term 'law' is very soft law, if it is a form of law at all.

In Roman Law, it was held that ***ubi jus ibi remedium*** which means wherever there is law, there is a remedy. This holds for areas of law such as civil and criminal. But in Public International Law, where are the remedies?

These questions will be dealt with under Private International Law. It is contrasted with Public International Law because it is seen that there is one Public International Law across the whole board, and any issues are solved at the ICJ at the Hague (State v State according to Common Rules of Public International Law). In this case, both the plaintiff and the defendant are quoting from the same laws, and the judges are asking questions and evidence according to the same rules and will pass a judgement quoting rules from the singular Public International Law. This was usually based on custom, now codified to a remarkable extent in the Treaties.

By having it in writing with definitions, it makes discussion and challenges and disputes clearer, and this also holds for the judgements since the judges can rely on the written texts of law.

This particular feature of Public International Law is the same as for Civil Codes, Commercial Codes, and Criminal Codes.

The word law in Public International Law is not the same as under Private International Law. This is because **There are Private International Laws as many as there are jurisdictions in the world** and there are potentially Codes of PIL in each of these jurisdictions in the world, whether written or unwritten. Additionally, there is no single Court to adjudicate, like the ICJ for Public International Law.

The world is divided by Roman Civil Law Countries and the Common Law Countries. Each country has its own jurisdiction. For example, Scottish Law is much more based on Roman Law, and English Law is based on Common Law. They both have their own Private International Law. In PIL, there are many different Private International Laws.

PIL arises in a domestic Court, and not in an International Court. There is no ICJ as a superior ultimate appellate Court in disputes between States. Public International Law issues cannot be brought before a domestic Court. Each jurisdiction, not state, has its own set of Private International Laws. The Laws in the latter are strongly enforceable, unlike laws in Public International Law, which are hardly enforceable.

In the absence of a Super Court above States, PIL remains essentially domestic law, unless it is unified into a regional Union i.e. EU. The EU is pulling together and unifying the different PIL in MS into an EU Regulation. This is the most advanced form of unification. With the EU, there is an exception to the rule that there are many PIL as there are jurisdiction since the EU made it its task to unify the PIL rules in its MS to create one EU PIL administered by the ECJ. At the EU Level, EU PIL is adjudicated upon by the ECJ in a final determinate manner.

The Term 'International'

Public International Law seeks to resolve disputes between states, hence the term 'international' is very well used. The same as in the legislative level, when multilateral treaties are concluded, to legislate and regulate relations between States. In more recent years, there is also the individual becoming a subject of Public International Law with Human Rights becoming a set of International Human Rights, but again, with hardly any enforceability. States still remain the main subjects.

Why is the term used in PIL, when in PIL it is not usually the States who have their disputes resolved? It is mainly an individual in a Civil Law issue with a cross-border dimension. States can also, as a judicial entity (not as a State), be subjects of a dispute covered by PIL. When there is a foreign element in a case, that is where PIL will try and regulate the cross-border dimension of the Civil Court Case.

The judge first checks whether he has jurisdiction to be able to pass judgement.

The word 'international' does not apply in the scenario of PIL. Hearing go on in one Domestic Court with Civil Issues and cross-border dimensions. The judge can dismiss a PIL reference, subject to appeal.

N.B. The US calls this Conflict of Laws, and even this is a misnomer. However, there is no real conflict. This is merely an imaginary concept in the mind of the judge.

The Procedure:

- Phase 1: Jurisdiction Question which by each country's procedural rules arise.
- Phase 2: If the Court has jurisdiction and there is a foreign element in the case, the Court has to decide upon the applicable law i.e. domestic or foreign (this is the basic element of concept)

PIL will lead to a different destination and consequence of the case, and this depends of the applicable law. The applicable law can sway the outcome, and is an enormous tipping factor.

From a client's perspective, one must do his outmost to pul the best punches in terms of PIL.

- Phase 3: Recognition and Enforcement of Foreign Judgement means that there will be rules on when and how to recognise a foreign judgement and turn it into a local one.

Out of these three phases, the first one is arguably the most importance. Jurisdiction can be pleaded upon at the very outset of the case, in order to get a yes or no. There may be a second PIL element popping up with regard to the choice of law.

Another competitor for the name of PIL or Conflict of Laws was Comparative Law. This is only a scholarly exercise, and it is not law, even in the softest sense. It is an academic exercise comparing two different legal systems, but this is only theoretical. It is not positive law, and does not lead to a judgement. There would be no plaintiff and defendant. What arises in Court in a PIL Case will be evidence of a foreign law. The expert evidence would not be a matter of law, but just a matter of fact, subject to counter-factual evidence.

There is no real competition between two disputants in comparative law. Only the author carries out an exercise of comparing and contrasting, but this does not change the position of the parties before a Court of Law.

PIL arises in a Court room during an ongoing lawsuit. One of the parties, upon convenience, will bring up the issue of PIL and the cross-border element. This is arguably unconstitutional because one would be applying foreign law into a national court.

Missed Lecture - 09/03/2023

16/03/2023

How does a PIL case arise in a Court of Law? There are three phases:

i. Jurisdiction
ii. Conflict of Laws
iii. Recognition and Enforcement of Foreign Judgement

There are also Constitutional Law arguments, against given credence to a foreign judgement, when this is not even intended. This is due to our own rules of PIL, which guide us to apply the relevant foreign law. Enforceability is as strong as if it was a fully local case with no cross-border context. Contrary to this, and as an example, if Mr. Borg is to get a garage in Germany, the judgement is to be first obtained from a local court, followed by recognition and enforceability in the German Courts vis-a-vis freedom of mobility of judgements between EU MS.

With this as a background, the question is: where is PIL found? Unlike Italy, Malta does not have a Code of PIL. It is interesting to note how legislation looks like vis-a-vis PIL. There are questions as to whether Malta should develop a Code on the matter. Nt having a Code creates a sense of emptiness, and thus, reference has to be made to other sources.

The first source is the **Legislative Source.** The second source is the **Judicial Source.** Finally, the third source is **English PIL.** These three sources of Maltese PIL are in strict hierarchal order, meaning the first needs to be exhausted before moving to the second, and the same from second to third. It is this hierarchy, that as soon as there is a client, one would know what source is to be referred to vis-a-vis the foreign element. The word case-law in Malta is a misnomer, and again, one has to keep in mind that the Doctrine of Precedence is not relevant in the Maltese Courts. Other cases are not binding on those which follow.

The Legislative Source

The best legislative expression is in the **COCP,** mainly Article 742 onwards on jurisdiction, and Article 826 onwards on recognition and enforceability of foreign judgement. There are certain provisions in the COCP, but not one whole Code on the matter. The COCP provides one with a first taste of legislatively passed with full authority of Parliament, Laws of Malta, having the full force of law.

Questions of Jurisdiction, which have to be raised at the threshold of the lawsuit, have to be decided upon by the judge at the outset of such lawsuit. One will have there various points on which to ground jurisdiction, either through the person or obligation. When the plea of jurisdiction is submitted at the outset of the lawsuit, the judge is to decide whether to accept or reject that plea: whether to continue to be ceased of the lawsuit, or to fully dismiss it because the judge has been convinced that a foreign court has more appropriate claims to jurisdiction. He may, in between, suspend a hearing of a lawsuit pending the outcome of the foreign court judgement, which may or may not effect the target of the present lawsuit in front of a Maltese Court. He may have accepted it on the plea of *lis alibi pendes*. One may not merely contest the full jurisdiction of the Court, but pause such lawsuit.

The aforementioned is decided very explicitly on the basis of Section 722-745. Both the plaintiff and defendant argue in front of the judge on the basis of the Articles of the COCP. The judge will give a preliminary judgement, not on the merits of the case, but on whether the Court has jurisdiction. The vast majority of PIL lawsuits in Malta are related to jurisdiction.

Jurisdiction is fundamental, and the arguments relating to it are many, because of its constant development. Whereas 180 years ago, with the initial introduction to the COCP, one had a basis of jurisdiction relating to citizenship and the word 'domicile', Sir A. Dingli was referring to a residential address. This is based on Italian Law, but in parallel, in English the same term went beyond what A. Dingli initially meant. This expanded to also mean a domicile with a double-decker meaning*: an intention to make that place one's permanent home and showing by fact that one has made that same place his or her permanent home*.

At this level, there are influences on the meaning of words. This is not through legislative formal amendments, but through mere interpretation. There was formal amendments of Article 742 because of the findings of the Permanent Law Reform Commission in the nineties, opening up the Maltese Jurisdiction to having presence in Malta. This obviously raises the question: do our Courts have jurisdiction of fleeting presence? Instead of

introducing ordinary residence, the Commission suggested introducing residence as a personal connecting factor. But, in Parliament, the discussion to even presence, today found under Article 742.

PIL had recently had a shower of EU legislation, especially in the last fifteen to twenty years. Because of the Treaty of Accession, ratified by Maltese Parliament and made into an Act, Malta delegated legislative making powers to the EU and its institutions to legislate and issue regulations which have immediate and rect binding effect in all MS, and which prevail over local legislation.

Each time one checks what the law states, Maltese Law is the first step, but one has to keep in mind the fact that EU Law can eclipse an Article of Maltese PIL. A lot of discussion in the Courts is whether an EU regulations covers the same area that a Maltese norm of PIL covers. They might not always cover the same grounds. EU Law is not subject to Maltese *later* law derogating from previous EU regulations because the latter retain their supremacy.

There is an interplay between EU regulations and Maltese Law. If one takes jurisdiction, for example, the Regulation called **Brussels I** is a creation of the EU. This was a regulation based on a 1968 Convention which entered into force in the various states depending on whether a state was monist or dualist. In the monist countries, a Treaty signed by Government has immediate force of law inside the Territory of such State. In the dualist countries, an International Treaty would need to be re-passed via a transformative act of parliament to become actual law of the country.

The Convention was a Treaty with various countries acceding to it, but not all in the EU, thus the EU decided to come up with an act of unification. It unified all the MS rules on jurisdiction, created uniform rules on the matter, restricted to specific subject matters, and passed them as **Brussels I Regulation** which was No. 44 of 2001, later becoming a Recast of 2015. The point about this is that to the extent that this unification took place with immediate and direct effect, it prevails over the Maltese COCP. Where this Regulation stops, one would fall back on the Maltese rules in the COCP.

Zeturf Case - there was a French Court case with a judgement which was sought to be enforced in Malta to stop the betting industry in Malta. Our AG said that this is not a normal Court case covered under the freedom of mobility of judgements under the EU regulation on the matter. It covers tax matters, and tax matters are excluded from Brussels I.

These EU Regulations (i.e. Brussels II, Reg. 650 of 2012, Rome I, Rome II) are evidently, very influential. The draftsmen have been busy in putting together these unified PIL Laws, applicable in the MS in a contest manner, only to the extent that they declare their scope to be.

Judicial Sources (Secondary Sources)
This is essentially when one goes back to Court Judgements. Although one is not bound by precedence under Maltese Law, judgements still serve to act as a source to convince the judge to decide in a certain way. One cannot presume that a judge would know what a previous judgement decided. Therefore, presenting judgements are evidence that a case is to be decided in a certain manner cannot be underestimated.

English PIL
This last area creates confusion, but serves as a tertiary source because of two main judgements:

1. **Smith v Muscat Azzopardi (1936)**
2. **Spiteri v Soler (1937)**

English Acts of Parliament and only if they were passed under the Colonial Laws Validity Act and made applicable to Malta, would be applicable to Malta. But this was only applicable until 1964.

There is also a level of Common Law, which is English Judge made law. In both these judgements, in referring to English PIL, reference was also made to English Judgements as a form of PIL. English judgements are still used today because of the lacunae in Maltese Law i.e. effect of leverage and suasion.

missed lectures

20/04/2023
During the last lectures, we were discussing the concept of Classification. In summary, classification of facts was distinguished from classification of rule of law. In between, if one shows the Court that the matter should be classified as procedure, then the Court will simply apply local law and not foreign law:

i. Classification under a Legal Category
ii. How a Legal Rule is classified (Maldonado Case)
iii. Show the Court *convincingly* that the matter is procedural in terms of its nature

Ogden v Ogden - there was a French man domiciled in France. The nationality is the connecting factor, alongside domicile. He was married in England, to an English women domiciled in England. He did this without obtaining consent from one of his parents as per the law at the time. His father started proceedings to annul the marriage, and got an annulment by the Court of First instance. Mrs. Ogden married Mr. Ogden at a Lancashire parish church, describing herself as a widow. Two years later the person she married sued for nullity based on the grounds of bigamy. The wife denied that she was still married to the French man, producing her French Court judgement of annulment. The Court gave a favourable judgment to the husband because it classified the marriage taking place in England as a question of formal validity to be ruled by English Law, the place in which the marriage is taking place in contrast to clarifying the lack of parental consent as a matter of essential validity of marriage which would be ruled by the place of domicile, which is this case would have been France.

The Court, in declaring that the marriage was still valid, and the second one was bigamous, classified parental consent as a **matter of formal validity**, which English Law did not recognise. If parental consent was classified as an **essential validity of marriage**, it would have been ruled by the domicile of the person i.e. French Law.

In France, the wife was considered to be married to an English man who does not want her. In England, she is married to a French man who does not want her.

Another problem in PIL is the **incidental question**. This presumes that there is a main question to be regulated by one law and that there is an incidental question regulated by another law. The problem is how to decide which should prevail over the other, or whether two different conclusions are determined. This is a complex situation.

There are basically two known cases:

1. <u>Lawrence v Lawrence</u>

There was a First husband and wife, married in Brazil, and lived together there till the 1970s. The wife later goes to Nevada and got a 24hour divorce, but Brazil did not recognise divorce. The next day she marries her second husband in Nevada. He petitioned to the COA for the invalidity of the marriage.

There is a question of validity of the marriage as a main question, and underlying it the incidental question of the wife's capacity to marry. The capacity to marry, being a a question of essential validity is regulated by the law of the wife's domicile i.e. Brazil who did recognise divorce. English PIL points to her domicile, which was Brazilian and therefore she had no capacity to marry someone else. The English Courts went right up to the House of Lords, distinguishing between the two questions put forward.

They came up with reliance on an English Statute of Recognition of Divorces oversea, which recognised divorces in Nevada. This married was therefore recognised, and ignored the incidental question of whether she had capacity to marry which they would have had to follow through with the place of domicile of the wife.

The judges have quite a task to identify which one of the two questions should are recognised, and how to resolve and reconcile this internal conflict in the same matter at dispute. The Court said that one is bound with the proper theory of PIL, and such proper law gives a general guidance to lawyers that in case of doubt, one should always apply the law with which the parties have the most close and real and substantial connection. This is the proper law of the case. There is a search for the roper law of the case at hand to find the most real and substantial connection to the proper law.

One of the judges was arguing that since both of them came to England, after the divorce and marriage, and it was clear that they strongly desired to make England their permanent home, English Law should be the proper law vis-a-vis the case in question.

Another judge created a novel set of arguments by saying that divorce is a right, because there is a fundamental right to remarry. He said that in England, one is looking at divorce as a right to remarry, and that based on this, the wife had such right.

A different judge said that when in doubt, one should apply the *lex fori,* without referring to the main and incidental question. This is a usual default in PIL. Thus, there is a strong hint that as rules of evidence, it is he who alleges that a foreign law should apply, he must prove that. The PIL tours in a sense of concession by the forum. If it is not proven clearly, the default is to apply local law. One has to look at the asymmetry: the burden of proof in a PIL case is on the shoulders of he who alleges that a foreign law should apply, in sharp contrast to who alleges that local law applies. Applying a foreign law is to be seen as an exception to the rule. This is the strongest argument. ***The lex fori prevails as a default position.*** This helps also insofar as enforceability is concerned.

2. <u>Schwebel v Ungar</u>

A Jewish husband and wife were domiciled in Hungary, and decided to go and settle in Israel, travelling overland. While being in Italy en route to Israel, under Judaic Law, a divorce can be carried out through *Ghet*. This was not recognised in Italy, because of its form, and also based on the fact that Italian Law did not recognise divorce in general. This form of divorce was not even recognised in Hungary. Although the both ended up in Israel, the wife did not want to stay in Israel, although she had domicile. She later flew to Canada and got married in Ontario. The second husband petitioned for a Court decree of nullity because the wife was still validly married to her first husband.

There is an inversion to the prior case, because the main question was the capacity, and the incidental was the validity of the *Ghet*. Canadian Law did not recognise the verbal form of divorce. In regarding the capacity to marry, the judges held that the marriage was valid because it was according to Canadian Law and in any case it was also according to the essential validity of the marriage which is determined by the wife's domicile. Israel recognised *Ghet* and therefore the second marriage was valid.

There was also **<u>Khan v Marriage Registrar</u>**, but the case was eventually withdrawn. Khan was married to his wife, both being Pakistanis in Pakistan, and both were Muslims. Under Islamic law, the husband can divorce his wife with *Talaq*. This is not recognised under Maltese Law. He wanted to remarry in Malta, believing he had a perfect divorce, but the Registrar did not accept this on the basis of the Marriage Act. A divorce has to be granted by a Court judgement. From this case, this *Talaq* divorce is only recognised if recognised by a foreign Court who has jurisdiction over either party vis-a-vis domicile or nationality.

i.e. wife claims rights over intestate succession of husband's immovable in Italy. Through English Law, she was classified as a widow, unlike under Italian Law which at the time did not recognise divorce. Can she succeed to her husband's estate, where English Law is pointing us to Italian Law? The subsidiary question is: the question on the validity of marriage. Would her second marriage be valid? It is valid under English Law but not Italian Law.

4th May 2023

An issue in PIL is known as the **Question of Renvoi.** The English term for this is 'remit' or 'transmit'. When in PIL we have a connecting factor, in a law suit arising in a Court where a foreign element arises, which prevails to link us to a foreign law. If we were speaking of immovables, one would say that we are linked to the law relating to the location of such immovable. When speaking of marriage, we look at where the marriage was celebrated. This is the basic structure of PIL.

Through the connecting factor, we are referred to a foreign law to apply. We are doing this in order to suit our client's convenience. PIL is used to improve the outcome for the client. Pleading PIL is a way of improving one's position. It is defence which usually makes a PIL claim.

When we say that we are referred to a foreign law, as being applicable to a particular case, what are we actually referring to? There are three possibilities:

1. **Referring to the foreign law insofar as its substantive content is concerned** (i.e. a specific Code). A particular provision would be applied. However, why, when we refer to law in foreign law, do we only refer to substantive law and not own PIL rules? In this case, we refer to a foreign law and delve internally into a substantive law i.e. **no renvoi**.

2. **Referring to substantive law and the PIL Rules**. The latter may redirect us, either to a new law, or remit us back to the origin i.e. *lex fori*. This is termed as being a **Single Renvoi.** This was criticised because why should we utilise the PIL rules of a foreign State, when own PIL rules can be used? The critics said Single Renvoi shouldn't exist because PIL would be used twice over.

3. **Peculiar English Doctrine of Renvoi** (Double/Total Renvoi) - this is the most complicated. The judge imagines he is sitting instead of a foreign judge in a foreign court. From that position, he checks what the outcome of the case would be and then applies it as the Maltese Judge in the domestic courts. There is a double case. It all depends on whether the other party i.e. jurisdiction being referred to, accepts single renvoi. Double Renvoi operates only if the other party accepts the renvoi. If such other party also follows a double renvoi theory, one would get a vicious circle which never ends.

These are the three possibilities of understanding the term 'foreign law'.

Evidence and Proof of Foreign Law

The proof of content of foreign law is a matter of fact and not law. The facts can be contested as facts, and this is important to keep in mind. When we look at foreign law, it is not as if such law has a force of law in Malta. It is merely a fact which provides rights which the judge can entertain to provide for justice. Proof of foreign law is a proof of fact which is rebuttable. Facts are always rebuttable by other facts.

PIL depends on getting proof of foreign law. An expert is needed vis-a-vis foreign laws.

With Renvoi, if we are going on the first track, referred to i.e. Spanish Law, we'd need an expert on Spanish Law. For it to be applied it needs to be accepted by the parties and Court.

In the second case, we'd need experts on the Spanish Law and PIL of Spain. This is to be submitted, and only upon acceptance it becomes part of the conclusion.

In the third case, you'd have to also have an expert relating to the principles of Renvoi acceptance.

Under Italian Law

Under the Italy Code of PIL, when there was a reference to a foreign law, the Italians would refer to such law and apply it, without taking into consideration the PIL rules of such foreign country. This has now been amended but is important for academic purposes. There was an exclusion of taking notice of PIL of other jurisdictions. In 1995, this was amended. Under Article 13, Renvoi is now taken into consideration. Before it was no Renvoi, and now it says that Single Renvoi is adopted. If the foreign law's PIL refers to another foreign law, that is what is used.

Forgo Case (1883)

This arose in a French Court where you had a Bavarian National who was domiciled in France, died in France and left intestate there. However, since he was illegitimate, the French State took everything. In the French Court, there was a link to Bavaria i.e. *lex patriae*. When they followed the law of Bavaria, the followed its substantive law and its PIL rules. The latter referred to the *lex domicilii* i.e. France. This meant that all property when to the French State. This is a case of remit. From the French Court to Bavarian Law, and Bavarian Law remitted back to the French Law.

Case 2: ??

German domiciled in France and dies intestate there, leaving movables in England. The case arises before the English Court which used domicile as the connecting factor, and so reference was made to France. French Law refers onwards to the German Nationality that he had. You can have a remit and a transmit.

The criticism is why one stops there. It is foolish to proceed to apply a foreign PIL rules which decides a fact twice over. From England to France to German. There is strong criticism of the single renvoi theory. It decides the question twice over, and why is this? The criticism is, why do we come back or go forward again? Is there a justification to keep going on? Logically, it can be used a *contrario senso*. Single Renvoi does not explain why it stops. It appears arbitrary. There is no legal justification for the double PIL exercise.

There is also a sovereignty argument. Utilising the first PIL rule is a manifestation of the sovereignty of the Court of the *lex fori*. Resorting to the second PIL rule is obnoxious. Why should a sovereign state utilise a foreign PIL rule? In effect, this amounts to abandonment of sovereignty. A local court should also follow its own procedure.

The third argument is that by adopting the second PIL rule after first referral, one is abounding sovereignty for a procedural rule of a totally different jurisdiction. The defendants usually bring up the argument of enforceability.

Before the Brussels Conventions and the followings, which allow for mobility of judgements and enforcement within the EU, it was difficult to enforce one judgment from another MS. The defenders of Single Renvoi said that this system of thought allows enforceability in the final country. This has sway, because we are looking for enforceability. If you have a judgement which cannot be enforceable, it can be rendered practically useless.

Some have argued that single renvoi enables enforceability at the end. It may sound labyrinthine, but at the end it is very useful. It justifies going over twice over. There are pros and cons to single renvoi.

One famous case for Double Renvoi is **Re Ross of 1930.** A British national was domiciled in Italy for 51 years. Domicile has a double layer: animus and fact. The degree of animus has varying calibration, unlike the facts. Domicile was duly acquired in this case as per Italian Law and even as per English Law. She draws up a will and excludes her son from the will. She was substantially wealthy i.e. movables and immovables. The case arose in England where the son held that this was invalid, Italian law applied and thus, he had a legitimate portion of his mum's wealth i.e. one third.

The judge said that regarding the movables, English PIL operates through domicile at the moment of death of the *de cujus*. In Italian Law, with its PIL and Renvoi Rules (at the time was not accepted), the British Judge imagined he was sitting in the Italian Court. The Italian Court would have referred through the connecting factor of the *patriae*. This would refer the Italian Judge to England and England would then, with its PIL rule refer back to Italian Law, and Italian Law does not accept renvoi (at that time).

On the immovables, under English Law it is the law of the location of the immovable property, being Italy. Again, he has to imagine he is an Italian judge, which would refer to English Law. English law would refer to Italy again, and Italy does not accept renvoi. The son's claim would also quashed in terms of immovables.

This breaks down if the Italian Legal system accepts the Renvoi, because a vicious cycle would be created. This is an extremely peculiar theory, because it only holds if the other country does not accept the theory of renvoi.

Duke of Wellington Case

Up till now, all the judges in Malta have avoided referring to Renvoi because it is complicated. There is only **Fiumara v Newby.** The defendant was the Maltese wife of a British husband. While in Italy, she was shopping and signed a bill of exchange in favour of the plaintiff. The defendant did not pay when the bill can to be protested, and the plaintiff sued her in Malta.

The issue before the judge can and revolved on the question of her capacity to conclude a bill of exchange on her own. The court considered that both English and Italian law confer the husband's nationality on the wife. Therefore, the wife was a British national. English law regulated the capacity of the wife by the law of the place of conclusion of the contract (Bills of Exchange Act 1882). The place of conclusion of the contract was Italy. The Italian Civil Code, Articles 134 and 135, provided that the wife cannot contract debts without the authority of the husband if she is not either legally separated from him due to his fault or she is a trader of her own right.

The Court concluded that wife was unable to enter into contract without authorisation of her husband - obligation was null under Italian law and hence the demand for payment was rejected. Therefore, the judge decided the case just as an English (or Italian) judge would have decided it. The Merits of double renvoi in cases of capacity: case would have had the same result in Malta, England and Italy. The judge could have easily not used renvoi at all and applied Maltese law as the *lex fori* because at the time the Maltese rule was also that the wife could not enter into contracts without the authorisation of her husband.

The Maltese Judge could have used another route by applying Maltese Law, because the rule at the time was that the wife could not enter into a contract without husband authorisation.

In all and every reference we make to a foreign law, one has to remember that there is an overriding criterion called Public Policy. If applying a foreign law in a law suit in Malta goes against Public Policy, our Public Policy should and would prevail.

Public Policy changes with times. There were many cases (**Gray v Formosa**) where divorce was said to be against the Public Policy of Malta, and therefore, even maintenance was not recognised. This is obviously no longer the case.

Lord Simon, in **Verveke v Smith**, there is authority that England would not recognised a foreign rule of law, even when applicable, when it goes against English Public Policy.

Against Public Policy:
- Verbal Divorces
- Usury
- Rights of Jews from Holocaust
- Polygamy

PIL Essay Questions

1. **To what extent would you think that the Brussels Regulations on jurisdiction mark a distinct improvement on the previously obtaining situation?**

The Brussels Regulations on jurisdiction, particularly the Brussels I Regulation (Recast), have marked a significant improvement over the previously existing situation in several ways. Here are some key aspects that demonstrate the advancements brought by the Brussels Regulations:

A. **Enhanced Legal Certainty**: The Brussels Regulations provide clearer and more predictable rules for determining which member state's courts have jurisdiction in cross-border disputes. They establish specific criteria based on the defendant's domicile, the location of assets, and other objective factors, which reduce uncertainty and avoid forum shopping. This ensures that parties involved in cross-border cases have a better understanding of the competent court.

B. **Minimization of Parallel Proceedings**: Prior to the Brussels Regulations, parallel proceedings in different member states were common due to the lack of harmonised jurisdictional rules. This led to conflicting judgments and legal uncertainty. The Brussels Regulations introduced mechanisms to avoid parallel proceedings and promote the concentration of related cases in a single jurisdiction. This minimises the risk of contradictory decisions and streamlines the legal process.

C. **Streamlined Recognition and Enforcement**: The Brussels Regulations simplify and expedite the recognition and enforcement of judgments across EU member states. They provide a mechanism for automatic recognition of judgments rendered in one member state, eliminating the need for separate proceedings in each jurisdiction. This streamlined process saves time and costs, facilitates the enforcement of rights, and enhances legal certainty for individuals and businesses.

D. **Enhanced Cooperation and Judicial Assistance:** The Brussels Regulations foster increased cooperation and judicial assistance among member states. They establish mechanisms for the exchange of information and cooperation between courts, enabling efficient communication and coordination in cross-border cases. This cooperation helps in gathering evidence, resolving conflicts of jurisdiction, and ensuring the effectiveness of the judicial process.

E. **Protection of Weaker Parties**: The Brussels Regulations include specific provisions aimed at protecting weaker parties, such as consumers and employees, in cross-border disputes. These provisions restrict the ability of businesses to choose a jurisdiction that is favourable to their interests and ensure that individuals have access to justice in their home country or a jurisdiction closely connected to the dispute.

Overall, the Brussels Regulations have significantly improved the legal framework for jurisdiction in cross-border disputes within the EU. They have brought greater legal certainty, reduced parallel proceedings, streamlined the recognition and enforcement of

judgments, enhanced cooperation among member states, and provided safeguards for weaker parties. These improvements contribute to the establishment of a more efficient and harmonised system of cross-border justice within the EU.

2. Although the lex fori is the starting point for the process of classification, foreign rules should never be applied out of their natural context. Discuss.

3. Explain the merits and demerits of domicile and habitual residence as connecting factors tor personal law issues.

Domicile is arguably one of the most discussed principles vis-a-vis Private International Law. It is a person connecting factor, and in essence, deals with the place in which one has his centre of activities. While it is a predominantly Common Law Approach, its origins can be traced back to Roman Law, and therefore, an analysis of its development is required to better understand the reasoning behind many countries preferring other connecting factors. In fact, even Commonwealth jurisdictions started to retreat from domicile, with Shah v. Barnet London Borough Council maintaining that domicile is a very difficult concept.

The starting point is the relevance of elements of residence and intent with regard to domicile. Under Roman Law, the intent was merely positive being the intention of acquiring a domicile. Additionally, under Roman Law it was possible for a person to have no domicile at all, or more than one domicile. Reference was also made to the Domicilium Neccessarium, wherein certain categories of people had no will in determining their domicile i.e. kids, wives, widows.

Moving to the Common Law concept, there are five important principles one had to keep in mind. One cannot have more than one domicile because it would be difficult to establish that person's rights and obligations. Similarly, everyone had to have one domicile, the former being the domicile of origin. While domicile signified a connection with one particular legal system, it was not to say that one always speaks of identical rules. Moreover, the presumption is in favour of a containing domicile, therefore, a change was very hard to prove. Finally, domicile had to be followed vis the English Concept.

Intention in the Common Law approach was more rigid seeing a negative sub-element was included, being the intention to never return back. With regard to residence, reference was made to the permanent element, which again, is a bit rigid. A person who was to stay in a place for a long period without the establishment of a permanent intention, because of an uncertain event, was in a difficult position to proof domicile.

Thus, one has to refer to the domicile of origin which at birth relates to the person, and where there is a foundling, where the child is found, the domicile of choice which can be changed, and a domicile of dependence. The latter is spoken of vis-a-vis minors who follow their parents and mentally-ill people. The degree to abandon the domicile of origin was extremely high in common law. The issues of rigidity in the Common Law approach are extremely evident.

In terms of Maltese Law, domicile started as a Roman Law approach which gradually shifted to the Common Law approach. Reference can be made to Article 1316 which establishes the Community of Acquests to those established in Malta. This shoes that there is a lower level of proof that what is typically needed in the strict Common Law concept. In fact, in Saliba v. Micallef it was held that the COA is irrelevant to domicile in the strict sense.

Domicile is referred to in the COCP in terms of whether the Maltese Court has jurisdiction and regarding the recognition and enforcement of foreign divorces.

In terms of intention, the negative sub-element is now excluded unlike in the case of Xerri v. Sladden wherein the total concept of Common Law was adopted. Moreover, the domicile of choice was to be voluntary, establishing free will and no constraint. Under Maltese Law, there is also the presumption of a change of domicile after a long absence. An indivisible object is subject to Maltese jurisdiction, even if only one party is domiciled in Malta.

Reference can be made to Domicile of the Child with reference to the parents, and the same concept for foundlings as under the Common Law Approach. Finally, any person of age can choose his own domicile.

In Spiteri v. Soler, while English PIL was referred to as a source, as in Smith v. Muscat Azzoaprdi, the former case eliminated the negative sub-element which makes the Common Law concept very rigid.

An important case is that of Chircop v. Frendo Randon where it was established that a change of domicile is based on a balance of probabilities in terms of proof. Moreover, reference is made to the indefinite stay, rather than to the permanent stay. Moreover, the length of residence was unnecessary to determine the acquisition of a new domicile.

While Malta is yet to reform the concept of Domcile, there has been a gradual shift towards using Nationality or Habitual Residence as connecting factor, seeing as domicile required elements which are arguably too strict.

In terms of Nationality, this is much more easily ascertainable and is linked to a person’s personal status and signifies allegiance to a particulate country. Nationality is in most cases determined by parentage or place of birth. Moreover, to acquire a nationality, it has to be recognised by the state. In Malta, nationality is used as a person connecting factor in matters of maintenance, parental authority, and even nationality of husband at time of marriage.

A person's nationality is normally an easy matter to determine, whereas a person's domicile is frequently quite difficult to establish. The difficulty can spring from the uncertainty of determining a person's intention on the available facts, or it may result from the application of the legal principles relating to domicile. These uncertainties may compel those concerned with, for instance, administration of estates to have recourse to legal proceedings to settle the matter.

However, there are also certain demerits attached to it. The first is linked to the fact that a person might have lost the connection with the country of his nationality, or never had a connection at all, thus, using it as a connecting factor is arguably more or less prejudicial. Moreover, a person is allowed to have a dual nationality, and can also be stateless. In this case, domicile offers an advantage seeing it is arguably more certain in that regard.

Finally, a nationality might not lead to a direct legal system where you have more than one law in a given territory, an example of which being federal states in the US. The nationality is that of a US national, however, federal states have different laws. In countries such as the United States, Canada, Australia and Britain, where the same nationality embraces more than one legal system, the notion of domicile serves as a practical standard, since it permits the application of the law of the particular legal system in the State or Province, as the case may be. Nationality does not permit this.

Finally, one can also speak about habitual residence. It has played a most important role in the Conventions of the Hague Conference on Private International Law, since it is perceived as providing an alternative to nationality and as being free of the difficulties associated with domicile, such as those in regard to intention, origin, dependency. The EU uses habitual residence as a main connecting factor in contractual and non-contractual obligators, divorces, separation, parental responsibility, and even maintenance.

Its development seems to show that it is the most appropriate connecting factor given the modern and fluid society one is living in. For example, it would be prejudicial to use nationality as a connecting factor where it is evident that over 12 million EU citizens live in a country other than that of their nationality. Thus, habitual residence allows for flexibility.

Habitual Residence generally involves a simpler inquiry to establish where a person has his habitual residence than to determine what his domicile is. Also, intention, though relevant, is a less controlling factor in the determination of habitual residence.

Moreover, the concept of habitual residence does not involve any concept similar to domicile of dependency. This means that the application of the concept in specific cases may involve far less complex considerations than does domicile. This also excludes concepts of domicile of origin, and domicile of choice, making the matter easier to understand.

This does not mean that habitual residence is very easy to determine, especially when a person is always on the move. Similarly, the question of how long a person's residence must continue before it may be described as “habitual” may give rise to considerable doubt in certain cases. One advantage of domicile in this respect is that where the requisite intention is present, a person may acquire a domicile immediately he arrives in the country in which he wishes to reside permanently. Usually, in terms of habitual residence, all circumstances have to be analysed to come to a determination based on the case at hand.

4. The sources of Maltese private international law are closely linked with Maltese political history. Discuss.

- The Statutory Sources
- The Judicial Sources
- Code de Rohan
- English Private International Law
- Should Malta have its own Code?

5. Explain the role of Public Policy in PIL

National courts always retain the power to refuse to apply a foreign law or recognise or enforce a foreign judgment on the grounds of inconsistency with public policy. The law which would ordinarily be applicable under choice of law rules may, for example, be denied application where it is manifestly incompatible with the public policy ('ordre public') of the forum, and a foreign judgment may be refused recognition on the grounds that, for example, such recognition is manifestly contrary to public policy in the State in which recognition is sought.

In essence, Public Policy is used as a self-defence mechanism by the local Courts to refuse to recognise or enforce the rule in the case in question. It is an escape route from the application of the relevant choice of law rule, or to deny recognition of a foreign judgement which would otherwise be entitled to be recognised.

The question which comes up is with regard to the extent to which the concept of public policy should be stretched. Although the concept is there against offending foreign rules and judgement, it is to be seen as a last defence. In fact, this notion of refusing based on public policy has gained some criticism through two ideas.

First, the exercise of public policy is often characterised and maligned as involving a broad and unfettered discretion, giving excessive and unguided power to the judiciary. Second, critics point out that when the courts do decide to apply public policy it is not always easy to identify in advance what the content of public policy actually is or what the consequences of its application will be.

Before understanding the role of Public Policy under Private International Law, it is important to differentiate between the two main jurisdictions. Civil Law jurisdictions tend to refer to any domestic rule designed to protect public welfare which must prevail over an inconsistent foreign rule. The forum must defend these at all costs. Common Law Jurisdictions refers directly to Public Policy. It withholds all recognition of any foreign law or judgement which is repugnant to the distinctive policy of the forum, and refuses to enforce any foreign law which is of a penal, revenue or other public law nature. Furthermore, foreign expropriatory laws will, in some circumstances, not be recognised and in other scenarios, although recognised, will not be enforced.

In terms of Maltese Law, reference can be made to the concept of substantive justice. This is an English Head of Public Policy which was developed because of a conflict with Maltese Law and Judgements. The underlying cause was the fact that back in the day, the only form of marriage available in Malta and to the Maltese, wherever they may be was the Canonical Form of Marriage.

Any marriage not in this form was automatically null and void under Maltese Courts. There were a series of cases which concerned Maltese Catholics who married in an English Registry and then, upon their return to Malta, succeeded in annulling that marriage. The man would usually go back to England asking the Courts to recognise the annulment of the English Marriage. The English Courts said that this offended their idea of substantive justice.

Public Policy in relation to PIL is better understood by reference to case-law. A major case is that o**f Lemenda Ltd v African Middle East Co.** In this case there was an infringement of the English Concepts of Morality. The national oil corporation of Qatar had contracted to supply oil to the defendants for a six-month period at a particular price. The contract provided for a renewal for a further six months given both parties agree. It became clear to the defendants that they would have difficulty in getting the oil company to agree to renewal. They therefore entered into another agreement with the plaintiff, with the contract saying that if the plaintiff used its influence of the Minister of Oil in Qatar to get the contract renewed, then they would be paid a commission fee of 30US per barrel.

In fact, the contract was renewed from the 1st August of 1985, but the defendants wanted the contract to be renewed by the 1st of April of the same year. The defendants held that since the renewal came at a later date, they should not pay the commission fee to the plaintiff. The Agreement was governed by English Law. The issue was whether the Agreement should be enforced. The English Courts did not allow this because if it did, it would corrode the principles of morality of the English Legal System.

Reference can also be made to the case of **Varvakae v. Smith.** A woman domiciled in Belgium had married a British domiciling in England. The main purpose of the marriage had been to enable her to acquire British nationality and to practise her profession of prostitute in the United Kingdom without running the risk of deportation. This is evidently a marriage of convenience. After 11 years, she left to Italy and married another man. Upon his death, she sought to annul the former marriage to have a claim of his inheritance. English Court held that the former marriage was valid, therefore, she went to Belgium who considered the marriage a mock and annulled it. Her capacity to enter into the marriage was governed by Belgian law because at the time she was a Belgian national domiciled in Belgium. Therefore, she was annulled in Belgium. However, the UK Courts failed to recognise such annulment based on public policy.

6. Why is the term 'Private International Law' more appropriate for this subject than 'Conflict of laws' or 'Comparative Law"?

Private International Law arises because of the existence of a number of separate municipal systems of law that differ greatly from each other in terms of the rules through which they regulate various legal situations. In essence, it attempts to regulate a cross border dimension of a Civil Law case. There has been an ongoing debate as to whether Private International Law should be called as such. Some have argued, as in the US, that the term conflict of laws is more appropriate in terms of the aforementioned. Others have terms this as being Comparative Law. However, there are many reasons which show that the term 'Private International Law' is the better out of the three for a multitude of reasons.

The starting point is to understand the concept and definitions of Private International Law. It is to be noted, that in contract to Public International Law, the term 'law' means something different. There are many forms of private international law relating to each jurisdiction in the world. There is no International Court as the ICJ, and disputes are still brought in front of domestic courts. There is no one single framework, therefore, one might argue that the term 'law' as used in this sense can be misleading. In essence, even the world 'international' can sometimes be misleading seeing as the law essentially remains domestic law.

The term 'international' therefore refers to inter-state, unlike in Public International Law where disputes are settled between States. In terms of PIL, it is always the individuals which are parties to the disputes at hand. States are only mentioned if they act as a juridical entity.

Nevertheless, the fact remains that by its nature, PIL is international in some way. A domestic legal system would be finding a way to be international and receptive to other foreign legal systems.

In terms of Comparative Law, it is important to consider that this is a purely scholar and academic exercise. Comparative Law cannot be seen as being law, not even in the softest sense as in Public International Law. It is not law, and it is certainly not law that can be placed in society. It is merely theoretical, and cannot provide for enforceability. It is a comparative exercise, where no judgement is made in favour of the plaintiff or the defendant.

A comparative law expert in the case of Private International Law can indicate or give reference regarding the foreign law, however, this is not a question of law, but a question of fact. When speaking about Comparative Law, you'd have an author who comments on the advantages and differences between the two laws in question whereas in PIL, the difference between the two laws is of utmost importance as it can be a deciding factor in the case.

The term conflict of laws originated from the American War of Independence against the British. However, this is arguably misleading because it seems to imply that there is a real conflict between different legal systems, when in reality, no such conflict would be in

existence. Realistically, the conflict is one relating to the choice of law rather than a conflict of laws in and of themselves, and such a conflict merely exists in the mind of the judge.

Therefore, we see that although Private International Law might not be the perfect term to be used when seeing what it actually refers to, it is safe to argue that it is the best out of the aforementioned.

7. Conflicting classifications of the cause of action as well as of an applicable rule of law are not always best resolved by sole and exclusive reference to the lex fori. Discuss.

8. **The European Union's stint for over a decade at unification of private international law norms has rapidly overtaken the age old efforts of both the Hague Conference and those of Unidroit put together. Discuss.**

The process of unification of private international law in the EU has been primarily driven by the objective of creating a single European area of justice, where individuals and businesses can operate with certainty and confidence across national borders. The EU has implemented various legal instruments and initiatives to achieve this goal.

The EU is slowly but surely pulling together laws and regulations to unify the different form of private international law in the Member States vis EU Regulations. This is arguably the most advanced unification system process that exists so far. With the EU, there is an exception to the statement saying that there are as many PIL systems are there jurisdictions in the world. The EU's aim is to develop one single Private International Law standard for Member States to follow, within which the ECJ could be the sole and Amin adjudicator. This would operate as how PIL operates through the Maltese Civil Court. When rules have been unified by the EU, disputes are adjudicated upon in a final and decisive manner by the ECJ.

With regard to regulations, reference can be made to Brussels I Regulation (Recast), also known as which is the primary instrument governing jurisdiction and the recognition and enforcement of judgments in civil and commercial matters within the EU. It replaced the original Brussels I Regulation and has been in effect since January 2015. The recast regulation applies to all EU member states, except for Denmark.

Moreover, The EU has actively pursued the harmonisation of laws among member states in various areas of private international law. This includes harmonisation efforts in family law, such as the Brussels II(a) Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility. The aim is to ensure consistent rules and procedures across member states in areas like divorce, child custody, and maintenance obligations.

The Brussels II(a) Regulation establishes rules to determine which member state's courts have jurisdiction in family law matters. It also ensures that judgments relating to matrimonial matters and parental responsibility are recognised and enforced in all EU

member states, promoting legal certainty and the protection of individuals and families involved in cross-border disputes.

Reference can be made to the Rome Conventions. The EU has adopted several conventions known as the "Rome Conventions" that establish uniform rules for determining the applicable law in various civil and commercial matters. These conventions include the Rome I Regulation on the law applicable to contractual obligations and the Rome II Regulation on the law applicable to non-contractual obligations. The conventions provide clear criteria for determining the applicable law and promote legal certainty in cross-border disputes.

Brief reference can also be made to the principle of mutual recognition which is fundamental to the EU's approach to private international law. It means that decisions and judgments rendered in one member state should be recognised and enforced in other member states without further formalities. This principle is crucial for promoting the free movement of judgments within the EU and ensuring the effectiveness of judicial cooperation.

Overall, the EU's process of unification of private international law aims to establish a coherent and predictable legal framework for cross-border transactions, disputes, and legal relationships. It seeks to reduce legal uncertainty, promote legal harmonisation, and enhance judicial cooperation among member states, ultimately facilitating the free movement of individuals and businesses within the EU.

Go into Unidroit and the Hague Convention

9. **In which cases is the application of foreign law excluded? And if it is not excluded what would amount to valid proof of foreign law?**

- Public Policy
- Substance v Procedure
- Proof of Foreign Law

10. By re-classifying the cause of action or a rule of law the smart lawyer can swing the judge to pass judgement in his client's favour. Is this inevitably the case? Discuss with reference to cases.

11. In Private International Law there are several notions with have been defined by case law. A case that clearly illustrates the importance of classification is Ogden vs. Ogden (1904). Explain the salient issues discussed in the case and give your opinion on the conclusions thereof.

Short Questions:
1. the incidental question
2. the doctrine of renvoi

3. the distinction between substance and procedure
4. the exclusion of foreign law
5. the proof of foreign law
6. Acquisition of Domicile of Choice
7. Connecting Factors in Classification
8. Lex Fori in Procedure
9. Double Renvoi
10. Habitual Residence

How is foreign law proved?
The established rule in England and Malta is that knowledge of a foreign law is not to be imputed to the judge unless the foreign law with which a case may be connected is pleaded by the party relying thereon, the it is assumed that it is the same as local law. The onus of proof lies on the person alleging that there is a foreign law. If there is no such plea, reference is made to the law of the forum.

In Micallef v. Le Peuple, it was held that the position under Common Law maintains that if a party fails to bring evidences what the foreign law is, then the court will decides the matter as if it was decided a local case, applying mere local law.

As per Article 562 of the COCP, saving any other provision of the law, the burden of proving a fact shall rest on the party alleging it.

One must note that the foreign law is a question of fact of a peculiar kind, as mentioned in a multitude of case law one of which being Parkasho v. Singh. In the absence of the plea or if the difference is not satisfactorily proved, the court must give a decision according to the law of the forum, even though the case may be connected with some foreign country and the law of that foreign country is applicable according to the choice of law rules. This was also held in Warner Bro v. Nelson.

The question which arises is therefore regarding the way in which the foreign law is to be proven. The only evidence which is allowed in such a scenario is expert evidence, having witnesses with the necessary qualifications.

As seen in Nelson v. Bridport, Foreign law cannot be proven by citing previous decisions of the court, nor by merely presenting the judge with the text of the foreign law and leaving him to draw his own conclusions, nor by referring to a decision in which a court of the foreign country has stated the meaning and effect of the law in question. This is even more important seeing that the judge sitting in the domestic court would not have perfect knowledge on all legal systems of the world.

The next point is regarding nomination of expert witnesses. In England, ex party witnesses are produced meaning each party may bring forward expert witnesses. In Malta, as per the COCP there are three possibilities:

1. Parties produce ex parte witnesses
2. Parties agree on one expert witness appointed as referee by Court
3. Combination of both (i) and (ii)

However, the question of an expert witness comes up. In England, the general principle has been that no person is a competent witness unless he is a practising lawyer in the particular legal system in question, or unless he occupies a position, or follows a calling, in which he must necessarily acquire a practical working knowledge of the foreign law. In Malta, even academic are considered competent to give expert evidence in Malta but not in England.

Today, the issue of proof of foreign law is specifically regulated by Article 563B of the Code of Organisation and Civil Procedure. The amendments of 1995 allow the parties to a dispute, to bring forward to the Court, their own experts to give evidence in front of the Court on what the position under the foreign law is.

The law does not set out specific criteria by which one can be said to be a sufficient expert. Our law requires that the expert must be knowledgeable in the foreign law; however, the wording of article 563B makes it clear that this does not simply mean that the expert has a purely academic knowledge of the foreign law at issue.

Discuss the Differences between substance and procedure.
One of the most important points to establish in terms of Private International Law is to differentiate between substance and procedure. In essence, while substantive rights of a party to an action may be governed by a foreign law, all matters appertaining to procedure are left in hands of the law of the forum. The field of procedure constitutes perhaps the most technical part of any legal system and comprises of many rules that would be unintelligible to a foreign judge and certainly unworkable by a machinery designed on different lines.

However, it is often said that there is a difficulty in detraining procedure from substance. The same issue as in classification is established, namely that one must determine by what tests is a procedural rule considered as different from one of substantive law.

Reference can be made to case law. In **Leroux v. Brown,** an oral agreement was made in France where the English defendant agreed to employ French resident. Under French Law contract was enforceable, unlike under UK Law. The action failed because it was said that the rule was one of procedure which was biding on everyone suing in England. This decision was criticised because it was implied that the contract, governed substantively by French Law, denied to confer a right. A substantive right can only be refused on grounds of public policy.

In **Montesresso Shipping Co Ltd v. International Transport Workers' Federation**, reference can be made to Lord Denning who held that if there is no contract, there is nothing to enforce. That is substantive law. If there is a contract, and the law says it cannot be enforced (expect if in writing), it is procedural governed by the lex fori. So while existence of a contract is substantive, the remedies of a breach of it is procedural.

Substance and Procedure cannot be related to clear-cut categories and there is no one exact dividing-line between the two. Although the two must be distinguished, the line between them should be drawn by having regard to the relativity of legal terms and the exact purpose for which the distinction is being made. Therefore, reference is to be made to all the circumstances of the case at hand.

The distinction is arguably made to the convenience of the Court. When faced with a conflict of laws problem, though bound to apply the law selected by the choice of law rules, the court cannot be expected to import all the relevant rules of the foreign law.

To better understand the difference, it is necessary to consider certain issues whose classification between substantive or procedural raises difficulties. All matters arising in the successive stages of litigation are to be governed exclusively by the lex fori:

i. Service of process
ii. Form of action
iii. Title of Action
iv. Competency of Witnesses
v. Functions of the Judge
vi. The Right to Appeal

Reference can also be made to the issue of prescription under UK Law. In England, until 1984, even if an action was still maintainable under the applicable law, no action would lie in England if the English limitation period had expired. Conversely, if the permissible period were longer in England than in the foreign country, the plaintiff was free to pursue his claim within the English period even if the foreign period had expired.

On the contrary, Civil Countries tend to treat the statutes of limitation as ones of substance. Moreover, the English Rule had been attacked inc certain Common Law jurisdictions. Today, the English Court is to apply the period of prescription which governs the substantive issue according to English choice of law rules, and this new approach is applied to both actions and arbitrations in England, except in tort claims. At EU level, the Rome II Regulation on non-contractual obligations now also provides that in tort actions the applicable law will also determine the period of prescription.

In terms of Prescription in Malta, reference can be made to cases. In **Page v. Naudi,** the Court adopted the English principle saying that prescription is to be governed by the lex fori. This was contrasted in **Degabriele v. Agius.** In **Ganado v. Vadala,** it was held that the applicable rule should be the one favourable to the debtor. This is unfair vis-a-vis the creditor. When Malta joined the European Union in 2004, and the Rome I and Rome II Regulations became directly applicable, the chosen law will also govern issues of prescription.

In terms of evidence, whether governed by domestic or foreign law, the rules of evidence are evidently those of the lex fori. Finally, presumptions and burden of proof are debatable

as to whether they are substance or procedure. However, in the Rome regulations it was provided that the law governing the obligation shall apply to the extent that it contains rules which raise presumptions of law or determine the burden of proof.

Analyse the Sources of Maltese PIL in line with the historical context of Malta.
In terms of Maltese Private International Law, reference can be made to three main sources, and these can be classified in a hierarchal order. When referring to sources, it is to be noted that there has been a great division between Continental and Common Law approaches. The former refer to statutory sources, the latter make more reference to the doctrine of precedence. In Malta, there is no Code of Private International Law, and the doctrine of precedent is not adopted.

The primary source in Malta is the Legislative Source, meaning any provisions contained in legislation and codes. This is arguably the strongest source, when compared to those which will follow. This type of source, however, is scattered amongst different legislation seeing that as aforementioned, Malta does not have an established Code. For example, reference can be made to certain provisions in the Civil Code. Article 682 relates the validity of a will and states that if a will is drawn up according to the formalities of the country within which it was written, it is valid in Malta. Moreover, Article 1316 deals with the Community of Acquests, being the default regime of couples who establish themselves in Malta. Reference can also be made to the law relating to usury and sureties.

One can also mention the Marriage Act which also seems to be gaining considerable importance vis-a-vis Maltese Private International Law. Article 18 deals with the capacity to marry relating to the law of domicile, while Article 33 refers to recognition and enforcement of foreign divorces.

Here, one can also refer to the EU, who is at the forefront of the process of unification. Regulations such as Brussels I (Recast), Brussels II, and the Rome Regulations are also legislative sources. One treaties are enacted, they achieve the level on being primary sources of Maltese PIL.

The secondary source refers to judicial sources, namely cases. Even though Malta does not follow the rule of binding precedence, cases are still referred to and are a source one should look at especially when there is a lacunae under our law. For example, in Fernandez v. Pace, it was held that in maintenance cases, the law of nationality must be referred to. Additionally, Smith v. Muscat Azzopardi established that succession of immovables relate to the law situs, while that of movables relates to the lex domicilii.

Regardless of the fact that there is little statutory sources, there have been a wide range of cases involving cross-border elements. When there was no statute to follow, the judge had to get inspiration from elsewhere, to fill in the gaps left open by our law.

The starting point of the third source of Maltese PIL has to be the Code de Rohan. Thus, a historical understanding of the development is of utmost importance. At the time it was

developed, such Code was considered as being very advanced and helped judges with issue of lacunae. If a solution was not catered for by our own Law, we had to look at the *leggi commune,* which at that time was Roman Law. This started to change along the years, and following the case of Micallef v. Dawson which established that the Code de Rohan was a source of Maltese PIL, came the landmark judgement of Smith v. Muscat Azzopardi. In this case it was held that absence to the provisions which regulate PIL, it is usual for the Maltese Courts to have resources to the principle of English Law.

It is important to note that all existing laws remained in place when Malta became a British Colony, and thus, at the beginning, the Code de Rohan still held its relevance. However, as soon as the legislative power started to shift, laws of the colonies started to be applied in Malta, and the importance of Roman Law started to diminish. This is essentially the Historical reason why Maltese Courts started to fill in any lacunae with English PIL. It is however to be argued whether the word 'usual' is the appropriate word to use for instances in which Malta uses English PIL. Notwithstanding, English PIL retained its importance seeing that Maltese Private International Law was considered as being public law, thus, following the Common Law approach as noted in Spiteri v. Soler.

This does not mean that all British Public Law is the same to Maltese Public Law, therefore the former's application still has some qualifications. A provision of Maltese Law would always override English Common Law. Maltese PIL depends on English Common Law unless there are areas within which Parliament has adopted legislation. Moreover, when applying the Common Law approach, these have to be in line with principles of Maltese Law.

A question which arises was whether Malta needs a Code relating to Private International Law. However, one can possibly argue that the system never worked. It felt better for the legislators to simply add statutory provisions to pre-existing laws and Codes to increase the amount of Statutory sources.