Lectures (Court of Cassation): role of the judge in conflict of law rules

Seventh lecture in the "The role of the judge revisited" series of lectures organised by the Court of Cassation, the Société de Législation Comparée, the University of Toulouse 1 Capitole and the University of Nîmes.

Whether there is - or should be - a unified approach to the role played by judges in conflict of law rules was the main focus of the private international law lecture held on 17 May 2021 as part of the *"The role of the judge revisited*" series of lectures. Three different approaches were discussed to assess how judges should handle conflict of law rules.

The first approach looked at the nature of the conflict of law rule. Although this issue has already been discussed many times before, N. Nord, Secretary General of the International Commission on Civil Status, and Gian Paolo Romano, Professor at the University of Geneva, explained why it was still relevant today and why it may be time to take a new approach to this issue. N. Nord pointed out that the main justification for the current solution, based on the availability of the law in question, is a pragmatic solution and not a legal solution, adopted to simplify the work of judges by minimising the need to apply a foreign law. However, "this solution is misguided as it disregards the true nature of the conflict of law rules". In addition to their allocation role, conflicts of law rules increasingly seek to influence the substantive outcome, based on public policy considerations or through non-neutral rules designed to obtain a specific substantive decision. The current solution also overlooks the primary nature of conflict of law rules, as they are a legal norm even when they only have an allocation role. This aim needs to be respected too. Accordingly, conflict of law rules should systematically be applied of the court's own motion to build up a higher degree of consistency in this area, as the obstacles to this can now easily be overcome by judges.

From a completely different perspective, G. P. Romano explained that the spread of the freedom of choice principle to areas that were previously considered off limits weakens the claim that judges breach conflict of law rules when they do not apply them of their own motion. Legal proceedings are the business of the parties, who "generally have the *free disposition* of legal proceedings, even in cases where they do not have the free disposition of their rights." The ever-increasing number of mechanisms diverting cases away from the courts confirms this approach. Accordingly, the choice made by the parties should be systematically used, especially when they wish to use the law of the forum. However, judges should always inform the parties, of their own motion, that a conflict of law rule exists, applying a foreign law.

The second approach follows on from the first. Lukas Rass-Masson, Professor at the University of Toulouse Capitole, examined the role of the judge based on the official nature of EU conflict of law rules, without overlooking their specific purposes. The specific characteristics of EU law mean that it should be analysed separately, as its authority can impact the role played by judges in this area of law. Moreover, three different points need to be considered for a methodical implementation of EU conflict of law rules: the specific nature of these rules, an understanding of their purpose (methodical implementation of rules of law (*droit objectif*) and individual rights (*droits subjectifs*)) and an identification of the function that most strongly embodies EU policy. If the implementation of subjective rights were to take precedence, this would necessarily impact the role of the judge. In such a case, judges would need to apply EU conflict of law rules systematically, as their contribution to a methodical implementation of EU private law.

The last approach deals with the role played by judges in the implementation of conflict of law rules. François Mélin, judge at the Paris Court of Appeal, suggested an analysis covering all stages of judicial reasoning in this area, from the detection of conflicts of laws to the implementation of the foreign law to be applied under the conflict of law rule. It appears that the implementation of

a foreign law raises important practical problems for judges ruling on the merits of a case (as it can be difficult to find suitable sources of information, obtain a general knowledge of the applicable foreign law and interpret a foreign law and may impact the length of the proceedings). However, like N. Nord, F. Mélin believes that there is good reason to remain optimistic as foreign laws can be satisfactorily applied, mainly by ensuring that judges and lawyers are familiar with conflict of law issues and certain foreign laws.

Reluctance to apply a foreign law, role of party autonomy and implementation of the European Union's legislative policy: all these factors can help us understand the role played by judges in conflict of law rules. So what can we expect in the future? As it is now easier to establish the content of a foreign law, an increased role for judges would appear inevitable. However, the increasing importance given to party autonomy in international cases suggests that this would be limited to overseeing the proper operation of a liberalised conflict of law system. Will judges act as a "whistleblower", applying "mediation" of law rules rather than conflict of law rules? The answer to this question and the many others arising from the insights and recommendations of the Speakers may come from the private international law of the European Union. But for this, it will need to show its true face. **François Ancel and Gustavo Cerqueira**.