

Conflict of Laws

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Conflict of laws (or private international law) is a set of procedural rules that determines which legal system and which jurisdiction's applies to a given dispute. The rules typically apply when a legal dispute has a "foreign" element such as a contract agreed to by parties located in different countries¹.

Identification of appropriate law rules

Identification of the appropriate law rules involved the following process²:

1. Characterization or classification of the issues;
2. selection of the rules of conflict of laws which lays down a connecting factor;
3. identification of the system of law which is tied by that connecting factor to that issue.

The appropriate law rules to be applied is usually determined by *lex rei sitae* or *lex situs*, which is the law of the place where the subject matter is located. However, jurisprudence had acknowledged other methods for determining the law rules such as the domicile, habitual residence, nationality, choice of law clause, forum selection clause, *lex loci contractus*, *lex loci actus*, *lex patriae*, *lex loci arbitri*, *lex loci delicti commissi*, *lex loci solutionis*, *lex loci protectionis*, *lex loci celebrationis*, proper law, and *depeçage*. Another widely recommended option is *lex fori*

Significance in disputes

The appropriate law rules which will be applied for cases involving different foreign elements is a very crucial step since the rights, obligations and the remedies available to a party will significantly vary under different laws. Additionally the statute of limitation will also differ, and this may impact the enforcement of any right and remedies.

Due to the significance stated above, litigants often try to proceed their cases in courts where the law can be more favorable for them. This is known as "Forum Shopping". Thus, the choice of forum can be a determining factor for a party in a dispute to either "win" or "lose" the case.

Effect of Conflict of Law principles

It will be a major issue for a company if it enters into a contract with a foreign party and eventually the contract is interpreted by a different law rules. Such event can have material implications on a contract, for instance, under a different law some clauses might be un-enforceable, or implied terms are ruled to be associated in a contract, or issues may arise during the enforcement of court decision / arbitral award.

¹ http://en.wikipedia.org/wiki/Conflict_of_laws

² See *Macmillan Inc v. Bishopsgate Investment Trust Plc* [1996] 1 WLR 387, 391–2 per Staughton LJ; *Raiffeisen Zentralbank Osterreich AG v. Five Star Trading LLC* ("The Mount I") [2001] QB 825 at 840B to 841B.

An example that I would like to highlight is that under several law of common law countries, a limitation of liability clause can be challenged if it does not satisfy the reasonableness test. However, this is different under the Indonesian Civil Law. Such limitation is possible to be fully enforced due to the absence of the requirements of reasonableness rule known in the common law system, and thus it can be interpreted as the intention of both parties to have such limitation in a contract.

In addition to the above, based upon the principle of reciprocity most common law countries can recognize and enforce judgment of foreign courts, while Indonesia, save for arbitration, does not recognize foreign court judgments without a re-trial in the Indonesian court of law.

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