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Introduction

1.01 Procedure is highly important in transnational disputes, both in the context of litigation and arbitration. Many cases are decided not on the basis of the applicable substantive law or the merits of the action but because one party has secured or been granted a procedural advantage over the other. Most of the legal literature and court decisions on procedural issues in private international law have focused on individual topics within the broad realm of procedure, such as service of process and jurisdiction, the taking of evidence, or interim or provisional measures. A question that has so far been little explored is the question of applicable law or choice of law in procedural matters. Indeed, the statement of one English commentator, made over 40 years ago, still remains valid: 'The basic question which has seldom been faced by English writers and courts is whether procedure in cases of private international law should be linked to rules of private international law or confined to those of municipal law or municipal jurisdiction. This question deserves consideration . . .'[1]

1.02 The principal reason for this gap in the discourse to date is that procedural matters have been governed by a single choice of law rule, common to all legal systems, whose status has been rarely, if ever, questioned. The rule provides that '*lex fori regit processum*', that is, the law of the forum governs procedure. Courts, legislatures, and writers (at least in the common law world) have been almost universal in their approval of this rule with the result that the choice of law dimensions of procedure have only been appreciated in one real respect: the need to distinguish between matters of procedure (governed by the law of the forum) and matters of substance (governed by the law of the cause of action). According to this view, the rule *lex fori regit processum* is absolute and the only issue to be resolved by a court is whether a matter falls within the rubric of 'procedure'. If a matter is classified as substantive, then the ordinary choice of law rules or approaches of the forum with respect to cases involving a foreign element will be employed to determine the applicable law; if considered procedural, then the law of the forum is applied. The distinction

[1] R Graveson, 'Review of I Szászy, *International Civil Procedure: A Comparative Study*' (1968) 17 ICLQ 534; see also R Graveson, *Conflict of Laws* (Sweet & Maxwell, 7th edn, 1974) 593.

between substance and procedure will be analysed in detail in this book. In particular, there will be an examination of the rationale for the distinction and an assessment of whether a general classification is possible or whether the content of the distinction can only be elucidated on a case-by-case basis.[2] The argument will be made that the concept of procedure should be generally limited to matters relating to the mode, conduct, or regulation of court proceedings rather than being based on any concept of 'remedy'. A substantial part of the book considers how the distinction has been applied by courts and legislatures in important areas of doctrine such as evidence, damages, statutes of limitation, and matters concerning the process of the courts. The aim is to give practitioners a clear picture not only of the current state of the law but also as to how it may develop and be applied in future cases. The primary focus will be on the rules applicable in Commonwealth countries but reference will also be made to recent choice of law instruments of the European Union, as well as US commentary and decisions and some materials from European civil law countries.

1.03 Any examination of the distinction between substance and procedure must, however, also take into account the wider choice of law context in Anglo-Commonwealth private international law. Key objectives of private international law have long been the pursuit of uniformity of outcome in decisions of different national courts and the discouragement of forum shopping. Such aims are compromised when national systems of choice of law allow too wide a scope for the operation of forum law at the expense of foreign rules. Therefore, any consideration of the scope of the law of the forum in procedural matters must also examine the nature of forum interests in choice of law more generally, as well as other methods or devices of 'forum reference', such as *lex fori*-specific choice of law rules, overriding mandatory rules, public policy, mechanisms for displacing the applicable law, and the failure to plead and prove foreign law. Ultimately, therefore, any recommendation as to the appropriate scope of 'procedure' in Commonwealth choice of law must take into account the place of the law of the forum in Anglo-Commonwealth choice of law systems as a whole.

1.04 A further important point to note is that most writers, courts, and legislatures have largely assumed that no choice of law problems can ever arise *within* the context of procedure. Such a conclusion flows from the equation made at 1.02 between procedure and forum law. The implications of this view are that the procedural law of the forum can never come into

[2] See Ch 2.

conflict with another country's procedural rules and foreign procedural rules can never be admitted into the forum.[3] Hence, if a matter is classified as procedural, then the reference to the law of the forum is absolute; there is no scope whatsoever for the recognition of other foreign laws by the forum. As will be argued in this book this position is flawed both in practice and principle. First, there are increasing instances where, in the context of applying forum procedural law, *foreign* procedural law is also applied or at least recognized by English and other Commonwealth courts, such as in the areas of taking of evidence abroad (where laws in the country where the evidence is located, which prevent disclosure, may call for recognition) and jurisdiction (where a court may, in determining whether to exercise jurisdiction, examine whether a foreign court would have done so under its laws). Secondly, there are circumstances where the scope and reach of the procedural rules of the forum are qualified and limited by reference to foreign laws, for example where a forum court refuses to allow service of process in a foreign country because it would violate the laws of that state or where a forum court will recognize service of process in a foreign country if it was effected according to the procedural rules governing service in that country. Some scholars have recognized that even where forum law is not *replaced* by foreign law but is modified to take account of foreign rules or elements, a type of choice of law process is at work. Kahn-Freund's doctrine of the 'enlightened *lex fori*'[4] and Kay's concept of foreign law as 'datum'[5] where the forum takes cognisance of foreign laws in the context of applying forum law, are examples of this idea, practical illustrations of which will be considered throughout this work.

1.05 A further aim of this book therefore, apart from identifying the precise scope of substance and procedure and considering its application in various practical situations, is to establish a more complete choice of law framework for procedural questions. In developing this framework it may be necessary to suggest further, more precisely tailored choice of law rules in addition to the traditional law of the forum/law of the cause of action dichotomy. Questions relating to the capacity of persons, the formal validity of documents and acts, rights to privilege, and quantification of damages are all areas where the dichotomy is arguably inadequate and alternative choice of law rules may be required. Relevantly, an examination will be made of the position in the United States, where the perceived

[3] See eg Australian Law Reform Commission, *Choice of Law* Report No 58 (1992) 122, para 10.2; *Hamlyn & Co v Talisker Distillery* [1894] AC 202, 210 (Lord Herschell LC): 'the parties cannot, in a case where the merits fall to be determined in the Scotch Courts, insist, by virtue of an agreement, that those Courts shall depart from their ordinary course of procedure'.

[4] O Kahn-Freund, *General Problems of Private International Law* (Sijthoff, 1976) 227.

[5] H Kay, 'Foreign Law as Datum' (1965) 53 California L Rev 47.

limitations of the substance / procedure distinction has led to it being increasingly discarded and subsumed within a broader general choice of law inquiry, based on the concept of the law which has the 'most significant relationship' to an issue. The work of organizations such as the American Law Institute and UNIDROIT, which have proposed harmonized models of procedural rules for transnational cases, will also be considered to determine whether harmonization can overcome the problem of applicable law.

1.06 The focus of this book will be on cross-border litigation, excluding international commercial arbitration. Not only has the topic of procedure in international arbitration been thoroughly covered in a recent work in the present series[6] but the choice of law analysis in arbitration, especially in procedural matters, is different from litigation due to the absence of a 'forum' and the interplay between arbitral tribunals and the courts.[7] Overall, the aim of the book is to provide guidance to lawyers on a topic which has had only limited attention in the literature to date but which is of important practical significance.

[6] G Petrochilos, *Procedure In International Arbitration* (OUP, 2004).

[7] As was noted by an English judge: 'Arbitration law is all about a particular method of resolving disputes. Its substance and processes are closely intertwined. The Arbitration Act contains various provisions which could not be readily separated into boxes labelled substantive arbitration law or procedural law, because that would be an artificial division'; *XL Insurance Ltd v Owens Corning* [2001] 1 All ER (Comm) 530, 541 (Toulson J).