

**UNIVERSITY OF SWAZILAND
DEPARTMENT OF LAW
FINAL EXAMINATION PAPER
YEAR 2007**

TITLE OF PAPER : CONFLICT OF LAWS
COURSE CODE : L 404/L 503
TIME ALLOWED : THREE (3) HOURS
**INSTRUCTIONS : ANSWER ANY FOUR (4)
QUESTIONS.
ALL QUESTIONS CARRY
EQUAL MARKS.**

**THIS PAPER MUST NOT BE OPENED UNTIL PERMISSION HAS BEEN
GRANTED BY THE INVIGILATOR.**

Question 1

What do you understand by the “statute theory”? What contributions, in your opinion, has it made to the theoretical development of private international law?
(25 marks)

Question 2

Thabo, a Mosotho domiciled and resident in Swaziland, married Nakku, a Ugandan domicile, resident in Swaziland. Prior to the marriage, Thabo had gone to Uganda and paid the bride price as was required by the law and custom of that particular area of Uganda. Nakku’s parents were initially reluctant to approve of the marriage but Thabo assured them that he would respect their laws and customs in all matters pertaining to the marriage.

It was only after this assurance that Nakku’s parents gave their consent and blessing to the marriage. The two then returned to Swaziland. Nakku left behind a small house which was to be managed by her parents on her behalf. A month later, Thabo and Nakku went through a ceremony of marriage governed by the Marriage Act, in Swaziland.

Recently, Nakku died from natural causes. According to the Ugandan law and custom, the parents in Uganda were entitled to the body and burial of their daughter in Uganda. They were also entitled to her pre-marital property left under the care of her parents at marriage, but if they did not bury her, they would forfeit the property to whoever buried her.

The parents have now come to Swaziland with the sole purpose of taking the body back to Uganda for burial. Thabo adamantly refuses, claiming that under Sesotho law and custom it is the sacred duty of the husband to bury his deceased wife.

Advise the parties on all the legal issues involved.

[25 marks]

Question 3

Magagula, a Swazi domiciliary resident in Manzini, entered into a contract with Johnson, a British citizen, temporarily resident in Maputo, for the supply of 22, 000 tons of Grade AA21P cement to be delivered in Maputo for the contract price of E5, 500 (five thousand five hundred Emalangen). The contract, which was in English in Standard

Form, with a Portuguese translation attached, contained a clause to the effect that all disputes arising from the agreement were to be referred to the English courts for arbitration. The parties did not, however, discuss or specify the law to govern the contract.

Magagula has, therefore, on the advice of his attorney, instituted an action in the High Court of Swaziland. Meanwhile, Johnson has also instituted an action in England for breach of contract on the basis that the cement supplied was of inferior quality, and was definitely not Grade AA21P. He claims additionally that Magagula's action in Swaziland should be stayed.

Advise Magagula fully on the relevant jurisdictional matters as well as the proper law of the contract. [25 Marks]

Question 4

With the aid of the case of *Ogden v Ogden* [1908] P 46, illustrate the shortcomings of the *lex fori* approach to classification. What alternative approach would you advocate to arrest the recurring problems which bedevil this area of the law? [25 marks]

Question 5

Discuss the principles and the jurisdictional connecting factors governing the jurisdiction of the High Court of Swaziland in matters involving a foreign element. Under what circumstances is the jurisdiction of the Court excluded? [25 marks]

Question 5

The contribution of the German Legal Scholar, Count Von Savigny, to the theoretical jurisprudence of private international law has been termed "*the Copernicus revolution in private international law*". Is this rare accolade, in your opinion, justified? What is the abiding contribution of this reputed founder of the historical school of jurisprudence to the development of private international law? [25 marks]

Question 6

(a) Khumalo, a Swazi national domiciled in France, dies intestate in Mbabane leaving movables in France. According to the Swaziland conflict rule, intestate succession to movables is governed by the law of the last domicile of the *propositus*. According to the French conflict rule,

however, the matter is governed by the *lex patriae*. Assuming that the Swazi courts operate the “total renvoi” theory, how will the matter be resolved by the High Court of Swaziland? (15 marks)

(b) Will your answer be different if at the time of his death in Mbabane, Khumalo was domiciled in Italy and the Italian conflict rules determined the question of intestate succession by the national law of the *propositus*? (10 marks)

[Total marks 25]

Question 7

(a) *Herr Kohl*, a man with German domicile of origin, arrived in Swaziland in 1986 with intention “to stay in Swaziland and remain in this beautiful Kingdom until ‘the GREENS’ win the majority of seats in the German Parliament.” He settled in Mbabane and married a Swazi nurse in 1992. When his wife died in a tragic accident in 1996, he decided to return permanently to Germany, even though “the GREENS” had not won a single seat in the German parliament. On his way to Matsapha International Airport to board the plane to Germany, he was involved in a fatal accident and died. What law should govern the distribution of his estate consisting entirely of movables in Mbabane? (18 marks)

(b) If it is decided that German law governs the distribution of his estate how will the contents of the applicable German law be ascertained before the High Court of Swaziland? (7 marks)

[Total marks 25]