

UNIVERSITY OF SWAZILAND
FACULTY OF SOCIAL SCIENCE
DEPARTMENT OF LAW

MAIN EXAMINATION PAPER 2009

TITLE OF PAPER : CONFLICT OF LAWS

COURSE CODE : L404

TIME ALLOWED : THREE (3) HOURS

**INSTRUCTIONS : ANSWER QUESTION 1
WHICH IS COMPULSORY
AND ANY OTHER THREE
QUESTIONS OF YOUR
CHOICE.
MARKS FOR EACH
QUESTION ARE
INDICATED IN BRACKETS.**

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

QUESTION 1

You are the in-house General Counsel to a multinational media conglomerate called ~~Vision Inc.~~ Vision Inc. is incorporated in Delaware, and has its headquarters in jingoist New York, and its shares are traded publicly on the New York Stock Exchange. It has several tens of millions of dollars in corporate bonds outstanding. Vision Inc's business spans television, radio, book publishing, movies, and even magazines – it aims for the worldwide market interested in celebrity. Thus its TV shows are trash celebrity entertainment (e.g. Entertainment Tonight), its books are either fawning or scandalous biographies of glitzy entertainment and other celebrities, its magazines are fan magazines and stuff for the teen crowd, etc. it is a world of cutthroat competition in the world of down-market celebrity worship, and as general counsel, you have many pressures, ranging from the constant threat of legal action such as libel suits to many contracts and corporate issues arising from Vision Inc's far flung empire in other parts of the world.

Recently your client and, effectively, boss, Vision CEO MaryLou Who, has asked you to join a series of meetings with senior executives of a small London-based, UK chartered corporation, Celebrity Community Services (CCS). The CCS executives have an idea for a TV series, to be run worldwide in a wide variety of TV settings, of celebrities, such as Winona Ryder, who have gotten in trouble with the law and have been sentenced to community service of one kind or another – showing how they are paying their debts to society (without actually going to jail). Some of the convicted celebrities might be convinced to cooperate with CCS as a way of cleaning up their public images, and others can simply be captured by paparazzi photographers on videotape if they won't cooperate with their series. Either way, it's either an uplifting story of a celebrity who has done wrong and is making amends, or else an ungrateful scummy celebrity who deserves to be spied on and publicly humiliated. MaryLou Who, who had come to this business as the daughter of a Hollywood gossip columnist, has immediately sensed the lucrative possibilities in what is not so very far from blackmail.

Vision Inc and CCS enter into a contract in terms of which CCS proposes that it provide the production and the personnel for production for the series (to be called "Payback") in London. From Vision's perspective, the series is not that expensive to produce, but CCS is a small outfit, and it does not have the cash necessary to support production. It would like Vision to finance the roughly \$10 million that the series would cost over a three year period – a year for start-up, then two years of continued production as the already shot episodes appear. Ideally, CCS would like the money upfront – a proposal that Vision is very skeptical about. CCS does have some possibilities of borrowing money from some other sources, but nowhere close to \$10 million – it could borrow perhaps \$3 million from wealthy investors, and could also probably obtain a \$2 million line of credit (special loan) from a commercial London bank. With respect to the wealthy investors, they would charge a reasonable interest rate (but would be concerned about whether completion of the project would actually take place), whereas the bank would charge very steep rates of interest, at least if the line of credit were immediately accessible up to the maximum amount and immediately repayable. But CCS does not really have access to more capital than that, either borrowed or in some other form, except from Vision Inc. – so ultimately, if Vision wanted to go forward, it would have to anticipate putting up in New York, which has partiality approach to returning suits from other jurisdictions, a total of \$5 million toward production costs over the three year period. Vision has concerns, too, that CCS shows that it has the funds necessary to complete production, and that it won't run out halfway through and leave Vision stuck with having to come up with yet more money – while CCS, for its part, wants to be sure that Vision won't simply walk away at some point from the project and leave it unfinished and without fully paying.

CCS also would need access to both Vision's worldwide distribution system for TV and cable – not a small matter, since Vision has built itself a brand name around its particular variety of trash, and is very careful to be sure that the trash it sells under its name is genuinely its kind of trash – it would hate to see its brand diluted by other kinds of trash. Indeed, CCS has suggested that both its name and Vision's name go on the final series as producers. MaryLou Who is genuinely unsure how to proceed on this issue – she

emphatically does not want a joint venture as a legal matter with CCS, but on the other hand, she wants to ensure certain standards of trashiness.

But MaryLou Who also has questions about how Vision should receive profits or revenues, including return of its invested capital, from this project – how much, in what way, on what kind of schedule, on what basis, both for itself and in relationship to CCS. Nonetheless, she is convinced that the proposal is a good one creatively, and has very strong worldwide profit possibilities, if the right kind of transactions can be structured and documented. She has asked you to propose a transactional structure that could make this deal work legally without jeopardizing Vision Inc's financial and ultimate legal interests. She asked you to draft a pragmatic and comprehensive Memorandum that includes legal considerations on how to structure such a transaction in light of the potential legal issues as soon as possible. As an eminent counsel, you have adverted to the well-known New-York applied multi-lateral conflict rule which states that the *lex loci contractus*(place of conclusion of contract) governs in contractual obligations unless the contract is to be performed elsewhere, in which case the *lex loci solutionis*(place of performance) applies, which is converse in London. Draft the Memorandum.

(25 Marks)

Question 2

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 3

Vusi Sibandze was born in South Africa in 1923. He lived there until 1950, residing in Soweto with his father, a miner, and employed in his father's business. One of Sibandze's sons, during testimony, said that when Sibandze spoke of Soweto, he always called it "home." In 1950, Sibandze went to Lusaka, Zambia to seek for work. He was employed by the Zambian government as chief mining inspector overseeing mining operations extending to South Africa. In Zambia he married a beautiful Swazi lady, the daughter of a gentleman also employed by the Zambian government. In 1959 his health broke down and he incurred tuberculosis, whereupon he was advised by doctors to recover in Mbabane due to the therapeutic weather conditions there lest his condition became fatal. Reluctantly, he left Zambia and spent the winter of 1950 in Mbabane returning to Zambia when the winter was over.

In 1960, he took a furnished house in Dalriach for a term of five years, renewable at the end of each year. He leased another house for a period of 21 years, renewable at the fifth, seventh or fourteenth year. He connected the two houses structurally, and held both until the time of his death. From 1960 to 1970 he would spend the winter in Swaziland and about eight months of the year in Zambia. In 1970 he gave up his house in Lusaka. From 1971 to 1983, he spent about two months in Zambia, two or three months in Tanzania, and the rest of the year in Mbabane, Siteki and Ezulwini. In 1983, he ceased to visit Zambia, thenceforward dividing his time between Siteki, Ezulwini and Mbabane. This mode of life continued until 1993. After that date he spent the whole year in Mbabane, Swaziland. He never bought a house or estate in Swaziland for himself or for either of his children. As far as he was concerned "he preferred living in furnished houses or hotels," so his son testified.

Sibandze died leaving an enormous property fortune and the Commissioner of Taxes in Swaziland is desirous of levying the relevant estate and other property tax on his remaining property. As Counsel to the Commissioner draft an objective legal opinion on the prospects of such intended exercise in readiness for probable court action/defence.

(25 Marks)

Question 4

Menzi Simelane, a Swazi national domiciled in France, died interstate leaving movable property in Nice, France. According to the Swazi conflict rule, succession to movables is governed by the *lex ultimi domicilii* of the *propositus*. According to the French conflict rule, the matter was to be governed by the *lex patriae*.

- (a) Assuming the Swazi courts adopt the total *renvoi* approach, how will the matter be resolved by the High Court of Swaziland? (20 Marks)
- (b) How would your answer to (a) change, if at all, in terms of the selected legal system, a convicted prostitute mistress could succeed to the movable property in place of the wife. (5 Marks)

Total (25 Marks)

Question 5

Render a comprehensive account of the status of the law of obligations with regard to the so-called "*proper law of the contract*" in our jurisdiction.

(25 Marks)