

**UNIVERSITY OF SWAZILAND**  
**FACULTY OF SOCIAL SCIENCE**  
**DEPARTMENT OF LAW**

245

**EXAMINATION PAPER, MAY 2012**  
**(MAIN)**

**TITLE OF PAPER** : **CONFLICT OF LAWS**  
**COURSE CODE** : **L404**  
**DURATION** : **3 HOURS**  
**MARKS ALLOCATED** : **100 MARKS**  
**INSTRUCTIONS** : **ANSWER QUESTION ONE**  
**WHICH IS COMPULSORY, &**  
**THREE (3) QUESTIONS**  
**OF YOUR CHOICE.**

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GRANTED BY THE PROCTOR.**

### **Question 1**

Father (domiciled in Brazil but resident in Mbabane) and Son (domiciled in Lesotho) are visiting an amusement park in Randburg, South Africa when an electric circuit breaks exploding on their roller-coaster ride and they both die intestate. At the time of his death Father has only two assets: land in Swaziland and a bank account in Brazil. After his death, Father's land is sold and the proceeds are added to the bank account in Brazil. Administrative proceedings concerning Father's estate are then brought in the High Court of Swaziland. There are only two claimants – Mother (the wife of Father), who is domiciled in Brazil, and Grandson (the son of Son), who is domiciled in Lesotho.

Under the law of intestate succession of all relevant countries (Brazil, Lesotho, Swaziland and South Africa), if Son died before Father or if Father and Son died at the same time, Father's assets go to Mother. On the other hand, under the law of all relevant countries, if Son outlived Father (if only for a second), then Mother and Grandson share Father's assets equally.

There is no evidence concerning who died first, Father or Son. Under the law of Brazil and South Africa, when a parent and a child both die in the same event, the rebuttable presumption is that they both died at the same time. Under the law of Swaziland and Lesotho, when a parent and a child both die in the same event, the rebuttable presumption is that the child died after the parent.

You are the Chief Justice presiding over this matter. Justiciouly referring to the relevant rules for choice of law, critically determine which legal system to apply as well as the legal entitlements, if at all, of Mother and Grandson.

**[25 Marks]**

## **Question 2**

“To say that the foreign law is to govern, and then not to apply its characterisation, is tantamount to not applying it at all. This is superficially convincing. But it is arguing in a circle to say that the foreign law governs the process of characterisation before the process of characterisation has led to the selection of the appropriate legal system.” (*Anonymous*)

Adverting to the relevant theoretical impediment on choice of law, fully discuss the substance of the above quote and offer a critical rebuttal of this critique.

**[25 Marks]**

## **Question 3**

Suppose the property of a Namibian citizen, resident in Mbabane Swaziland, has been the subject of seizure (expropriation) by revolutionaries (and subsequently endorsed by a Libyan Supreme Court judgment) in the course of a civil war in Libya.

Give an account of the principles (or rules) of conflict of laws relevant to whether this seizure (expropriation) will be recognised and enforced in Swaziland by motion of the Namibian who seeks to avoid contractual liability (on a sales contract with a Swazi national) based on impossibility of performance.

**[25 Marks]**

## **Question 4**

- a) P (a domiciliary of Zimbabwe) was invited by D (a domiciliary of Swaziland) to take a pleasure trip by car to Cape town, South Africa.

The trip began in Zimbabwe and was to end in Zimbabwe. While in Cape town, D drove the car into a telephone pole. P sues D for damages in the High Court of Swaziland. D asserts the defense of Zimbabwe's guest statute. Discuss. **(10)**

b) X (a domiciliary of Swaziland) became drunk in a bar in Namibia owned and run by D (a domiciliary of Namibia). After getting drunk at D's bar, X drove home to Swaziland, where he was involved in an accident with P (a domiciliary of Namibia). P sues D in a Namibian court under Namibia's Tavern Act, which imposes liability on tavern keepers for the accidents of those whom they intoxicate. Swaziland does not have such an Act.

D argues that Swazi law applies and makes an application to dismiss the case. Discuss. **(15)**

**[25 Marks]**

### **Question 5**

a) Explain the theory of *Renvoi*. With the aid of decided cases, indicate what, in your opinion, should be the attitude of the Swazi Courts to it. Highlight also what you understand to be the "incidental question" which arises in connection with the problem of *Renvoi*? **(20)**

b) Referring to relevant case law, explain what you understand to be "the incidental question." **(5)**

**[25 Marks]**

**Question 6**

**A)** The case of **Red Sea Insurance Co v Bouygues SA**, a judicial lodestar, engendered a 'season of reform' (of the old rule in *Phillips v Eyre*) in the area of choice of law involving delictual obligations. Trace the development of this reform and render a critical brief of the Red Sea case. **(20)**

**B)** Discuss US Alien Tort Claims Act, and decide whether in your opinion, the "Khulumani Plaintiffs" may jurisprudentially benefit from its provisions. **(5)**

**[25 Marks]**