

Renvoi v medzinárodnom práve súkromnom

The Renvoi in Private International Law

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Abstrakt

Na rozdiel od iných nariadení, jedno z posledných európskych nariadení, Nariadenie Európskeho parlamentu a Rady (EÚ) č. 650/2012 zo 4. júla 2012 o právomoci, rozhodnom práve, uznávaní a výkone rozhodnutí a prijatí a výkone verejných listín v dedičských veciach a o zavedení európskeho osvedčenia o dedičstve, pripúšťa tzv. Renvoi. Výsledkom je, že na úrovni Európskej únie bola obnovená diskusia o tomto právnom inštitúte. Nasledujúci príspevok skúma relevantnosť a spôsob použitia spätného odkazu v medzinárodnom práve súkromnom, osobitne pri vzniku právnych kolízií.

Abstract

In contrast to other regulations one of the recent European regulations, the *European Regulation of Succession*^[1] allows the so-called *renvoi*. As a result, the discussion about this construct has been rekindled at European level. This paper examines the relevance and treatment of the *renvoi* in private international law and in European conflict of law.

Kľúčové slová

Renvoi, medzinárodné právo súkromné, konflikt v medzinárodnom práve súkromnom, negatívny konflikt

Key Words

renvoi, private international law, conflict of law, negative conflict

1 Introduction

The *Renvoi* is one of the most controversial issues in private international law. On 22 February 1882, the French „*Cour de Cassation*“ made the landmark decision on the famous „*Forgo*“ case.

In it, the court accepted the remittal of the right of domicile of the Bavarian citizen Xavier Forgo, who died in France, to his last French right of residence and therefore applied French law to the succession after him.^[2]

Previously English and German courts had already accepted a remittal of the primarily invoked foreign right to the *lex fori* as the last right of domicile of a testator. However, the discussion of the actual problem of *renvoi* only began with the Forgo affair.^[3]

2 Term

In private international law (PIL), the term *renvoi* (actually only „reference“) is used internationally for a very specific type of reference: for a reference back or further to the foreign legal system appointed by the PIL of the *lex fori*, which is called comprehensive reference.

Such a reference arises internationally for various reasons. On the one hand, it can be taken from the meaning of the own reference to foreign law or be provided by law (e.g. Art. 4 sec. 1 to the German Introductory Law of the Civil Code (*EGBGB*); Art. 13 ital. PIL Act; Art. 5 sec. 1 and 2 Austrian. PIL Act and Art. 14 Swiss. IPRG). In some legal systems it is also completely excluded (Art. 32 Greek Civil Code).

3 Types

The term *renvoi* is closely related to the *transmission provision* and *comprehensive reference*.

First of all, it is necessary to clarify the difference between the types of reference – factual standard and comprehensive reference. These must be distinguished from each other, since the phenom of the *renvoi* can only occur in the case of a comprehensive reference.

A „substantive norm reference“ exists if a conflict rule refers directly to the substantive law of a foreign state, so that the conflict rule of the foreign state is not questioned but the foreign substantive law is directly applicable.^[4] This manifestation is also referred to as „*unconditional referral*“ since the application of foreign substantive law does not depend on whether the foreign conflict of laws rules recognize this reference.^[5]

A „*comprehensive reference*“, on the other hand, is defined as a reference to foreign law, including its conflict of laws provisions. This means that the foreign conflict of laws is first questioned. If the latter accepts the reference and invokes its own substantive law, the substantive law of the foreign state applies.^[6]

Contrary to the transmission provision, this is a „*conditional reference*“,^[7]

A *renvoi* can only occur if there is a comprehensive reference. This means that the conflict law of the foreign legal system does not accept the reference, but refers to another law.

There are two possible manifestations of *renvoi*: On the one hand, foreign law can refer back to the law of the country of origin (*first level renvoi* or *renvoi au premier degré*).^[8] On the other hand, it is possible that the law of a third country may be invoked (*second level renvoi* or *renvoi au second degré*).^[9]

4 Causes

The causes for a *renvoi* can be different. The most common causes are explained in more detail below.

4.1 Different Factors of Connection & Different Times of Connection

The most obvious cause for the occurrence of a *renvoi* is that different states use different factors of connection. This is the case, for example, if State A refers to habitual residence as the connecting factor, but State B uses nationality.^[10]

In German conflict-of-law law, nationality is often taken as the basis^[11], whereas other legal systems regularly use domicile.^[12] If, for example, a German with last residence in Switzerland dies, a German judge would apply German law for the determination of the legal succession (link to nationality), but a Swiss judge would refer to Swiss law (link to last residence).^[13] The same occurs when different states refer to different persons, e.g. State A applies the parents' home law in matters of custody but State B applies the child's home law.^[14]

Likewise, sometimes different times of connection are causal. For example, it may happen that in matrimonial property law, both states are based on the domicile of both spouses, but State A applies the time of the marriage and State B declares another point in time applicable.^[15]

4.2 Different Interpretations

Another reason for the occurrence of a *renvoi* is when two states use the same factor of connection, but each state interprets it differently. An example of this is the Forgo case described above. There the different interpretation consisted in the fact that one state suspended a residence permit for the domicile, but the other state did not. Thus, it came to a *renvoi* due to the different interpretation.^[16]

4.3 Different Qualifications

Similarly, different qualifications, i.e. different conflict-of-law classifications of states with the same factor of connection, can be the cause of a *renvoi*. This is the case, for example, if State A qualifies the limitation of the legal capacity of a married woman as a question of personal marriage effects and State B classifies the question under marital property law.^[17]

4.4 Referral to a Qualification

Finally, a referral to a qualification can lead to a *renvoi*. A referral to a qualification exists if the PIL does not define a system term, but refers to the law called for the qualification.^[18] An example for this case is that a US-American leaves an estate in Germany, because the US-American inheritance law distinguishes between *movables* and *immovables* in contrast to the German law. Depending on the qualification, there is a different assessment under inheritance law.^[19]

5 Fundamental Arguments for the Applicability of the Renvoi

When arguing for or against the application of *renvoi*, reference is repeatedly made to state sovereignty. On the one hand, one could be of the opinion that the application of a *first or second level renvoi* would result in the abdication of the sovereignty of the state, which would evade its collision-law mandate. This would argue against the application of *renvoi*.^[20] However, it may be argued that the court which follows the *renvoi* merely complies with a standard order which has been laid down by its own state in the legislation. This is therefore not constitutionally questionable.^[21] On the other hand one could be of the opinion that precisely the principle of sovereignty and the *Comitas inter gentium* based on it indicate the observance of *renvoi*. The sovereignty and the interests of the foreign state would only be fully respected if the court included the conflict-law preferences of foreign law in its decision.^[22]

A further point of discussion in the general pros and cons of the question of the application of *renvoi* is the question of whether *renvoi* can serve as a means of achieving greater conflict-law justice in

individual cases or even as an instrument for improving substantive law.^[23] With regard to the function of flexibilization, it can be stated that this is always present when the conflict of laws contains only a few formally defined connecting factors. An example of this is citizenship and the crime scene.^[24] However, the more the conflict of laws differentiates, the less the need for a correction by the *renvoi* becomes.^[25] The same applies to the *renvoi*'s function in achieving an improved substantive law. If the legislator wishes to favor certain persons, e.g. children, consumers or employees, it will provide alternative links so that recourse to *renvoi* is not necessary or contrary to the system.^[26]

The principle of international consistency, which underlies European conflict of laws, is of decisive importance for the admission of *renvoi*. It serves to promote international decision-making harmony by making decisions in the home country in the same way as the judge of the primarily appointed legal system would. On the other hand, it is well possible that through a *first level renvoi* domestic law can again be applied, which can be applied quickly and well by the domestic judge. Especially in the case of an accepted *second level renvoi*, disharmonies of decision and limping legal relationships can be avoided and a domestic decision in the foreign country can be enforced more easily.^[27]

Finally, the respect of the *renvoi* allows the courts to increasingly apply the *lex fori*. This ensures for the benefit of the courts and usually also of the parties that the law familiar to them is applied.^[28]

The foregoing makes it clear that there are arguments both for and against the compliance of the *renvoi*. All in all, however, the arguments for attention of the *renvoi* predominate, in particular the promotion of international decision-making harmony as well as the idea of simplifying the application of the law, so that overall the use of the *renvoi* can be advocated.

6 Relevance for International Consistency

The achievability of international consistency and decision-making harmony depends on whether the specific case is a first level *renvoi* or second level *renvoi*.

6.1 First Level Renvoi

With the first level *renvoi* it is problematic that an eternal back and forth of referrals could take place, since state A refers to state B and vice versa. This is also called „ping-pong game“ or „dead end of endless referral“.^[29] This problem exists only if the own right makes a comprehensive reference and the foreign right makes a comprehensive reference, but not if the own right or the foreign right applies a substantive reference.

In the case of a comprehensive referral, there are three ways of interrupting the Ping Pong game:^[30]

First, the state to which the referral is made may terminate the referral under domestic law. This is regulated, for example, in German law in Art. 4 sec. 1 to the German Introductory Law of the Civil Code (EGBGB). It breaks the chain of referrals back to the country and understands foreign referral as a normative reference.^[31]

Another possibility is the method of the double *renvoi*. This means that the comprehensive reference of foreign law is applied and that a domestic conflict of laws rule is not used again. In this case, too, the foreign conflict of laws will ultimately apply. If the foreign law then terminates the referral, the foreign substantive law is applicable.^[32]

Finally, it is possible for the domestic judge to look at the case from the perspective of the foreign judge whose right is invoked by the domestic conflict rule. This method is called *foreign court theory*.^[33]

6.2 Second Level Renvoi

In the cases of a *second level renvoi*, in contrast to the cases of a *first level renvoi*, a more memorable decision-making harmony is achieved. The reason for this is that in the case of comprehensive references, a referral loop always occurs, the termination of which is necessary for the decision to be made.^[34]

These loops occur much less frequently in *second level renvoi*. This is mainly due to the fact that State B does not refer back to State A, but to a third legal system (State C). The achievement of decision harmony in the case of *second level renvoi* depends on whether this is accepted.

The case is not problematic if the third legal system to which reference is made accepts the reference and invokes its own substantive law. Then a decision is reached between all legal systems.^[35] Even if the *second level renvoi* go further to a 4th or even 5th legal order. Decisive is that one of these jurisdictions accepts the referral. However, this case is very rare in practice.^[36]

It is less simple in the case where the *second level renvoi* is not accepted, but it is referred back to the legal order of State A or State B by the third PIL (State C) as a comprehensive reference. This is also referred to as *unaccepted second level renvoi*.^[37] In these cases, reference loops can occur in a similar way to the *first level renvoi*. This can jeopardize the international decision-making process if the referral chain is arbitrarily terminated.^[38]

7 Conclusion

In the present paper the institution of *renvoi*, a specific institution to the international private law has been analyzed. The foregoing makes it clear that there are arguments both for and against the compliance of the *renvoi*. All in all, however, the arguments for attention of the *renvoi* predominate, in particular the promotion of international decision-making harmony as well as the idea of simplifying the application of the law, so that overall the use of the *renvoi* can be advocated.

All in all it can be concluded, that the *renvoi* is an important method from both, the theoretical and the practical point of view. Overall, it can be stated that although the *renvoi* is not a „miracle cure“ for achieving decision-making harmony, there are a number of constellations in which compliance with *renvoi* is suitable for promoting international decision-making harmony in relations with third countries. Especially in the cases of a second level *renvoi*, it is often possible to reach agreement on a decision.

8 Literature

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Poznámky pod čiarou

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