

CHOICE OF LAW IN THE UNITED ARAB EMIRATES: THE NEED FOR REFORM

Ali Essa Aljasmi

Assistant Professor, Emirate Canadian University College, UAE

PhD in Law, Essex University, United Kingdom

Abstract

Conflict of laws rules in many legal systems, like any other legal rules, develop over time. However, the conflict rules in the UAE have not developed since 1985. The existing conflict rules may have been appropriate at the time of their adoption, but they may not be appropriate today. Since the UAE legislature has not amended these rules, this paper will endeavour to establish that the UAE choice of law rules need to be reformed by focusing on the content of various general and particular provisions, an seeking to identify deficiencies therein and appropriate potential reforms thereto. The paper will then examine ways to achieve such reforms. and concluded by arguing that conflict rules reforms are urgently needed to keep pace with the prosperity and growth in the UAE and to address the shortcomings and deficiencies in the existing UAE conflict rules.

Keywords: Choice of laws, History of Conflict of laws, United Arab Emirates, Reform, Civil Code

INTRODUCTION

The UAE legislature has regulated the issue of conflict of laws in Articles 10-28 of the UAE Civil Code.¹ Some of these provisions (Articles 11–21) determine the laws applicable to various issues, such as marriage, divorce, contract, and tort. Others (Articles 10 and 22–28) deal with more general aspects of the operation of the choice of law rules, such as classification, public policy, and renvoi.

¹ The Civil Code (or Civil Transactions Act) is contained in Federal Act 5/1985, as amended by Act 1/1987.

The UAE legislature has also regulated a few conflict issues in the Commercial Code.² For instance, Article 495 deals with conflicts regarding form and capacity in respect of a bill of exchange.³ In addition Article 594(1) provides for the application of provisions on bills of exchange (including Article 495) to promissory notes,⁴ and Article 595 provides for the application of the provisions on bills of exchange (including Article 495) to cheques.⁵

The UAE conflict rules in the Civil Code have been influenced by the Egyptian Civil Code. Thus most of these provisions are very similar to the conflict rules specified in the Egyptian Civil Code, with some rare exceptions. The UAE legislator has not amended these provisions since they were enacted in 1985. Consequently, after a lapse of 30 years, a question has arisen about the need for the reform of these rules and how this will be achieved or accomplished.

In view of this situation, the core of this paper will examine many of the conflict provisions currently contained in the UAE Civil Code, with a view to identifying any ambiguities and otherwise unsatisfactory features, and thus to establishing whether there is a need for reform of the UAE conflict rules. After this, consideration will be given to the manner in which the reform should take place. But first the paper will begin by exploring the history of the UAE conflict rules, and considering the significance of economic and social developments within the UAE, and of legal developments elsewhere, since their adoption.

² The Commercial Code (or Commercial Transactions Act) is contained in Federal Act 18/1993.

³ Article 495 of the Commercial Code provides that

- 1 - The form of a bill of exchange shall be governed by the law of the state where it is made.
- 2 - The capacity of the obligor of a bill of exchange is determined according to his national law, and where such law makes a renvoi to the law of another country, the latter shall apply.
- 3 - Where the governing law considers the obligor as a person lacking legal capacity, his obligation under the bill shall nevertheless remain valid if he signed the bill in a state under whose laws he is deemed to have full legal capacity.

⁴ Article 594(1) provides that ‘The provisions concerning the bill of exchange in regard to capacity, ..., shall apply to promissory notes, inasmuch as they are not inconsistent with the nature of a promissory note’.

⁵ Article 595 provides that ‘‘Subject to the provisions stipulated in this Part, the provisions concerning bills of exchange shall apply to checks, inasmuch as they are not inconsistent with the nature of a check’’.

The historical development

After the British withdrawal from the seven emirates (Abu Dhabi, Dubai, Sharjah, Umm Al Quwain, Ajman, Al Fujairah, and Ras Al Khaimah), a federal country was formed under the name of the United Arab Emirates on 2 December 1971. The legal system in this new country consisted of the local acts of each emirate, which only applied in the territory of that emirate, along with Islamic Shari'a law and customs. However, Articles 110, 120, and 121 of the UAE Constitution granted to federal authorities the right to enact federal legislation.

As the UAE was a newly established country, it relied on jurists and scholars from other Arab countries to draft its legislation. These jurists and scholars were influenced by their own laws - particularly Egyptian law, which in turn had been influenced by French law, because the relevant scholars had studied in France. As a result, most UAE enactments are very similar to Egyptian enactments. Nevertheless, the UAE Civil Code corresponds more closely to the Jordan Civil Code, which was influenced by Shari'a law and Egyptian law. Therefore, the choice of law rules contained in Articles 10–28 of the UAE Civil Code correspond to Articles 10-28 of the Egyptian Civil Code.

Although a UAE legislator has in some respects amended the Civil Code (or Civil Transactions Act), which is contained in Federal Act 5/1985, by Act 1/1987, the conflict of laws rules have not been amended at the time of writing this paper. However the legislator has, by Article 1(2) of the UAE Federal Act 28/2005 on Personal Status (Family Law), added a new provision, which insists that foreign law will only be applied where a party has so requested. Otherwise, the court will apply the *lex fori*.⁶ This enactment was designed to overrule the approach which had previously been adopted by the Dubai Court of Cassation.⁷ That court had regarded the conflict rules in respect to personal status as related to public policy. Consequently, the court needed to apply the forum's conflict rules, whether or not the parties had asked for the application of those rules. Additionally, in the application of foreign law, the

⁶ Article 1(2) provides that 'The provisions of this Law shall apply to citizens of the United Arab Emirates State unless non-Muslims among them have special provisions applicable to their community or confession. They shall equally apply to non-citizens unless one of them asks for the application of his law'.

⁷ The judiciary in the UAE is divided into a federal judiciary and a local judiciary in some emirates, such as Abu Dhabi, Dubai, and Ras Al Khaimah. The structure of the federal courts includes a first instance court, an appeal court, and the federal Supreme Court. There are also separate first instance courts, appeal courts, and cassation courts in Abu Dhabi, Dubai, and Ras Al Khaimah.

court had to investigate that law's provisions.⁸ Since the amendment the Dubai Court of Cassation has adopted the principle provided by Article 1(2) of the Personal Status Act.⁹

Since the UAE Civil Code was adopted in 1985, over 30 years ago, and (save for Act 28/2005 on Personal Status) there has been no subsequent amendment to the conflicts of laws rules, the question arises whether these rules need to be reformed, or whether they are still appropriate to regulate the conflict issues in current circumstances.

In reality, it can be argued that the UAE conflict of laws rules originate from the date of adoption of the Egyptian Civil Code in 1948, and its entry into force in October 1949. This means that more than 65 years have passed since the adoption of these rules. Moreover it is obvious from the history of the Egyptian conflict rules that these rules derived from various other countries' laws adopted before 1948. Therefore, the question arises whether the UAE conflict rules need to be reformed or developed after more than 65 years.

The need for reform

The nature of law and its characteristics are unstable and change and evolve to keep pace with the development of society. Conflict of laws rules have evolved at the international and regional level through international and regional instruments, as well as at the national level in many countries. The UAE conflict of laws need to be reformed to keep pace with rapid economic and social developments within of the UAE, as well as to keep pace with the development of modern conflict of law theories. There are many elements which support this argument in favour of such reform and development.

Firstly it is obvious from the history that the UAE legislature, when adopting conflict rules, did not have regard to decisions of local courts, since the UAE courts had not recognised or applied conflict rules before the enactment of the UAE Civil Code. Instead the legislator imported these rules from other countries' laws (particularly the Egyptian Civil Code).

Secondly, the legislator sought to address issues which could arise in the future, in order to attract numerous foreign people and international companies to the country with a view to advancing oil investment and prosperity. Nonetheless, the adoption of rules by importation does

⁸ See the Dubai Court of Cassation decisions in Case 26/2000, 26 June 2000; Case 31/200, 30 September 2000; Case 49/2000, 26 November 2000; Case 23/2004, 20 June 2004; Case 55/2004, 26 June 2005; and Case 24/2005, 26 June 2005.

⁹ See the Dubai Court of Cassation decisions in Case 52/2006, 3 June 2006; Case 127/2007, 1 April 2008; and Case 52/2010, 25 May 2010.

not always accurately express the true policy of the legislator. It may be assumed that that these conflict rules were formed as a part of the legislative policy at the time of enactment of the UAE Civil Code, but this policy may have changed in the 30 years since 1985, in view of the sharp increase in the number of foreign people and investments between 1985 and 2016.

The best evidence for this is that (with federal authorisation) the local government in Dubai has established the Dubai International Financial Centre (DIFC), which has its own enactments on choice of law, as well as substantive law, in respect of the commercial field, and which utilises modern conflict theories with a view to creating an environment for growth, progress, and economic development in the UAE and the wider region.¹⁰ Consequently, it is desirable that the UAE legislator should reform the conflict rules for the rest of the territory of the UAE, to make them consistent with its current legislative policy, with the aim of attracting foreign investment and foreign people in order to contribute to economic development.

Thirdly, the Explanatory Memorandum of the Civil Code expected evolution to take place in respect of conflict of laws, particularly in regard to contractual obligations. It pointed out that the legislator should choose an elastic formulation to allow the courts some scope for creativity, as well as to enable the use of recent developments in jurisprudence.¹¹ Consequently, it can be argued that it is more appropriate for the legislator to introduce rules reflecting such developments rather than leave the decision to the courts. This preference for legislation rather than the judicial decision-making stems from the fact that during the last 30 years, there has not been any judicial precedent in this respect.

Fourthly, the treaties and foreign enactments from which the Egyptian conflict rules were derived have already been amended or replaced by other treaties or enactments. For instance, the Hague Convention of 12 June 1902 relating to the settlement of the conflict of the laws concerning marriage, which is one source of the Egyptian conflict rules – particularly Article 13

¹⁰ The DIFC has its own courts and its own civil and commercial laws, to the exclusion of the normal UAE legislation on civil and commercial matters (including private international law). The DIFC ‘is designed to be a financial free zone offering a unique, independent legal and regulatory framework which help to create an environment of growth, progress, and economic development in the UAE and the wider region.’ The DIFC regulates choice of law by special enactments. See [www. http://difccourts.ae/](http://difccourts.ae/) (last visited on 25/12/2015).

¹¹ UAE Ministry of Justice, *Explanatory Memorandum of the Federal Act No 5 of 1985* (Civil Transactions Act), p. 29.

of the Egyptian Civil Code,¹² which corresponds to Article 12 of the UAE Civil Code¹³ – was replaced by the Hague Convention of 14 March 1978 on the Celebration and Recognition of the Validity of Marriages.¹⁴ Another source of Egyptian conflict rules is the Polish Private International Law Act of 1926, which was replaced by the new Polish Private International Law Act of 1965,¹⁵ which in turn was replaced by the Polish Private International Act of 2011.¹⁶ Egyptian conflict rules also derive from conflict rules contained in the German Civil Code that came into effect on 1 January 1900, and were replaced by the German Civil Code that entered into force on 1 September 1986.¹⁷ The rules were last amended by Article 4(4) of the Act of 1 October 2013.¹⁸

In view of these external and international developments in the content of conflict rules, it is clear that amendment of the corresponding old-fashioned conflict rules which continue to exist in Egyptian and the UAE law needs to be considered. In other words, the foreign enactments and international instruments from which the Egyptian conflict rules were derived have developed and adopted modern theories of conflict of laws, and the UAE conflict rules were derived from the Egyptian conflict rules; therefore, this logically means that the UAE conflict

¹² See R Meftah (القانون المدني ، الموسوعة الأعمال التحضيرية ، القانون المدني) *The Encyclopedia of Preparatory Work Of Civil Code*, first part (Alexandria, Egypt, Alwafaa legal library, 2015), p. 318.

¹³ UAE Ministry of Justice, *Explanatory Memorandum of the Federal Act No 5 of 1985* (Civil Transactions Act), p. 25.

¹⁴ See the Hague Conference website: www.hcch.net/index_en.php?act=text.display&tid=4, last accessed on 11 January 2016.

¹⁵ See A Kaczynski, *Polish Private International*, in *Yearbook of Private International Law*, Volume 6, edited by Sarcevic, Volken and Bonomi (Munich, Sellier European Law Publishers, Vol. VI, 2004), p. 204.

¹⁶ Article 80 of the Polish PIL Act 2011 provides: ‘The Law of 12 November 1965 – Private International Law (Journal of Laws No. 46, pos. 290, with amendments) shall be abrogated, except for the provisions relating to the maintenance obligations, which in this regard shall remain in force until 17 June, 2011’.

¹⁷ See R Gildeggen and J Langkeit, *The New Conflict of Laws Code Provisions of the Federal Republic of Germany: Introductory Comment and Translation*, (1987) 17 *Georgia Journal of International and Comparative Law*, p. 229.

¹⁸ In the version promulgated on 21 September 1994, Federal Law Gazette [Bundesgesetzblatt] I p. 2494, last amended by Article 4(4) of the Act of 1 October 2013, Federal Law Gazette I p. 3719.

laws need to be reformed. In particular, there are some conflict rules in the UAE Civil Code which have not kept pace with modern theories in the field of choice of law. It has also been argued that the Egyptian conflict rules (and the UAE conflict rules) are unable to keep up with technical developments in the modern era, and that this often puts judges in a troublesome situation if they hear conflict cases related to such developments, such as disputes related to the Internet.¹⁹

A final reason for reforming the UAE conflict rules lies in the fact that these conflict rules have not adequately addressed all the relevant issues (as will be shown below). Although there is a shortage of monographs in respect of the conflict of laws in the UAE, a few scholarly articles and casebooks do argue in favour of amending the conflicts rules in the UAE Civil Code or adding other conflict rules in order to address the shortcomings and deficiencies in the UAE conflict rules. Additionally, a similar argument is made by Egyptian scholars in regard to the Egyptian conflict rules, which are very similar to the UAE rules,

Article 23 of the Civil Code confirms the incompleteness of the choice of laws in the UAE: 'The principles of private international law shall apply in the absence of a relevant provision in the foregoing Articles governing the conflict of laws'. This article grants the court the ability to apply general principles of private international law to determine the appropriate conflict rule for the matter in question, where it is not governed by any provision of the conflict rules specified in the UAE Civil Code. The legislator of this provision also needs to keep abreast of recent developments in the field of conflicts of law.

The current provisions

The choice of law rules specified in the UAE Civil Code may be divided into two types. Some provisions deal with general aspects of the operation of the choice of law rules (Articles 10 and 22–28). Others (Articles 11–21) determine the law applicable to various particular issues. This next two sections will respectively address the content of various general and particular provisions, and will seek to identify deficiencies therein and appropriate potential reforms thereto.

¹⁹ A A Salama, (خمسون عام خلت من عمر قواعد التنازع المصرية الحاجة إلى التعديل والاستقلال), *Fifty years ago from the age of the Egyptian conflict rules the need to be amended and independence*, (1997) 53 Egyptian Journal of International law, p. 18.

General Provisions

Regarding questions of choice of law, some provisions apply in all types of case. These will be examined in the following sub-sections.

Classification

The choice of law rules specified by the UAE legislation neither deal with all legal issues by means of a single general provision nor create a highly specific rule for each detailed legal issue. Rather, the approach adopted is to divide these legal issues into different categories that include legal issues with similar features. Thus, a court called on to determine the law applicable to any relationship or legal issue must determine the category to which the relationship or issue belongs. This procedure is known as classification.²⁰ Thus the question arises as to the law by reference to which the court should classify a legal issue or a relationship.

The UAE legislature has adapted Bartin's theory of classification in Article 10 of the Civil Code, which provides: "The law of the State of the United Arab Emirates shall be the authoritative source in determining relationships when the nature of such relationships requires being determined in a suit in which there is a conflict of laws as to the law to be applied between the parties."

This Article establishes that UAE law (the *lex fori*) determines the nature of a relationship for the purpose of including it in a particular category in order to identify the law governing the relationship. However, after the court has determined the applicable law in this way, other classifications may become relevant under the *lex causae*. In any event, when interpreting the forum's conflict rules in accordance with Article 10, the court should use a broader concept of issues or relationships than that contained in its internal law, so that its conflict rules are able to absorb issues and relationships that exist under various foreign legal systems. Such broadmindedness is authorised by Article 23 of the Civil Code.²¹

Furthermore, the UAE legislator has adopted an exception to Bartin's theory by virtue of Article 18(2), which provides that "The law of the state in which property is located shall determine whether such property is real or movable." Consequently, the law of the country where the property is located governs the classification of a property's nature as immovable or movable.

²⁰ See A S Alsuboosi, *Choice of Law in Tort - A Comparative Study involving the Laws of the United Arab Emirates and of Other Countries*, (PhD Thesis, University of Essex, 2009), p. 80. See also A E Aljasmī, (القانون الضار الواجب التطبيق على الفعل الضار) *The Law Applicable to Torts* (UAE Researcher, 1st edition, 2011), p. 23.

²¹ O M Abd Al-aal, (الوسيط في تنازع القوانين) *Conflict of law* (Dubai Police Academy, 2008), p. 113.

Renvoi

In any legal system, there are two kinds of rule: substantive rules and choice of law rules. When the forum's choice of law rules point to the application of a foreign law, the question arises as to whether the court should simply apply the internal substantive rules of that foreign law, or whether it should also take into account the conflict rules of the said foreign law. In the latter case, some version of the doctrine of renvoi will be utilized. In other words, the question of renvoi will arise when the forum's conflict rule refers to a foreign law; but the conflict rules of that law refer the question to the forum law or to the law of a third country.²²

In the UAE, Article 26 of the Civil Code²³ adopts a general principle and an exception. The general principle is the rejection of renvoi and the application of the domestic provisions of the applicable law. The exception is that if the applicable law refers to the *lex fori*, the UAE court will accept the renvoi and apply the domestic provisions of UAE law. In addition, Article 495 of the UAE Commercial Code makes another exception, in favor of application of the law of a third country when the applicable law refers to the law of the third country in the case of an obligor's capacity regarding a bill of exchange.²⁴

Regarding renvoi, the majority of scholars argue that it should not be applied in the area of contractual obligations.²⁵ Accordingly, with regard to the EU, the Rome I Regulation excludes

²² Dicey, Morris and Collins, *The Conflict of Laws* (Sweet & Maxwell, UK, 15th edition, 2012), p. 79.

²³ Article 26 provides: "(1) If it is established that a foreign law is to be applied, only the domestic provisions thereof shall be applied, to the exclusion of those provisions relating to private international law.

(2) Provided that the law of the United Arab Emirates shall apply if international law relating to applicable law provides that United Arab Emirates law shall apply."

²⁴ Article 495(2) of the Commercial Code provides: "The capacity of the obligor of a bill of exchange is determined according to the law of his country; and where such laws refer to that of another State, this latter shall apply."

²⁵ See J O'Brien, *Conflict of Laws* (Cavendish Publishing Ltd, UK, 2nd edition, 1999), p. 140. See also T Einhorn, *Private International Law in Israel* (Wolters Kluwer Law and Business, New York, 2nd Edition), p. 56; G V Calster, *European Private International Law* (Hart Publishing, Oxford, 2013), p. 8; and J Lookofsky and Ketilbjorn, *European Union Private International Law in Contract and Tort* (DJOF Publishing, Copenhagen, 1st edition, 2009), p. 22.

the application of renvoi within its scope by virtue of Article 20.²⁶ A similar provision is made by the Rome II Regulation with respect to tort obligations by virtue of Article 24.²⁷ Consequently, it is appropriate that the UAE legislator should add to Article 27 a provision that renvoi shall not apply to contractual and tortious obligations.

Countries with multiple legal systems

In some countries, more than one law governs some or all matters, and this situation may add a further level of complication to the operation of private international law. There are two types of such situations. The first type occurs where a federal state, such as the UK or the USA, is composed of several territories, and each territory has its own law with respect to the matter in question. We may then speak of an inter-territorial conflict. The second type of situation occurs where a country has different laws on the personal status of different groups of people according to their religion. For example, the Egyptian legislation provides different rules on the personal status of Muslims, Christians, and Jews. This may be referred to as an inter-personal conflict.

The UAE legislature has addressed both inter-territorial and inter-personal conflicts in Article 25 of the Civil Code²⁸, and this distinguishes between two situations. The first situation occurs when the law applicable to the matter in question has a provision to solve an internal conflict of laws. In this case, the court will apply this law in determining which law to apply. In the second situation, the applicable law does not contain any provisions to solve this issue. In this situation, a distinction can be drawn between inter-territorial conflicts and inter-personal

²⁶ Article 20 of the Regulation provides: "The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation."

²⁷ Article 24 of the Rome II Regulation provides: " The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law."

²⁸ Article 25 of Civil Code provides: "Where, in the provisions of the preceding Articles the governing law is that of a specific country that has a multi legislative system, the domestic law in this country shall indicate which law in this system should be applied. In the absence of such indication, the prevailing law or the domicile, as the case may be, shall apply."

conflicts.²⁹ In the case of inter-territorial conflict, the UAE court will apply the law of residence. However, in the case of inter-personal conflict, the court will apply the “prevailing law.”³⁰

Although the legislature regulates the question of countries with multiple legal systems, several questions may arise. For instance, it seems unfortunate that Article 25 does not explicitly provide that each territory with its own legal system should be treated as a country in determining the applicable law in the case where the choice of law rule laid down by the UAE Civil Code is based on a territorial connection (such as the residence of a person, the place where the events constituting a tort occurred, or the place where a contract was concluded). Such a provision has been adopted by the Rome I Regulation. Another problem may arise in the case of inter-territorial conflicts when the applicable law does not contain any provisions to solve the issue, and the UAE court is directed to apply the law of residence, but the party in question resides in a country other than the federal state.³¹

Moreover, the application of the “prevailing law” in the case of interpersonal conflict may lead to strange results, or it may not be accepted by the parties. It seems that the reference is to the dominant law, in the sense of the law which applies to the largest proportion of the population. Thus the prevailing law may be a personal status law based on Christianity, but one party involved in the case may be Muslim and other party Jewish. In such a case the application of the personal status law based on Christianity to the relationship between the Muslim and the Jewish parties may be regarded as unacceptable.

Some might argue that these questions may be solved by applying the general principles of private international law. But it seems desirable that the legislator should address such questions.

Special legislation and international conventions

In Article 22 of the Civil Code, the UAE legislator has provided that “The provisions of the foregoing Articles shall not apply in cases where there is a contrary provision in a special law or in an international convention in force in the State.” Consequently, if a choice of laws in any UAE special Act is incompatible with the choice of laws in the Civil Code, preference will be given to the application of the conflicts rule in that special Act. This provision adopts the

²⁹ O M Abd Al-aal, n. 22 above, p. 198.

³⁰ Ibid.

³¹ A A Salama, (القانون الدولي الخاص الإماراتي) *The UAE Private International Law* (The UAE University, 1st edition, 2002), p. 124.

principle of *lex specialis derogat legi generali*. In addition, Article 22 ensures that preference is given to the application of conflict rules specified in any international convention in force in the UAE, so as to prevail over the conflict rules specified in the Civil Code.

General principles of private international law

Article 23 of the Civil Code³² grants the court the ability to apply general principles of private international law in order to determine the conflict rule that is appropriate to the matter in question where no existing conflict rules govern the matter in question. In order to enable a conflict rule to be recognised as a general principle of private international law, it must have been widely adopted. One must look for adoption in international treaties or similar measures (such as EU Regulations), or by numerous legal systems, national courts in various countries, international courts, and international arbitrations.³³ On the basis of Article 23 the Dubai Court of Cassation in two cases has decided on the application of the law of nationality of a person who seeks a child custody order.³⁴

Public policy

The UAE legislation, similar to many others, recognizes the principle of a saving in favour of the forum's public policy in the context of choice of law rules. Such a saving is provided for by Article 27 of the UAE Civil Code.³⁵ However, the UAE legislation has added the terms "Islamic Shari'a" in Article 27. Thus, the normally applicable law will be set aside if its provisions are manifestly incompatible with the UAE public policy or Islamic Shari'a. It should be noted that not all the rules of Shari'a law establish a public policy designed to have universal scope. Some of

³² Article 23 of Civil Code provides: "The principles of private international law shall apply in the absence of a relevant provision in the foregoing Articles governing the conflict of laws."

³³ S Rashid, (دور المادة 24 مدني في حل مشكلات تنازع القوانين) "The role of Article 24 to solve the problems of conflict of laws" (Cairo University), p. 8.

³⁴ See the Dubai Court of Cassation decisions in Case 68/2003, 25 January 2004, and Case 24/2005, 26 June 2005.

³⁵ Article 27 of the Civil Code provides: "It shall not be permissible to apply the provisions of a law specified by the preceding Articles if such provisions are contrary to Islamic Shari'a, public order, or morals in the State of the United Arab Emirates."

its provisions establish a public policy that is applicable only to Muslims, while others provisions give rise to a public policy that is applicable to both Muslims and non-Muslims.³⁶

The UAE legislature has not stipulated expressly for the application of overriding mandatory rules. Nonetheless, some argue that a UAE court may apply overriding mandatory rules of the *lex fori* in the application of the public policy proviso specified by Article 27 of the Civil Code.³⁷ However, it seems preferable that the legislator should enact a new Article that explicitly provides for the application of overriding mandatory provisions of the *lex fori*.

Particular Issues

The personal status of individuals

With respect to personal status, the UAE conflict laws are based on nationality to determine the applicable law. According to Article 11(1) of the Civil Code, the civil status and capacity of a person are governed by the law of his or her nationality. However, the legislator provides an exception to this provision in cases where the relevant transaction was concluded and its results materialised in the UAE. In such a situation, where one party lacks capacity according to the law of his or her nationality, and it is not easy for the other party to discover the incapacity, this incapacity will be disregarded.³⁸

Furthermore, pursuant to Article 12(1), the law of each party's nationality at the time of marriage will govern the substantive conditions for the validity of the marriage related to this party.³⁹ In other words, the UAE legislature adopted the principle of distributive application of the

³⁶ O M Abd Al-aal, n. 22 above, p. 385.

³⁷ *Ibid*, p. 367.

³⁸ Article 11(1) provides: "Civil status and capacity of persons are governed by the law of the State to which they belong by nationality. However, in financial dealings transacted in the State of the United Arab Emirates and producing their effects therein, should one of the parties be an incapacitated alien and the reason of his incapacity is not easily detected by the other party, this reason shall not affect his capacity." The UAE Ministry of Justice: elaws.gov.ae/ArLegislations.aspx. (last visited on 12/03/2016).

³⁹ Article 12(1) provides: "For the objective conditions for the validity of marriage, the law of each of the spouses at the time of the conclusion of the marriage shall be referred to." The UAE Ministry of Justice: elaws.gov.ae/ArLegislations.aspx. (last visited on 12/03/2016).

laws of nationality of both parties except the conditions relating to prohibited marriage.⁴⁰ In contrast, as regards the form of marriage, it is sufficient that the marriage satisfies the formal requirements of the law of the country in which the marriage concluded, or alternative that it satisfies those of the laws of both parties' nationalities.⁴¹ Therefore, if the parties have different nationalities, the second alternative requires that the marriage should comply with the form that is required in both laws; thus the cumulative application to both laws is required.⁴²

Furthermore, regarding the effects of marriage, Article 13 of the Civil Code provides for the application of the law of the husband's nationality at the time of marriage. It also subjects divorce by unilateral will (talaq) to the law of the husband's nationality at the time of divorce, and divorce (tatleq) or separation by judicial decision to the law of the husband's nationality at the time when the judicial proceedings are brought.⁴³ However a major exception is made by Article 14 of the Civil Code, so that if one of the parties has UAE nationality at the time of the marriage, the law of the UAE will apply to marriage and its effects and to divorce, except as regards capacity to marry.⁴⁴ As regards maintenance obligations, in general the law of nationality of the person by whom the obligation is owed will apply.⁴⁵ By way of exception, as regards the

⁴⁰ See A A Salama, (علم قاعدة التنازع والاختيار بين الشرائع), *The Knowledge of Conflicts Rule and Choice between Legislations*, (Maktabat Al-Jala Al-Jadid, Egypt, 1st Edition, 1996), p. 777.

⁴¹ Article 12(2) of the Civil Code provides: "With regard to the form, a marriage between owt foreigners or between a national and a foreigner shall be deemed to be valid if it is contracted in accordance with the rules of the country in which it is concluded, or if the rules laid down by the law of each of the spouses have been observed".

⁴² O M Abd Al-aal, n. 22 above, p. 518.

⁴³ Article 13 of the Civil Code provides: "1 - The law of the State of the husband upon the conclusion of the marriage shall govern the personal and financial impacts set by the contract of marriage.

2 - On the other hand, divorce shall be governed by the law of the State of the husband upon the time of divorce. As for the cases of divorce and separation, the law of the State of the husband upon the filing of the case shall apply."

⁴⁴ Article 14 provides: "In cases referred to in the preceding two articles, should one of the spouses be a national upon the conclusion of marriage, the law of the United Arab Emirates alone shall apply, with the exception of the condition of capacity for marriage" .

⁴⁵ Article 15 provides: "Obligations to support relatives shall be governed by the law of the person having such obligation."

protection of incompetent persons (by way of trusteeship, guardianship, and maintenance), Article 16 provides the application of the law of the nationality of the person requiring protection.⁴⁶

According to Article 17, the law of the deceased's nationality at the time of death will govern intestate succession to his property,⁴⁷ and the law of the nationality of the testator at the time of death will govern the substantive provisions of wills.⁴⁸ However, the UAE law will apply to wills relating to immovable property⁴⁹ located in the UAE.

The foregoing discussion has demonstrated that under the UAE legislation most issues concerning family matters or succession on death are subject to the law of the nationality, rather than the domicile or habitual residence, of the person involved. However, the current international trend is towards the use of habitual residence (rather than nationality) as the main connecting factor. For instance, with respect to the law applicable to divorce and legal separation, the Rome III Regulation gives priority to the spouses' habitual residence.⁵⁰ Furthermore, regarding the choice of law with respect to succession, the EU Regulation on Succession⁵¹ refers primarily to the law of the deceased's habitual residence.⁵² The Hague

⁴⁶ Article 16 provides: "Substantive matters relating to guardianship, trusteeship and maintenance and other systems laid down for the protection of persons having no competence or of defective competence or of absent persons shall be governed by the law of the person requiring to be protected."

⁴⁷ Article 17(1) provides: "Inheritance shall be governed by the law of the deceased at the time of his death."

⁴⁸ Article 17(3) provides: "The substantive provisions governing testamentary dispositions and other dispositions taking effect after death shall be governed by the law of the state of which the person making such dispositions is a national at the time of his death."

⁴⁹ Article 17(5) provides: " Provided that the law of the United Arab Emirates prevails regarding the will issued by a foreigner about the real - estates thereof in the State."

⁵⁰ EU Council Regulation 1259/2010, implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, [2010] OJ L343/10. See especially Article 8(1) and (2).

⁵¹ EU Regulation 650/2012 on jurisdiction, applicable law, recognition, and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, [2012] OJ L201/107.

⁵² Article 21(1) provides: "Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death."

Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons gives priority to the deceased's habitual residence.⁵³

Therefore, the question arises whether the UAE should legislate to follow this trend, or whether it is more appropriate to retain the existing UAE approach because the local law on personal status is based on religion (Shar'ia law), or whether change is desirable in some (but not all) situations. For instance, some argue in favor of the application the law of the deceased's habitual residence because the application of this law is consistent and compatible with economic, social, and political considerations in the country where property is located.⁵⁴ Consequently, these questions need further examination before the legislator takes the decision to change its approach or keep it.

Moreover, there is another international trend in regard to the choice of law with respect to personal status, in favour of granting the parties the right to determine the applicable law. For instance, the Rome III Regulation grants a spouses the right to determine by agreement the law that governs a divorce or legal separation between them, though it confines the permissible range of choice to the law of the country in which the spouses are habitually resident, or were last habitual resident and one of the spouses is still resident, or the law of one spouse's nationality, or the *lex fori*.⁵⁵ Furthermore, regarding succession, the EU Regulation on Succession enable a testator to choose the law of his nationality to govern his succession,

⁵³ Article 3 provides : " (1) Succession is governed by the law of the State in which the deceased at the time of his death was habitually resident, if he was then a national of that State. (2) Succession is also governed by the law of the State in which the deceased at the time of his death was habitually resident if he had been resident there for a period of no less than five years immediately preceding his death. However, in exceptional circumstances, if at the time of his death he was manifestly more closely connected with the State of which he was then a national, the law of that State applies." For the Convention text, see <https://assets.hcch.net/docs/5af01fa4-c81f-4e99-b214-64421135069f.pdf> (last visited on 16/4/2016). The Convention has not entered into force.

⁵⁴ O M Abd Al-aal, n. 22 above, p. 603.

⁵⁵ Article 5 (1) of Rome III Regulation provides: "The spouses may agree to designate the law applicable to divorce and legal separation provided that it is one of the following laws:

- (a) the law of the State where the spouses are habitually resident at the time the agreement is concluded; or
- (b) the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded; or
- (c) the law of the State of nationality of either spouse at the time the agreement is concluded; or
- (d) the law of the *forum*."

instead of the law of his habitual residence.⁵⁶ The Hague Convention of Succession also grants the person the right to determine the law governing his or her succession but confines it to the law of his or her nationality or the law of the country in which he or she was habitually resident at the time of the choice of law or the time of death.⁵⁷ Thus, the question will arise regarding whether the UAE legislator should adopt such provisions granting the parties a right to determine applicable law for issues pertaining to personal status or succession.

Apart from these broad issues of conflict policy, legislative attention seems desirable with regard to certain existing UAE enactments which appear to be ill-drafted.

Thus Article 1(2) of the Personal Status Act provides that 'The provisions of this Law shall apply to citizens of the UAE State unless non-Muslims among them have special provisions applicable to their community or confession. They shall equally apply to non-citizens unless one of them asks for the application of his law'.

The drafting of this article – particularly this part: 'They shall equally apply to non-citizens unless one of them asks for the application of his law' – could be interpreted literally as meaning that this Article grants any party the right to ask for the application of the law of his own of nationality (since the legislator relies on the nationality when regulating the conflict rules in the UAE Civil Code in respect of personal status). In other words, the literal interpretation of this article means that the law of any party may be applied if that party requests its application, regardless of the law specified by the conflict rules in the Civil Code in respect of personal status.⁵⁸ Nevertheless, this interpretation cannot be accepted for many reasons. Conflict will arise if the parties have different nationalities and each of them asks to apply his law. The question of which law to consider will arise in this case.

In addition, the aim of legislator when formulating the text of this article was the adoption of the principle that, for a foreign law to be applied, a party should request its application. Since the committee that prepared the draft of the Personal Status Act included judges from the UAE Supreme Court, the Personal Status Act was influenced by approach adopted by the Supreme

⁵⁶ Article 22(1) of Regulation on Succession provides: "A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death."

⁵⁷ Article 5(1) of the Hague Convention of Succession provides: "A person may designate the law of a particular State to govern the succession to the whole of his estate. The designation will be effective only if at the time of the designation or of his death such person was a national of that State or had his habitual residence there." The Convention has not entered into force.

⁵⁸ Interview with Judge Jassem Al Hosni (of the Dubai Court of Appeal) through WhatsApp on 17 December 2015.

Court, that it is for the parties to ask for the application of foreign law and provide proof of its content. Thus, it seems that the right interpretation of this article is that the UAE Personal Status Act will apply to non-citizens unless a party requests application of the law that is specified by the conflict rules contained in the Civil Code. Consequently, it is appropriate for the legislator to redraft this article.⁵⁹

Another drafting defect exists in Article 24 of the Civil Code, which provides that ‘The law of the UAE shall apply with regards to stateless persons, or to persons having multiple nationalities. However, [for] people proven to hold the UAE nationality and the nationality of another State, the law of the UAE shall be applied’.

It is clear from the wording of the first sentence of this article that the UAE law will apply instead of the applicable law, which is determined by the conflict rules (based on nationality) in the Civil Code in the case of stateless persons and persons having multiple nationalities, whether the UAE nationality is one of these multiple nationalities or not. This is obvious from the wording of the second sentence of the Article –‘However, [for] people proven to hold the UAE nationality and the nationality of another State, the law of the UAE shall be applied’ – which deals with a case when the UAE nationality is one of the multiple nationalities. Thus there is repetition in the second sentence of the Article.⁶⁰

More importantly, the application of UAE law in the case of a party with multiple foreign nationalities may lead to unfamiliar and inappropriate results, particularly in a case when the party has no connection with the UAE. The application of the UAE law may also be criticised in a case when the stateless person has no connection with the UAE. However, the application of the UAE law may be acceptable if the stateless person has his habitual residence or domicile in the UAE.⁶¹

Corporate status

Under Article 11(2) of the Civil Code, the legal status and capacity of a company are subjected to the law of the country in which its main administrative centre is located. But an important

⁵⁹ The suggestion that this article should be redrafted does not mean the present writer agrees with the policy underlying this provision. Rather, the redrafting of this article is needed in order to be consistent with the legislative purpose and the UAE court approach.

⁶⁰ O M Abdel-aal, n 22 above, p. 442.

⁶¹ Ibid.

exception is made: insofar as the company conducts activities in the UAE, the internal law of the UAE will apply.⁶²

Of course, there is a trend in EU law towards respect for the law of the place of incorporation and against that of the place of central administration.⁶³ Thus, the legislator needs to decide whether to change its approach (applying the theory of a main administrative centre) or keep it. Some argue that the best solution the UAE legislator should adopt is that the company's capacity should be governed by the law of the country in which the business was incorporated. In cases where there is some difficulty in determining the place of incorporation, the legislator should follow the law of the country in which the company's administrative centre is located.⁶⁴

It also seems desirable that consideration should be given as to whether the exception in respect of local activities should be retained; and, if so, whether it should be reformulated by way of a clearer and narrower provision.

Property rights

The UAE legislator has subjected immovable property rights, such as possession, ownership, and other rights *in rem*, to the law of the country in which the immovable property is situated (the *lex situs*). The legislator has adopted the same principle in respect of movable property. Thus movable property rights will be governed by the law of the country where the movable property was located at the time of the occurrence of the situation that gives rise to the rights.⁶⁵

⁶² Article 11(2) provides: "The legal system related to foreign juridical personalities, such as companies, associations, institutions and others shall be governed by the law of the State where such personalities have the actual headquarters thereof. Should such personalities carry out an activity in the United Arab Emirates State, the national Law shall prevail."The UAE Ministry of Justice: elaws.gov.ae/ArLegislations.aspx. (last visited on 12/03/2016).

⁶³ J Borg-Barthet, *A new approach to the governing law of companies in the EU: a legislative proposal*, (2010) 6 (3) *Journal of Private International Law*, p. 594.

⁶⁴ H Alustath, *Choice of Law in respect of contracts in the United Arab Emirates and the European Union; and related aspects of Private International Law in relation to the Dubai International Financial Centre*. (PhD thesis, University of Essex, 2016), p. 87.

⁶⁵ Article 18(1) of Civil Code provides: " Possession, ownership and over property shall be governed by the *lex situs* in the case at real property, and movable property shall be subject to the law of the place in which such

This provision resolves the temporal conflict where the location of a movable asset has changed over time.

Contracts

The UAE legislation, like that of most other countries, grants to contracting parties the freedom to choose expressly or impliedly the applicable law; however, if no such choice is made, the court will apply the default rules. Thus, Article 19(1) of the Civil Code provides that the form and substance of contractual obligations shall be governed by the law of the state in which the contracting parties are both residents if they are residents in the same state; but if they are residing in different states, the law of the state in which the contract was concluded shall apply unless they agree, or it is apparent from the circumstances that the intention was, that another law should apply.

It should be noted that the official English translation of Article 19 might be interpreted as restricting the parties' freedom available under Article 19 to cases where the parties are not resident in the same country. However, this interpretation is incorrect, as the text of the authoritative Arabic version makes it clear that the Article enables the parties to choose explicitly or impliedly the applicable law even when they reside in the same country. If the parties do not choose the applicable law, the court will use the default rules to apply the law of the parties' common residence if a common residence exists, and if not, the law of the place of contracting will be applied. The text in Arabic is clear, and all Arab commentators tend to agree.⁶⁶

Moreover, UAE courts have admitted this interpretation in many decisions. For instance, the federal Supreme Court has decided in numerous cases that the law of the parties' common residence will govern their contract if the parties do not select the applicable law.⁶⁷ This interpretation is consistent with the international trend in respect of conflict rules in the field of

property is at the time when the cause resulting in the acquisition or loss of possession, ownership or other rights over the property arose."

⁶⁶ See A Elhawary, (الموجز في القانون الدولي الخاص الاماراتي) *The Emirate Private International Law* (Jordan, Ithraa Publishing and Distribution, 3rd edition, 2012), p. 458. See also O M Abd Al-aal, note 22 above, p. 697.

⁶⁷ See the UAE federal Supreme Court decisions in Case 212, 255/1990, 19 June 1990; Case 201, 270/1998, 15 February 1998; and Case 364/2005, 17 May 2005.

contract law, and it is based on granting the parties the freedom to determine the applicable law as the primary rule. If they do not, the court will apply the default rules.

After evaluating the UAE approach in Article 19, it can be argued that granting the parties the freedom to select an applicable law is recognised as a desirable approach in various legal systems and various international conventions, regulations, and treaties. On the other hand, the default rules adopted by Article 19(1) are open to criticism. The parties often do not reside in the same country. Moreover, in recent years, numerous contracts have come to be concluded electronically; hence, the default rule in favour of the law of the place of contracting gives rise to increasing difficulty in determining that place. Additionally, the default rules utilise rigid criteria which may not be appropriate to particular types of contract, such as banking transactions⁶⁸ or agency contracts. Moreover, the UAE legislation does not provide for an escape clause in favour of a law which has a closer connection to the contract.

Further, the UAE legislation does not contain any explicit provisions in the field of choice of law designed to secure protection of weaker parties in relation to certain contracts, such as consumer, insurance, and employment contracts. However, it is recognised elsewhere that these kinds of contract require special provisions with respect to conflict rules.⁶⁹

Consequently, it seems to the present writer that it would be better if the legislator amended Article 19(1) by providing for the application of modern theories in place of the default rules, as well as studying whether it is better to adopt an escape clause in favour of the law which has the closest connection with the contract. Furthermore, it would be desirable to provide special rules for certain kinds of contracts, such as banking transactions, agency contracts, consumer contracts, insurance contracts, and employment contracts.

Torts and restitutional obligations

The UAE legislation, like that of most other Arab countries, has adopted a principle of application of the *lex loci delicti* in the case of non-contractual obligations. Thus Article 20 of the UAE Civil Code provides that

1 - Non-contractual commitments shall be governed by the law of the State where the incident causing the commitment takes place.

⁶⁸ O M Abd Al-aal, n 22 above, p. 744.

⁶⁹ See Dicey, Morris and Collins, n 23 above, p. 1948. See also P Stone, *EU Private International Law* (Elgar European Law, UK, 3rd edition, 2014), p. 343.

2 - The provisions of the preceding paragraph shall not apply to commitments arising from an illegal business and to incidents carried out abroad and considered legal in the UAE, even if they are deemed illegal in the country where they take place.

It should be noted that non-contractual obligations in this article include both tortious claims and claims arising from unjust enrichment. Thus, some argue that it would be more appropriate if the legislator were to regulate the two categories by special rules, since each of them has different characteristics and elements.⁷⁰ The Rome II Regulation also differentiates between them in respect of determining the applicable law.⁷¹

It is obvious that the UAE legislature in Article 20 of the Civil Code has adopted a rigid approach when deciding that *lex loci delicti* alone should apply in respect of tort liability. It has left no scope for the use of more flexible approaches that may derogate from the *lex loci delicti*, such as the application of the law of the parties' common residence, and application of the proper law of a contract in cases where the tort is closely connected with the contract.

Moreover, the UAE legislature has not granted parties the right to determine by agreement the law applicable to a tort claim between them, although the principle of party autonomy in respect of tort liability is a modern theory in the field of choice of law adopted by many enactments, such as the Tunisian Private International Act No 97 of 1998 and the Rome II Regulation. Consequently, it seems to the current writer that it would be better if the legislator adopted the principle of party autonomy in respect of conflict of laws in the field of tort.⁷²

Furthermore, UAE legislation does not contain any specific provisions in the field of choice of law designed for particular types of tort, such as infringement of intellectual property rights, product liability, environmental damage, privacy and defamation, and industrial action. Since these types of tort have a special nature, they need to be regulated by special conflict of law provisions.⁷³

Additionally, the UAE legislature has not regulated the situation when the injury occurs in a country other than a country where the tortious act happened. The legislature has also not regulated conflict of laws in respect of a debtor's right (in case of multiple liability) to seek contribution from other debtors when he has already fulfilled the whole or a part of the claim.

⁷⁰ See A S Alsuboosi, n 21 above, p. 282.

⁷¹ EC Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II), [2007] OJ L199/40.

⁷² See A E Aljasmī, n 21 above, p. 99.

⁷³ A S Alsuboosi, n 21 above, p. 287.

Other unregulated issues

The UAE legislator has not enacted particular choice of law rules regarding rights of custody,⁷⁴ and this has led to inconsistency in court decisions. For instance, the Dubai Court of Cassation in one case decided on the application of the law of the nationality of the husband, in reliance on Articles 13 and 16.⁷⁵ However, in other cases, the court has applied the law of the nationality of persons who claimed the right of custody, in reliance on Articles 23 without indicating from where this solution was adopted.⁷⁶

The UAE legislator has also not regulated other issues such as filiation, child abduction, insolvency, and corporate shares.

Some may suggest the application of the general principles of private international law pursuant to Article 23 of the Civil Code to make up for deficiencies arising where there are no relevant conflict rules in the Civil Code.⁷⁷ Nevertheless, it would be more appropriate if the legislator regulated those issues which have not been regulated yet. For thirty years Article 23 has rarely been applied in the UAE case law.

Given the reasons discussed above, it can be argued that the UAE choice of laws need to be reformed, but questions still remain about the way to do so.

The Reform Process

If the UAE choice of laws rules need to be reformed, this means that the legislator should amend the conflict of laws rules in the Civil Code, but the legislator needs to rely on court decisions and scholars' works to achieve this. Thus, this paper will examine the role of each of them in addition to the role of legal educational institutions.

⁷⁴ It should be noted that although the official translation in the UAE Ministry of Justice website of Article 16, which provides that 'The objective matters related to guardianship, custody, tutelage and other objective systems to protect persons lacking capacity shall be governed by the law of the person whose protection is required', uses the word 'custody', this is a mistranslation, as the official Arabic article does not contain 'custody'.

⁷⁵ See the Dubai Court of Cassation decision in Case 26/1995, 20 April 1996.

⁷⁶ See the Dubai Court of Cassation decisions in Case 68/2003, 25 January 2004; and Case 24/2005, 26 June 2005.

⁷⁷ O M Abd Al-aal, n 22 above, p. 40.

New legislation

In 1980, as the UAE was a newly established country and there were no local jurists, it was natural to rely on jurists and scholars from other Arab countries, particularly from Egypt, to draft legislation. These jurists and scholars were influenced by their own laws (Egyptian law). As a result, most UAE enactments are very similar to Egyptian enactments, and this is true in particular in the choice of law rules contained in Articles 10–28 of the UAE Civil Code, which correspond to the Egyptian Civil Code. Nonetheless, after 30 years since the enactment of the UAE choice rules, the UAE legislator is in a position to reform these rules.

From a historical and comparative perspective, there are two ways to amend any choice of laws rules: by amendment of the rules in the same enactment (the UAE Civil Code and Commercial Code); or by regulation of all questions related to private international law, such as rules on conflict of laws or jurisdictions, in a separate enactment (a Code on Private International Law). Some argue that it is more appropriate if the legislator enacts a separate enactment, since this will help the court to apply and interpret the choice of laws rules and assist in the coordination between the various provisions. Moreover, some argue that it will be easier for amendment if it is within the a separate enactment.⁷⁸ Nevertheless, this is just a matter of organisation and may lead to more application of conflict rules.

The legislator, in the case of amendment of the conflict rules in the Civil Code, should have regard to the courts' decisions, Emirate jurists' and scholars' works (e.g. books and articles), and comparative legislation (other countries' enactments and international and regional instruments).

Judicial decisions

Thirty years ago, in the UAE there were few court judgments regarding conflict rules. Since the UAE Court⁷⁹ and the Personal Statues Act, that adopted the principle that to apply foreign law, parties should ask to apply it and prove its content.⁸⁰ Therefore, the parties' lawyers should direct their clients' attention to this matter.

Nevertheless, if the question of conflict of laws arises and the parties ask to apply a foreign law, but there are no conflict rules in the UAE legislative, the court should apply the general principles of private international laws pursuant to Article 23 of the Civil Code to determine the appropriate conflict rule for the matter in question. The legislator allows the court

⁷⁸ A ASalama, n 20 above, p. 27.

⁷⁹ except some of the Dubai Court of Cassation decisions, see above p

⁸⁰ See above p. 4..

to do so, wishing to keep abreast of recent developments in the field of conflicts of law. Consequently, the court may establish new conflict of laws rules which the legislator can rely on to amend the choice of law provisions in the Civil Code. Although there are rare judicial precedents which rely on Article 23 to create new conflict rules, the few judicial precedents in question do not indicate from where the principle of application of the law of nationality of the person claiming the right of custody is adopted.⁸¹ The court should rely on Article 23 where the issue is not governed by any provision of the conflict rules specified in the UAE Civil Code to create new conflict rules and indicate from where they were adopted.

Scholarly monographs

The UAE suffers from a severe shortage of published materials written by scholars. First, there are fewer than 10 books on the UAE conflict of laws, and most of these books are short textbooks written by Arab scholars (particularly Egyptian scholars) for university students. However, two of them are considered as substantial works, one written by Okasha Mohammed Abdel-aal⁸² and the other written by Ahmed Abdulkarim Salama,⁸³ but both of these are considered somewhat old books. Moreover, regarding books written by Emirate people, there are two specialist books (including one in respect of choice of laws regarding tort liability written by the present writer). Furthermore, there are just three PhD theses which focus on choice of law in the UAE,⁸⁴ and fewer than 20 articles on the topic written by Arab scholars. In the UAE, there is a lack of local scholars. There are just three doctors⁸⁵ in the field of private international

⁸¹ See the Dubai Court of Cassation decisions in Case 68/2003, 25 January 2004; and Case 24/2005, 26 June 2005.

⁸² O M Abdel-aal, (الوسيط في تنازع القوانين) *Conflict of law* (Dubai Police Academy, 2008).

⁸³ A A Salama, (القانون الدولي الخاص الاماراتي) *The UAE Private International Law* (The UAE University, 1st edition, 2002).

⁸⁴ A S Alsuboosi, *Choice of Law in Tort - A Comparative Study involving the Laws of the United Arab Emirates and of Other Countries*, (PhD Thesis, University of Essex, 2009). H Alustath, *Choice of Law in respect of contracts in the United Arab Emirates and the European Union; and related aspects of Private International Law in relation to the Dubai International Financial Centre*. (PhD thesis, University of Essex, 2016). A E Aljasmī, *Choice of law in respect of agency relationships in the European Union and the United Arab Emirates*. (PhD thesis, University of Essex, 2016).

⁸⁵ Abdulla Alsuboosi, Hamad Alustath, and Ali Aljasmī.

laws, but during the next three years, about six Emirate researchers will obtain their PhDs in the field of private international laws. These people should conduct more research regarding the UAE choice of laws that can be relied on by the legislator to reform the conflict rules in the UAE. These studies should also help the UAE courts to apply the general principle of private international laws pursuant of Article 23 of the Civil Code.

Comparative legislation

Legislations in other countries, and international and regional instruments, are a source on which the UAE legislator may rely to reform its conflict rules. Nonetheless, the legislator should not only consider the texts of comparative legislation or the texts of international instruments, but should also examine their application by the courts in the countries where they were enacted, and the commenters' views about them.

Educational institutions

Recently, some private universities, which are the majority of universities in the UAE, have limited to one term only the teaching of private international law topics such as nationality, conflict of laws, jurisdiction and recognition, and enforcement of foreign judgments.⁸⁶ But some universities teach these topics over two terms. The teaching of all these topics in one term is clearly not sufficient, so it should be done over two terms.

Moreover, over the last 30 years, there has been no conference on conflict of laws in the UAE, given the lack of scholars in the field of private international laws, particularly Emirate scholars. Such conferences could help to develop the science of choice of law. Thus it is desirable that the universities should support such conferences in the UAE. Moreover, the publication of a special journal of private international law could help to develop the science of choice of laws.

CONCLUSION

UAE legislation regarding choice of law, like that in other Arab countries, has been influenced by Egyptian legislation on conflict of laws; consequently, most conflict rules in the UAE are very similar to Egyptian conflict rules. These conflict rules may have been appropriate at the time of

⁸⁶ The UAE, like Egypt and France, adopts a wide concept of private international law which includes the nationality, condition of foreigners, conflict of laws, jurisdiction, and recognition and enforcement of foreign judgments.

their enactment, but the economic development, prosperity, and growth of the number of foreign people in the UAE during last 30 years, have given rise to an urgent need to reform the conflict rules in order to keep pace with this prosperity and growth. Additionally, the shortcomings and deficiencies in the existing UAE conflict rules justify this need for reform.

Therefore, the UAE legislator should reform its conflict of laws by relying on court judgments, scholars' works, and comparative legislation. Moreover, developing the academic understanding of conflict rules in the UAE through universities, conferences, and a private international laws journal may help to accomplish this reform.

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