Incidental (preliminary) question

I. General remarks

Lawyers commonly find that a rule of law can attach specific effects to an existing legal status or relationship. When a court or an administrative authority is required to take a decision on a legal question involving the application of such a rule, it may be required to take first a decision on the presupposed status or relationship, if its existence or validity is disputed. In such circumstances, it is common to say that the decision on the 'main' question (ie the main object of the decision) depends on the decision of a 'preliminary' or 'incidental question' (*question préalable* in French, *Vorfrage* in German).

Take, for example, a contentious → succession case in which a court is required to take a decision on the division of the estate among the heirs. If the applicable rules on intestate succession confer to the surviving spouse the right to a part of the estate, it may be that the existence or validity of the deceased's → marriage is disputed: this is the case if some other potential heirs allege that the marriage was null and void or that it had been terminated by a divorce (→ Divorce and personal separation). In such a case, the question of the existence and validity of the marriage is not the main object of the proceedings; nevertheless the court will have to decide this issue incidentally in order to determine whether the surviving spouse can inherit part of the estate.

In some cases, the decision on the main question may depend on an incidental question, which hinges in turn on another incidental question (*Vor-Vorfrage*). This is for instance the case if the rules on intestate succession grant some heirship rights to the deceased's children, but distinguish between children born during the marriage and outside the marriage. If the legitimacy of a child is in dispute, this is an incidental question. However, it may be that the decision on this incidental question depends on another (logically preliminary) incidental question: that of the existence of a valid marriage between the child's parents.

When the situation is purely domestic, incidental questions do not raise any private international law issue. The decision on the incidental question – like the decision on the main question – depends solely on the domestic rules

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of the → *lex fori*. Normally, the rules applicable to the main question simply refer, for the decision on the incidental question, to the rules, which would govern this question if it had been the main object of separate proceedings. Thus, the validity of a marriage for the purpose of a succession is normally decided based on the same rules which would govern proceedings for the annulment of the marriage. However, it may also be that special rules govern the disputed issue when it arises as an incidental question. Thus, the rules on so-called 'putative marriage' (as provided for in several jurisdictions) are nothing other than special rules extending some specific effects or benefits of marriage to persons who entered, in good faith, into an invalid marriage. In any case, in the absence of foreign elements, the choice between these different ways of deciding on the incidental question depends solely on domestic law and no issue of private international law arises.

If the situation is international, the law applicable to the main question is determined by the choice-of-law rules of the forum. These may designate the *lex fori* or a foreign law (the foreign *lex causae*). In the first case, it is undisputed that the solution of the incidental question will also depend on the rules of the forum, including, where appropriate, its private international law rules. Thus, if the incidental question – unlike the main question – does not involve any international element, it seems obvious that it should be decided pursuant the domestic rules of the → *lex fori*. If the incidental question has an international dimension, its solution will depend on the private international law rules of the forum; these may be choice-of-law rules or recognition rules, depending on the circumstances of the case. Thus, if the incidental question has been decided with *res judicata* effect by a foreign court, and this decision is recognized in the forum, the recognition rules of the forum will dictate the solution, thus prevailing over its choice of rules. By contrast, if the incidental question was not decided with *res judicata* effect, or if the foreign decision is not recognized in the forum, this question will have to be decided in conformity with the law designated by the choice-of-law rules of the forum.

When the main question is purely domestic, but the incidental question is not, the solution also depends on the choice-of-law and recognition rules of the *lex fori*.

From a private international law perspective, the controversial problem involving the incidental question only arises when, under the choice-of-law rules of the forum, the main question is governed by a foreign law. In such a case, the issue arises as to whether the incidental question should be decided in accordance with the law of the forum (including where appropriate its choice-of-law and recognition rules) or by reference to the *lex causae* (including where appropriate its choice-of-law or recognition rules). In the German legal literature, which first tackled the problem (George Melchior, *Die Grundlagen des deutschen internationalen Privatrechts* (De Gruyter 1932) 245 ff; Wilhelm Wengler, 'Die Vorfrage im Kollisionsrecht' (1934) 8 RabelsZ 148), the '*lex fori* approach' was traditionally described as an 'independent connection' ('*selbständige Anknüpfung*') and the '*lex causae* approach' as a 'dependent connection' ('*unselbständige Anknüpfung*'). This is the 'problem of the incidental question' in private international law. There is a clear divide among scholars on this issue, but intermediate or 'agnostic' solutions have also been proposed.

National courts only rarely take a clear stand on this issue. From a comparative perspective, the '*lex fori* approach' seems to be preponderant, at least in certain countries (in → France, see the decision of the Cour de Cassation of 22 April 1986, *Djenangi*), but important decisions have been taken based on the opposite approach (see the well-known decision of the Ontario Court of Appeal of 4 November 1963, *Schwebel v Ungar*, 42 DLR (2d) 622).

Contrary to one author's view (Wilhelm Wengler, 'Die Vorfrage im Kollisionsrecht' (1934) 8 RabelsZ 149), the incidental question is not simply a question of construction of the legal concept used by a rule of law. In the examples above, there might well be a problem of construction of the rules of the foreign *lex causae*. For instance, the effects of the annulment of the marriage on the inheritance rights of the deceased's spouse could be disputed. This is simply a question of construction of the legal notion of 'spouse' as used by the rules on intestate succession of the foreign succession law. Once it is clear that a 'spouse' loses his/her inheritance rights when the marriage is void, the question may arise as to whether the marriage is valid or not. This is the incidental question. As mentioned above, it concerns the validity of the legal status or relationship, on which the effects of the rules on intestate succession depend (Torben Svenné Schmidt, 'The Incidental Question in Private international law' (1992) 233 *Collected Courses of the Hague Academy of International Law* 305, 324).

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According to a traditional understanding of the problem, the alternative is between the 'application' of the choice-of-law rules of the forum and the 'application' of the choice-of-law rules of the *lex causae*. However, as rightly emphasized (Paolo Picone, 'La méthode de la reference à lordre juridique competent en droit international privé' (1986) 197 *Collected Courses of the Hague Academy of International Law* 229, 307 *et seq*), if the 'independent' approach consists indeed of the application of the private international rules of the forum, the 'dependent' approach should be more aptly described as based on a 'reference' to the solution of the incidental question under the legal system of the *lex causae* as a whole (in Italian *riferimento all'ordinamento competente*). As a matter of fact, the solution of the incidental question under the *lex causae* does not necessarily depend on its choice-of-law rules but can result from other rules of that legal system, in particular from its rules on the recognition of foreign decisions or from other principles on the recognition of foreign legal status and relationships in that country. In such a case, it would be improper to consider 'under a *lex causae* approach' that the foreign recognition rules or principles should be 'applied' in the forum state: it is self-evident that foreign recognition rules are never 'applied' by foreign courts. More exactly, if a dependent approach is adopted, the *lex causae* is taken into account as a whole with the consequence that the solution given under that law to the incidental question is accepted ('imported') as such in the legal system of the forum.

II. Conditions of the incidental question problem

As mentioned above, the logical conditions of the private international law problem of the incidental question are that (i) the main question is governed by a foreign *lex causae* and (ii) the application of a substantive law rule of this law requires a decision on an incidental legal question.

From a practical point of view, other conditions must also be fulfilled. In particular, for the alternative between the → *lex fori* approach and the *lex causae* approach to become relevant *in concreto*, it is also necessary (iii) that the two approaches lead to diverging decisions on the incidental question. This is the case when the choice-of-law rules of the *lex fori* designate, as applicable to the incidental question, a law that is different from the one that would be applicable under the *lex causae*, provided that the substantive rules of the designated laws also lead to different results. A conflict can also arise when the incidental question had already been decided by a judgment having *res judicata* effects in the forum but not recognized in the *lex causae* state, or vice versa. By contrast, a 'false conflict' arises when the choice-of-law rules of both the *lex fori* and the *lex causae* designate the same law as governing the incidental question, or when the substantive rules of the designated laws lead to the same result, or when a previous decision on the incidental question is recognized with similar effects in both states concerned.

It has been rightly argued (Paolo Picone, 'La méthode de la reference à l'ordre juridique competent en droit international privé' (1986) 197 *Collected Courses of the Hague Academy of International Law* 229, 304) that a further condition for the problem to arise is (iv) that the *lex causae* designated by the choice-of-law rules of the forum as applicable to the main question is also applicable to this question under the choice-of-law rules of the *lex causae*. *In abstracto*, this condition is not required because, from the perspective of the forum state, the alternative between the 'independent' and the 'dependent' connection of the incidental question can arise irrespective of the law that is applicable to the main question under the *lex causae*. However, the most weighty arguments for the *lex causae* approach – which are, as we will see, the uniformity of decisions between the → *lex fori* and the *lex causae* and the consistent application of the foreign *lex causae* as a whole – are devoid of their substance if the main question itself is not governed by the same law in the two states concerned. Therefore, the alternative between the two approaches mentioned will only become relevant when the choice-of-law rules of both the *lex fori* and the *lex causae* provide for the application of the substantive rules of the *lex causae* to the main question. In the examples above, it is necessary, for instance, that the succession (main question) is governed, both in state A (forum) and in state B, by the law of state B (*lex causae*).

Of course, this does not necessarily imply that both states apply the same → connecting factor, since the application of one and the same law to the main question can also result from different choice-of-law rules, as well as

from the adoption, in at least one of the states concerned, of the → *renvoi* doctrine.

In the following section, we will review some of the arguments that are most often put forward in favour of the *lex fori* approach and the *lex causae* approach. Many of these considerations play an important role, but we believe that none of them can justify, in general terms, an *a priori* choice in favour of one or the other of the two proposed solutions. Nevertheless, in some circumstances, some of these arguments clearly plead in favour of one solution or the other. In other cases, they just give useful indications for a decision to be taken on a case-by-case basis.

III. The main arguments for a *lex fori* approach (independent connection)

The → *lex fori* approach is the solution that courts of most countries tend to adopt spontaneously, in the absence of particular grounds. As mentioned above, the problem of the incidental question arises when the decision of the main question depends on the existence or validity of a certain legal status or relationship involving some foreign elements. If this issue were to be decided as the main object of the proceedings, it would be decided in accordance with the choice-of-law rules of the forum. The first reflex of the courts is normally to resort to these same choice-of-law rules, even when that question arises incidentally.

Indeed, this instinctive reaction seeks to safeguard consistency within the domestic legal order. The strong interest of each country in the consistency of all decisions, which are taken (or could be taken) in those countries with regard to the existence or validity of a particular legal status or relationship, cannot be denied. Now, if a 'dependent' connection were preferred, the decision on the incidental question – based on the choice-of-law or recognition rules of the *lex causae* – could differ from the decision that a court of the forum state would take based on the conflict rules of the forum if the same question arose as the main object of separate proceedings. Moreover, the decision on the incidental question based on the *lex causae* approach could also differ from the decision, which the forum courts would take if the same question arose incidentally in proceedings relating to a different main question, governed by a distinct *lex causae* (eg the question of a marriage validity could be answered differently depending on whether the main question turns on the spouses' capacity to remarry or their inheritance rights) (Pierre Mayer, 'Le phénomène de la coordination des ordres juridiques étatiques en droit privé' (2007) 327 *Collected Courses of the Hague Academy of International Law* 9, 335 *et seq*). This leads to uncertainty. By contrast, if the courts always apply the law designated by the forum choice-of-law rules, the decision on the disputed question should always be the same, irrespective of whether it arises as the main question or as an incidental question.

The consistency argument is reinforced by the following consideration. Each legal status and relationship consists of a body of rights and effects of which that status or relationship cannot be completely devoid. If the choice-of-law rules of the forum recognize the existence and validity of such a status or relationship by referring to a certain law, it would be contradictory to deny this status or relationship all of its consequences by systematically referring to a different law when its effects are at stake. It does not make sense to consider that a marriage is valid if it produces no effects with regard to the relationships between the spouses and vis-à-vis the children and the → succession. As it has been rightly pointed out, such a paradoxical conclusion would also be problematic from a human rights perspective: thus, under art 8 of the European Convention on Human Rights (European Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221), respect for the family life implies that a family status or relationship is recognized with its concrete effects (Andreas Bucher, 'La dimension sociale du droit international privé' (2009) 341 *Collected Courses of the Hague Academy of International Law* 9, 246).

These arguments are certainly very strong, but they are not always decisive. Inconsistent decisions on the same issue can also be rendered in purely domestic cases. This possibility is tolerated in all legal systems within the limits of *res judicata*. Now, *res judicata* is a relative principle, which only covers decisions rendered on the same question between the same parties. Moreover, decisions rendered on incidental questions are normally not covered by *res judicata*, which means that they can co-exist within the same legal system with contradictory decisions on the same question. Nevertheless, this is in practice a relatively rare occurrence. It is certainly true that some inconsistencies can be

more broadly accepted in international situations, but they should be avoided unless justified by very serious reasons.

Internal consistency is very important, but its weight varies depending on the circumstances of the case. First, one should distinguish the instances, where the *res judicata* principle controls. This is generally the case when the incidental question was already decided as the main question in previous proceedings between the same parties. For example, if we assume that the deceased's marriage has been declared null and void by a final judgment in the forum state, the court seized with the same question as an incidental question is bound by *res judicata* and should therefore not be allowed to render an inconsistent decision based on the *lex causae*.

The same is also true when the same question, raised incidentally in previous proceedings concerning a different question, was decided with *res judicata* effect in conformity with the applicable procedural rules. Thus, in certain legal orders, one of the parties can require an incidental question to be decided with *res judicata* effect (eg '*Zwischenfeststellungsklage*' in → Germany, '*accertamento costitutivo*' in → Italy). In some systems, all questions relating to the existence of a → personal status must always be decided with *res judicata* effect, irrespective of whether they constitute the main object of the proceedings or an incidental question (Italy).

Of course, the preclusive effect of *res judicata* not only attaches to previous judgments rendered in the forum, but also to foreign judgments duly recognized in the forum. Thus, if the nullity of the deceased's marriage has been declared by a foreign judgment recognized in the forum, the forum courts will be bound by that judgment when they have to decide on the spouse's inheritance rights.

Even if the now incidentally disputed question was not yet decided in previous proceedings, the need for internal consistency is controlling when, in the pending proceedings, the incidental question must be decided with *res judicata* effect according to the rules of civil procedure of the forum. Since, in this case, the court's decision on the incidental question will also be binding with respect to future proceedings, it seems that it should not be based on the law governing the main question in the pending proceedings, but on the law designated by the choice-of-law rules of the forum (Carmen Christina Bernitt, *Die Anknüpfung von Vorfragen im europäischen Kollisionsrecht* (Mohr Siebeck 2010) 72 *et seq*).

Besides the cases where the decision on the incidental question is (or will be) covered by *res judicata*, the need for internal consistency is particularly stringent when the legal status or relationship, which is the object of the incidental question, was validly created or constituted in the forum (Paul Lagarde, 'La règle de conflit applicable aux questions préalables' [1960] Rev. crit.DIP 459, 481). This is for instance the case when a marriage was celebrated in the forum or an adoption constituted through a local decree. In such a case, it is very unlikely that the local courts will give priority to the foreign *lex causae*, when this leads to an invalidity decision.

The same is probably true when the legal status or relationship was created abroad, but its recognition in the forum is imposed by some higher principles of European or international law. Based on well-known case-law of the European Court of Justice regarding the effects of freedom of movement on the recognition of a person's name attributed abroad (Case C-148/02 *Carlos Garcia Avello v Belgian State* [2003] ECR I-11613; Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-7639), it is now widely accepted that other kinds of legal status or relationships legally constituted under the law of a Member State (such as marriage or filiation) also benefit from recognition in the other Member States, under certain (although not yet entirely settled) conditions (Andreas Bucher, 'La dimension sociale du droit international privé' (2009) 341 *Collected Courses of the Hague Academy of International Law* 9, 359 *et seq*). The same is also true with respect to certain principles of the European Human Rights Convention, such as the protection of family life (art 8 ECHR). When such principles are applicable in the forum, the local authorities will not be allowed to deny recognition to the relevant foreign legal status or relationship, even if this is not valid under the *lex causae* governing the main question.

Apart from these cases, internal consistency does not always seem to be conclusive for the decision on the incidental question. Nevertheless, it still is a significant consideration, which should be balanced against the factors militating for a *lex causae* approach.

To this effect, the need for internal consistency will carry more weight when the choice-of-law rules of the forum submit the incidental question to the substantive law of the forum, and in particular when this is the result of specific policy considerations.

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Another relevant factor is the more or less close connection existing between the main question and the incidental question. As it was frequently pointed out, a legal status or relationship frequently produces some 'natural' effects, which are part of its core, but also other 'side-effects' which are perceived as not belonging to the essence (Andreas Bucher, 'La dimension sociale du droit international privé' (2009) 341 *Collected Courses of the Hague Academy of International Law* 9, 246). Thus, the incapacity to remarry is regarded as a core effect of marriage in all legal systems which do not allow polygamy; by contrast, the spouses' rights to → matrimonial property and inheritance, although very frequently granted, are not always perceived as essential consequences of marriage. It follows that internal consistency is more directly threatened when opposite decisions on the existence or validity of legal status relate to its core effects rather than when 'ancillary' effects are at stake. Thus, when a marriage is void under the law designated by choice-of-law rules of the forum but valid under a *lex causae* approach, it would be nevertheless problematic to allow one of the spouses to remarry. By contrast, under the same circumstances it would be more acceptable that the same marriage confers some inheritance rights to the surviving spouse.

IV. The main arguments for the *lex causae* approach (dependent connection)

Notwithstanding the strengths of the *lex fori* approach, very important arguments can also be put forward for the *lex causae* approach (for a detailed analysis, see Carmen Christina Bernitt, *Die Anknüpfung von Vorfragen im europäischen Kollisionsrecht* (Mohr Siebeck 2010) 36 *et seq*; Torben Svenné Schmidt, 'The Incidental Question in Private international law' (1992) 233 *Collected Courses of the Hague Academy of International Law*, 305, 368 *et seq*). In the absence of compelling reasons for an independent connection, these arguments should be put in the balance with the need for internal consistency and can justify, in some instances, the choice for a dependent connection.

1. International harmony of decisions

One of the main arguments for the *lex causae* is undoubtedly the quest for international harmony of decisions (or international uniformity). It is clear that the application of a foreign law to the main question under the choice-of-law rules of the forum, is meant to promote uniformity, a goal that is attained, in particular, when the *lex causae* is also applicable to that question under its own choice-of-law rules. However, uniformity is jeopardized if the forum courts take, on the incidental question, a diverging decision that would be rendered under the foreign *lex causae*. The dependant connection avoids this, thus promoting a harmonious result.

Criticism is sometimes levied against this reasoning. Several scholars note that international decisional harmony is an ideal objective, which is often practically unattainable (Paul Lagarde, 'La règle de conflit applicable aux questions préalables' [1960] Rev.crit.DIP 459, 467 *et seq*). In situations that give rise to incidental questions, it happens that the laws of more than two states are involved, and that these provide for different solutions; then, complete uniformity cannot be achieved. Moreover, harmony of decisions does not only depend on the determination of the applicable law, but on several other factors, including the possibly diverging assessment of the disputed facts. Therefore, the importance of international uniformity of the applicable law should not be overestimated. These considerations are not unfounded, and they explain why the quest for international uniformity should not always prevail over the need for internal consistency. Therefore, a general preference for the *lex causae* approach cannot be based on the quest for uniformity.

Nevertheless, it cannot be denied that uniformity is one of the important goals of private international law. In particular it constitutes one of the main reasons why states accept, in international situations, to apply foreign laws or to recognize foreign decisions. As it has been frequently noted, international harmony promotes legal certainty, avoids limping relationships and limits forum shopping (→ Forum (and law) shopping). Therefore, the search for uniformity is an important factor when determining the way to deal with an incidental question. Its weight depends on various factors.

On one hand, uniformity is clearly more important in some private international systems and in some areas of law than in others.

Thus, the fact that the private international law system of the forum follows the *renvoi* doctrine in general or in the specific area of law covered by the dispute reflects a clear propensity to search for international harmony. This is certainly not conclusive *per se*, but

constitutes a significant indication in favour of the *lex causae* approach. This indication is even stronger when all kinds of *renvoi* are accepted (not only '*Rückverweisung*', but also '*Weiterverweisung*'), and in particular when situations of 'cross-references' ('*chassé-croisé*') are solved by resorting to the so-called 'foreign court doctrine'. By contrast, the fact that *renvoi* is rejected (in general terms or in the specific area), is a very strong indication against the *lex causae* approach: why should the courts of the forum state strive for a uniform solution of the incidental question, if the *lex fori* shows no real interest in a uniform solution of the main question? (Carmen Christina Bernitt, *Die Anknüpfung von Vorfragen im europäischen Kollisionsrecht* (Mohr Siebeck 2010) 75).

On the other hand, uniformity is more important when it can be concretely achieved in the case at hand. First as mentioned, there are good reasons to consider that the problem of the incidental question does not even arise when the *lex causae* is not applicable to the main question under the choice-of-law rules of that law: in such a case it is clear that uniformity will not be achieved such that a dependent connection of the incidental question does not make much sense. Second, international uniformity can more easily be achieved when only two legal orders are concerned, ie the *lex fori* and the *lex causae*, than in the presence of several interested states. Thus, if under the choice-of-law rules of the law applicable to the main question, the incidental question is governed by the substantive rules of the *lex causae*, international uniformity can easily be attained if the courts in the forum state are ready to follow that solution, renouncing the application of the domestic substantive rules, which would apply under a → *lex fori* approach. By contrast, if a third state also comes into play (because its law is designated to govern the incidental question by the choice-of-law rules of either the *lex fori* or of the *lex causae*, or because its courts have decided on the incidental question by a judgment, which is recognized in only one of the other two states concerned) a complete uniformity cannot be achieved, and the weight of this argument is clearly reduced (Paul Lagarde, 'La règle de conflit applicable aux questions préalables' [1960] Rev.crit.DIP 459, 467 *et seq*).

International uniformity is also particularly important when the choice of rules governing the main question have been unified by virtue of an international convention or a European regulation. In such cases, several commentators plead for the adoption of the *lex causae* approach (Torger W Wienke, *Zur Anknüpfung der Vorfrage bei international-privatrechtlichen Staatsverträgen* (Verlag für Standesamtswesen 1977) 195; Christian Heinze, 'Bausteine eines Allgemeinen Teils des europäischen Internationalen Privatrechts' in Dietmar Baetge, Jan von Hein and Michael von Hinden (eds), *Die richtige Ordnung – Festschrift für Jan Kropholler* (Mohr Siebeck 2008) 112; Hans Jürgen Sonnenberger, 'Randbemerkungen zum Allgemeinen Teil eines europäisierten IPR' in Dietmar Baetge, Jan von Hein and Michael von Hinden (eds), *Die richtige Ordnung – Festschrift für Jan Kropholler* (Mohr Siebeck 2008) 241). However, it has been correctly pointed out that – at least when *renvoi* is excluded – uniform private international law instruments only promote international harmony among the contracting states (or the EU Member States), but not necessarily with respect to third states (Carmen Christina Bernitt, *Die Anknüpfung von Vorfragen im europäischen Kollisionsrecht* (Mohr Siebeck 2010) 467 *et seq*). Unification of the choice-of-law rules is therefore not conclusive for the adoption of a *lex causae* approach.

2. *Deference for the foreign* lex causae

A further argument sometimes invoked in favour of a dependent connection is the need to respect the foreign *lex causae* and to apply it consistently. If the choice-of-law rules of the forum refer to the law of a foreign country for the decision on the main question, all conditions set up by the foreign substantive rules should be construed and applied as they would be in the courts of the foreign country. Following this reasoning, the incidental question raised by those rules should also be decided in conformity with the choice-of-law rules and the recognition rules of the *lex causae* (Paul Lagarde, 'La règle de conflit applicable aux questions préalables' [1960] Rev.crit.DIP 459, 470 *et seq*; Torben Svenné Schmidt, 'The Incidental Question in Private international law' (1992) 233 *Collected Courses of the Hague Academy of International Law*, 305, 369 *et seq*).

It is certainly desirable that the foreign *lex causae* be applied exactly as it would in the courts of the relevant foreign state. However, this goal is not sufficient to impose a *lex causae* approach, in particular if this leads to inconsistencies within the legal system of the forum. As

a matter of fact, there are other instances where the foreign law designated by the choice-of-law rule of the forum is not applied exactly as it should be: this is the case when the courts of the forum 'adapt' the foreign rules in order to avoid inconsistencies, or when they refuse to apply a specific rule of the foreign law because it would result in a violation of the forum's public policy. It goes even further when the → *renvoi* doctrine is not accepted by the forum state, since the foreign *lex causae* is then applied notwithstanding the fact that it would not be applicable under its own criteria. These examples show that the deference for a foreign applicable law is not without limits. It should also be noted that in private international law, separate aspects of one single relationship are commonly 'split' among different laws (eg the specific effects of a marriage such as the spouses' name, their personal relationships and the matrimonial property, are often regulated by different laws). Therefore, the fact that the main question is governed by a law does not necessarily imply that the same law should also govern the incidental question.

One could also contend that the consistency of the *lex causae* is not really threatened by the independent connection. It can happen that the *lex causae* itself refers to a foreign law for the decision on the incidental question. If this is the case, it impliedly accepts that the effects of its own substantive law rules attach to a legal status or relationship, which is not validly constituted under its domestic law rules. In this case, there is no particular need to preserve the consistency between the substantive rules applicable, respectively, to the incidental question and to the main question. Thus, it is acceptable that the effects of the substantive rules of the *lex causae* attach to a legal status or relationship, which is valid under the law of the forum.

The argument based on respect for the *lex causae* is certainly stronger when, under that law, the incidental question would be governed – as the main question – by the substantive rules of the *lex causae*. In this case, there is an intrinsic connection between the rules governing the main question and the incidental question, and this should be taken into account. The need to respect the *lex causae* is probably even stronger when the *lex fori* approach would lead to recognition of the validity of a legal status or relationship that is contrary to the public policy of the *lex causae*. In such a case, the decision on the incidental question would be in open contradiction with the rationale of the substantive rules of the *lex causae*.

3. Absence of a forum interest

As a further justification for a *lex causae* approach, it has been argued that the forum state does not have a real interest in applying its own choice-of-law rules to the incidental question (Paul Lagarde, 'La règle de conflit applicable aux questions préalables' [1960] Rev.crit.DIP 459, 468 *et seq*). According to this opinion, the fact that the main question is subject to a foreign law indicates that the forum state is not directly concerned with the decision to be taken on that question; *a fortiori* there is no interest of the forum state in imposing the application of its own choice-of-law rules to a question, which only arises incidentally and for the sole purpose of answering the main question.

It is certainly true that under certain circumstances the incidental question does not present any substantial connection with the forum state and can only arise before the courts of that state because they are seized with the main question. In such circumstances, the interest of the forum in the decision of the incidental question may appear very limited and the application of the law designated by its choice-of-law rules improper. This is so, in particular, when the disputed question could not even be the main object of proceedings in the forum because the local courts would lack jurisdiction. In that case, the application of the law designated by the choice-of-law rules of the forum is not really justified (see Georges AL Droz, 'Regards sur le droit international privé comparé' (1991) 229 *Collected Courses of the Hague Academy of International Law* 9, 361 *et seq*).

However, this is not always true. In particular, the fact that a foreign law is applicable to the main question does not always imply a lack of interest of the forum state.

On one hand, contrary to some American theories, state interests are not always paramount for the determination of the applicable law. It is widely recognized that other considerations also play an important role, in particular the desire to apply a law that is close and familiar to the parties. Therefore, the reference to a foreign law does not imply a lack of interest of the forum state.

On the other hand, even if one accepts that – at least under certain circumstances – the forum state is not directly interested in the outcome of the dispute over the main question, this does

not exclude that it might well be interested in the decision on the incidental question. This may be so because the incidental question is much more closely connected to the forum state (eg when the inheritance rights in a foreign estate depend on the validity of a local marriage) and/or because it raises policy considerations which are more sensitive in the perspective of that state (eg the inheritance rights depend on the recognition of → same-sex marriages).

V. The main arguments for a 'result-oriented' solution

In light of the difficulty to opt for a general solution, some scholars have suggested to adopt a result-oriented approach to the incidental question (Kurt Siehr, 'Die rechtliche Stellung von Kindern aus hinkenden Ehen – Zur alternativen Anknüpfung der Vorfrage in favorem legitimitatis' (1971) StAZ 205, 212; Rhona Schuz, *A Modern Approach to the Incidental Question* (Springer Netherland 1997) 68 *et seq*).

In many choice-of-law systems, the traditional 'jurisdiction-selecting' rules have been replaced in certain areas of law by 'result-oriented' rules, which have as their purpose to favour the achievement of a certain substantive result in accordance with a specific policy of the forum. Thus, in the area of parent–child relationships, the choice-of-law rules often provide for alternative connections. This means that among several potentially applicable laws, the court may select the one which is more consistent with the purpose of establishing a parent–child relationship or, when relevant, the child's legitimacy. It has been suggested that a similar approach should also be adopted for incidental questions, with the consequence that the *lex fori* approach and a *lex causae* approach could be applied on an alternative basis in order to promote a certain desired substantive result.

Much can be said in favour of a result-oriented approach. In the absence of generally accepted solutions to the problem of the incidental question, it is reasonable to prefer an approach that is consistent with the existing choice-of-law rules of the forum. Therefore, when the choice-of-law rules of the forum state are based on a clear policy option, a result-oriented approach should be undoubtedly preferred.

On one hand, this is the case when the forum choice-of-law rules applicable to the incidental question are result oriented. Let us assume that the court is seized with the question of determining a child's inheritance rights and that the forum choice-of-law rules regarding filiation are based on the '*favor filiationis*' principle. This means that, where the establishment of the parent–child link constitutes the main question, it can potentially be regulated by one of several laws applicable on an alternative basis. Such a method should be extended to the solution of the incidental question with the consequence that the court should be allowed to select, between the *lex fori* approach and the *lex causae* approach, the one which fosters the creation of a parent–child relationship. The fact that the choice-of-law rules regarding the main question (ie succession) are not result oriented should not rule out this result.

In practice, this approach results in adding, to the alternative connections provided for by the choice-of-law rules of the forum, the possible solution (or solutions) based on the choice-of-law or the recognition rules of the *lex causae*. Assuming that the question of the parent–child link is governed, under the *lex fori*, either by the national law or by the law of the habitual residence of the child, and that under the law of a parent's last domicile (applicable to the succession), the same question is governed by the national law or the law of the habitual residence of the parents, the proposed 'oriented' solution would be to take into account all of these alternative connections. In the end, the existence of the parent–child relationship would be accepted if it is validly constituted under (at least) one of the mentioned laws.

On the other hand, a similar approach could also be adopted when the forum choice-of-law rules applicable to the main question (as opposed those applicable to the incidental question) are result oriented. If this is the case, several laws are potentially applicable to the main question under the choice-of-law rules of the forum. In this framework, it makes sense to favour the intended result by allowing the court to decide the dilemma of the incidental question in a way that is consistent with the goal of those rules. Thus, if the incidental question of the validity of a marriage must be decided for the purpose of establishing a child's legitimacy, the court should be able to select, between the law applicable under the *lex fori* approach and the law applicable under the *lex causae* approach, the one that upholds the validity of the marriage. The fact that the forum choice-of-law rules for the incidental question (ie the marriage validity) are not themselves result oriented should not exclude this solution.

In both cases, the relevant forum policy ('*favor filiationis*' or '*favor legitimitatis*') should prevail over the other considerations mentioned above (under points III. and IV.), because this reflects the rationale of the choice-of-law rules of the forum.

By contrast, a result-oriented approach to the incidental question would be ill founded when the choice-of-law rules of the forum (both those for the main question and those for the incidental question) are not result oriented. For instance, if the question of the validity of the marriage arises as an incidental question in a succession case, it would not be appropriate to select the solution which favours the validity of the marriage if the choice-of-law rules regarding both the succession and the validity of marriage are not result oriented. In such a case an *a priori* choice in favour of the validity or invalidity of the disputed legal status or relationship cannot be founded on a specific policy of forum law.

One should consider that a result-oriented approach affects the interests of the parties involved. This can only be justified if it reflects a specific forum policy. In our last example, a rule oriented towards upholding the validity of the deceased's marriage would affect the interests of other competing heirs (children, parents, other relatives). If such a policy is not reflected in the choice of law of the forum, then there is no sufficient reason for basing the solution of the incidental questions on such a policy.

In particular, and contrary to one author's suggestion (Rhona Schuz, *A Modern Approach to the Incidental Question* (Springer Netherland 1997) 68 *et seq*), we consider that it would be too much of a stretch to infer the principles for a result-oriented solution of the incidental question directly from the substantive rules and policies of the forum.

VI. Some suggestions for an empirical approach

As it appears from the previous remarks, no abstract preference for a general solution to the problem of the incidental question can be directly inferred from the arguments invoked by the proponents of one or the other approach. This does not mean that the decision should always be taken on a case-by-case basis. Under certain circumstances, certain solutions should be clearly preferred. When these do not apply, the decision will ultimately be in the judge's discretion; nevertheless some guidance can be inferred from the arguments mentioned above.

1. A priori *solutions*

First of all, it is important to recall that in some instances the problem of the incidental question does not even arise. Besides purely domestic instances and those in which the main question is governed by the *lex fori*, we will also mention the cases in which the law designated by the forum to govern the main question is not applicable to that question under its own choice-of-law rules. In all of these situations, it is clear that the law applicable to the incidental question should be determined under the choice-of-law rules of the forum.

The problem can be easily solved when the courts in the forum state are bound by a previous decision with *res judicata* effect between the parties. This is obviously the case when the now-incidental question was previously decided as the main question in a judgment rendered in the forum state: the *res judicata* principle takes priority over the choice-of-law rules of the forum. The same is also true when the previous judgment has exceptionally decided an incidental question with *res judicata* effect. In our opinion, the *res judicata* effect should also prevail when the previous judgment was rendered abroad, provided that it is recognized in the forum state (*ex lege* or following a registration procedure). In this case, the recognition rules of the *lex fori* prevail over its choice-of-law rules; *a fortiori*, they will take precedence over the diverging solutions possibly inferred from the *lex causae*.

Of course, the extension of *res judicata* will depend on the civil procedure rules of the state where the decision has been rendered (forum state or foreign state of origin). Normally, the *res judicata* effect is restricted to the parties of the previous proceedings. Therefore, the existence of a previous decision does not always bind the court, which is presently seized with the incidental question. However, one should consider that the notion of 'parties' normally also includes the heirs and other successors of the parties.

Failing a decision with *res judicata* effect between the parties, a result-oriented approach should be followed whenever the forum choice-of-law rules applicable either to the incidental question or to the main question are themselves result oriented. As argued above, when a clear preference for a specific result can be inferred

from the choice of rules of the forum, this principle of preference should also be followed when deciding on the incidental question. The substantive goal reflected by the choice-of-law rules should prevail over the arguments invoked for a *lex fori* approach or a *lex causae* approach.

In the absence of a clear result-oriented solution based on the forum choice-of-law rules, the *lex fori* approach should in principle be preferred when the legal status or relationship, which forms the object of the incidental question, was validly created or constituted in the forum state. In such a case, a diverging decision on the incidental question will openly contradict a previous act of the forum authorities. Although the court seized with the incidental question can, in theory, opt for a *lex causae* approach, it seems very unlikely that – in the absence of a clear policy goal to that effect – the court will sacrifice the internal consistency of the domestic legal order in order to pursue the uncertain objective of international harmony of decisions.

The court will have to reach a similar result even if the disputed legal status or relationship was created or constituted abroad, provided that higher principles of European or international law – such as the freedom of movement inside the EU or the respect for family life under the ECHR – require its recognition, or the recognition of some of its specific effects, in the forum.

2. *Case-by-case approach*

The criteria mentioned above will help to solve a significant number of cases. In the residual situations, we think that no clear preference between a *lex fori* approach and a *lex causae* approach can be formulated *in abstracto*. As the doctrinal debate clearly shows, strong arguments can be raised in favour of both prevailing approaches and their respective weight changes with the circumstances of the case. Courts are also reluctant to adopt clear-cut solutions and prefer to benefit from a measure of discretion in order to reach a just result in each individual case.

Although a case-by-case approach is normally not in line with the goal of legal certainty, we do not believe that the risk of unpredictable results should be overestimated (*contra*: Carmen Christina Bernitt, *Die Anknüpfung von Vorfragen im europäischen Kollisionsrecht* (Mohr Siebeck 2010) 89 *et seq*). First of all, the problem of the incidental question only arises in a very limited number of cases, and the principles mentioned above further reduce the number of uncertain situations. Moreover, predictability is, in any case, extremely difficult to ensure in circumstances where incidental questions arise: in fact, even if a specific and uniform approach to incidental questions is adopted, the decision will, in any case, depend on which court is seized with the main proceedings and on which law is applicable to the main question under the forum choice-of-law rules. Since these circumstances are generally difficult to foresee, the predictability of the final decision is, in any case, not completely granted. Finally, based on the arguments discussed above, guidance can be given to the court in order to increase predictability. In particular, we think that the following criteria should be taken into account:

First, the choice between a *lex fori* approach or a *lex causae* approach will depend on the emphasis placed, by the private international law system of the forum state, on international uniformity of decisions, in particular in the dispute's specific area of law. The assessment of this should be based on the content of the choice-of-law rules of the forum. In particular, the attitude towards *renvoi* is very significant in this respect. The fact that the *renvoi* doctrine is accepted reveals a clear propensity for the search of uniform solutions, in particular when all kinds of *renvoi* are taken into account in the *forum*. The adherence to the so-called 'foreign court theory' is an even stronger indication that uniformity with the foreign *lex causae* is an important goal for the forum state. This is not sufficient in itself to impose a *lex causae* approach to the incidental question, but it certainly favours it. By contrast, the fact that the *renvoi* doctrine is excluded clearly indicates that international uniformity is not a priority for the forum; therefore, there is no particular reason to follow a *lex causae* approach.

A second factor is the probability that the incidental question will be raised – as a main question or again incidentally – in separate proceedings before the courts in the forum state. As explained above, the main reason to favour the *lex fori* approach is to avoid inconsistent decisions on the same question in the forum state. The weight of this argument is clearly reduced when, in the light of the circumstances, the risk of such inconsistent decisions is low or nonexistent.

This can result from the fact that the disputed legal status or relationship does not present significant contacts to the forum. Several scholars stress that this aspect can sometimes justify the

choice in favour of a *lex causae* approach. In the absence of sufficient connections to the forum, it may even be that the courts in that country would not have jurisdiction to decide on the disputed question as the main question. Under such circumstances there seems to be no compelling reason for deciding the incidental question under the choice-of-law rules of the forum.

The risk of inconsistent decisions can also be influenced by other circumstances which *de facto* exclude or reduce the possibility of further proceedings on the same question in the forum. Thus, once the alleged parent is dead, there is no real risk that the question of the existence of a parent–child relationship will arise otherwise than in proceedings concerning the → succession.

A third aspect to consider is the more or less close relationship existing between the main question and the incidental question. As explained above, the main question can sometimes be seen as belonging to the 'core' effects of the legal status or relationship which constitutes the incidental question (eg the inability to remarry is clearly a core effect of a marriage). In such a case, it is more difficult for the courts to deviate from the application of the forum choice-of-law rules and follow the *lex causae* approach. If a legal status or relationship is valid under the choice-of-law rules of the forum it cannot be devoid of its core effects by simply referring to the *lex causae*. On the same lines, it is difficult to recognize such core effects to a relationship that does not validly exist under choice-of-law rules of the forum. By contrast, the *lex causae* approach can more easily be followed when the main question does not belong to the core effects of the disputed status or relationship. This is, for instance, the case when the main question turns on a person's surname: since the link between the name and the existence of a certain family status (→ marriage, divorce (→ Divorce and personal separation), filiation), albeit important, is not so close, we can more easily accept that the person's name will conform to the foreign *lex causae* even if this does not correspond to the person's status under the choice-of-law rules of the forum (Andreas Bucher, 'La dimension sociale du droit international privé' (2009) 341 *Collected Courses of the Hague Academy of International Law* 9 (246 *et seq*); see also the decision of the German Federal Court of Justice (BGH), 15 February 1984 [1986] IPRax 35).

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