

Theories of Conflict of Laws: Evaluating in the Perspective of E-Commerce Consumer Transactions in Malaysia

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Abstract: Conflict of laws principles derived from theories which are mainly territorial in nature. This article analyses the deficiencies of these theories to evaluate its suitability of application into the modern day commerce, known as electronic commerce (hereinafter referred to as 'e-commerce') in Malaysia. The first objective of this article is to analyse the suitability of the traditional theories of conflict of laws, which upheld the concept of territoriality, with the infrastructure of internet that discards the notion of territoriality. Besides that, this article intends to analyse the theories which could be utilised to form a model that is suitable with the infrastructure of the internet in the context of electronic consumer (hereinafter referred to as 'e-consumer') protection. Upon doctrinal analysis conducted, it could be propounded that the theories which upheld the concept of territoriality are not suitable to be applied into the modern form of contracting known as e-commerce. A harmonised model law is proposed based on the theories of universalist and justice especially at ASEAN level as a key in solving the problem of the notion of territoriality that has been imprinted into most of the traditional theories of conflict of laws.

Key words: Conflict of laws E-commerce Theories Harmonisation

INTRODUCTION

Conflict of laws is the private law of a particular country which deals with cases having a foreign element. Foreign element means that, the case involves contracts with some system of law other than that of the forum country [1]. Conflict of laws jurisprudence recognises the application of foreign laws in deciding a case even though those laws are different from the law of the forum court where its appropriate do so [2]. A clear illustration on the meaning of conflict of laws above could be viewed when a Malaysian company entered into a contract with French company and its performance is to be executed in Belgium. In the event of dispute, the issue on choice of law i.e. proper law to govern the contract, jurisdiction of court, i.e. which country's court has jurisdiction to hear the case and enforcement of foreign judgement i.e. whether the decision made in one country court could be enforced in another shall be determined. Hence, the existence of clear law and rules on conflict of laws is pertinent to avoid grave injustice to be done to the contracting parties.

Traditionally, to protect a country's sovereignty, the law on conflict of laws was developed from the theories of conflict of laws which are generally, territorial in nature. Nevertheless, the present world is an era of information technology, which allows any computer connected with the Internet to access into any websites. Businesses, through the use of the Internet, can enter into electronic contracts with other businesses located in different countries, known as e-commerce [3]. The borderless nature of internet has led the authors of this article to question the suitability of the traditional theories of conflict of laws, which place reliance onto the notion of territoriality with the operation of internet that discards the concept of territoriality.

Furthermore, question arises on whether the traditional theories could do justice to e-consumers who enter into contracts to buy goods or services online. In circumstance where traditional theories developed on the basis of territoriality are found to be unsuitable, the authors of this article query other forms of theories which should be utilised to form a model law that is suitable with the infrastructure of the internet and incorporate consumer protection.

Moreover, the authors emphasis on a model law which harmonises the law at ASEAN level. Currently, there has yet to be any legislation enacted by any of the ASEAN member countries to develop and enact laws which address the issues on conflict of laws in the context of consumer protection in cross borders e-commerce transactions. The E-ASEAN Reference Framework for E-Commerce Legal Infrastructure discussed in 2001 has highlighted the issues on conflict of laws in cross borders contracts to be discussed at the ASEAN level. Nevertheless, to date, such a discussion has yet to materialise [4].

Besides that, the United Nations Conference on Trade and Development (UNCTAD) has discussed the review of e-commerce legislations for the purpose of harmonisation of e-commerce laws in the ASEAN regions, by ensuring that all ASEAN countries initiate in developing laws pertaining to electronic transactions, privacy, cybercrime, consumer protection, content regulations and domain names [5]. Nonetheless, the issues on conflict of laws in cross borders contracts, which was highlighted in 2001 has been left undiscussed. Consequently, some ASEAN countries such as Malaysia, Singapore and Brunei, deals with the issue on choice of law, i.e. selection of proper choice of law in the event of disputes, by utilising the common law principle [6].

However, the laws on jurisdiction of courts in conflict of laws cases, which could be found in the respective Rules of Courts of these countries are unclear [7]. The laws on enforcement of foreign judgements in these countries solely recognises money judgements and judgements from some ASEAN countries, such as judgements delivered at the courts in Malaysia, Singapore and Brunei [8]. Besides that, Thailand possesses its own Conflict of Laws Act, which discuss its position on choosing the proper choice of law in conflict of laws cases [9]. However, the law on jurisdiction of courts in conflict of laws cases is not clear. There is also absence of law pertaining to enforcement of foreign judgments in this country [10].

Unlike in Malaysia and other ASEAN member states, various efforts and discussions had been carried out by the European Commission (hereinafter referred to as 'EC') to protect the rights and built the confidence in consumers to enter into cross border contracts. Thus, series of efforts have been made by the EU to provide solutions to the three issues, which have led the EU countries to harmonise their laws on the branches of private international law. This includes the enforcement of

Brussels I Regulation which deals with court's jurisdiction and the Rome I Regulation which deals with choice of law. By adopting a doctrinal approach, this article articulates the unsuitability of the traditional theories for e-commerce transactions specifically in the vicissitude of consumer protection. The authors of this article propose that private international law in the ASEAN region should be harmonised for the purposes of congruency and consistency.

MATERIALS AND METHODS

Adopting adocrinal legal research, data collection of this article deliberates on the discovery of the historical development of the theories on conflict of laws, its interpretations and criticisms from various researchers.

The theories discussed in this article comprises of the old and modern theories on conflict of laws. Various literatures have been utilised to provide an insight on the subject matter of the article. The sources referred to consist of primary sources, such as statutes and the secondary sources, such as books and online articles.

Subsequent to analysing the exertion of other researchers above, the authors of this article examined the suitable theories to be applied into e-commerce B2C transactions, by placing emphasis on consumer protection.

RESULTS AND DISCUSSION

Theories of Conflict of Laws: The historical development of private international law has taken place in recent period of time in England. Its evolution however dates back through the development of theories by the jurists on private international law in European continents [11].

Hence, in understanding the history of private international law, specifically on conflict of laws, one needs to simultaneously observe the theories of private international law. It shall be noted that, there are two forms of theories which have been developed in private international law, known as, the old or traditional and modern theories. The old theories on private international law consists of the statutory theory which was developed by Dumolin and D' Argenterre, the territorial theory developed by Huber and Jon Voet, the vested rights theory which was developed by Dicey and Beale, the local law theory developed by Cook, the universalist theory which was developed by Savigny and Mancini and theory of justice which was initiated by Aristotle.

Besides that, the substance of the modern theories consists of the theories on forum and jurisdiction, which were developed, amongst others, by Cavers which established the theory on jurisdiction selecting rules or rule selecting jurisdiction, Currie governmental analysis theory, Baxter comparative impairment theory, Cavers rule selecting approach and Ehrenzweig interpretation of forum policy.

Whilst the modern theories on private international law place reliance on the concept of territoriality, not all the old theories on private international law had place reliance on such concept. Consequently, a number of theories which was developed in the olden days, such as the universalist theory and theory of justice do not rely on the said concept. It could be inferred that, the rationale on the development of theories by jurists on private international law on the basis of territoriality is to protect each states' sovereignty.

Besides that, during the era where the jurists on private international law developed such theories, contractual transactions were conducted via physical presence. The visibility of borders amongst states, has led questions on place of performance of contract, place where the contract was entered into and parties to the contract to become certain. Nevertheless, the issues on choice of law, jurisdiction of court and enforcement of foreign judgement were unresolved in those times because laws on conflict of laws were not harmonised.

The Traditional Theories of Private International Law:

The discussions on the old theories had been made by several authors. RH Grevenson and SM MasumBillah in their writings had explained on the manner in which the statutory theory had come into being. During the ancient Roman period, the civil law of Rome only governs the Roman citizens, whereas, the inhabitants of provinces of the Empire were subjected to their own provincial laws [12].

According to Graveson, the concept of conflict of laws existed in praetorian jurisdiction. MasumBillah is of the same view with DrGraveson above, however, he provided the explanation on how this concept was developed during the era of the praetorian jurisdiction. Praetorian jurisdiction according to SM MasumBillah, refers to individuals known as "praetor peregrini" who functions as officers of specialised tribunal to deal with multi state cases. To decide on jurisdictions, the "praetor peregrini" will refer to the "jus gentium", which consists of a flexible body of law that was formed based on

international norms that eventually created a substantive law for each case, known in the present day as the substantive solution on choice of law issue.

The ancient statute theory had divided the theory into real and personal. The modern statute theory however, had extended its application by allocating disputes to fit the relevant categories. The modern theory has classified that the real statute shall govern the law of a territorial situation of an act or thing and statute personal or an individual personal law shall be the law that governs a dispute irrespective of the place of occurrence of dispute.

However, it was noted by Greavenson that, the problem in the theory is when both statute real and personal are applicable in a dispute. This may occur when the law of a country may regard the application of real statute and at the same time, the law of another country regard the application of personal statute as the relevant law to govern a dispute. Besides that, both Grevenson and MasumBillah noted the absence of uniformity in the meaning of real and personal [13] as a country might base its personal law on a party's nationality and the other on domicile [14].

In addition, Grevenson stated that, Holland welcomed the theory of D'Argentre which was further developed by Huber and Jon Voet. According to jurists, it is the ultimate power of the sovereign to permit what law he pleases to apply in a matter of conflict of laws [15]. This has brought the beginning of modern territorial theory and the idea of comity [16].

Whilst Greavenson has clogged his elaborations on Huber's territorial theory to the extent discussed above, David Mcclean and KischBeevers further states that Huber laid down three maxims which includes, the laws of each states have force within the limits of each sovereignties and bind the citizen of each countries, a citizen of a country are those who are living permanently or temporarily within the administration of the sovereign or government that rule the state and, foreign rights, which are derived from the foreign laws could be applied into another state through the consent of the other [17].

Thus according to the maxims above, the law of another country will be applied in a territory to the extent of the permissibility of its sovereign and it shall apply to all those who live within the parameters of the state. Besides that, the third maxim by Huber has expressed the idea of comity which places an emphasis to avoid injustice that will occur in the circumstance where relevant foreign law is disregarded [18].

Dicey's theory of vested right or acquired rights attempts to reconcile the principle of territorial sovereignty with the application of foreign law. According to Dicey;

"English judges never in strictness enforce the law of any country but their own and when they are popularly said to enforce a foreign law, what they enforce is not a foreign law, but a right acquired under the law of a foreign country."

This means that, this theory believes on the enforcement rights provided by a law. For an example, in deciding a case which involves foreign element and foreign law was decided to govern the contract, it is not the law of the foreign land that will be enforced by the court, instead, it is the right provided under the law that will be enforced. Besides that, according to another jurist, Beale, the issue on conflict of laws involves recognition and enforcement of foreign acquired rights [19].

Cook demolished the application of vested rights theory [20]. According to him, the local law theory rejects the application of foreign law into a sovereign state, [21] as the forum frequently enforces its local rights [22]. Hence, P.R. Beaumont, FRSE and P.E. Mceleavy, David Mcclean, KischBeevers, Greavenson, Cheshire, North and Fawcett collectively quoted Cook who basically states that, when a court faces a case which involves a foreign element, the court will adopt and enforce a rule of decision identical or highly similar with the principle of other case laws decided at another state. The incorporation of the foreign case decisions in to the forum shall than be regarded as the domestic rule. In other words, the forum enforces the rights created under its own law [23].

This theory is alike with the practice of judicial precedent by countries that adopts the common law principles [24]. P.R. Beaumont, FRSE and P.E. Mceleavy in his criticism on this theory states that, although Cook observed that the application of foreign law into a forum state will lead to an obvious complexity, however, P.R. Beaumont, FRSE and P.E. Mceleavy are of the opinion that, such complexity is not defective if it provides helpful and accurate explanation of the facts [25].

Besides that, Cheshire, North and Fawcett, are of the view that, this theory provides no development on private international law and enforcement of forum law do not contribute to resolution of dispute. In addition, Cheshire, North and Fawcett also states that, this theory do not provide guidance as to the extent where local courts shall regard the foreign law [26].

Moreover, David Mcclean and KischBeevers opined that, the reconciliation of foreign law with the doctrine of territorial sovereignty as the law of England also includes the rule on conflict of laws besides its domestic law. Hence it is the opinion of the said writers, to express that the formation of a model of law in the forum is made on the basis of foreign law merely constitute word play [27].

The local law theory provides the inception of foreign law into the forum by the courts of the forum. Whilst the reconciliation of foreign law into forum, this theory suggests that such reconciliation has transform the foreign law to adopt into the forum culture and circumstance making it the law of the forum. Though this theory allows the adaptation of foreign law into forum, exhibiting that the concept of territoriality on conflict of laws disputes could be discarded. Nevertheless, the authors of this article agrees with the researchers above who alleged that the extent of the application of foreign law into forum was not drawn in this theory. Besides that, which foreign law to be adopted by the forum state in ascertaining the answers on the issues of conflict of laws was also not discussed in this theory. This theory merely suggested the application of foreign law into forum without other important guidelines as stated above to ease its application in conflict of laws cases.

Theorist on universalism, Pasquale Stanislao Mancini has argued that people are united by race, language, customs, history, law and religion, but the moral force that provides life to all of these is consciousness of nationality [28].

Grouping of people in a state is prompted by this consciousness. Due to this, it was suggested that, preservation and development of nationality is more than a moral right, instead it is a legal duty. The followers of Mancini, Esperson and Lurent, agreed that the starting point of private international law must be the idea of nationality. States in general bestowed law to its subjects which consists of no frontiers. Thus, it is a violation of sovereignty of the national law where another state does not apply the law of a state.

Nevertheless, a state could exclude itself from applying the law of another state on the ground of public policy, application of principle of *locus regit actum* and application of party autonomy in contracts. Mancini published the necessity for international harmonisation of private international law by convening the first Hague Conference. When the Hague conference secured the membership of USA and United Kingdom's membership, in the 1960s, it began to make a major impact beyond continental Europe [29].

The universalist theory by Mancini result into the application of a standard rules on private International law through the method of harmonisation. The success of Hague Conference as the outcome of this theory, shows that private international law, especially conflict of laws cases in e-commerce transactions needs to apply laws that discards territoriality and spells a standard form of rules in answering the conflict of laws issues. Despite his great effort in harmonising the laws on private international laws, it should be highlighted that, the Hague Principles on Choice of Law in International Commercial Contracts, do not require the selection of laws by the parties to a contract to be made on the basis of consumer protection, which this article intends to examine.

Grevenson, as he states in his book that the theory of justice shall be viewed in threefold, namely, sociological, i.e. the need of fair treatment of international private transactions, ethical i.e. reflects the training of expounders of justice such as lawyers and judges and finally, legal, i.e. refers to judges' vow or oath [30] that promises to deliver justice. Besides that, Mahmood Bahgeri in his Article states that, theory of justice suggests the practise of private international law allows the application of foreign law into the forum when necessary, however, such application shall be accompanied with justice, convenience, necessities and an enlightened conception of public policy.

There are generally two forms of justice in this theory, which are known as corrective justice and methodological in nature. The former emphasise on form and structure and the latter, focuses on contents and results [31]. In addition, LB Curzon, discussed the concept of justice by Aristotle, which recognises the existence of distributive and corrective justice. This means that, in ensuring justice is delivered, Aristotle suggested that, the former concept above shall be applied to distribute honour, wealth and other divisible assets to the members of community in equal or unequal portion. Thus, when assets are distributed equally, all shall attain the same amount and when they are not, all members shall receive their respective unequal shares. The latter however, refers to circumstance where the courts are bestowed with the duty to treat parties in a case equally, investigate the nature of the losses suffered and take away any gains gotten in an ill manner. Corrective justice as the author noted, was stated by Aristotle to be administered in two different forms of situations, namely, in voluntary transactions, which involves, selling, buying,

hiring pledging and lending and involuntary transactions, which involves violent conduct, such as assault and theft. [32].

It is the opinion of the authors in this article that the law on private international law, i.e. conflict of laws shall be just, especially as Grevenson has put forward, justice on the sociological perspective. This is pertinent because, any laws shall be impartial and fair. As far as conflict of laws is concerned, the laws shall reflect impartiality and fairness on private international law transactions. Hence, there shall be fairness in ascertaining the rules on choice of law, jurisdiction of court and enforcement of foreign judgements. In determining the meaning of fairness, the respective authors partially agreed on the concept of corrective justice, as discussed by LB Curzon and Mahmood Bahgeri which was founded by Aristotle. Fairness could only be served to consumers who transact online in the event where the court plays a corrective role to return the losses suffered by the consumers. However, despite placing absolute reliance on the court to ensure fairness to be delivered to e-consumers, the mechanism which shall be used as a shield of protection to consumers are legal rules.

The Modern Theories on Private International Law:

Apart from the discussion on the old theories on private international law, it is crucial for this article to lead its readers to the modern theories on private international law. These theories however are limited to determining the jurisdiction of courts, in deciding cases on conflict of laws issues. These modern theories arose in the United States of America subsequent to the American Revolution. According to Cheshire and North, in contract cases, English choice of law are interpreted by analysing the law chosen by the parties to contract, or in its absence, the law of the country which is more closely connected to the contract. Hence, according to the authors, all these rules reflect to one common approach in the perspective of American authors', known as jurisdiction selecting rules.

The said researchers stated that, in England, or needless to say, in countries that practise common law principles, the courts ascertain jurisdiction by applying the law of the country selected by the choice of law rules, without analysing on the content of the laws selected. [33] Nonetheless, in the United States, David McClean and Kish Beevers, states that, Cavers suggested that, the courts in applying a country's law shall be aware of its content prior to its application into a case to avoid from generating false problems and injustice [34].

Cheshire and North, explained that, Cavers theory emphasises on the choice that has to be made from different substantive rules of law, which will lead to the application of a substantive rule of law originated from one legal system, instead of the application of a rule of law from another legal system. According to Cheshire and North, to eliminate the issue on choice, analysis on whether the case falls within the ambit of true or false conflict shall be made. True conflict refers to the situation where more than one set of rules has legitimate claim, on the other hand, false conflict refers to the circumstance where there is non-existence of issue on rules of choice needs to be made.

Besides that, Cheshire and North states that, where no states have interest in its law being applied whilst there is an existence of conflict of choice, such a situation is known as, no interest case. In addition, Cavers has suggested the two stage analysis to identify whether a case falls within the category of true conflict or false conflict. According to Cavers, as Cheshire and North noted, at the first stage, the court will have to decide on whether the case consist of true or false conflict and if the answer is true conflict, the court shall re analyse the situation and apply the test in a more careful manner with the hope that the conflict will prove to be a false one to lesser the need to decide on choice of law rules. Nevertheless, where re analysis of the case resulted again on true conflict, the court at this interval shall move to the next stage and decide on the selection of proper rule from various rules which has legitimate prerogatives in the case [35].

David Maclean and KischBeevers do not entirely agree on Cavers' approach. They opined that, Cavers' theory is not fit to deal with international conflict compared to national conflict. In addition, they believe that, if courts are given discretion to select the rule without proper guidance on the doctrines that shall be the influential factor for the basis of its selection, there will be danger where choice of law might be made on the basis of which rule is a better rule. Besides that, the researchers are of the view that, expectations laid on the courts to discard and abandon the traditional conflict of laws system developed in centuries, exhibits the request for a noble covenant.

The researchers also explained that, Cavers, has no objection to "jurisdiction selecting rule" i.e. where the court select the appropriate rule to apply in a case, if two decisions of competing rules are made on the basis of policy, consist of reversed law fact pattern provided the

way in which it was put together is kept in mind. According to them, though Cavers' theory has been consciously or unconsciously adopted by the courts, however, in international perspective, a judge can't possibly express his or her preference in adopting the rules practice by one country where the said country do not fall within the federal system of the other country and the only relation the country has with the other is through diplomatic relations and common cultural heritage [36].

The authors of this article agree with the authors in Morris conflict of laws, David Maclean and Kish Beevers, whereby Cavers' theory on jurisdiction selecting rule is not suitable to be adopted in international conflict, specifically on conflict of laws cases in e-commerce transactions. This is because, e-commerce B2C contracts transcends cross borders and in need of international perspective on rules of jurisdiction. Cavers' theory promotes territorial basis of rules in identifying jurisdiction where judges are given discretion to decide on the proper rule in ascertaining jurisdiction to be applicable in a dispute.

Sir Peter North and JJ Fawcett discussed on the theory of governmental analysis introduced by Currie. According to this theory, court should examine substantive laws and policies and the interest of states in having those policies embodied in their rules. Therefore, this theory requires cautious analysis of the rules, policies and interest of state, in the event where there is an existence of true conflict. This theory suggests that, the court in the case of true conflict shall apply the law of forum in resolving disputes.

However, the researchers above criticises this theory by stating that its application result into an abandonment of internationalism of private international law. Besides that, the researchers also states that this theory assumes judges are willing to evaluate policies and interest expressed in substantive laws, which may or may not be evident at the time of the passing of the statute. The researchers of Morris on conflict of laws, have highlighted the criticisms put forth by European writers on the application of Currie's theory in conflict of laws issues. Amongst the criticisms are, conflict of laws deals with issues encountered in a dispute involving private persons, whereas, Currie's theory refers to the interest of government.

For this reason, this theory does not suit the concept of conflict of laws, unless the government is a party to the dispute. Currie also discusses on how his method affected by the American Constitution. Hence, it is difficult to view

the workability of this theory in the absence of constitutional checks and balances. Besides that, it was also criticised that, Currie's theory necessitate the application of the law of forum whilst other states have interest in a case. Apart from that, Currie's theory emphasise on the courts and counsels to identify forum and foreign interest. According to them, rule of law is a result of conflicting social, economic and political interest that consist of fusion of conflicting interest. Due to this, it is impractical to place the idea and assumes the clarity and unambiguity of substantive laws.

Finally, the European writers also criticises that, in seeking the court to decide jurisdiction on case to case basis through this theory and abandon the choice of law rule seems pointless, as the cases decided based on this theory bound to produce choice of law rule through the doctrine of *stare decisis*. The authors of this article agree with the criticisms of the Sir Peter North and JJ Fawcett and David Mclean and Kish Beevers. Exclusive application of the law of the forum in conflict of laws cases discards the idea of nature of conflict of laws issues which often arise in cross borders transactions and does not resolve the issues to ascertain proper choice of law, jurisdiction of courts and enforcement of foreign judgement in conflict of laws cases.

Besides that, Baxter who propounded the comparative impairment theory which agreed with Currie's governmental interest analysis however, disregards the automatic application of law of forum. This theory propose that courts are able and should weigh conflicting interest of states in a case, by analysing which conflicting states' interest will be impaired if its policy will be subordinated to the policy of other states.

It is the opinion of the authors of this article that, placing the burden on the court to decide which conflicting states' interest will be affected or subordinated in the event where the policy of the other state is to be applied in the forum, is not a method to resolve the issues in conflict of laws cases especially in online B2C contracts. This is because, the line to be drawn in identifying forum and foreign state is vague in the cyberspace. Despite simply specifying its disagreement with Currie's theory and suggest the ground on the elimination on the application of the law of forum, the theory does not discuss on the extent of application of law of foreign. Besides that, it shall be noted, the court will indirectly subordinate the interest of a country's law with the other when the court chooses to apply the other country's law [37].

Cavers' subsequently abandon the jurisdiction selecting approach and adopt the rule in favour of rule selecting approach. According to Cavers, in resolving true conflict, court shall develop broad principle of preferences to do justice to parties in a case through judicial development. Cheshire and North criticised this theory by stating that, evolution based on judicial development will result into uncertain and unpredictable principles on conflict of laws rules. Besides that, according to them, this theory will require a long time to develop conflict of laws rules as the courts are bestowed with the authority to develop the principles.

The authors of this article are of the opinion that placing burden on the court to develop conflict of laws rules will lead the court to decide the rule on case to case basis. This theory is not suitable to be adopted into modern transaction i.e. online B2C e-commerce contract as courts will develop rules base on its own preferences laws on choice of laws. Hence, the conflict of laws rules will remain being law that is appropriate to be applied to certain territory only.

Furthermore, Ehrenzweig interpretation of forum policy theory suggests that, courts shall only look into law of the forum in determining appropriate choice of law rule and application of foreign law shall only be made when it will result into injustice to the parties or contrary to their intentions.

From the discussions of modern theories above, it is apparent that, these theories believe justice could be served by placing an emphasis on the law of forum instead of law of foreign. However, it is in the opinion of the authors of this article that, the intention to serve protection onto consumers could not be met in this manner. This is because, consumers could be from either the forum or foreign state. Thus, consumer protection could not be served if a choice of jurisdiction is solely placed onto law of forum. Besides that, this theories also seem to view conflict of laws issues deals with transactions that involves physical presence. However, in the present day, consumers transact goods and services online, which does not require physical presence. Hence, the issues on conflict of laws could not be resolved following these theories.

CONCLUSION

The discussions above has displayed that most of the theories on private international law and all of the theories on jurisdictions have exhibited the application of

territorial concept to solve issues on conflict of laws. It is apparent from the discussions above that, adaptation of English law in ascertaining proper choice of law in conflict of laws cases simply shows that Malaysian, Singapore and Brunei courts adopts the local law theory discussed above. Moreover, by placing reliance on the Thailand Conflict of Law Act in ascertaining choice of law in conflict of laws cases, shows that there is dependence on statute theory in determining choice of law by Thai courts. In addition, the reference on the statutory rule in determining jurisdiction of court shows that Malaysian, Singapore, Brunei and Thai courts, relies on statute theory and territorial theory.

Furthermore, statutes of the ASEAN countries discussed, pertaining to recognition and enforcement of foreign judgement also exhibited that application of the statute theory and territorial theory. This thereafter led this article to question on whether local theory, statute theory and territorial theory are suitable to be adopted into cross borders e-commerce transactions?.

Reliance on local law theory, statute theory and territorial theory, in ascertaining choice of law, jurisdiction of court and enforcement of foreign judgement will not solve the issue on jurisdiction in e-commerce transactions as contracts concluded in the cyberspace are not affixed to be bound by a specific sovereignty. Application of such theories will thereafter result into difficulty in determining which jurisdiction's law shall be used to hear the case, which courts have the authority to hear the case and whether the judgement made in one jurisdiction could be recognised and enforced in another.

These theories are not suitable to be applied to resolve conflict of laws issues. This is because, these theories place reliance on the concept of territoriality, whilst e-commerce has made the world seem flatter, by permitting consumers from across the globe to transact with businesses with a click of a mouse. Thus, the said theories does not suit the infrastructure of internet and e-commerce.

Apart from that, the modern theories on private international law discussed above, generally bestowed the courts with the authority to decide on the proper choice of law and jurisdiction in a conflict of laws case. As stated, the theories on jurisdiction as discussed above, imputes application of the law of forum to determine jurisdiction. When a contract is transacted via cyberspace, it is obviously difficult to determine what may constitute forum and foreign state and law. Besides that, the authors of this article opined that, relying solely onto

law of the forum to resolve conflict of laws issues is unreasonable as such reliance may not provide e-consumer protection, as consumers may be positioned in the forum or foreign country.

Thus, similar with some of the old theories on private international law discussed above, the modern theories also relies on the concept of territoriality, which does not suit the infrastructure of the internet. Thus, it could be concluded that taking into consideration the flaws in the other theories, only the universalist theory by Mancini and theory of justice i.e. corrective justice, could be used.

The authors of this article believe that, these theories could be the foundation to provide a harmonised private international law, in e-commerce dispute, with the emphasis to be placed on the fairness and justice to protect the interest of of e-consumers. This is because, only harmonisation of laws is viewed as the key to discard the notion of territorial concept of conflict of laws and will be adaptable to the infrastructure of the internet. The authors of this article also collectively believe that, the practice of harmonisation of laws on conflict of laws, which has been legislated and practiced by the EU member states, provides hope that such laws and practice could be adoptable into the ASEAN members' states and elucidate the issues on conflict of laws in the cyber domain.

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