Substance Versus Procedure in Private International Law: Distinguishing *Lex Fori* From *Lex Causae* and the Challenges of Incidental Questions and Time Factor

By

Zainab Mojisola, Oniyide[*] and Dr. Abdulwasi Musah[**]

Abstract

The distinction between substantive and procedural law remains one of the most challenging issues in private international law. Although the traditional rule provides that substantive matters are governed by the lex causae while procedural matters are regulated by the lex fori, courts frequently encounter difficulties in classifying legal rules that exhibit characteristics of both categories. This uncertainty is particularly evident in relation to limitation statutes, damages, remedies, and evidentiary matters, where classification may significantly affect the outcome of a dispute. This article examines the theoretical and practical foundations of the substance–procedure distinction and analyses the judicial approaches adopted in resolving classification disputes. It further explores the doctrine of incidental questions and the challenges arising when subsidiary issues intersect with the law governing the principal dispute. Particular attention is given to the impact of temporal factors and inter-temporal changes on the resolution of incidental questions in cross-border litigation. The article argues that rigid classifications often undermine the objectives of private international law and advocates a flexible, purposive approach that focuses on the function and effect of the rule in question. It concludes that such an approach better promotes fairness, legal certainty, and international comity in the resolution of transnational disputes.

KEYWORDS: International Law, Lex fori, Lex causae, Procedure, Substance

1. INTRODUCTION

Conflict of Laws,[1] usually referred to as Private International Law, Conflicts Law or Conflicts is defined as a body of laws that regulates interaction of legal persons (individuals or companies) transacting or contracting in different countries. It covers the entirety of laws that would regulate the resolution of disputes among these entities including the determination of the court with jurisdiction to resolve the dispute, the governing or applicable law (choice of law) and also the procedure for the enforcement of decision of the judgment of the Court. Under Choice of Law heading a question arises is a court to apply the substantive law or procedural law of the foreign country where it has to decide a case with foreign elements?, what is the thin line between procedural issues in which the court is bound to apply *lex fori* and substantive issues wherein the court must apply the law of a foreign country? Also must a forum apply the procedural law of a foreign court and would it be injustice when a forum fails to do so? This research investigates these issues.

[*] **LLB,** Lecturer, Department of Jurisprudence and International Law, Bola Ajibola College of Law , Crescent University Abeokuta, E-mail: zainaboniyide2017@gmail.com , +234 9035945166

[**] **NCE, (Oyo) LL.B, (Ife) LL.M, (Akoka) PH.D. (Ibadan),** Head, Jurisprudence and International Law Department, Bola Ajibola College of Law, Crescent University, Abeokuta, Ogun State, Nigeria, musaabdulwasi@gmail.com

[1] This is the term adopted the most in the United States of America, Canada and the United Kingdom.

For more than two centuries, legal thought has recognised the distinction between substantive and procedural law. Nevertheless, notwithstanding the long-standing existence of these categories, the precise line separating substance from procedure remains a subject of continuing judicial and academic debate.[2]The authors[3] state that jurisdictional conflict of laws arises when it becomes necessary to determine whether a rule is procedural or substantive when resolving a conflict of laws involving a foreign element and in such circumstances, procedural issues are regulated by the law of the forum (*lex fori)*, whereas substantive issues are governed by the law identified through the court's applicable choice of law rules (*lex causae*). This is commonly described as jurisdictional conflict of laws.

British courts have traditionally interpreted the concept of "procedure" quite broadly, extending it to encompass virtually every aspect relating to relief and enforcement in an action, commonly referred to as "the remedy."[4] This expansive interpretation has, however, attracted criticism in recent times.[5] Within the sphere of jurisdictional conflict of laws, it has been contended that such an approach undermines the objectives of choice of law rules. In response to these concerns, certain Commonwealth courts have adopted a different test for distinguishing procedural rules from substantive ones. Notably, the High Court of Australia observed that matters affecting the existence, scope, or enforceability of the parties' rights and obligations are, by their nature, matters of substance rather than procedure.[6] Authors opined that:

> *the primary object of this Rule is to obviate the inconvenience of conducting the trial of a case containing foreign elements in a manner with which the court is unfamiliar. If, therefore, it is possible to apply a foreign rule, or to refrain from applying an English rule, without causing any such inconvenience, those rules should not necessarily, for the purpose of this Rule, be classified as procedural.*[7]

Similarly, A E Anton states that:

> *...upon intelligible practical grounds: a legal system's rules of procedure are usually complex and interrelated and to isolate a particular foreign rule and apply it against the very different background of Scottish procedural rules would be absurd. The Scottish courts, for example, could not easily apply French methods of proof by enqumite or expertise.*[8]

Also, in private international law, courts generally apply their own procedural rules in disputes involving foreign elements because, at the commencement of proceedings, the applicable foreign law governing the substantive issues may not yet have been identified or established. Since the foreign law must first be pleaded and proven, it would be impractical for the court to rely on it in regulating the conduct of the proceedings from the outset.

---

[2]Ofer Malcaiand Ronit Levine-Schnur, 'Which Came First, the Procedure or the Substance? Justificational Priority and the Substance–Procedure Distinction', [2014] 34 (1) *Oxford Journal of Legal Studies*, , pp. 1–19.

[3]ibid.

[4]R Garnett, Substance and Procedure in Private International Law (OUP 2012) 6.

[5]A.V. Dicey, J.H.C. Morris & Lawrence Collins, *Dicey, Morris and Collins on the Conflict of Laws* (14th edn, Sweet & Maxwell, 2006).

[6] ibid.

[7]ibid.

[8]A E Anton & P R Beaumont, *Private International Law* (2nd edn Edinburgh W Green 1990), at 742.

The application of the law of the forum to procedural matters ensures certainty, orderliness, and effective judicial administration. Courts require a recognised procedural framework for matters such as the commencement of actions, filing of processes, admissibility of evidence, and enforcement of judgments. Allowing parties to rely on procedural mechanisms unknown to the forum merely because they exist under a foreign legal system would create confusion and disrupt the administration of justice.

Furthermore, practical considerations such as cost, efficiency, and time strongly support the continued application of the forum's procedural law throughout the litigation process. Consequently, while substantive rights and obligations may be governed by a foreign law identified through the applicable choice of law rules, procedural matters remain regulated by the *lex fori.* Dicey and Morris justify the application of the *lex fori* to procedural matters not merely on grounds of practicality, but also on considerations of justice and fairness.[9] According to this view, it is consistent with natural justice that a court should apply its own procedural rules irrespective of whether the substantive issues in dispute are governed by domestic or foreign law. The rationale is that courts are established to administer justice through procedures recognised within their legal systems, and parties who submit to the jurisdiction of a court are ordinarily entitled to expect that those procedures will govern the conduct of the proceedings.

The concept of legitimate expectation also supports this position. A claimant who voluntarily chooses a particular forum reasonably anticipates that the procedural rules of that forum will apply. The forum itself also has an institutional interest in ensuring that litigation conducted before it adheres to its own procedural standards. Furthermore, the principles of justice and practical convenience are closely connected in this context. The application of the forum's procedural law promotes certainty, predictability, and efficiency in judicial proceedings, while also ensuring fairness to the parties and preserving the orderly administration of justice. Although the principle that procedural matters are governed by the *lex fori* appears straightforward in theory, considerable difficulty arises in practice when courts attempt to distinguish between substantive and procedural rules. The real challenge lies not in stating the principle itself, but in determining whether a particular legal issue should properly be classified as one of substance or procedure. This distinction is often uncertain because some rules possess characteristics of both categories depending on their legal effect and context.[10]

The issue becomes particularly significant in relation to statutes of limitation in conflict of laws. Traditionally, limitation statutes were regarded by English courts as procedural because they merely barred the remedy without extinguishing the underlying right. On this view, matters relating to limitation periods were governed by the *lex fori,* meaning that the forum court applied its own limitation law irrespective of the foreign law governing the substantive dispute.[11]However, this approach generated substantial criticism because limitation periods can directly affect the enforceability and practical existence of legal rights. In some legal systems, the expiration of a limitation period does not merely prevent the institution of an action; rather, it extinguishes the substantive right itself.[12] Consequently, classifying all

---

[9]M Wolff, *Private International Law* (2nd edn Oxford Clarendon Press 1950).

[10]Dicey & Morris (n 5).

[11]JM Carruthers, 'Substance and Procedure in the Conflict of Laws' [2004] 54(4) International and Comparative Law Quarterly 949 https://www.jstor.org/stable/3663295 accessed 22 May 2026.

[12] For example in France.

limitation statutes as purely procedural may undermine the objectives of choice of law rules by allowing the forum's law to override the foreign law that otherwise governs the dispute.[13]

This difficulty demonstrates the uncertainty inherent in the substance–procedure distinction. A statute of limitation may appear procedural where it regulates the time within which an action may be commenced, yet it may also be substantive where its effect is to extinguish or significantly affect the rights and obligations of the parties. As a result, courts increasingly examine the nature and effect of the limitation rule in question rather than relying solely on rigid classifications.[14]The controversy surrounding limitation statutes therefore illustrates the broader problem identified by conflict of laws scholars: the distinction between substance and procedure is rarely clear-cut, and its application depends heavily on the legal context, the purpose of the rule, and its practical effect on the parties' rights.[15]

2. X-RAYING THE THIN LINE BETWEEN PROCEDURE AND SUBSTANCE

The distinction between substantive and procedural law remains one of the most difficult issues in private international law. Although the general principle appears straightforward, those substantive matters are governed by the *lex causae* while procedural matters are governed by the *lex fori*, its practical application often creates considerable uncertainty. Scholars and courts have repeatedly observed that the challenge lies not in stating the principle, but in determining on which side of the substance–procedure divide a particular issue falls. As Cook famously observed, the line separating substance from procedure is not fixed or objectively discoverable; rather, it is drawn according to the purpose sought to be achieved in a particular context.[16]

The uncertainty surrounding the distinction is particularly evident in tort and delict claims involving damages. Courts have acknowledged that some aspects of damages are substantive while others are procedural. In *Boys v Chaplin,*[17] Lord Hodson stated that the law relating to damages is "partly procedural and partly substantive." Generally, heads of damages, remoteness, mitigation, and recoverability are treated as substantive matters governed by the *lex causae*, whereas the method of assessment or quantification of damages is usually regarded as procedural and therefore governed by the *lex fori*. However, despite this apparent distinction, courts continue to struggle with borderline issues.

The decision in *Edmunds v Simmonds*[18] demonstrates these difficulties. The case arose from a road traffic accident in Spain involving English parties. Although Spanish law governed the substantive issues under the Private International Law (Miscellaneous Provisions) Act 1995, dispute arose regarding the law applicable to the quantification of damages. English law would produce a substantially higher award than Spanish law. Garland J held that English law should govern the assessment of damages, emphasizing that quantification was procedural and therefore governed by the *lex fori*. The case illustrates the tendency of forum courts to apply their own procedural rules even where substantive liability is governed by foreign law.

---

[13]ibid.
[14]ibid.
[15]ibid.
[16]WW Cook, 'Substance' and 'Procedure' in the Conflict of Law' ([932-3] 42 *Yale LJ* 333, 334).
[17][1971] AC 356.
[18][2001] 1 WLR 1003.

Similarly, in *Roerig v Valiant Trawlers Ltd*[19] , the court was required to determine whether the deduction of collateral benefits from damages was a substantive or procedural issue. Dutch law required such deductions, whereas English law did not. The Court of Appeal held that the issue related to the assessment and quantification of damages rather than liability itself and therefore classified it as procedural. English law as the *lex fori* consequently applied. The case demonstrates how courts frequently classify issues concerning damages as procedural in order to preserve the application of forum law.

The same approach was adopted in *Hulse v Chambers*[20], The claimants sustained injuries in Greece, and Greek law governed substantive liability. Nevertheless, the English court applied English law to the quantification of damages on the basis that assessment of damages was procedural. Holland J reaffirmed that the distinction between substance and procedure survives under the 1995 Act because courts cannot practically function by abandoning their own procedural systems. The case further highlights the entrenched preference of courts for applying the *lex fori* in procedural matters.

Another important illustration is *Henderson v Jaouen*[21] , where the issue concerned whether deterioration in a claimant's medical condition constituted a fresh harmful event capable of founding a new cause of action. The Court of Appeal treated the French rule permitting claims "*en cas d'aggravation*"[22] as procedural and held that the original harmful event remained the accident in France. The case demonstrates how classification disputes may arise not only in relation to damages but also concerning jurisdictional and procedural consequences flowing from foreign legal rules. Courts should exercise caution in classifying foreign rules as procedural merely to justify the application of forum law. Excessive reliance on the l*ex fori* may encourage forum shopping and undermine the objectives of private international law. As Graveson observed, rules of procedure should not automatically escape the influence of foreign elements simply because they concern litigation mechanics.[23] Similarly, Cook argued that refusal to apply foreign procedural rules in appropriate cases may defeat the policy underlying the applicable foreign substantive law. [24]

Accordingly, modern conflict of laws scholarship increasingly favors a functional and purposive approach to classification. Rather than mechanically applying labels such as "substance" or "procedure," courts are encouraged to examine the practical effect, policy considerations, and objectives of the rule in question.[25] The central inquiry should be whether applying the foreign rule would genuinely create inconvenience or undermine the administration of justice in the forum. Where no such difficulty exists, greater willingness to recognize foreign rules as substantive may better serve the goals of fairness, certainty, and international comity.[26]

3. INCIDENTAL QUESTIONS AND THE THREE STRUCTURAL PREREQUISITES

3.1 The Incidental Questions

[19][2002] 1 Lloyd's Rep 681
[20][2001] 1 WLR 2386.
[21][2002] 2 All ER 705.
[22]Aggravation claim.
[23]RH Graveson, *Conflict of Laws Private International Law* (7th edn London Sweet & Maxwell 1974).
[24]Cook (n 14).
[25]Carruthers (n 10).
[26]ibid.

A case involving private international law may place a subsidiary issue, as well as a main question, before the court. Once the relevant choice of law rule has been applied and the law to govern the main issue thereby determined, a further choice of law rule may be required to answer the subsidiary question affecting the main issue.[27]

The incidental question, often referred to in civil law jurisdictions as a preliminary or subsidiary question, represents one of the most intellectually challenging and theoretically dense problems within the field of the conflict of laws or private international law. It arises when a court, having already determined that its own choice of law rules dictate the application of a foreign legal system to govern the primary dispute, is confronted with a secondary legal issue that must be resolved before the primary dispute can be settled. The core of the dilemma lies in a systemic conflict of choice of law rules. The court must decide whether to resolve this secondary issue by applying its own conflict rules, known as the approach of the *lex fori,* or by applying the conflict rules of the foreign legal system that governs the main issue, known as the approach of the *lex causae.*

This issue does not merely represent a technical procedural hitch but exposes a profound philosophical division regarding the ultimate purpose of private international law. Courts and academic commentators are deeply divided between the pursuit of internal consistency, which demands that a forum court resolve identical legal issues in the same manner regardless of the nature of the main claim, and international uniformity, which dictates that a forum court should reach the exact same conclusion as the courts of the foreign state governing the principal issue.

3.2 The Three Structural Prerequisites

A true incidental question does not exist simply because a case involves multiple legal issues or complex factual matrices. Legal jurisprudence has established that three specific, cumulative conditions must be satisfied before a court faces a genuine incidental question.[28] The first requirement is that the main issue must, by virtue of the choice of law rules of the forum, be governed by a foreign legal system.[29] If the choice of law rules of the forum point to the internal law of the forum itself to govern the principal claim, the structural framework for a true incidental question collapses. In such instances, any secondary question is simply resolved by the forum's own laws or its standard choice of law mechanisms.[30] The second requirement is that a subsidiary or secondary issue must arise which contains international or foreign elements, possesses its own independent choice of law rule within the forum, and is capable of arising as a primary issue in its own right.[31] Common examples of these subsidiary issues include the validity of a foreign marriage, the legitimacy of a child, or the validity of a prior divorce decree, all of which are essential precursors to resolving a primary dispute such as the intestate succession of property or entitlement to matrimonial assets.[32]

The third and most critical requirement is that the choice of law rules of the forum and the choice of law rules of the foreign country governing the main issue must lead to

---

[27]JJ Fawcett and JM Carruthers, 'The Incidental Question' in Sir Peter North (ed), Cheshire, North & Fawcett, *Private International Law* (14th edn, Oxford University Press 2008). 51 https://academic.oup.com/book/57733/chapter/470452951accessed 22 May 2026.

[28]Dicey and Morris (n 5).

[29]Fawcett and Carruthers (n 25)

[30]Adrian Briggs, *The Conflict of Laws* (5th edn, OUP 2024) 167–172.

[31]Fawcett and Carruthers (n 25).

[32]JG Collier, *Conflict of Laws* (4th edn, Cambridge University Press 2001) 121–125.

contradictory results on the secondary issue.[33] If both systems of law would utilize rules that yield the exact same substantive conclusion, the problem is false or illusory, as no conflict exists. A true incidental question only manifests when the secondary issue would be decided in favor of a party under the conflict rules of the forum but against that same party under the conflict rules of the foreign country, or vice versa.

4. THE THEORETICAL CONFLICT BETWEEN *LEX FORI* AND *LEX CAUSAE*

When a true incidental question is identified, the court faces a choice between two major competing legal theories, each supported by distinct policy objectives and rationales.[34] The first theory mandates the application of the choice of law rules of the forum, or the *lex fori.* Proponents of this approach argue that a court must remain loyal to its own system of private international law. According to this view, it is illogical for a court to abandon its own carefully crafted choice of law rules for an incidental issue simply because that issue arises under the umbrella of a foreign main issue.[35] The primary advantage of the *lex fori* approach is that it ensures internal consistency within the forum jurisdiction. It guarantees that the validity of a legal status, such as a marriage or a divorce, is evaluated identically by the forum's courts regardless of whether the question arises directly as a main claim or incidentally within a succession dispute.[36] This prevents the anomalous situation where a person could be recognized as a lawful spouse for one type of claim but not for another within the very same courthouse.

The second theory advocates for the application of the choice of law rules of the foreign legal system governing the main issue, or the *lex causae.*[37] This methodology assumes that when the forum's choices of law rules select a foreign law to govern the main dispute, they intend for the case to be decided exactly as a judge sitting in that foreign jurisdiction would decide it. By adopting the conflict rules of the l*ex causae*, the forum court promotes international uniformity of results. This approach prevents forum shopping, as litigants cannot achieve a different substantive outcome merely by bringing their claim in a foreign court rather than the courts of the country most intimately connected to the primary dispute.[38]

4.1 Analysis of Landmark Judicial Precedents

The tension between these two competing methodologies is vividly illustrated in the historical development of common law jurisprudence. The jurisprudential landscape features cases that swing between the application of the *lex causae* and the *lex fori*, highlighting that courts often prefer pragmatic, equitable outcomes over rigid adherence to abstract doctrine.

The most famous modern affirmation of the l*ex causae* approach occurred in the Canadian case of *Schwebel v Ungar*[39]*,* decided by the Supreme Court of Canada in 1963. In that case, a Jewish couple who were originally domiciled in Hungary were divorced while traveling in a refugee camp in Germany by means of a religious divorce known as a get. Under the domestic laws of both Hungary and Germany at

[33]Dicey and Morris (n 5).
[34]Briggs (n 28).
[35]Dicey and Morris (n 5).
[36]Collier (n 30).
[37]Briggs (n 28).
[38]Dicey and Morris (n 5).
[39][1965] S.C.R. 148.

that time, this religious divorce was legally invalid. The parties subsequently migrated to Israel and established a new permanent domicile there. Under the law of Israel, which regulates personal status by religious law, the get was fully recognized as valid, meaning that under Israeli law, the woman was a single person with the capacity to remarry. The woman later traveled to Ontario and married her second husband. When the second husband later sought a nullity decree in Ontario on the grounds of bigamy, the Canadian court had to address an incidental question. The main issue was the capacity to marry, which under Ontario conflict rules was governed by the law of her domicile at the time of the marriage, namely Israel. The incidental question was whether her prior divorce was valid. Under Ontario's independent choice of law rules regarding divorce, the get would not be recognized because the parties were not domiciled in Germany or Hungary at the time of the divorce. However, under Israeli law, the divorce was perfectly valid. The Supreme Court of Canada bypassed its own choice of law rules for divorce and applied the law of Israel, the *lex causae* of the main issue. The court reasoned that since Israeli law gave her the capacity to marry, her prior divorce must be treated as valid for the purpose of that marriage, thereby upholding the validity of the Ontario marriage.

Conversely, a different judicial approach can be observed in the English decision of *Lawrence v Lawrence*[40], decided by the Court of Appeal in 1985. This case involved a woman who had obtained a divorce in Nevada, which was not initially recognized by the law of her current domicile, Brazil. She immediately remarried in Nevada and subsequently moved to England. The English court had to determine the validity of the second marriage. The primary issue was the capacity to marry, which the court linked to her domicile, but the underlying incidental question was the validity of the Nevada divorce. The Court of Appeal struggled to reconcile the competing choice of law rules, ultimately utilizing a combination of statutory interpretation and an altered formulation of the *lex fori* approach to recognize the divorce. The court preferred an outcome that validated the marriage and maintained consistency with English public policy regarding the recognition of foreign divorces, rather than allowing the restrictive domestic laws of Brazil to invalidate a marriage celebrated in Nevada.

4.2 The Civil Law Distinction of Proper versus Improper Issues

While common law jurisdictions often treat the incidental question as a unified theoretical puzzle, civil law systems, particularly reflected in continental European and South African jurisprudence, apply a more refined classification system.[41] These jurisdictions draw a sharp distinction between what they term proper and improper incidental questions.

A proper incidental question corresponds strictly to the classical definition. It occurs when the private international law of the forum points directly to a foreign legal system to govern the principal issue, and that foreign system contains conflict rules that contradict the forum's own conflict rules regarding the subsidiary issue. In these scenarios, civil law courts engage in the traditional debate between international uniformity and internal consistency, often leaning toward the l*ex causae* if the foreign country has a deeply vested interest in the holistic resolution of the matter. An improper incidental question arises when the choice of law rules of the forum point not to a foreign law, but back to the forum's own domestic law to govern the main

[40][1985] Fam 106.

[41]Symeon C Symeonides, 'Codifying Choice of Law Around the World' (OUP 2014) 45–52 <https://clients.all-in-web.fr/offres/file_inline_src/141/141_P_16701_6.pdf>accessed 9th June, 2026.

issue. In this structural alignment, even if a subsidiary issue contains foreign elements, the fact that the main issue is anchored in the *lex fori* means that the court will almost universally apply its own domestic choice of law rules to resolve the secondary issue.[42] Civil law jurists argue that it is conceptually impossible to subordinate the forum's own laws to a foreign choice of law rule when the forum itself is the designated custodian of the primary right or remedy.

4.3 Academic Critique and Modern Trends

Legal scholars have criticized both the rigid application of the *lex fori* and the unyielding adoption of the *lex causae*, noting that a single, mechanical formula often fails to deliver justice in complex international disputes. Prominent conflict scholars, such as Albert Dicey, John Morris, and Ernst Rabel, have argued against a dogmatic, one-size-fits-all solution to the incidental question.[43] The modern trend in private international law favors a flexible, policy-oriented approach, closely aligned with the concept of dépeçage, which is the process of cutting up a case and applying different laws to different issues within the same dispute. Instead of blindly applying the conflict rules of the main issue or the forum, contemporary courts increasingly look at the underlying legislative purpose behind the specific laws in conflict. A court today will evaluate which jurisdiction has the most significant relationship to the specific incidental issue and consider the expectations of the parties involved. For instance, in matters concerning family status, legitimacy, and the validity of marriage, modern judicial policy heavily favors the validation of status and the protection of expectations over abstract adherence to either international uniformity or internal consistency. Consequently, the incidental question is increasingly treated not as an absolute rule of law, but as a discretionary judicial tool utilized to prevent hardship and ensure equity across borders.

4.4 Time Factor

The time factor, often termed the temporal element or the problem of inter-temporal law, constitutes a profound dimension of complexity within private international law that frequently intersects with the incidental question.[44] While standard conflict of laws analysis focuses on a spatial conflict, determining which country’s law applies across geographical borders, the time factor introduces a chronological conflict.[45] This occurs when a relevant legal system changes its internal laws, its boundaries, or its choice of law rules over time.[46]

When a court faces an incidental question, the temporal element complicates the dispute because the judge must determine not only which jurisdiction’s choice of law rules to apply but also at which specific point in time those rules must be frozen.[47] Legal relationships are fluid, and statutes evolve. Consequently, a court must decide whether to evaluate a preliminary issue using the law as it existed when the status was created, when the main right accrued, or when the court renders its final judgment.

4.5 The Three Operational Phases of Time in Preliminary Statuses

The impact of the time factor on an incidental question may be analysed through three temporal reference points, each carrying different judicial consequences. The first

[42]ibid.
[43]Dicey and Morris (n 5).
[44]Adrian Briggs, *The Conflict of Laws* (5th edn, Oxford University Press 2024) 28–33.
[45]Dicey and Morris (n 5).
[46]Fawcett and Carruthers (n 25).
[47]Collier (n 30).

marker is the time of the creation of the status or relationship, such as the date a marriage was solemnized or a child was born. Applying the law of this specific moment protects vested rights and the legitimate expectations of the parties at the time they entered into the legal relationship.[48] The second marker is the time when the main cause of action arises or accrues, such as the exact date of a testator's death in an inheritance dispute or the date an injury occurs in a tort claim. Many jurisdictions argue that this is the critical moment when the rights of the litigants crystallize, meaning the incidental status must be verified using the legal framework active at this precise instant.[49]

The third marker is the time of the judicial hearing or judgment. While applying the law of the trial allows the court to utilize the most modern and enlightened legal standards, it risks disrupting long-standing human relationships by retroactively invalidating a status that was completely lawful when it was established decades prior.[50]

4.6 Analysis of Landmark Temporal Precedents

The challenges of managing the time factor alongside incidental questions are well-documented in foundational common law decisions, where courts have had to decide which temporal anchor to prioritize to achieve an equitable result.

In the crucial Canadian decision of *Schwebel v Ungar*[51], decided in 1963, the time factor played a decisive role that is frequently understated. When the parties obtained their religious divorce in Germany, they were domiciled in Hungary, a country that did not recognize the divorce. Had the court evaluated the validity of the divorce at the exact moment it occurred, the status would have been deemed void. However, by the time the woman entered into her second marriage in Ontario, her domicile had shifted to Israel, which did recognize the historical divorce. The Supreme Court of Canada effectively determined that the temporal focus for the incidental question should not be frozen at the historical date of the divorce itself. Instead, the court evaluated her status at the subsequent time of her second marriage, validating the marriage by looking at her capacity under Israeli law at that later operational moment.

A similar temporal struggle arose in the English case of *Starkowski v Attorney-General*[52], decided by the House of Lords in 1953. This case involved a couple who married in Austria in 1945 using a religious ceremony that was legally invalid under Austrian law at that time. They later separated, and the woman moved to England, where she remarried. Crucially, between her first and second marriages, Austrian law enacted a retroactive statute validating the earlier religious ceremonies if they were properly registered. The House of Lords had to determine whether to view the incidental question of her marital status through the lens of Austrian law as it stood in 1945 or as amended retroactively. The Court chose to give effect to the retroactive foreign legislation, holding that the first marriage had been validated before the second marriage took place. This decision established that when the *lex causae* changes retroactively, the forum court will generally recognize those temporal alterations, even if it disrupts an intermediate status created in the forum.

4.7 The Doctrine of Vested Rights and Retroactive Foreign Legislation

---

[48]ibid.
[49]ibid.
[50]ibid.
[51]*Schwebel* (n 39)
[52]1954 AC 155.

One of the primary theoretical frameworks used to manage the time factor in incidental questions is the doctrine of vested or acquired rights. This doctrine asserts that once a legal status or property right is validly created under the law applicable at that time, it should be recognized globally and protected against subsequent legislative alterations, unless public policy demands otherwise.[53]

When a foreign state passes retroactive legislation that alters a preliminary status, the forum court must balance respect for foreign sovereignty against the protection of local citizens. If the foreign law retroactively invalidates a marriage that the forum considers valid, the forum court will frequently invoke public policy to reject the temporal change, preserving internal consistency.[54] Conversely, if the foreign law retroactively validates a status, as seen in *Starkowski's* case[55], courts are far more willing to adopt the temporal shift because it aligns with a general global policy in favor of validating marriages and legitimizing children.

5.0 CRITICAL EVALUATION OF THE CHALLENGES OF THE SUBSTANCE-PROCEDURE DISTINCTION, INCIDENTAL QUESTIONS AND TIME FACTORS IN THE ADJUDICATION OF INTERNATIONAL DISPUTES

The traditional application of the *lex fori* is justified largely on grounds of convenience, judicial convenience and the need for a court to regulate proceedings according to its own procedural framework.[56] This justification remains important, particularly where matters such as commencement of proceedings, filing of processes, admissibility of evidence and conduct of trial are concerned. However, the difficulty arises where a rule classified as procedural has consequences that substantially affect the rights of the parties. In such circumstances, adherence to the *lex fori* may enable the forum to alter, indirectly, the substantive consequences of a foreign law which its own choice of law rules have selected to govern the dispute. The problem is therefore not with the application of the *lex fori* itself, but with an overly broad conception of procedure which permits rules affecting substantive rights to be treated as matters of mere litigation mechanics. This concern is particularly apparent in relation to limitation periods and damages, where classification may determine whether a claim can be maintained or the extent of compensation recoverable.[57]

The authorities on damages illustrate the difficulty. In Boys v Chaplin[58], Lord Hodson recognised that damages may contain both substantive and procedural elements, thereby demonstrating that the distinction cannot always be maintained in absolute terms.[59] While matters such as heads of damages, remoteness and recoverability may concern the substantive right, the method of assessment may be regarded as procedural. The decisions in *Edmunds v Simmonds*[60], *Roerig v Valiant Trawlers Ltd*[61] *and Hulse v Chambers*[62] portrays the willingness of courts to apply the *lex fori* to the quantification of damages even where the substantive liability is governed

[53]Dicey and Morris (n 5).
[54]Collier (n 30).
[55]*Starkowsk*i (52)
[56] Dicey and Morris (n 5).
[57] Anton & Beaumont (n 8).
[58] *Boys* (n 17).
[59] Ibid.
[60] *Edmunds* (n 18).
[61] *Roerig* (n 19).
[62] [2001] 1 Lloyd's Rep 225.

by foreign law. The approach is understandable from the standpoint of judicial convenience, but it may become problematic where the method of assessment substantially determines the practical value of the right created by the *lex causae*. It is therefore necessary to consider not merely the label attached to a rule, but the actual effect of its application.

The argument for a greater role for the *lex causae* must, however, be approached with equal caution. Once a foreign law has been selected to govern the substantive dispute, there is considerable justification for ensuring that the rights created by that law are not undermined by an unnecessarily expansive application of forum law. At the same time, it would be impractical to require Nigerian courts to administer every aspect of proceedings according to the procedural law of a foreign jurisdiction. Procedural rules are closely connected with the organization and administration of the forum, and the application of unfamiliar foreign procedures may create uncertainty, increase litigation costs and interfere with the efficient disposal of cases. The better approach is therefore not to replace the *lex fori* with the *lex causae*, but to determine which law should apply by reference to the function and effect of the particular rule.

A functional approach is preferable because some rules cannot satisfactorily be described as exclusively substantive or procedural. The question should be whether the rule principally regulates the machinery of litigation or whether it determines, limits or extinguishes a substantive right. A limitation rule, for instance, may properly be regarded as procedural where it merely prescribes the period within which proceedings must be commenced. Conversely, where the expiry of the limitation period extinguishes the underlying right. Treating such a rule as purely procedural would allow the forum's limitation law to defeat a substantive entitlement governed by foreign law. The same reasoning applies to damages and remedies. Rather than placing an entire category of rules automatically under the *lex fori* or *lex causae*, the court should examine the purpose of the rule and the consequences which its application would produce. This approach is consistent with the criticism of rigid classification advanced by Cook and other conflicts scholars.[63]

The distinction also has implications for forum shopping. If procedural rules are capable of producing substantial differences in the outcome of disputes, parties may be encouraged to select a forum whose procedural law is more favourable to their interests. An expansive application of the *lex fori* may therefore undermine the predictability which private international law seeks to achieve. On the other hand, excessive reliance on foreign procedural rules may compromise the ability of the forum to control proceedings conducted before it. The objective should invariably be to maintain a balance between procedural autonomy and substantive justice. The application of the *lex fori* should remain the general rule for matters genuinely concerned with the administration of proceedings, but it should not be used to disguise rules whose principal effect is to determine the existence or extent of substantive rights.

In relation to incidental questions, there is also a complication where the forum may have to choose between applying its own conflict rules and that of the legal system governing the principal issue. The *lex fori* approach promotes internal consistency because the same subsidiary issue is treated according to the same conflict rules whether it arises as a principal or incidental matter. The *lex causae* approach, however, promotes international uniformity by seeking to ensure that the principal dispute is resolved in substantially the same manner as it would have been resolved in the

[63] Cook (n 14), Graveson (n 23).

foreign jurisdiction. The decisions in *Schwebel v Ungar*[64] and *Lawrence v Lawrence*[65] demonstrate that neither approach provides a universally satisfactory answer. The choice should therefore depend upon the nature of the incidental question, the relationship of the competing legal systems to that question and the consequences of adopting either approach.

The temporal dimension introduces further complication. Where the applicable foreign law changes between the creation of a legal relationship, the accrual of the cause of action and the determination of the dispute, the court must decide which version of the law should govern the incidental issue. Applying the law at the time the status was created protects vested rights and legitimate expectations, whereas applying the law at the time of judgment permits the court to recognise subsequent developments in the relevant legal system. Neither position should, however, be adopted mechanically. Courts should consider the nature of the right involved, the purpose of the relevant law, whether the subsequent legislation was intended to operate retrospectively and the effect of the change on the legitimate expectations of the parties. Going by *Starkowski v Attorney-General*[66] courts are willing to recognise the retrospective effect of foreign legislation where the foreign legal system itself has altered the status in question.

For Nigerian courts, these considerations support a flexible approach to classification disputes. The *lex fori* should remain the starting point for rules which genuinely concern the machinery and administration of justice, while the *lex causae* should ordinarily govern rules which determine the existence, scope or enforceability of substantive rights. Where the classification is uncertain, the court should examine the purpose and practical effect of the rule. In dealing with incidental questions, attention should equally be given to internal consistency, international uniformity, Nigerian public policy, legitimate expectations and the possibility of forum shopping. In relation to changes in law over time, the court should identify the point at which the relevant right or status crystallised and then determine whether subsequent legislation was intended to alter that position retrospectively. Such an approach does not seek to abolish the traditional distinction between substance and procedure but recognises that the distinction remains useful as a starting point but cannot adequately resolve every modern conflict of laws problem through rigid classification. The more appropriate approach is one which preserves the practical advantages of the lex fori while at the same time ensuring that procedural classification does not jepardize substantive rights governed by the lex causae. This would enable Nigerian courts to reconcile the competing demands of judicial efficiency, fairness, certainty and international comity.

6 CONCLUSION AND RECOMENDATIONS

6.1 Conclusion

Conflict of laws continues to present significant challenges in determining whether a legal issue should be classified as substantive or procedural. Although procedural matters are generally governed by the *lex fori* and substantive matters by the *lex causae,* the distinction is often uncertain in practice. Judicial decisions demonstrate that many rules possess both substantive and procedural characteristics depending on their effect and context. The discussion on incidental questions and the time factor

[64] *Schwebel* (n 39)
[65] *Lawrence* (n 40)
[66] Starkowski *(n 52)*

further reveals the complexity of private international law, particularly where multiple legal systems and changing legal relationships intersect. Courts are therefore increasingly adopting a flexible and purposive approach rather than relying on rigid classifications. Ultimately, the resolution of conflicts issues requires courts to balance practicality, fairness, certainty, and international comity, as the primary purpose of resolution of dispute is to ensure justice and fairness where strict adherence to technical rules may guarantee otherwise. As cross-border transactions and relationships continue to increase, the need for coherent and adaptable conflict of laws principles becomes even more important in ensuring justice across different legal systems.

6.2 Recommendations

Prominent conflicts scholars have argued that a rigid approach to the time factor can completely paralyze the resolution of an incidental question.[67] They contend that courts should reject mechanical formulas and instead utilize a policy-driven analysis to determine which temporal marker to apply.

The modern academic consensus suggests that the time factor should be handled by evaluating the purpose of the rule in question. If the primary objective of a choice of law rule is to provide stability in family relations, the court should look to the law at the time the status was created. If the objective is to distribute property fairly, the court should look to the law at the time the right accrued. By decoupling the temporal analysis from a single fixed date and applying a flexible approach, courts can prevent the temporal element from producing unjust or arbitrary results in cross-border litigation.[68]

[67]JH Morris, 'The Time Factor in the Conflict of Laws' [1966] 15 *International and Comparative Law Quarterly* 422–435. See also Ernst Rabel, *The Conflict of Laws: A Comparative Study* (University of Michigan Press 1945–1958); Ernst Rabel, 'An Interim Account on Comparative Conflicts Law' [1948] 46 *Michigan Law Review* 625.

[68]Fawcett and Carruthers (n 25).