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PRELIMINARY AND INCIDENTAL QUESTIONS IN CZECHOSLOVAK PRIVATE INTERNATIONAL LAW

PRELIMINÁRNÍ A INCIDENČNÍ OTÁZKY V ČESKOSLOVENSKÉM MEZINÁRODNÍM PRÁVU SOUKROMÉM

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PRELIMINARY

AND INCIDENTAL QUESTIONS
IN CZECHOSLOVAK
PRIVATE INTERNATIONAL LAW

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The Czechoslovak Act Concerning Private International Law and the Rules of Procedure Relating Thereto is referred to in the text as the Act No. 97/1963, and the Act Concerning Legal Relations in International Commerce as the Act No. 101/1963.

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Where *renvoi* is mentioned in the text, the author has in mind both remission and transmission. When speaking of the court or the forum, the author means — with reference to the Czechoslovak law — any agency charged with the application of the law, unless he indicates otherwise.

INTRODUCTION

(SPECIFIC FEATURES OF THE PROBLEM OF PRELIMINARY QUESTIONS IN PRIVATE INTERNATIONAL LAW)

The theory of private international law considers as preliminary questions in general any issue which must first be settled before the decision on the case proper (the principal question) can be made; as a rule, the preliminary question should be able to stand on its own as an object of the decision and should therefore have its own statute which can, of course, be identical in a concrete case with the statute of the principal question. In Anglo-American legal doctrine and terminology, preliminary questions are also known as incidental questions. In this sense, the preliminary (incidental) question arises only on the basis of the application of the *lex causae* of the principal question; thus its solution is an essential prerequisite for the application of a specific substantive rule of the *lex causae* of the principal question. From this viewpoint, the preliminary question in private international law is a subsequent question in judicial proceedings, as noted by Robertson.[1]) That is also why the theory of private international law has considered the determination of the law governing preliminary questions as the basic problem of these questions in general.

Czechoslovak literature on private international law has thus far avoided preliminary questions in the aforesaid meaning of this term. On the other hand, Czechoslovak legal theory concerned with conflict of laws has created a special institution of "incidental questions" which are not, however, identical with the same term as it is used in Anglo-American legal theory. In Czechoslovakia, incidental questions are considered to be those parts of the same legal relation (a single principal question), which generally fall within the scope of the law governing the legal relation involved but which are so closely connected in the concrete case with the law of the place where they occurred, that they can be judged only according to the law of such place. In contrast to the Czechoslovak school of private international law, there exist several monographs and articles

[1]) Robertson, "The Preliminary Question in the Conflict of Laws", *International Law Quarterly*, 1939.

dealing with this problem in Czechoslovak municipal civil and procedural law; procedural rules governing preliminary questions are embodied only in this municipal law. However, I believe that in some cases these rules cannot be applied in proceedings whose subject is a private-law relation with a foreign element. These facts, as well as a somewhat critical opinion of the conclusions reached in international literature regarding the determination of the law of preliminary questions, have induced me to attempt filling a gap in Czechoslovak literature on private international law by writing a monograph on preliminary questions in Czechoslovak private international law; in contrast to most German, British, American and French authors, and in view of Czechoslovak procedural law, I have laid special stress on *defining the concept* of preliminary question in Czechoslovak procedural rules relating to conflict of laws.

The present treatise is only a part of this monograph which is deposited in the library of the Faculty of Law of Charles University in Prague. In view of the strict limit placed by the editors on the number of pages of the manuscript have forced me to delete the first part of this monograph where I considered some problems of the application and interpretation of the Czechoslovak conflict rules and of the substantive rules of foreign law by Czechoslovak courts, as well some problems of procedure. I presume that the treatise in its present form will be understood by a reader who has concerned himself with the problem of preliminary questions, nevertheless, for the sake of completeness and theoretical precision, I want to outline in the following paragraphs at least some of the conclusions I made in the first part of my original study, which, as I have already said, was deleted from this text.

I approached the analysis of the whole set of problems relating to conflict of laws with the opinion that the uniform application of the conflict rules of the *lex fori* for determining the statute of the preliminary question precluded in all conflicting cases the possibility of deciding the main question, i.e. the substance of the case, which the court must primarily decide, in the way it would be decided by the foreign judge whose law is the *lex causae* of the main question, or even by the court should the preliminary question not arise at all. This opinion required a study of the question whether Czechoslovak private international law allowed a Czechoslovak judge to determine the statute of the preliminary question otherwise than by applying the Czechoslovak conflict rules, or, in other words, whether the Czechoslovak judge could consider the preliminary question under a different law than the law referred to by the Czechoslovak provisions. I reached the conclusion that *Czechoslovak private international law in no case prevents the Czechoslovak judge to decide on the law governing the preliminary question differently than on the*

basis of the point of contact specified by the Czechoslovak rule, i.e. that the Czechoslovak court could determine the statute of the preliminary question both under the conflict rules of the *lex causae* of the main question and in another manner. From the viewpoint of Czechoslovak legal theory this conclusion is not too disputable and therefore constitutes — from the viewpoint of the rules contained in Czechoslovak provisions governing conflict of laws — a conclusion which is quite at variance with the opinion held by G. Kegel and other authors. In this connection I tried to show that preliminary questions constitute an independent set of problems of Czechoslovak private international law, a new institution of law which has developed since the early 1930's, just as the institution of renvoi developed in the late 1890's.

Another problem I considered in the deleted part of my monograph was the question of the joint effect of the substantive rules of the *lex causae* of the principal question in determining the preliminary question under a law different from the *lex causae* of the principal question. *In principle I have adopted on this point the concept of Prof. W. Wengler concerning the dominant role of the lex causae of the principal question in determining the so-called general content of the preliminary concept used in the substantive rule of the lex causae of the principal question.*[2]) What is involved, is basically the fact that a judge who is to decide on a specific, e.g. probate, claim under the law of S as the principal question, must determine whether there exist facts which constitute the prerequisite of a certain probate rule of S or the non-application of another probate provision of S. Let us assume that one of these provisions of S makes the widow of the decedent his heir, but the question arises whether this widow is A or B. This disputable question constitutes a typical preliminary question, and it is necessary to determine the relationship between the decendent and both A and B. In the opinion of Prof. Wengler, which I share, it is first necessary to determine to whom the law of S grants the title to inherit — whether it does so with respect to the decedent's legitimate wife or to his wife from an invalid marriage, provided that the marriage was not invalidated during the decedent's lifetime, etc.... The judge must then determine whether, for example, the relationship between A and the decedent meets in fact the intent of the law of S rather than whether a third law — of X — makes the relationship a valid, invalid or putative marriage, etc.... It is, of course, natural that the law of X (let us assume that it is the *lex personalis* of the decedent and A at the time of their wedding) and the law of Y (perhaps the *lex*

[2]) See W. Wengler, "Die Vorfrage im Kollisionsrecht", *Zeitschrift für ausländisches und internationales Privatrecht,* 1934.

loci celebrationis) would answer the question whether the groom and bride were of age or not, whether the form of the wedding was recognized by Y, etc. In the aforesaid sense, we may therefore speak of the dominant role of the substantive provisions of the *lex causae* of the principal question. The concept of the substantive provision of the *lex causae* of the principal question, whose content is the subject of the preliminary question — in this case "marriage" — is called by me in accordance with Prof. Wengler the "preliminary concept". Its minimum content, which expresses the will of the legislator with respect to the application of a certain provision or rule, but which may often be obtained only by a comprehensive analysis of the law whose provision is involved, I again call, in keeping with Prof. Wengler, the "general concept" (Rahmenbegriff).[3]) This minimum content is nothing but the general definition of the facts which the legislator has set as the prerequisite for the application or non-application of a particular substantive rule of his law. In our case, it would have to be determined whether the law of S grants the inheritance title to the wife of the decedent from a valid marriage, his *bona fide* wife from an invalid marriage, etc. As Prof. Wengler says, the "general concept" provides the starting point[4]) for considering the preliminary question under a law differing from the *lex causae* of the principal question. Besides the general concept, Prof. Wengler also distinguishes the "factual concept" (Tatsachenbegriff) of a legal provision and the "auxiliary concept" (Hilfsbegriff).[5]) I have adopted also this terminology. Both concepts are almost identical in their content, but from the viewpoint of preliminary questions, they must be strictly distinguished from the preliminary (general) concept. If, for example, a provision uses the term "a person who has attained the age of eighteen years" (a factual concept), the court must only ascertain the age of the respective person, and no problem arises. If, however, a provision of the law of S uses the term "a legal entity under the law of S or the law of X" (a general concept), it is a clear *reference* to another legal provision of the law of S or X, which specifies what is to be considered a legal entity. This reference must be accepted, since the nature of a legal entity may not be considered under any other law than the law to which reference is made by the substantive rule of the *lex causae* of the principal question; this rule, together with the rule to which reference is made, constitute, in effect, a single legal provision. I have tried to demonstrate that Wengler's

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[3]) *Ibid.*, pp. 148–159, where you will find the rest of the terminology I have taken over.

[4]) Ausgangspunkt. See Wengler, Die Vorfrage, p. 158.

[5]) *Ibid.*, pp. 148–150.

view of the dominant role of the substantive provisions of the *lex causae* of the principal question in creating, as indicated, the "general preliminary concept", constitutes — from the viewpoint of our topic — not only the sole possible expression of the universally recognized theoretical principle of the necessity of applying a foreign law in the same manner as it would be applied by the foreign judge, but also the correct expression of the clearcut position of Czechoslovak theory and practice in the sphere of private international law regarding the application and interpretation of foreign law by Czechoslovak courts. This conclusion can hardly be placed in doubt — at least from the theoretical point of view — as regards the Czechoslovak position.

This much for clarifying the text which follows. Should the reader want to acquaint himself in greater detail with the aforesaid general problems, which underlie my approach to the problem of preliminary questions and also constitute a specific feature of preliminary questions as an institution of private international law, I must refer him — due to the limitations placed by the editors on the length of this study — to the work of Prof. Wengler.[6]) As for my own opinion, which differs from that of Prof. Wengler in some details, the full text of my work — as I have already stated — is available at the Library of the Law Faculty of Charles University in Prague. The reader would also find there a note that I consider as an essential prerequisite of my concept of solving conflict of laws regarding preliminary questions a certain similarity of form and content between the provisions of the principal legal systems of the world governing conflict of laws as well as questions of substance at least in some matters of principle.

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[6]) *Ibid.*

PART I

DEFINITION OF THE CONCEPT OF PRELIMINARY QUESTIONS UNDER CZECHOSLOVAK PRIVATE INTERNATIONAL LAW AND THE RULES OF PROCEDURE RELATING THERETO

§ 1 PRELIMINARY QUESTIONS UNDER CZECHOSLOVAK PROCEDURAL LAW

In keeping with what he has said of Czechoslovak procedural law in the introduction to the present study, the author will discuss somewhat untraditionally the topic of the study from the viewpoint of the application of Czechoslovak rules of procedure in proceedings involving a foreign element, held before a Czechoslovak court.

The principle that the court applies in cases with a foreign element the procedural rules of the *lex fori* is as old as private international law.[1]) As far as some provisions of the procedural law of the *forum* apply — or may apply, as the case may be — only to proceedings in matters of a purely internal (municipal) character, it is usually quite obvious even without an express specification of this fact in the respective provision. However, in the sphere of preliminary questions, the situation is somewhat different with a view to the Czechoslovak procedural law, and the provision of Czechoslovak procedural regulations must be somewhat adjusted with respect to private international law. On the other hand, of course, it is necessary to respect, even when considering preliminary questions in proceedings involving a foreign element, those provisions of Czechoslovak private international law, which are generally applicable to such matters. For both these reasons, it is necessary to sum up very briefly how Czechoslovak courts and authorities interpret Czechoslovak procedural rules affecting the consideration of preliminary questions; in doing so, the author proceeds from contemporary Czechoslovak literature on civil procedure.[2])

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[1]) The term "court" as used here and in other places, signifies the agency applying the law, unless the nature of the matter indicates otherwise. As far as arbitrators appointed *ad hoc* are concerned, the parties also influence, of course, the procedure and the rules governing the arbitration proceedings, although in Czechoslovakia it is necessary to observe at least the provisions on the Act No. 98/1963, governing arbitration proceedings.

[2]) See: A. Winterová, "Prejudiciální otázka v občanskoprávním řízení", *Socialistická zákonnost*, No. 2/1967, and the bibliography listed therein; M. Černý, "Ještě

It should be noted that in contrast to the 1950 Code of Civil Procedure, contemporary Czechoslovak law does not recognize the concept of "preliminary questions"; therefore, Czechoslovak jurists specializing in procedural law have centered their attention on determining what can or cannot be considered as a preliminary question in civil procedure and which decisions of other agencies charged with applying the law are binding on the forum making the respective decision. In both cases they proceed from the provisions of Sections 109 and 135 of the Code of Civil Procedure (CCP). Since, however, these cases involve at least a part of the institution of preliminary — or "prejudicial" — questions, as established by previous legislation and legal practice, the aforesaid Czechoslovak specialists have been using the terms preliminary, prejudicial and even, in one case and for unexplained reasons, incidental questions,[3]) while Winterová expressly refers to the Czechoslovak Code of Civil Procedure of 1950.[4])

The term "preliminary question", as used in older Czechoslovak literature, was usually understood to cover two groups of cases:

1. Questions which the court had to consider before it began to consider the substance of the case. This was true especially of cases where the court investigated some questions important for determining its jurisdiction (competence) after the proceedings had been initiated, or where it investigated the procedural capacity of a party or other legally relevant facts, such as the citizenship of a party, the existence of reciprocity, whether a foreign state allowed inheritance to be transferred to Czechoslovakia, etc. Some of these questions may also arise after the substance of the case has begun to be considered and may even be connected with the consideration of the preliminary question as this term is being used in the present study, nevertheless they do not fall within the scope of the consideration of preliminary questions in our sense of the word. For example, after a preliminary question arises, the court finds that it was settled by a foreign decision and before it begins to consider whether it should use such decision as the basis for settling the case, it determines whether the decision has become final (legally valid). From a purely procedural viewpoint, the term "preliminary questions" seems to me quite appropriate for the indicated cases.

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k výkladu ust. § 135 o. s. ř.", *Socialistická zákonnost*, No. 8/1967; Štajgr, Steiner, *Československé mezinárodní civilní právo procesní*, Prague, 1967. This last publication, however, does not — in the author's opinion — take much into consideration the specific nature of the problem of preliminary question given by the international aspect of the proceedings (with the sole exception concerning the consideration of foreign decision — see below).

[3]) Štajgr, Steiner, *op. cit.*, p. 208.

[4]) *Op. cit.*, pp. 93–94.

2. Questions which are not a pre-condition for initianting proceedings on the substance of the case but which are an essential prerequisite for issuing the decision on the case proper. These questions, which the author also calls preliminary, are characterized by the fact that they may be a *separate object of the proceedings.* A similar view is held by A. Winterová when she defines the preliminary question as "... a question arising after the establishment of a legal fact, whose settlement is an essential prerequisite of the decision on the case proper, which depends on the prejudicial question and which can at the same time be a separate object of proceedings".[5]) In her article, Winterová does indeed concern herself only with the indicated questions, which means that she does not study the questions outlined under (1) above. On the other hand, Štajgr and Steiner state that "... questions may be prejudicial questions in civil proceedings ... if they may become an object of separate proceedings and decision before a court or any other agency ..." but, in addition, they say that "also questions decisive for settling *purely procedural* problems may also be of a prejudicial nature".[6]) However, the examples the two authors use to illustrate their definition clearly indicate that they consider also the questions listed under (1) above as preliminary questions in keeping with Czechoslovak legal tradition.

As already noted, Czechoslovak authors specializing in procedural law concentrate primarily on the interpretation of Sections 135 and 109 of the Code of Civil Procedure, taking into consideration when the Czechoslovak court deciding on the main question is bound by a decision on the preliminary question and when, in the absence of a decision issued on the substance of the preliminary question or on the recognition of a foreign decision on this matter by another Czechoslovak court, it must not consider the preliminary question. In this connection they also interpret various legally uninterpreted terms of the Code of Civil Procedure which provides with respect of some cases that the court is *bound* by the decision of another court, but with respect of other cases states that the court must *proceed* from decisions of other courts. Winterová and Černý discuss these problems from the viewpoint of purely Czechoslovak legal relations, while, on the other hand, Štajgr and Steiner study proceedings involving a foreign element. Unless the author has misunderstood their arguments, they have reached the following conclusions:

a) A Czechoslovak court is bound by final decisions of other Czechoslovak courts "... that a crime, a minor offence or a transgression has been committed and who has committed it, as well as by decisions re-

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[5]) *Op. cit.*, pp. 93 ff.
[6]) *Op. cit.*, pp. 143–145.

garding personal status, i.e. decisions under Section 80, par. (a), of the Code of Civil Procedure, regarding divorce, annulment of marriage, determination whether a particular marriage exists or not, paternity, adoption, capacity to legal acts, and confirmation of death... Decisions regarding a crime, a minor offence or a transgression and the offender are binding for a civil court only in cases where the respective decision states that a specific offence was committed and who was the offender, but not in cases where the decision states that the offence was not committed or that the accused did not commit it. On the other hand, decisions regarding personal status are binding for the court irrespective of whether their content is positive or negative. If the decision on these matters is binding for the court, evidence on the opposite of the judgment proclaimed therein is precluded". Both authors also consider it indisputable that these decisions are binding for a Czechoslovak court only "... if they were issued by Czechoslovak authorities within the scope of their competence. In cases where they were issued by foreign authorities, they are binding for Czechoslovak civil courts only if they have been recognized in Czechoslovakia. If they have not been recognized as such, they may be used for evidence as public documents".[7])

All other decisions, whether issued by Czechoslovak or foreign courts, may be considered by a Czechoslovak court — if it considers them as a preliminary question — as questions of fact, i.e. it takes their content into account in the same manner "... as any other fact which has in the given situation the character of evidence".[8])

The author fully agrees with these conclusions.

b) If no other Czechoslovak court has issued a final decision on the preliminary question, or if no foreign decision regarding this question has been recognized, as stated under (a) above, the two authors conclude that the court *may* consider such a question as a preliminary one with the exception of questions regarding personal status which it may not consider. Both authors argue "... that judicial decisions regarding personal status — because they are binding for the court irrespective of their content — always settle prejudicial questions which may not be settled in other proceedings (judicial, administrative or any other), so that such other proceedings must be suspended...".[9])

The two authors therefore unequivocally conclude that a Czechoslovak court must not independently settle a question of personal status — although proceedings with a foreign element are concerned — even as

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[7]) *Op. cit.*, pp. 142—143.
[8]) *Ibid.*, p. 145.
[9]) *Ibid.*, p. 144 and other conclusions on p. 145.

a preliminary question, and if such a question arises in the proceedings, the court must suspend the proceedings.

This argument cannot be accepted. With very few exceptions (Section 67 of the Act No. 97/1963) it is even highly doubtful whether a Czechoslovak court can suspend or adjourn the proceedings concerned with the principal question and initiate proceedings on a preliminary question before another *Czechoslovak* authority charged with the application of the law, which is competent to deal with such a question from the viewpoint of the domestic regulations. In any case this would be possible *only because* the *lex fori,* i.e. the Czechoslovak procedural law forbids the court to consider the respective question as a preliminary one.

However, under no circumstances may the Czechoslovak court refer the parties to a foreign court; if it has jurisdiction over the principal question, it must consider the preliminary question even if no Czechoslovak court is competent to consider it, should it arise as a separate question, and even if the Czechoslovak law prevents it from considering the question as a preliminary one. There is only one exception — if the Czechoslovak law expressly provides that the Czechoslovak court must not consider a particular question as a preliminary one even in proceedings involving a foreign element. The Czechoslovak law does not have such a provision, and its application could give rise to an international liability of the State *(denegatio iustitiae).* The Czechoslovak provision indicating that a Czechoslovak court must not settle questions of personal status even as preliminary ones cannot and must not — in the author's opinion — apply to cases involving a foreign element.

For example, a Czechoslovak court considers a probate case where the decendent A, who was an Italian citizen at the time of his death but resided on Czechoslovak territory; the court does so on the basis of an action filed by A's former wife B. A Czechoslovak notarial office granted the inheritance to C, a Czechoslovak citizen whom A had married in Czechoslovakia and whose marriage had lasted until the decedent's death. A divorced B in the United States of America and B bases her claim on the fact that at the time of their divorce both she and A had been Italian citizens and consequently the divorce was not valid. It is obvious that the Czechoslovak court must decide the case. I explained the reasons why it must do so elsewhere,[10]) but even so, the whole matter is quite obvious.

Private international law as well as international procedural law provide quite unequivocally that a court may not refer the parties involved in a litigation to a foreign court. If the court has jurisdiction to decide the

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[10]) See "Uznání pravomocných rozhodnutí", *Socialistická zákonnost,* No. 4/1967.

principal question, it must decide it and must therefore consider all the preliminary questions which are essential for deciding the principal question. As far as a Czechoslovak court is concerned, in some cases it may and in other cases may not (see above) take into consideration the decision of another Czechoslovak court, may also recognize the decision of another foreign tribunal, or may decide the preliminary question on its own. If the court making the decision on the principal question refused to deal with a preliminary question in one of the aforesaid manners, the State would bear international responsibility for the behaviour of the court for reasons of *denegatio iustitiae* whenever at least one of the subjects of the proceedings were a foreign national. Most authors take this principle for granted so much so that they do not even mention it. Batiffol makes the following comment: *"En matiére de questions préalables le même refus de renvoyer les parties devant un juge étranger conduit les tribunaux français à statuer sur les questions qui n'auraient pas pu leur être soumises à titre principal."*[11])

In so far as the two above-mentioned Czech authors, Prof. Štajgr and Asst. Prof. Steiner, have the opposite in mind when discussing questions of personal status on pp. 144—145 of their work on Czechoslovak private international law, then, irrespective of the high esteem I have of them, I cannot but say a brief *non sequitur* on this matter as well as on the conclusion they reach in this respect on pp. 244—245 of their work.

I should yet add that what is known as purely procedural preliminary questions — as mentioned under (1) above — do not fall within the scope of the present study and I shall not discuss them any further. A Czechoslovak court will always consider them according to the *lex fori.* Where a Czechoslovak court considers the citizenship of a party to the proceedings from the viewpoint of its jurisdiction, it always applies the law specified in Section 33 of the Act No. 97/1963.

§ 2 PRELIMINARY QUESTIONS UNDER CZECHOSLOVAK PRIVATE INTERNATIONAL AND PROCEDURAL LAW

Some specific problems of preliminary questions — which are typical of private international law — appear in the *"obiter dicta"* of English and American courts dating back to last century[12]) and even earlier.

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[11]) Batiffol, *Traité élémentaire de Droit International Privé,* 1955, p. 776. Also I. Szászy, *International Civil Procedure,* 1967, pp. 158—159, and P. Lagarde, "La régle de conflit applicable aux questions préalables", *Revue critique de droit international privé,* 1960.

[12]) See *Sneed* v. *Ewing,* Kentucky Court of Appeal, 1831; *Birthwhistle* v. *Kardill* (Lord Brougham, 1840); *Goodmans Trusts,* 17 Ch. D. 266, 299 (1831), et al.

However, because of the nature of Common Law and Anglo-American judicial practice it is obvious that these matters were decided individually, case by case, and the *ratio decidendi* concerned exclusively the principal question; consequently, no legal rule was evolved, nor was any special attention brought to the problems considered today by authorities on private international law with respect to preliminary questions.

One of the very first mentions of preliminary questions in literature concerned with conflict of laws may be found in Anzilotti.[13])

The increased mobility of the European population at the beginning of this century and in particular the unprecedented occurrence of so-called mobile conflicts *(conflits mobiles)* following the First World War with respect to matters of personal status attracted growing attention to preliminary questions involved in status matters in inheritance disputes. The highly controversial decisions of German courts after the First World War, which pointed to the absence of any concept in these matters on the one hand, and the prevailing positivistic and normativistic trends in German legal theory on the other hand, which called for the establishment of uniform formulas for every specific category of cases, resulted precisely in Germany in a theoretical analysis of preliminary questions as a special, *general* problem of private international law. As early as in 1931 and in 1928 respectively, Raape and Kahn dealt with preliminary questions occurring in inheritance disputes,[14]) and in 1932, Melchior, as probably the first to do so, offered a general, theoretical solution of this problem.[15]) While Melchior concentrated on specifying the law of the preliminary question and also partly on defining the concept of this question — including it in the general part of his system of private international law as early as in 1934, Wengler published a monograph on preliminary questions as a separate problem.[16]) There — besides dealing with the questions studied by Melchior — he included for the first time a logically exhaustive study of the interdependence and scope of application of the substantive rules of the *lex causae* of the principal question and the law of the preliminary question in solving the preliminary question. Both Melchior and Wengler at the same time introduced certain terminology which was accepted as basic in sub-

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[13]) Anzilotti, *Il diritto internazionale nei giudizi interi*, 1905, pp. 192 ff. The author even speaks of a general principle *(principio generale)*: *"... secondo cui, nel dubio e salvo disposizioni in contrario, la competenza a decidere il rapporto principale controverso implica la competenza a decidere altresi tutte le questioni pregiudiziali ad esso connesae."*

[14]) G. Melchior, *Die Grundlagen des deutschen Internationalen Privatrechts*, 1932, p. 248.

[15]) *Ibid.*, pp. 245–265.

[16]) Wengler, Die Vorfrage.

sequent literature. The overwhelming majority of later authors also accepted Melchior's opinion that preliminary questions should be included as a general problem in the so-called general part of private international law. We find the only exception among those authors who do not recognize the specific problem of preliminary questions.[17])

Bot the aforesaid authors, who are today universally recognized as the "fathers" of the problem,[18]) originally studied preliminary questions exclusively from the viewpoint of *conflicting situations in the narrow sphere of conflict rules.* They set as their take-off point the *a priori* but then rational and, in fact, the only imaginable principle that the law of the preliminary question could be determined either according to the conflict rules of the forum or according to the conflict rules of the *lex causae* of the principal question. *There was no third alternative* for them. Under the then prevailing German philosophy of law, this starting point had to be followed by a study of which of the two alternatives should be viewed as the general rule. The result of this study (see Part II) in turn had to lead to the conclusion that exceptions from the alternative defined as the rule should be considered in accordance with the other alternative alone. These exceptions were concretely defined for individual types of cases (although each author did so somewhat differently) as exhaustively and absolutely as possible. It is remarkable to what extent most subsequent authors who have concerned themselves with preliminary questions have accepted this concept, especially its basic principle. This is also essentially true of Robertson, who did so already in 1939 (see Part II) with respect to the Common Law sphere (!), although he did expressly state that past English judicial decisions did not give preference to either alternative. We should realize that the 1930's were characterized in the Anglo-Saxon legal sphere by legal realism which laid still greater stress on the investigation of the concrete circumstances of every individual case. Even M. Wolff proceeded from

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[17]) E.g. Nussbaum. It should be noted that the problem of preliminary questions is sometimes studied within the framework of a broader scope of questions — either within the framework of the application of foreign conflict rules except for *renvoi* (e.g. M. Wolff), or as *conflits de lois à la seconde puissance* (e.g. Lagarde and Szászy), which involves the application of foreign conflict rules in general. Szászy at the same time points out that socialist authors do not concern themselves with this problem at all. It is difficult to deduce from his argument whether this or that socialist author rejects the special position of preliminary questions at all, or whether he deems it natural that the law of the preliminary question should be determined by the conflict rule of the forum and that all other questions are a purely procedural matter.

[18]) See the editor's note on Wengler's article "Nouvelles réfléxions sur les »questions préalables«", *Revue critique de droit international privé*, No. 2/1966, p. 165: *"Avec son compatriote Melchior, M. Wengler est consideré à bon droit comme »l'inventeur« du problème..."*

the same concept in his famous system which he developed in 1950. The original concept of two alternatives, i.e. either the conflict rule of the lex fori or the conflict rule of the lex causae of the principal question, also provides the starting point for many contemporary authors. Only a few of them go beyond its scope, in particular Gotlieb, Ehrenzweig and — with respect to a narrow category of cases — even Prof. Wengler himself in his last work devoted to this topic.[19])

The aforesaid principle on which Melchior and Wengler based their studies in the 1930's has, i.a., the following consequences:

i) If it is possible to determine the law of the preliminary question only on the basis of the conflict rule of the *lex fori* or the *lex causae* of the principal question, those cases are eliminated from the sphere of consideration, which *exclude controversial situations* in the sense of the initial principle, i.e.:

a) cases where the conflict rule of the *lex fori* and the conflict rule of the *lex causae* (possibly with the application of *renvoi)* identically specify the same law for considering the preliminary question;

b) cases where the *lex causae* of the principal question is at the same time the *lex fori*;

c) cases where the *lex fori* expressly instructs the judge to apply the law specified by the conflict rule of the forum when considering the preliminary question.

In all these cases it is, of course, necessary to study the scope of applicability of the substantive rules of the *lex causae* of the principal question and the substantive rules of the law governing the preliminary question with regard to the consideration of the latter question, unless the preliminary question is governed by the law of the principal question.

ii) If the basic problem is the determination of the law governing the preliminary question, as stated under i) above, the preliminary question may arise only on the basis of the application of the substantive rule of the *lex causae* of the principal question, which eliminates the purely procedural preliminary questions (see under § 1, sub. 1).

The fact that the preliminary question is an essential prerequisite for making the decision on the case proper, as well as the fact that the preliminary legal relation is "capable" of being the object of a separate point of contact, constitute additional and obvious essentials of this concept of preliminary questions.

Thus we must necessarily reach the conclusion that if the settlement

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[19]) Gotlieb, "The Incidental Question in Anglo-American Conflict of Laws", 1962; Wengler, Nouvelles réflexions, in particular p. 215, sub. 4; for details see Part II below.

of the preliminary question is a prerequisite of the decision on the case proper, this question must not form a part of the legal relation constituting the principal question. Secondly, if a concrete preliminary legal relations is "capable" of being the object of a separate point of contact, it should also lend itself to consideration in a different connection than with the given, concrete principal question. What questions may or may not be viewed at least generally as a part of the legal relation constituting the principal question, as well as the question whether the requirement of a separate point of contact with respect to the preliminary question is met by the fact that such a question may be settled in connection with another principal question (e.g. matters of form, legal capacity etc.) or whether the preliminary question must be able to become the object of separate proceedings, these are all disputable problems on which no uniform opinion has been reached either between Melchior and Wengler or in more recent literature.

Melchior settles these questions through interpretation of the conflict rules of the forum. He proceeds from a study of the scope of applicability of the *lex causae* of the principal question, while leaving the definition of this scope to the forum. If the forum leaves the decision on who inherits to the law governing the probate matters, i.e. to the *les successionis,* any question which must be settled for determining the heirs, such as the validity of a marriage or the personal status of a child, is a preliminary question. If, on the other hand, the question involved is one, which from the viewpoint of the law or the practice of the forum does not fall within the scope of applicability of the *lex causae,* it is not a preliminary question but a part *(Teil)* of the principal question, even if such question is a prerequisite for making a decision on the case proper.[20]) This applies primarily to some parts of the legal relation, which the forum always considers according to its own conflict rules, such as the form of legal acts, forms of marriage, etc.[21]) Then there are the cases which Melchior calls *begriffsnotwendige Bestandteile der Hauptfrage.* For example, a claim to compensation of damage caused to a thing proceeds from the ownership title of the injured party to the damaged thing. The question of ownership does not fall within the scope of applicability of the *lex loci delicti commissi* and does not therefore constitute a preliminary question.[22]) However, Melchior does not attempt to give a general definition of his *begriffsnotwendige Bestandteile* and merely lists examples of indisputable cases. In my opinion, Melchior's approach

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[20]) Melchior, pp. 261—262.
[21]) *Ibid.*, p. 249.
[22]) *Ibid.*, pp. 258, 260.

to the problem is also deficient in that the author fails to give any consideration to the nature of the claim the court is called upon to decide. For if the court is to decide on damages *ex delicto,* the question of the title of the injured party to the damaged thing does in this sense truly constitute a prerequisite for the decision on the disputed claim, although under the existing doctrine, the court must consider the ownership title according to the law specified by the conflict rule of the forum. This is where we come to the principal logical error of Melchior's approach. Melchior, as the aforesaid arguments indicate, seems to view as a preliminary question in private international law only a question which, although it constitutes a prerequisite of the decision on the case proper and has arisen from the application of a substantive rule of the *lex causae,* is at the same time governed by the law determined under the conflict rule of the *lex causae* of the principal question, if a foreign law is involved. In order to fully understand this point, we must somewhat anticipate our exposition to note that according to Melchior, the law of the preliminary question should be determined by the conflict rule of the lex causae of the *principal question.* Thus, for Melchior, the result of his study at the same time constitutes one of the conceptual features of the object of that study. Therefore, all the legal relations governed by the law determined under the conflict rule of the forum constitute in their sum total the principal question.[23]) In this point Melchior differs from all other authors because he considers as the principal question all that is not a preliminary question, while the prevailing, general opinion is that only the legal relation which is the purpose of the judicial proceedings is the principal question. Thus, the criterion of Melchior's definition is the problematic character of the settlement of the conflict of laws rather than a specification of the concept. It should be noted that while to all the other authors the terms "principal question" and "the case proper" mean the legal relation which must be settled — i.e. they are, generally speaking, synonyms as regards the topic of the present study — Melchior holds a different view and both terms have a different meaning if the principal question is made up of several legal relations which can become a separate object of proceedings; only one of them constitutes the case proper in that the court is competent to decide only with respect of this relation in its verdict. It merely considers the other relations.

Wengler's approach to the aforesaid problems is quite different and is identical — at least as regards its method — with the opinion of the

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[23]) Melchior expressly excludes from the sphere of his study cases where the principal question is governed by the law of the forum. *Op. cit.,* p. 246.

overwhelming majority of later authors. As already indicated, Wengler "divides" a legal relation in the customary manner into so-called autonomous parts which may be studied separately at least from the formal point of view. For example, in the case of a sales contract, it would be possible to study independently the capacity of the parties, the form of the contract, the currency in which the contract is to be performed, the "principal" rights and obligations of the parties, etc. The court must "divide up" the legal relation constituting the object of the dispute in this manner before it even begins to seek the actual conflict rules under which it will establish the points of contact. If the forum decides on the basis of its law (including conflict rules), or on the basis of its precedents, to consider the individual parts of the respective legal relation separately, in isolation from each other, it will naturally apply to each, "separated" part the law specified by the conflict rule of the *lex fori.* For example, a Czechoslovak court will determine the heir according to the *lex successionis,* while determining the capacity of a juristic person to inherit according to such person's *lex personalis.* Even where the court establishes a point of contact with a particular substantive law according to its own conflict rule, it will be again the *lex fori* — or the court's precedents — which will determine whether a particular question, which could be considered independently, falls within the scope of the *lex causae* as a part of the legal relation constituting the principal question. For example, the court applies the *lex loci delicti commissi* either to determining the liability, as well as the extent of the damage, the capacity to commit delicts, etc., or it may apply the *lex loci delicti commissi* only to determining the liability, the *lex fori* to the scope of the damage caused, the *lex personalis* to establishing the capacity of the offender, etc. The criterion will be the practice of the court or the *lex fori.* In the aforesaid cases, all the questions, which may be considered separately from the conceptual point of view, are parts of the legal relation constituting the principal question. If these parts are really considered independently, they constitute so-called *Teilfrage,* which may be translated only as partial questions. On the other hand, if the forum decides to apply the substantive rules of a particular law to a certain question (e.g. to determining the heirs) and if it finds when applying such law that the effects of the application depend on the consideration of another legal relation or fact, which may be considered independently and which is not a part of the considered legal relation both from the viewpoint of the forum and, in particular, from the viewpoint of the legislator whose law is the *lex causae,* only then is the question truly a preliminary one. As noted in the introduction, Wengler holds that the preliminary legal relation — or the rights and obligations or a legal fact,

or the legal consequences of the establishment, change or extinction of a particular legal relation, constituting the prerequisite of the application of a substantive rule of the *lex causae* of the principal question — is generally defined by the content of the concept of a part of the substantive rule of the *lex causae* of the principal question *(Rahmenbegriff).* The factual existence of such content must be considered according to a particular law which constitutes a separate statute of the legal relation, which is a condition for the application of the substantive rule of the *lex causae,* i.e. the legal relation which constitutes the preliminary question.[24]) Since Wengler expressly excludes from the scope of the concept of preliminary questions what he calls parts of the principal legal relation, which the forum may consider with a view to its precedents or law either according to the law determined by an isolated point of contact according to the conflict rule of the *lex fori* or as a question falling within the scope of the effect of the *lex causae,*[25]) it is obvious that in contrast to Melchior, he considers as preliminary questions all relations constituting the content of his "general concept" of the rule of the *lex causae (Rahmenbegriff),* irrespective of whether they are considered according to the law specified by the conflict rule of the *lex causae* or of the *lex fori. It seems that the only condition is that the preliminary question should arise on the basis of the application of a substantive rule of the lex causae of the principal question.* Thus Wengler considers as preliminary questions also those relations or facts, which Melchior views as *begriffsnotwendige Bestandteile der Hauptfrage* (see above). Not even the fact that both Wengler and Melchior fail to study cases where the principal question is governed by the law of the forum, affects this position.

We may therefore logically deduce that, as conceived by Wengler, the preliminary question should always lend itself to being considered in other proceedings as an independent, i.e. as a principal, question. Of course, it is quite possible that the author of the present study was somewhat lacking in precision when he noted above that Wengler excluded from the scope of his concept of preliminary questions those separable parts of the legal relation, which must conceptually form its part (e.g. the question of form or legal capacity). For, on the one hand, Wengler conceives the preliminary question and his *Teilfragen* as stated above,[26]) expressly underlining that the forum must apply its conflict

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[24]) Wengler, Die Vorfrage, pp. 149 ff. Comp. on p. 149: *"Die Vorfrage in dieser Bedeutung, als Frage nach dem Inhalt eines Rechtsnormteils, soll der Gegenstand der folgenden Untersuchung sein."*

[25]) *Ibid.,* pp. 152, 155.

[26]) *Ibid.,* Part I, pp. 148 ff.

rules to those parts of the legal relation, with respect to which his own legislator instructs it to do so, and listing by way of example precisely the form and legal capacity.[27]) On the other hand, in Part III of his study,[28]) he concerns himself with the problem of which questions would lend themselves to what he terms isolated points of contact. The result is somewhat surprising. Basically, Wengler argues as follows:[29]) The object of the point of contact may be any legal content (from the viewpoint of the respective rule, from the viewpoint of the facts of the case, any part thereof may be subsumed under such legal content — *author's note*), irrespective of whether a right or an obligation, an auxiliary legal concept *(Hilfsbegriff)*, or simply a legally important factual concept *(Tatsachenbegriff)* are involved. Any conflict rule may freely refer with respect of a particular legal relation to a greater or lesser number of laws. Nevertheless, some of these legal contents cannot stand on their own, so that they should not be considered as the object of a separate point of contact. They include, i.a., the form of legal acts and legal capacity.[30])

It might now seem that Wengler proposes to consider these "non-independent questions" according to a uniform statute of the legal relation involved, as was done, for example, by the Czechoslovak legislator at least alternatively as regards the form of legal acts. However, this is where, in my opinion, begins some formalistic juggling, for Wengler holds that with respect to these "non-independent questions" (Wengler uses the term "non-independent legal contents") it is not suitable to establish points of contact according to the conflict rule of the *lex fori* but according to the conflict rule of the *lex causae* of the legal relation involved (e.g. according to the conflict rule of the *lex obligationis* as regards the form of a contract). The reason for this solution is the endeavour to have the forum which is making the decision come as close as possible to decisions of the court whose law is involved. However, at the same time Wengler underlines that this concept is far from being materialized in decisions issued by courts in cases with a foreign element.

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[27]) *Ibid.*, p. 153.
[28]) *Ibid.*, pp. 229 ff., in particular sub. 2.
[29]) *Ibid.*, pp. 232—239.
[30]) *Hilfsbegriffe*, as well as *Tatsachenbegriffe* and so-called *Gestaltungsrechte* (probably such things as subjective rights resulting from the status of a person; e.g. from the viewpoint of an inheritance claim [a subjective right], the determination whether the child is legitimate or not, etc.). All the other "legal contents" are independent; it is obvious that they constitute a relatively small group of truly independent legal relations, such as the injured person's title to the damaged thing. Wengler uses Zittelmann's term *die ursprünglichen subjektiven Rechte* to describe them. Wengler holds that they should have a point of contact according to the *lex fori*.

From the viewpoint of the object of our study, Wengler's aforesaid consideration is of dual importance. First, we must ask whether Wengler would consider his "non-independent contents" as preliminary questions, if a particular court would accept his concept of considering these "contents" according to the law specified by the conflict rule of the *lex causae*. After all, decisions regarding the rights and obligations of the parties to a sales contract, for example, depend on decisions regarding the legal capacity of either party. In spite of all his endeavour to do so, the author of the present study has failed to ascertain Prof. Wengler's intent on this point, and he feels that it is possible to find contradictory answers on different pages of Wengler's treatise. In the case of a positive answer, i.e. if we were to view Wengler's "non-independent contents" as preliminary questions, it would not be possible to define as an essential feature of a preliminary question the fact that such a question may appear in different proceedings as the principal question. The author definitely does not consider the form of legal acts or legal capacity as preliminary questions, nevertheless — and therein lies the other significant point of Wengler's arguments — he does not consider as proper — at least in some cases, e.g. as regards matters of form — determination of an independent point of contact according to the conflict rule of the forum. This, however, will be discussed further below in connection with incidental questions.

In conclusion of this brief — and therefore necessarily somewhat simplified — interpretation of the concept of preliminary questions as developed by the two great German jurists and founders of the study of preliminary questions, it should be added that neither author precludes the consideration of preliminary questions by recognition of foreign decisions, which we shall discuss later, in Part II.

As regards the definition of the content of the concept of preliminary question, the problem of distinguishing the deparable parts of a legal relation on the one hand, and questions (or legal relations or facts, etc.) "capable" of creating the content of a preliminary question on the other hand, is again studied mostly by German authors. They usually proceed from the demand that the preliminary question could appear in different proceedings as the principal, as an independent, question.

For example, Serick[31]) says that the object of preliminary questions are independent, conditional facts of the case *(Bedingungstatbestände)* of a particular legal question *(Rechtsfrage)*. The partial question *(Teilfrage)* concerns non-independent parts *unselbstständige Glieder)* of the legal

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[31]) Serick, "Die Sonderanknüpfung von Teilfragen im IPR", *Zeitschrift für Ausländisches und Internationales Privatrecht*, 1953.

relation, such as the capacity to commit delicts within the scope of prohibited action.

A similar position is held by Raape[32]) who — as regards the concept of preliminary questions — merely stresses that a preliminary question must be able to become the object of independent reference by the conflict rule of the forum, but his other arguments indicate that he is not concerned with questions which cannot be considered independently, such as questions of form et al. *(nicht blosse Teilfragen).*

A somewhat different opinion is held by Kegel[33]) who on the one hand says that *Teilfragen* constitute statutory features of the facts of a case subsumed within the respective legal institution and expressly identifies himself with Serick, but on the other hand argues that preliminary questions and partial questions *(Teilfragen)* should be viewed as two circles intersecting each other, and does not further deal with the problem. Of course, Kegel's view on this point is affected by his unequivocal position as regards the determination of the statute of the preliminary question (exclusively according to the conflict rule of the forum — see Part II below), so that distinguishing between the two questions is quite understandably of no importance to him, since he is merely interested in finding when German conflict rules instruct the judge to make a separate point of contact. This investigation is, by the way, quite simple.

Such investigation is too formal and too abstract for Anglo-American authors and therefore — perhaps with the exception of Morris's definition noted below — they do not particularly concern themselves with this matter. The Anglo-American incidental questions, or as Ehrenzweig states, ". . . the 'preliminary', 'incidental', 'subsequent', or 'partial' question . . .",[34]) do not, it seems, preclude the consideration of a question which could not be an independent object of proceedings, provided that it has arisen from the application of a substantive rule of the *lex causae* of the principal question and that it is an essential condition of the decision on the principal question. On the other hand, in Robertson's and Wolff's concept it is also possible to find arguments to the contrary.[35])

French authors[36]) also concern themselves with this problem mostly from the viewpoint of conflicting situations arising from conflict of laws,

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[32]) Raape, *Internationales Privatrecht,* 1955, pp. 113, 114–115.
[33]) G. Kegel, *Internationales Privatrecht,* 1960, p. 107.
[34]) A. Ehrenzweig, *A Treatise on the Conflict of Laws,* 1962, p. 340.
[35]) Robertson, *op. cit.* M. Wolff, *Private International Law,* 1950.
[36]) E.g. Maury, "Régles général des conflits de lois", *Recueil des Cours,* 1936, III, pp. 554 ff.; Batiffol, *op. cit.;* Lagarde, *op. cit.,* pp. 459 ff. Also see Cormack, 14 So. Cal. L. Rev. 221 (1941). The problem is also indirectly touched upon by some authors when studying conflicts of qualification (Bartin in 1930, *Recueil des Cours,* I, 1930, p. 608) or *renvoi* (the latest monograph by Francescakis).

and therefore define preliminary question as independent questions which may be considered in other proceedings as principal questions and which are a prerequisite for making the decision on the case proper. This is stressed especially by Batiffol when he underlines the duty of the French courts to decide on the preliminary question in the absence of jurisdiction.[37]) Lagarde adds that the preliminary question must lend itself to consideration as an independent question in other proceedings before the dispute arises, concerning the principal question which is dependent on the settlement of the preliminary question. For example, if the validity of an adoption is examined as a preliminary question within the scope of proceedings concerning an inheritance claim, it is obvious that the validity of the adoption could have been considered by a different court even before the decedent's demise. Lagarde also makes a distinction of partial questions *(élement partiel)* similarly as Serick.[38])

In contrast to most other authors, Prof. Szászy concerns himself with preliminary questions both from the narrow aspect of conflict rules and from the procedural aspect.[39]) As regards the former aspect, Szászy, too, does not go beyond the scope of studying conflicting situations, which means that he considers a preliminary question to present a problem only if the *lex causae* of the principal question is a foreign law. That is also why he examines preliminary questions within the broader framework of what he calls conflicts of second degree.[40]) The situation in the procedural sphere is opposite; besides preliminary questions which are important from the viewpoint of the conflicts law, Szászy most carefully distinguishes questions which I have called above "purely procedural questions of preliminary nature".[41]) However, Szászy places too great a stress on the importance of procedural aspects, which is linked with his somewhat original concept of procedural law in private international law, a point we shall not discuss here. It should be noted that from the viewpoint of procedural law, the Hungarian author considers the problems of preliminary questions to be a separate institution within the framework of so-called general problems of private international law. We must greatly appreciate Szászy's endeavour to deduce from the general theory of the individual socialist states their opinion on the given problem. It was an extremely difficult and unenviable task because he had no

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[37]) See under § 1 above.
[38]) Lagarde, *op. cit.*, pp. 460—461.
[39]) I. Szászy, *Private International Law in the European People's Democracies*, Budapest, 1964, pp. 128 ff.; *International Civil Procedure (A Comparative Study)*, Budapest, 1967, pp. 155 ff.
[40]) See footnote 17 above.
[41]) Szászy, *International Civil Procedure*, in particular p. 160: "wider and narrower sense of the preliminary question".

sources — legislative or doctrinal — to draw on. Although the author of the present study holds mostly an opposite opinion with respect to Czechoslovak private international law, it is to be recognized that Szászy's conclusions regarding a uniform socialist concept are well grounded not only in Soviet, Bulgarian and Hungarian theory but also in the conclusions reached by some Czechoslovak authors especially in the first years following the promulgation of the Act No. 41/48.

In conslusion of this survey of doctrinal opinion, I should like to return to English theory, namely the definition of preliminary questions offered by Prof. Morris.[42])

I refer to this definition outside the framework of the concepts of other Anglo-American authors because I shall refer to it in the following explanation of my opinion regarding the Czechoslovak law, in which the Morris definition will be used as something of a criterion of a concept based on the study of purely conflicting situations in conflicts law.

Prof. Morris argues that an incidental question arises if, first, the principal question is governed under the English conflict rule by foreign law; secondly, it arises as a subsidiary question containing a foreign element, it may arise independently or in another context (i.e. in connection with another principal question — *author's note*), and may become the subject of a separate point of contact; thirdly, the English conflict rule applicable to this question refers to another law than the conflict rule of the *lex causae* of the principal question.

The Morris definition of the incidental question (i.e. the preliminary and incidental question in our concept) in private international law offers a classical example of a formally logical controversy of two non-uniform criteria of the concept.

Both questions must primarily contain a foreign element and, at the same time, the statute of the preliminary question must differ according to whether the point of contact is made under the conflict rule of the forum or the conflict rule of the *lex causae* of the principal question. The disputability of the conflicts solution in this case is an extremely narrow criterion. It is a purely formal and technical criterion because what is being examined is only the conflict rule of the *lex causae* of the principal question rather than the opinion of the judge of the state whose law is involved, regarding the solution of the problem.

The preliminary question must also arise from the application of a substantive rule of the *lex causae* of the principal question, whose final application (the decision whether the facts specified in the hypothesis

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[42]) Dicey, *Conflict of Laws*, 7th ed., 1958, p. 58.

of such rule have been met) depends on the consideration of the preliminary question which must, at the same time, constitute the object of a separate point of contact. The maximally *expanding* criterion in this case is any subject of a separate point of contact under the *lex fori* (English law), provided, of course, that it constitutes the prerequisite of the application of another substantive rule.

The synthesis of both these criteria creates an insufficiently general concept which relates only to a small group of cases of the same kind. At the same time, the subject of the principal question is merely a declaratory or constitutive decision regarding the existence of a particular status or a particular right or obligation (a child is legitimate because its parents were legally married; X is the subject of an inheritance title because he is the legitimate child of the decendent). Finally, if the subject of the principal question is the existence of a claim, the qualifying question is all on which the existence of the claim depends, provided that the condition is the object of a separate point of contact under the *lex fori*. For example, the existence of the claim to the payment of the purchasing price depends on the validity of the sales contract and, therefore, also subjectivity or the form of a legal act can become a condition. In this sense, this constitutes the broadest concept of incidental questions whose subject are both questions which may stand independently as objects of other proceedings (preliminary questions) and partial questions which may appear as qualifying questions in another context.

We should add that the Morris concept is frequently considered as the English law; this is true, for example, of the well-known Casebook on the Conflict of Laws.[43])

As indicated in § 1 above in the passage dealing with Czechoslovak rules of procedure and the related traditional doctrine regarding preliminary questions, these questions are treated in Czechoslovak procedural law on the basis of the objective, generalizing differentiation principle. The Czechoslovak judge must respect Czechoslovak procedural rules also in private-law proceedings involving a foreign element, if the character of private international law does not preclude it; this has already been underlined. There is no reason, therefore, why the Czechoslovak tradition in the sphere of procedural law should not serve as one of the author's starting points. Another starting point for the study of the topic of the present treatise is, quite naturally, the doctrine of private international law, in particular in the conclusions regarding preliminary questions. Since, however, the Czechoslovak school of private international law has

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[43]) Webb and Brown, *A Casebook on the Conflict of Laws*, 1960, pp. 74–75.

taken its own and, in my opinion, a very progressive position on some of the general problems of this sphere of law — let us mention, at least, the problem of *renvoi,* the principle of the focal point of the legal relation, expressed in the principle of a reasonable settlement of the case, the reservation of public order, the endeavour to obtain the widest possible applicability of the *lex causae* as the sole statute, etc. — I shall try to define the scope of the concept of preliminary question and to specify the method of determining its statute on the basis of the specific contribution made by Czechoslovak authors to private international law. This is why I have stressed in the title and frequently also in the text of this study that my work represents an effort to formulate the *Czechoslovak* position.

I have based the definition of the scope of the concept of preliminary question on a distinction between preliminary and so-called partial question *(Teilfragen).*

The reader has undoubtedly noticed that in some cases different terms have been used thus far to describe apparently the same thing, such as the principal question, the legal relation or legal relations constituting the principal question, the claim which is the object of the preliminary question, or the fact constituting the preliminary question, on the other hand. I shall first try to explain these differences in terminology.

In Czechoslovak legal theory, legal relations (legal situations or conditions) are defined as ". . . relations between people, in which the people act as the holders of subjective rights and legal obligations specified by rules of law".[44])

Under this definition, we may undoubtedly consider as a legal relation (*one* legal relation) a sales contract as a set of all the rights and obligations of each subject regarding a particular object. On the other hand, neither the above definition, nor the provision of Section 100, pars. 1 and 2, of the Act No. 101/63 preclude the specification of the set of the rights and the obligations of the subjects of the sales contract regarding performance *in rem* as one legal relation, and the pecuniary obligations between the same subjects as another legal relation. And yet, both these relations result from one and the same contract. In a true sales contract both relations are inseparable, and if either of the aforesaid obligations were missing in a concrete case, the respective contract would not be a sales contract but a contract of a different kind (e.g. donation, a barter contract, etc.). At the same time, each of the aforesaid obligations represents certain subjective rights, i.e. claims, and, of course, duties as well. For example, under a pecuniary obligation, one subject may have the right to receive

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[44]) *Učebnice teorie státu a práva,* I, Prague, 1967, p. 405.

payment, another subject may have the contractual right to perform in different currencies, etc. Nevertheless, when the court entertains an action concerning even a single claim, it must take into account and consider all the other elements of the contract because the existence of the claim it is to adjudicate as well as its judgment are unthinkable without a consideration of the contract as a whole, i.e. without ascertainment of what contract is involved, whether it was concluded validly, etc. If we consider separately let us say a pecuniary obligation, it is quite obvious that a concrete pecuniary obligation must have a concrete content. If this concrete relation includes, for example, a valorization clause — which jointly determines the extent of the creditor's claim and the debtor's obligation — such valorization clause forms an inseparable element of the concrete pecuniary obligation and thereby also an inseparable element of the obligation relationship established by the same sales contract whose object is performance *in rem.* In this sense, the valorization clause is as firmly tied with the other elements of this concrete sales contract — e.g. with all the elements connected with the establishment of the contract — as, for instance, the form of the contract, the legal capacity of its subjects, etc. Thus, in a concrete sales contract, the capacity of its subjects, the form of the legal act, the relationship concerning the performance *in rem,* the pecuniary obligation and the elements of its content, such as a valorization clause, etc., are all mutually inseparable elements determining the nature and the content of each specific case. If even a single one of these elements is missing, the case will never be the same and, depending on the nature of the matter, it may be either another case of the same kind (without a valorization clause) or another contract (without a pecuniary obligation), or a case which is not legally relevant (the absence of capacity makes a legal act invalid — *non negotium*).

All the elements of a particular case, including the individual separable but mutually inseparable legal relations (an obligation whose object is a performance *in rem,* a pecuniary obligation etc.), which are essential parts of a certain concrete relationship between certain subjects, constitute the facts of the given case.[45]) These facts — irrespective of whether we consider the legal relationship concerned as one relationship in the broader sense of the term or a sum of several legal relationships — constitutes a separate question, which means that if it is a question which the court is to adjudicate on the basis of the respective action, it con-

[45]) We are concerned only with such elements, the absence of one of which would constitute a different case. Such inseparable element will be in contracts always the form as an abstract concept — e.g. written form in a concrete contract — but not factual circumstances, such as the fact that the requirement of written form has been met by an exchange of telegrams or letters (provided, of course, that an exchange of telegrams constitutes written form under the *lex causae*).

stitutes the *principal question.* We must not let ourselves be confused by the seemingly obvious and yet erroneous idea that the court decides only on the existence, justification etc. of a specific claim (i.e. a subjective right and the corresponding obligation). It is true that the pleadings as well as the judgment frequently speak only of a particular claim, but the court may odjudicate such a claim — i.e. subsume it under a specific substantive rule — only if it considers all the other elements which are inseparable from such concrete, subjective claim, i.e. elements which constitute together with the claim the one, single case in question. If the court is to adjudicate a claim to pecuniary performance under a sales contract, it must first find that the contract is a *valid* one, that it is indeed a contract of *sale,* that the claim is mature, etc.

All the elements of the facts of the case in the aforesaid sense, which may be conceptually the object of a separate point of contact, i.e. those which may at all be considered under a different law than all the other elements of *the same* facts of the case, constitute so-called partial questions *(Teilfragen)* of the object of the principal question *in abstracto.* Which elements may be conceptually at all the object of a separate point of contact, is a problem of the development of private international law as a whole throughout the world. As a rule, they will be the elements which have been separately tested by important courts (important from the viewpoint of private international law), or which can be at least theoretically the object of separate points of contact.

What should be understood as a partial question in a concrete case is exclusively a matter of the law and the practice of the forum adjudicating the given case. The courts of every state will make their own decision as to which questions fall within the scope of the *lex causae* and which do not. The practice of individual courts in this matter may perhaps be justly criticized, but we cannot deny that there are no other criteria in this respect than the law and the practice of the forum.

For example, a Czechoslovak court must always consider the question of validity and effect of a valorization clause in a contract of sale under the *lex causae,* i.e. under the same law, under which it considers, for instance, the essential subjective rights and obligations of the parties, etc. Therefore, under Czechoslovak conflict rules, the validity and the effects of a valorization clause do not constitute a partial question.[46]) However, from the conceptual point of view, a valorization clause may be the object

[46]) The text indicates, perhaps, that we are concerned with partial questions only in the sense in which this term is used in the literature concerning preliminary questions. Otherwise, of course, also a Czechoslovak court will consider "separately" and parallel, i.e. independently of each other, e.g. a valorization clause and, let us say, the permissibility or possibility of a performance *in rem.*

of a separate point of contact. It may be considered, for example, under the *lex monetae,* as American judicial practice, based on the Joint Resolution Act, has shown, or as Canadian courts have done.

In Czechoslovak private international law, partial questions are those elements of the principal question, which may become the object of separate testing under Czechoslovak conflict rules (e.g. the form, legal capacity, etc.) or according to Czechoslovak doctrine and judicial practice (e.g. the conversion rate in the case of a structural change of the currency is governed by the *lex monetae*), or which are in a concrete case so closely linked with the place of their origin, that they may be considered only under the law of such a place (incidental questions which are discussed below).

We should also see that some elements of a legal relationship constitute a partial question before a certain forum in every case while others only in certain cases. For example, a Czechoslovak court which considers the validity of a marriage as the principal question must refer as regards the form to the *lex loci celebrationis* and as regards capacity to the *lex patriae* of the groom and the bride. On the other hand, in the absence of a contractual clause regarding effective payment, the Czechoslovak court will refer to the *lex obligationis,* provided that this law contains provisions concerning substitution of currencies. Otherwise it will refer to the *lex loci solutionis.*

The *lex fori* and the practice of the forum as the criteria for determining the partial question apply only to the principal question, not to the consideration of preliminary questions (see under Part II below).

Let us consider the following example. The forum of F entertains an action concerning a claim to performance in rem based on a sales contract concluded between the plaintiff A and the defendant B. Neither party has made a choice of law.

The court, let us say, has certain doubts as to the type of the contract. Therefore, it ascertains all the facts of the case, which it deems to be legally significant and eventually qualifies the case in keeping with the action as one involving a sales contract. It is usually quite clear already at this stage whether the court will — besides applying the *lex causae* of the contract — consider some elements of the contract under a law specified by independent conflict criteria. It is, of course, quite possible that under the substantive rules of the *lex causae,* the court will supplement its opinion of the circumstances legally relevant for the specific case.[47]) The court must decide at least from the viewpoint of the logic

[47]) If the *lex causae* is English law, the court will be interested in whether a consideration had been granted; if the *lex causae* is French law, the fact that the offeree may have *promised* executory consideration will be quite irrelevant.

and technique of its adjudication before it begins to consider the merits of the case under the substantive rules of the *lex causae,* which conflict rules it will apply to determining the law governing the various elements of the contract. It must therefore also decide which questions of the factual substance of the case may be considered as partial before it begins to consider whether the claim is justified, objections that may be raised, etc.[48]) As regards the practical objection that the court could proceed in another way, it should be noted that the court has at least the possibility of analyzing the given regal relationship into individual, partial questions before it establishes the point of contact.

Once the court comes to the application of the substantive rules of the *lex causae* (or the substantive rules of the law governing another partial question), a partial question may arise, which I would call secondary. This is true of a case where a substantive concept of the rule must be interpreted on the basis of an express or obvious reference of such rule under another, strictly specified rule of substantive law or, possibly, even under a different law. This involves the determination of the content of the auxiliary concept *(Hilfsbegriff)* discussed in the Introduction above.

However, the following situation may even develop: In the aforesaid litigation involving a sales contract, the claim of the plaintiff A is based on a provision of the contract, under which the defendant was granted credit towards the payment of the purchasing price, which was to be repaid within two years following the date the plaintiff met his obligation to perform *in rem.* The plaintiff asserts that the defendant B had failed to perform within the specified term, which fact is proven by evidence. B objects that the pecuniary performance by the plaintiff is endangered by the latter's economic situation, which is the reason for which he has refused to perform *in rem* himself in time.

The forum F finds that under the *lex causae,* the seller may refuse performance in advance only if a court finds the buyer insolvent.

Before we continue analyzing our example, we must underline in particular that the existence of a judicial decision finding a debtor insolvent and the content of such a decision, if it does indeed exist, in no way alter the strictly specified content (the subjective rights and duties of the parties regarding the object of the contract) of the concrete contract involved. Thus the consideration of insolvency cannot be a partial question of the principal question, as discussed above.

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[48]) It will therefore primarily define the most essential partial question and will test it by the *lex causae.* The question which elements of the contract must be considered under the *lex causae* — i.e. how to define such partial question — is a matter of the opinion of the court regarding the scope of the statute of the obligation.

The forum F also finds that the plaintiff A is a merchant whose seat is in Peru and that a local court, acting under Peruvian law, had granted to the plaintiff a one-year postponement of the terms of payment. The laws of some Latin American countries provide for a special institution of a one-year period of grace granted to businessmen in a tight economic situation to permit them avoiding possible bankruptcy.

The court now faces the special problem of considering the decision of the Peruvian court from the viewpoint of the substantive rule of the *lex causae* regarding the seller's right to refuse performance *in rem.*

Does the Peruvian decision extending the plaintiff's terms of payment constitute a judicial decision on insolvency as required by the substantive rule of the *lex causae*? Is the plaintiff insolvent? Both these questions arise from the application of the substantive rule of the *lex causae;* the manner in which they are answered will determine the application of the dispositional part of this rule, i.e. the answer to the question whether the objection raised by defendant B is warranted; the answer to both questions therefore constitute the content (or a part of the content) of the hypothesis of the aforesaid substantive rule of the *lex causae.* The content of the answer again appears to be a secondary partial question but in this case a partial question from the viewpoint of subsumption of a special situation under one of the concepts of the substantive rule. This situation exists quite independently of the subject of the principal question (the sales contract). The economic situation of A was the object of separate proceedings before the Peruvian court; it is certainly possible that in view of the fact that the respective institution of Peruvian law constitutes a specific feature of the law of some Latin American states, the consideration of the effects of the Peruvian decision may become the object of separate proceedings and a *declaratory* judgment of another court in a third state. In both instances, such a court would adjudicate irrespective of the existence of a concrete sales contract between A and B, which is being adjudicated by the court of F as the principal question.

The question of the debtor's insolvency is a true preliminary question. Its main requisites may be considered to be as follows:

a) it may be the object of separate proceedings before another court and therefore exists independently of the principal question, which means that it cannot be a partial question of the legal relationship (the factual substance of the case in the aforesaid meaning of the term) that constitutes the principal question;

b) it arises in the course of the application of a substantive rule of the *lex causae* of the principal question and represents the content of the general concept of this substantive rule; in this sense it is a truly subsidiary question to use Robertson's terminology;

c) it is an essential prerequisite for the adjudication of the principal question. In this sense it is an essential prerequisite for the application of a particular substantive rule of the *lex causae* of the principal question, a rule which specifies the concrete, subjective right of the subject of the relationship constituting the principal question, and, finally, the rule which the court must apply in a concrete litigation. (If the forum F considers A to be insolvent, it will apply the rule of the *lex causae* positively, i.e. it will deny the action. If it concludes that the hypothesis of the rule has not been met — and therefore apply the respective rule negatively — it will approve the action.);

d) a merely formal consequence of c) above is the fact that the court may adjudicate the principal question only after it has adjudicated the preliminary question;

e) the decision of the court regarding the preliminary question is not a part of the pronouncement of the judgment concerning the principal question, which means that it is not a judgment in the true meaning of the term, but an assessment of the preliminary question which may appear only in the grounds of the judgment. *The court therefore considers the preliminary question as a question of fact* with the sole exception of cases where the court is bound *ex lege fori* by the decision issued on the preliminary question by another court of the state of the forum, which considered it as a separate question.[49])

The importance of this last requisite lies in the fact that neither party to the dispute constituting the principal question may refer to the result of a judicial consideration of a preliminary question as to a final judicial decision, which applies at least to cases where the forum is a Czechoslovak court. As far as I am aware, with the exception of P. Lagarde (see below), no author who has thus far devoted himself to the study of the problem of preliminary questions *in private international law* has dealt with this particular aspect of the problem. However, the author takes the above requisite as the basic point of departure in determining the statute of the preliminary question.

Taking into consideration Czechoslovak procedural law, the author is of the opinion that the requisites listed under a) to e) provide the only objective criteria for defining the concept of preliminary questions in *Czechoslovak* private international law. From the viewpoint of the presence of a foreign element, it is necessary that the foreign element be contained in the principal question. This means that in a concrete case, the conclusions specified here will also apply to cases where a Czecho-

[49]) The same opinion is held by Štajgr and Steiner, *op. cit.*, p. 145.

slovak court, which would consider a question that is involved as a separate (principal) question, would consider it as a purely domestic legal relationship.[50])

If the preliminary question does not contain a foreign element from the viewpoint of the Czechoslovak court, then — with the exception of so-called mobile conflicts[51]) — no dispute can arise as regards a typically conflicts problem — the determination of the statute of the preliminary question. However, private international law must be taken into consideration also in this case with respect to the scope of applicability of the *lex causae* of the principal question and the statute of the preliminary question,[52]) provided that both questions are not governed by the same, i.e. Czechoslovak, law.

Finally, it should be noted that under the author's concept, some specific problems may arise, regarding preliminary questions in private international law, also when both questions contain a foreign element but the principal question is governed by Czechoslovak law. In the case of the aforesaid mobile conflicts, the Czechoslovak court will be entitled to determine the statute of the preliminary question differently than it is instructed to do by the respective Czechoslovak conflict rule.[53])

Thus, in contrast to Prof. Morris, the author's concept is fundamentally identical with the concept of prejudicial questions in their narrower sense[54]) (i.e. they are not so-called purely procedural preliminary questions), as they appear in Czechoslovak procedural law also for the purely municipal sphere. The specific character of this problem ensues from the fact that from the viewpoint of the Czechoslovak court a legal relationship with a foreign element appears in the proceedings at all.

If we require that a preliminary question should be able to stand on its own as a separate object of proceedings before another court or agency authorized to apply the law, we should not be confused by the fact that in a concrete case it may become necessary — from the viewpoint of the principal question — to consider only some legal effects of a certain legal relationship or event.

Let us consider the following example:

In a succession case (the principal question) a dispute arisses regarding

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[50]) E.g. the relationship between a child and X (recognition or determination of paternity), if X, the mother and the child were all Czechoslovak citizens in the decisive period. This question may become a preliminary one from the viewpoint of the child's right of succession towards X who was the citizen of another state at the time of his death.

[51]) See Part II below.

[52]) See the Introduction.

[53]) See below in Part II.

[54]) See above under II.

the succession title of the decedent's adoptive child. The succession rules of the *lex successionis* of S grant the right of succession to the decedent's "children", but the law of S does not know the institution of adoption; nevertheless, it contains no provision that would exclude from the scope of "children" for purposes of succession other persons than the decedent's own children. The forum must now consider according to the law applicable to the assessment of the relationship between the adopter and his adoptive child (possibly also according to the law determining the status of the adoptive child in the decisive period) whether the adoptive child has the same right of succession as the decedent's other children. If the forum considers the existence of adoption as indisputable, it will investigate as a preliminary question only whether the applicable law recognizes the adoptive child's claim to succession. It might seem that under the aforesaid criteria, this does not constitute a preliminary question because a mere ascertainment of certain legal effects of adoption cannot become the object of separate proceedings. We must see, however, that the legal effects of adoption cannot exist without the existence of adoption. Even if the court finds the existence of adoption indisputable, this should be viewed as recognition of the fact that the adoption had taken place and, moreover, that the adoption was of a kind which establishes a right of succession identical with that of the decedent's descendants (in this case his own children). We have here, therefore, consideration of the relationship between two persons and of the legal effects of this relationship, which can always become a separate object of a declaratory decision or the object of a decision recognizing a foreign decision concerning adoption (if the adoption is based on an official decision), or consideration of a decision issued by another organ of the state of the forum. This is not altered by the fact that the court which settles the matter only to the extent required for adjudicating the principal question may "settle" the preliminary question with a brief sentence in the grounds of its judgment, stating simply, e.g., that the adoptive child is considered under the law of X to be the decedent's lawful heir and enjoys in this respect equal status with the decedent's own children.

In connection with the requirement of possible separate proceedings regarding a concrete preliminary question, yet another fact should be noted. In the Introduction, the author mentioned the dominant role of the *lex causae* of the principal question. It is possible to quote many examples showing that it is frequently necessary — provided that the principal and the preliminary questions are governed by different laws — to consider some aspects of the preliminary question according to the substantive rules of the *lex causae* of the principal question and apply the law of the preliminary question only to some non-independent parts

of the relationship constituting the preliminary question. This case, too, meets, of course, the requirement of the possible separate consideration of the preliminary question. However, there is the specific problem that should a concrete preliminary question appear as a principal (independent) question, it would be considered in such case under a different law than it is as a preliminary question connected with another, principal question. In the first case, it should be remembered, there will be no necessity of taking into consideration the substantive rules of the law governing the principal question, which would be the case in the latter instance. This is quite natural, for this is precisely one of the specific features of preliminary questions in private international law. This feature leads to the conclusion — advocated by the author in Part II of his present work — that it is not necessary to lay special stress on arriving always at the same assessment of the same question which once appears as a preliminary question may be considered in two ways:

Both in Czechoslovak procedural law and in the general doctrine of private international law there is no dispute over the fact that a preliminary question may be considered in two ways:

a) either by considering separately the rights and duties of the subjects of the respective relationship (or facts) which constitutes the preliminary question, or

b) by recognizing or taking into consideration a decision which has already been issued on the preliminary question and which naturally concerns the same parties (i.e. parties to the adjudication of the preliminary question which had previously been considered as an independent one).

There is no need to analyze the assertion that the court may consider independently any preliminary question, including one, on which another court has already issued a valid decision,[55]) always whenever its own procedural law does not expressly instruct it that it must observe the already issued decision and if its own law does not prohibit the court to consider some questions as preliminary.

In Part II, below, the author will explain his opinion on when it is *appropriate* to take into consideration an already issued, final decision. (Czechoslovak terminology uses the expression "to proceed" from such a decision.) At this point, it is necessary to note the author's view on

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[55]) I.e., if such a decision has been issued, the court may recognize it or take it into consideration — if a decision is involved, which has not been issued by another court of the same country, it may merely take it into consideration as just one of the circumstances warranting its own decision, which means that it need not follow it — or it may consider the matter independently. It is fully up to the court to choose either alternative with a view to the nature of the matter.

when a Czechoslovak court is bound by a decision already issued on a preliminary question.

Under § 1 above, the author identified himself with the opinion of Prof. Štajgr and Asst. Prof. Steiner, that the Czechoslovak court is bound by the final decision of another Czechoslovak court that a crime, a minor offence or a transgression *was* committed and who committed it, as well as by final decisions of Czechoslovak courts in matters of personal status and, finally, by Czechoslovak judicial decision recognizing foreign decisions regarding matters of personal status.

As regards the aforesaid Czechoslovak decisions in penal and administrative matters, the author holds that the court must also recognize decisions stating that a *crime* (not a minor offence or transgression) *was not committed or that a certain person did not commit it in cases where the object of the preliminary question involves precisely the question whether a particular crime was committed by a particular offender,* i.e. not just whether the law was violated.[56]) For example, if the object of the preliminary question is the invalidity of a marriage due to bigamy, the court is bound by the decision of the Czechoslovak penal court which denied the action charging bigamy. The same would be true of a case where the validity of a testamentary provision disinheriting a statutory heir depends on whether the heir had committed a crime against the testator, etc. If a Czechoslovak penal court had previously found that such a crime had not been committed (naturally, between the respective parties), the Czechoslovak civil court is bound by this decision. *However, this applies only to cases where the Czechoslovak penal court decided on the merit of the respective case, i.e. that it did not, for example, deny the action because the period of limitation had expired, because of an amnesty, etc.* Thus the author extends the scope of the cases defined by Štajgr and Steiner. The reason for this is quite simple. Final decisions of Czechoslovak penal courts are effective on Czechoslovak territory with respect to all individuals and organs and must be unconditionally respected. The two authors apparently concerned themselves only with those cases where the negative decision of a Czechoslovak penal court does not preclude the violation of other rules than those of penal law; as already noted, this opinion of theirs is above any doubt in this respect.

As regards final decisions of Czechoslovak courts in matters of personal status, or the recognition of foreign decisions of the same kind, the Czechoslovak court is bound by these decisions of other Czechoslovak courts

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[56]) E.g., the question of the establishment of liability *ex delicto* is merely a question of violation of the law (or intent, etc.) and civil-law liability may also be established even if liability under penal law has not been established.

ex lege fori. What is involved here is recognition of the existing legal state but not an approval of this state. The author will specify in Part II the reasons for which he considers this situation utterly wrong.

The author stated under § 1 above that if a Czechoslovak court considers a legal relationship involving a foreign element, it must also consider questions of personal status which had not been adjudicated by another Czechoslovak court, if such questions arise as preliminary, although Czechoslovak rules of procedure prohibit this in "municipal" disputes. This was explained by the unequivocally recognized principle that a Czechoslovak court which has found itself competent to consider the principal question must adjudicate it and must not refer the parties to a foreign court even with respect to the preliminary question. It should be noted that should another Czechoslovak court be competent to consider a preliminary question concerning personal status, it would perhaps be appropriate, for the sake of observing Czechoslovak rules of procedure, if the forum requested under the general rules of civil procedure that the competent court should refer the status case to it so that it could be considered in the same proceedings. Such procedure is warranted by reasons of expediency and economy of the proceedings, which are especially important if one of the parties is a foreign national, as well as by the very nature of the preliminary question which, in the author's opinion, should not be considered separately from the principal question. The sole exception are cases where the Supreme Court has exclusive jurisdiction under Section 67 of the Act No. 97/63.

However, it should be particularly noted that the court may consider the preliminary question only if it can initiate proceedings with respect to the principal question; which means that the decision on the preliminary question must not be the object of the question whether the plaintiff or the defendant have active or passive competence with respect to the principal question. This is extremely important precisely in matters of personal status.

For example, A sues B for alimony, basing his claim on the assertion that he is the child of B. The court finds that A was not born of B's marriage, that B may not even be presumed of being A's father and that paternity in this case has not been admitted or determined. In this case there is an absence of capacity on either side and the court will therefore deny the action. It will do so always whenever Czechoslovak courts have no jurisdiction in matters of determining paternity. If the Czechoslovak courts do have jurisdiction, it is possible for the court to ask on various grounds (e.g. the danger of delay) for the proceedings on the principal and the preliminary questions to be combined. In such case, of course, it will not consider the determination of paternity as a preliminary but

as the principal question. If it reaches a positive decision, it will then, and only then, begin considering the question of the alimony. This is the same situation as in a case where the court, which is to begin divorce proceedings, finds that there is no evidence of the marriage ever having been concluded.

The character of questions concerning personal status indicates that the court may consider them as preliminary — in so far as they require a constitutive decision under all the laws involved — primarily if such a decision has been issued. It is only in cases where at least one of the laws possibly involved links the establishment, change or extinction of the respective status with a certain legal fact or legal fiction, that also the Czechoslovak court may consider the question of personal status as a preliminary one. For example, this would apply to consideration of extinction of marriage by banishment, the conclusion of marriage by the California Common Law form, or an improbable rule of law specifying by certain features a man as a child's father (on the basis of a legal fiction) although he is not the mother's husband (let us say a person who lived with the mother in the same household).

One brief note in conclusion. Although the author approaches the problem of preliminary questions as a problem originating primarily in the sphere of the law of conflict of laws, it is obvious that from the viewpoint of defining the content of the concept of preliminary questions, he assigns the major role to the broadest possible generalization in the sphere of Czechoslovak private international law. That is why the conflicting nature of situations from the viewpoint of connecting factors is of no significance for him. Therefore, under this concept, a preliminary question will also be involved in those cases, where the preliminary concept of a substantive rule of the *lex causae* of the principal question is considered by Melchior as what he calls *begriffsnotwendiger Bestandteil der Hauptfrage,* although in the majority of cases there will be no doubt that the conflict rule of the *lex fori* must be applied. However, from the viewpoint of what has been said, it should be noted that in these cases, the preliminary question must not be a prerequisite for ascertaining the active or passive capacity of the parties to the proceedings concerning the principal question.

PART II

DETERMINING THE STATUTE OF PRELIMINARY QUESTIONS

§ 3 THE EXISTING CONCEPT OF A UNIFORM CONFLICTS CRITERION HARMONY OF DECISIONS OF THE FORUM AND THE INTERNATIONAL (CONFLICTS) HARMONY OF DECISIONS

The brief review of the doctrine in the preceding part of the present study indicates that the determination of the law governing a preliminary question frequently proceeded from the presumption of two possible criteria; the statute of the preliminary question could be determined either according to the conflict rule of the forum or the conflict rule of the *lex causae*. This presumption always gave the rise to the necessity of considering the question of the applicability of foreign conflict rules.[1]) Since in the 1930's the institution of *renvoi* was the main cause for the application of foreign conflict rules, most authors deal with the relationship between renvoi and the problem of preliminary questions. To Melchior, renvoi not only serves as a proof of the fact that the then valid German law did not preclude *ex lege* the application of foreign conflict rules but also provides a major argument for determining the statute of the preliminary question in keeping with the conflict rule of the lex causae of the principal question.[2]) Under the then prevailing German theory, it should be remembered, *renvoi* was the judge's basic instrument for achieving uniformity of adjudication between the German court and the court whose law governed the respective legal relationship.[3]) Otherwise, of course, Melchior expressly states that the problem of determining the statute of the preliminary question has nothing common with *renvoi*, that it is a separate problem of private international law.[4]) A similar concept is upheld by M. Wolff who considers the English practice of "double *renvoi*" to be an obvious reason for determining the statute of the preliminary question according to the conflict rule of the *lex causae*

[1]) See the comment in the Introduction.
[2]) Melchior, *op. cit.*, p. 247.
[3]) *Ibid.*, p. 247 (compare "... *inhaltliche Übereinstimmung zwischen der Entscheidung* ...").
[4]) *Ibid.*, p. 246.

of the principal question. Otherwise, or course, Wolff clearly distinguishes between *renvoi* and the set of problems linked with preliminary questions; this is indicated by the very heading of the chapter in his well-known book, in which he deals with preliminary questions.[5]) Szászy is therefore wrong when he asserts that Wolff is trying to turn both problems into one.[6]) Wengler agrees that the problem of *renvoi* has nothing in common with preliminary questions and does not even find in *renvoi* support for the determination of the statute of preliminary questions.[7])

The author, just as all the other authors who *do not deny* the specific conflicts problem of preliminary questions in private international law, considers *renvoi* and preliminary questions to be two distinct, independent institutions of private international law. The acceptance (or non-acceptance) of *renvoi,* or reference to a third law, leads with final validity to the determination of the substantive law governing the case in question. It is only on the basis of the application of the substantive rules of such a law, that a preliminary question may arise and only then, therefore, it becomes necessary to find a point of contact regarding this question. It is, of course, natural that the application of the conflict rule to the preliminary problem may also give rise to the question of *renvoi* but only with respect to the preliminary question.[8]) However, the author believes that the concept of *renvoi* is actually a legal expression (together with the problems of conflicts of qualification) of the endeavour to achieve an international (conflicts) harmony in adjudication, as well as of the endeavour to apply foreign law as law in the proper sense of the word (i.e. its interpretation as done by the judge whose proper law is involved) rather than as isolated rules seemingly unconnected with the other rules of the same law. And it is precisely this endeavour, which is the focal point of some studies of the conflicts problems of preliminary questions.

Most authors who recognize the specific nature of the problems involved in preliminary questions find it necessary to distinguish them from the conflict of qualification. At first sight this may seem unnecessary because any relationship with a foreign element involves at least a potential problem — a real and often hardly soluble problem — of qualification. On the other hand, of course, it should be seen that a "correct" qualifi-

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[5]) The Application of Foreign Conflict Rules Apart from Renvoi; Wolff, *op. cit.*, pp. 206 ff.

[6]) Szászy, *International Civil Procedure,* p. 156.

[7]) Wengler, *Die Vorfrage,* pp. 191, 192.

[8]) The same opinion is held, i.a., by Wengler, Melchior, in 1955 also by Raape, and possibly by Kegel in Germany, by Maury, Batiffol and Lagarde in France, by Robertson, Gotlieb, Wolff, Cheshire, Morris and Ehrenzweig in the Anglo-Saxon sphere of jurisprudence, and, finally, by Szászy in the area of the socialist theory of law.

cation is a prerequisite of considering the preliminary question in two respects.

First, in cases of so-called primary and secondary qualification it is essential to distinguish the preliminary question strictly from mere qualification.

For example, the forum F, acting in a probate matter, refers to the *lex successionis* of S. If the forum F carries out in practice a secondary qualification, two quite distinct cases may occur. The substantive rule of S may use a typically disputable concept which must be classified, such as "immovables". The secondary qualification forces the judge to consider whether a thing is movable or immovable under the law of S. However, this qualification leads merely to "filling in" the so-called auxiliary concept *(Hilfsbegriff)* of the substantive rule of S. In addition, the forum F must also settle, let us say, the question whether A is entitled to inherit as the wife of the decedent. This is a typically preliminary question because it involves the examination of the origin and/or the consequences of a certain relationship between two persons and not a simple qualification. The problem of qualification will probably arise also in this case – on the one hand as a separate problem involving, for example, different concepts of marriage in different laws, and, on the other hand, as a subsequent problem arising only from the application of the law governing the preliminary question.[9]) For the court may find that under the statute of the preliminary question, the marriage between A and the decedent did not arise but that the effects of another relationship between the two persons (according to the statute of the preliminary question) meet the requirements of the rules of succession of S as regards the inheritance claim. The forum F will have to settle the question of qualifying this other relationship according to the statute of the preliminary question, which, of course, has nothing in common with the actual determination of this statute. This is, to some extent, a peculiarity. While the judge, who must determine the statute of the principal question, must settle the question whether the relationship is, for example, one of a husband and wife, the situation is somewhat the reverse in the case of the preliminary question. The substantive rule of the *lex causae* of the principal question not only specifies the legal relationship (e.g. marriage) but party also specifies its content,[10]) as already mentioned in the comments regarding the so-called general concept *(Rahmenbegriff)* in the Introduction. We are therefore interested more in establishing with

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[9]) I assume that there is no doubt as to the fact that an inheritance claim rather than a marriage claim is involved, etc.

[10]) Wengler, *Die Vorfrage*, p. 231 and elsewhere.

the help of qualification whether the preliminary relationship meets under the law which governs it the requirements of the substantive rule of the *lex causae* of the principal question. Naturally, the specification of the preliminary relationship used by the substantive rule of the *lex causae* of the principal question is of decisive importance only if it is expressly given an unequivocal interpretation in the respective rules[11]) (e.g. the term "lawful son" used in English law in some matters concerning real property). Otherwise, the terminology makes no difference and it is necessary to establish whether the law governing the preliminary question attaches to a certain relationship the effects required by the content of the general concept *(Rahmenbegriff)* of the *lex causae* of the principal question. In the end nothing more is involved, but a normal subsumption of the legal relationship to a rule of law with the only exception that the preliminary legal relationship must be legally relevant under the law by which it is governed and, moreover, its legal effects must meet the requirements of the *lex causae* of the principal question.

Since we have therefore made a distinction between the conflicts problems of these questions and *renvoi* and qualification — in harmony with the overwhelming majority of the authors who do not deny the existence of separate problems of preliminary questions in private international law[12]) — we may reach only two contradictory, logical conclusions:

a) *Preliminary questions are a separate institution not only in procedural law but also in the law of conflict of laws within the framework of what is known as the general problem of private international law,* which means that their solution under the conflict rules is generally applicable to all spheres of private-law relationship with a foreign element.[13]) The author holds the same but goes beyond the usual framework of conflicts solutions and tries to combine the conflicts and procedural aspects of preliminary questions into a single whole, into a separate institution of Czechoslovak private international law and the rules of procedure relating thereto.

b) If we do not accept the aforesaid conclusion, there is one more possibility, namely that we shall reject any specific character of preliminary questions and assert that these questions must be always con-

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[11]) *Ibid.*, p. 184.

[12]) See in particular Robertson, *op. cit.*, who is an advocate of primary and secondary qualification and who distinguishes in this connection most instructively between the problem of qualification and the determination of the statute of the preliminary question. This whole matter is stressed practically on every page of Wengler's Die Vorfrage.

[13]) Spheres, as used here, means the law of succession, of obligations, *in rem,* etc.

sidered quite separately and abstracted from the principal questions according to the law determined always under the conflict rule of the *lex fori.*

This latter opinion is consistently held perhaps only by Nussbaum who says: "There is no problem of preliminary questions; there is nothing, not a single word, that can justify them."[14]) The author believes that views like this need not be dealt with in particular because the purpose of this study is to demonstrate in a positive manner that this problem not only does exist but that it also has its specific features which distinguish it markedly from other separate problems of private international law.[15])

The authors who recognize the specific character of the conflicts problem of preliminary questions may be divided roughly into three basic groups:

First, there are the authors who advocate a uniform approach to settling conflict of laws problems — namely determining the statute of the preliminary question according to the conflict rule of the *lex causae* of the principal question. They admit certain exceptions from this principle in favour of reference to the conflict rule of the *lex fori.* This group is represented in particular by Melchior, by Wengler probably until 1966 (see below), by Robertson who has basically adopted Wengler's concept of 1934, by Morris, M. Wolff and Lagarde.[16]) As for Lagarde, Szászy claims that he holds a middle-of-the-road course between this particular group and the group of authors who advocate a uniform point of contact

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[14]) Nussbaum, *Grundzüge des Internationalen Privatrechts,* 1952, p. 100.

[15]) The study of *renvoi* and qualification *in any connection* always offers the possibility of considering these problems — as well as the problem of application of foreign conflict rules in general — from the viewpoint of the works of some socialist and especially Soviet authors. I ignore this possibility consciously for two reasons:

a) When Prof. Lunts, for example, has rejected at all the existence of the problem of qualification, it is possible to argue with him only in a comprehensive study on the problem of conflicts of qualification, which is something beyond the scope of the present study. Anything else would be simply placing one assertion against another.

b) Until recently contacts between the citizens of the socialist countries and foreign citizens had been artificially prevented and discouraged, and therefore there was a minimum number of litigations involving a foreign element coming before the courts of the socialist state, except for the commercial sphere, of course. It is therefore difficult to show that — as the author believes — given a greater number of normal family, inheritance and other disputes with a foreign element, even a Soviet court could not avoid the problems which regularly come up in other countries in the sphere of private international law. The concept held by some socialist authors is so abstract, that the author not only fails to understand it properly, but cannot even imagine its realization in practice. He will try to show this briefly, using Szászy's opinion on the determination of the preliminary question.

[16]) Melchior, *op. cit.,* pp. 245—265, Robertson, *op. cit.,* pp. 565—584, Morris, *Dicey, Conflict of Laws,* 7th ed., 1958; Wolff, *op. cit.,* pp. 206 ff. Lagarde, *op. cit.,* pp. 459 to 484.

according to the conflict rule of the lex fori.[17]) However, Szászy is undoubtedly wrong because Lagarde himself says: "... Nous retiendrons donc la compétence de principe de la régle conflict étranger ..."[18]) Szászy seems to have based his assertion on the somewhat different formulation of the exceptions listed by Lagarde (see below). But on this point, too, the author believes, Lagarde differs from Wengler only terminologically.

The second group is made up of authors who demand in principle reference to the conflict rule of the *lex fori*, admitting only some insignificant exceptions. The extreme representatives of this group are G. Kegel, Maury, Cheshire,[19]) and with some reservations also Rigaux. Another extreme representative of this group is Szászy.[20]) In addition to the usual reasoning based as in the case of the other authors on the harmony of the adjudication of the forum, Szászy lists another reason which is truly unique. He claims that a socialist court should apply as much as possible (generally speaking) the conflict rules of the forum because they are socialist rules (!). As regards concretely preliminary questions, he adds that their statute should always be determined so that the result is the application of the law of one of the great "coexisting" systems, the socialist or the capitalist laws (!!!).[21]) The author admits that he does not understand this argument , nor does he want to. He would feel embarassed if he were to comment on it because he holds that any argument of this kind has nothing in common with private international law.

Somewhere between these two groups stands Raape[22]) who in the past used to advocate the exclusive application of the conflict rule of the *lex fori* but who changed his position in his system of 1955, asserting that it is necessary between the two alternatives — the conflict rules of the *lex fori* or the *lex causae* — according to the circumstances of the case. As regards preliminary questions in disputes involving the law of succession, Raape favours the application of the conflict rule of the *lex causae* of the principal question, in other cases the application of the conflict rule of the *lex fori.*

The third group consists of authors who also admit the possibility of considering preliminary questions according other laws than those re-

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[17]) Szászy, *International Civil Procedure,* p. 156.
[18]) Lagarde, *op. cit.,* p. 455.
[19]) Kegel, *op. cit.,* pp. 102—108; Maury, *op. cit.*; G. C. Cheshire, *Private International Law,* 1950, p. 91. It is interesting that both Cheshire and Wolff present their differing positions as the English practice.
[20]) Szászy, *Private International Law in the European People's Democracies,* 1964, p. 142; *International Civil Procedure,* pp. 155—162.
[21]) Szászy, *Private International Law,* pp. 130, 143 and elsewhere.
[22]) *Op. cit.,* pp. 113—117.

ferred to by the conflict rule of the *lex fori* or the *lex causae* of the principal question. This group includes primarily Batiffol and Ehrenzweig and other authors who always recommend solutions according to the circumstances of each concrete case.[23]) There is also Gotlieb who considers any uniform rule impossible.[24]) A completely novel concept is developed by Wengler in his article written in 1966, which sums up the development of this problem in the thirty years following the publication of his 1934 study. In principle, he has not abandoned favouring points of contact according to the conflict rule of the *lex causae* of the principal question, but in some cases of "limping" legal relations he recommends a study of the position taken in all the laws in any way connected with the preliminary question.[25]) The author will return to this point in detail later.

Besides the aforesaid groups there are a few authors who have adopted more or less original positions. In addition to what the author said about Nussbaum, he should like to point to Bartin and Niboyet who more or less confuse the problem of conflict of laws relating to preliminary questions with the conflict of qualifications. A quite unique opinion is held by Louis-Lucas who recommends that the court should proceed from the preliminary rather than the principal question.[26]) He asserts that the court should examine whether the law governing the preliminary question can also govern (Louis-Lucas uses the term "absorb") the principal question or whether the *principal* (!) question can be considered independent to such a degree, that it may be considered according to a separate statute determined by the conflict rule of the forum. If we accept that the preliminary question arises only on the basis of the application of the substantive rule of the *lex causae* of the principal question, there is no need to take the opinion expounded by Louis-Lucas at all into consideration.

As regards judicial practice, there exists no prevailing opinion of English, American or French courts. The only French decision which used to be viewed as presenting a certain *new* concept[27]) cannot be viewed today as being of importance with respect to preliminary questions.

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[23]) Batiffol, *op. cit.*, pp. 353, or 25; Ehrenzweig, *op. cit.*, pp. 340—341.

[24]) Gotlieb, "The Incidental Question in Anglo-American Conflict of Laws", 33, *Canadian Bar Review*, 1955, p. 523.

[25]) Wengler, "Nouvelles réflexions sur les »questions préalables«", *Revue critique de droit international privé*, 1966.

[26]) Louis-Lucas, "Qualification et répartition", *Revue critique de droit international privé*, 1957.

[27]) Cour de Cassation, May 22, 1957; see *Revue critique de droit international privé*, 1957.

German and Swiss courts have been frequently considering preliminary questions according to the law specified by the conflict rule of the *lex causae* of the principal question.[28]) It seems, however, that only Austrian courts have been uniformly applying the law specified by the conflict rule of the *lex causae* of the principal question. This opinion was formulated by the Austrian Supreme Court in its judgement of October 25, 1952. The principal question — the legitimacy of a child — was adjudicated according to the Bulgarian law. The court applied the Bulgarian conflict rule to determining the law governing the validity of the marriage of the child's parents.

Standing apart from the aforesaid alternatives is one of the most interesting decisions of the recent period, issued by the Ontario Court of Appeals on November 4, 1963 in Schwebel v. Ungar, which is discussed in detail under § 4 below.

As regards judicial practice, the author must state with regret that he does not know of a single postwar decision of a Czechoslovak court which would touch upon the problem under discussion. This is undoubtedly due to the negligible contact between Czechoslovak nationals and other countries.

Following this brief survey of some authoritative concepts regarding the most useful manner of establishing a point of contact with the *lex causae* of the preliminary question, it is necessary to state the most important reasons which had led to the advocacy of these basic standpoints.

Except for some departures which have not been generally accepted and recognized, we may say that the rule before World War II was to proceed from the conflict rule of the forum in determining the statute of individual legal relationships with a foreign element outside the sphere of the law of obligations. If the conflict rule of the forum referred to the foreign law, the court examined whether the reference was merely to the substantive law or the law in general, including its conflict rules. This brought forth the institution of *renvoi* and this, too, in the author's opinion, explains why before World War II and mostly even today neither legal theory nor practice have passed beyond the narrow scope of two alternatives of determining the statute of preliminary questions, namely the application of the conflict rule of the *lex fori* or of the *lex causae* of the principal question. This taxative choice of two alternatives also determined the selection of arguments for or against the two possibilities. The author feels that the reasons given for establishing points of contact

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[28]) See the decisions quoted by Lagarde, *op. cit.*, pp. 473 ff.

under the conflict rule of the *lex causae* were theoretically best founded and will therefore discuss them first.[29])

The reasons favouring the determination of the statute of the preliminary question according to the conflict rule of the *lex causae* of the principal question may be summed up — in the author's opinion — into two interconnected groups of problems. The substance of the first of these is the endeavour to apply the foreign law as it is applied in its own country, while the second one is governed by the effort to ensure an international (conflict) harmony of adjudication.

First of all, if the court which is to adjudicate a private-law case with a foreign element (the principal question), it is to decide under its conflict rule according to the foreign law. This means actually that the legislator of the forum thereby expresses the "disinterest" of his law in the said case. This "disinterest" is also based, among other things, on the fact that in a concrete case the legislator of the forum adopts the position that in the given case the application of his law would not make it possible to consider at all the rights and the obligations of the parties or that such consideration would be unjust.[30]) However, if the intent of the legislator of the forum is not to miss its purpose, it is necessary to apply the decisive foreign law, at least its substantive rules, in the same manner in which it is applied in its own country. This is a universally recognized principle, for the opposite would in fact mean the "incorporation" of some foreign substantive rules into the law of the forum, their interpretation according to the practice of the forum and the rules of the *lex fori*. It is beyond any doubt that most rules of a particular law cannot at all exist abstracted from the other rules of such law.

If the law of the forum refuses its competence with respect to the consideration of a particular matter which constitutes the principal question, it should be obvious that it is necessary to leave it to the decisive foreign law to determine how the individual elements of the respective matter should be considered, for if we are to apply the foreign law as law in the true sense, we must apply it so as it is applied by the judge whose law is involved. If this judge refers to a third law with respect to a certain question of the given legal relationship and if this

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[29]) Only the most important reasons will be discussed, basically in accordance with Wengler's *Die Vorfrage*... The reader will also find in this study some deduced reasons which are of minor importance from the viewpoint of the author's concept. Most authors have accepted these reasons — some, like Robertson, in full — while others, who hold a different opinion — points of contact according to the conflict rule of the *lex fori* — mostly engage in polemics with Wengler without seeking their own, original approach to the problem (Kegel, Raape, Maury, et al.).

[30]) See the author's *Úvod do mezinárodního práva soukromého*, 1968, Chapter I, § 2.

question can be adjudicated separately (it is a preliminary question), it must be considered so that it is possible to decide under the law governing the principal question, whether the result of the consideration of the preliminary question warrants the application of this or that substantive rule of the law governing the principal question. The foreign law governing the principal question — it should be remembered — has an interest in the consideration of the preliminary question only in so far as such consideration can determine whether the preliminary — conditional — question meets the requirements of a particular substantive rule of such foreign law. It has therefore not the least interest in what other or different legal effects are ascribed by the third, foreign law for any other reasons to the legal relationship constituting the principal question. It should be noted that this fact is even recognized by Rigaux although this author otherwise prefers the determination of the statute of the preliminary question according to the conflict rule of the *lex fori*.[31])

It should be seen that the conflict rule of the *lex causae* of the principal question usually makes use of the same terms and, in particular, applies to the same questions of fact as the substantive rule of the *lex causae* of the principal question.[32]) It should therefore be obvious that the court should not seek in the foreign law let us say rules concerning marriage and apply them, but those provisions, which specify what is by its content marriage, as intended under a substantive rule of the *lex causae* for some specific purpose, e.g. for decisions regarding inheritance claims.[33])

This may be documented on the following case. Let us say that an American court F applies the *lex successionis* which is the Czechoslovak law. The preliminary question arises, whether the decedent A and B had been validly married. Both A and B were in the decisive period German citizens domiciled in Greese and had concluded their marriage in a civil ceremony in France. Should the American court adjudicate the preliminary question according to the law of domicile, it would not recognize the marriage as valid. At the same time, the marriage would be considered as valid not only according to the law specified by the conflict rule of the principal question, that is the Czechoslovak rule, but if the existence of the marriage were considered as the principal question, the marriage would also be considered as valid in Czechoslovakia, Germany, Greece and even the United States. Let us now change this example somewhat. The American court considers the relationship between A and B according to the law of X which attaches no effects to this relationship.

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[31]) Rigaux, *La théorie des qualifications en droit international privé*, 1956.
[32]) See Wengler, *Die Vorfrage*, pp. 196–198.
[33]) *Ibid.*, pp. 180–182.

However, the Czechoslovak conflict rule would refer to the law which would qualify the relationship between B and A as that of a common-law wife, which would permit the recognition of B's title to inherit under a different provision of the Czechoslovak law of succession.

If an English court were to decide in the aforesaid cases instead of an American tribunal, it seems logical to the author that even if it were to establish a point of contact according to its own conflict rules, it should accept *renvoi*. In such a case the result would be correct, nevertheless this need not always be the case.

The requirement that the forum should apply the foreign law which governs the principal question always in the same manner as this law is applied in the country of its origin is closely related with the second basic requirement, namely that the decisions on the *principal question* should be in keeping with what is called *international* (conflict) harmony of decisions.[34])

What are we to understand under the term international (conflict) harmony? Most authors use this term but it is obvious that it is actually a confusing term. The usual argument is that in disputes involving a foreign element it is necessary to decide so that the decision has the same legal effects in the largest possible number of states as it has in the state of the forum. This requirement is truly in keeping with the very purpose of private international law because if a decision issued by a court in state A had no effect in third states, or at least in those states, where it is important for the parties to the proceedings, it would not actually be necessary to apply the foreign law, at least not in those cases, where this would not be essential from the viewpoint of assessing the rights and obligations of the parties to the legal relationship in question. A decision issued in a case with a foreign element will undoubtedly have a better chance of being recognized and even executed in a third state, if the court which issued it had applied primarily the foreign law as it would be applied by a court in the state of its origin. However, if a preliminary question arises, this requirement becomes insufficient, for it will become necessary for the court not only to apply the foreign law as indicated above, but also to decide truly as would the judge whose law is the *lex causae* of the principal question. This shows that if the application of a particular substantive rule of the *lex causae* of the principal question depends on the consideration of a preliminary question, the condition for applying the substantive rule of the

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[34]) Wengler, Die Vorfrage, pp. 196–198; Wolff, *op. cit.*, pp. 206 ff.; Robertson, *op. cit.*, pp. 571 ff., Lagarde, *op. cit.*, pp. 467 ff., etc.

lex causae of the principal question must be considered in the same manner as it would be considered by the court of the state whose law is the *lex causae* of the principal question. Since the preliminary question as conceived by the author must be capable of being considered separately, it is obvious that if the principal question were adjudicated by a foreign court whose law is the *lex causae* of the principal question, the court would apply its own conflict rule to the consideration of the preliminary question. Such foreign court would at the same time decide whether *renvoi,* double *renvoi,* etc., must be accepted with respect to the preliminary question. The author finds it difficult to oppose the argument that the application of the conflict rule of the *lex causae* of the principal question to determining the statute of the preliminary question will really result in greater international (conflict) harmony of decisions than consideration of the preliminary question according to the law specified by the conflict rule of the forum.

This can be quite easily demonstrated. If the court X is to apply Czechoslovak law of succession and if its decision depends on its assessment of the validity of the decedent's marriage, the decision of the court X will be mostly respected in third states, provided that the court considers the preliminary question according to the same law as would be applied in such case by a Czechoslovak judge. If the court X considered the decedent's marriage according to the law specified by its own conflict rule, which differs from the Czechoslovak conflict rule (let us say that X would consider the capacity to conclude marriage according to the *lex domicilii*) and if the result of this consideration differed, we could hardly speak of application of the Czechoslovak law in the consideration of the principal question, for the Czechoslovak provisions governing succession would be applied differently than required by Czechoslovak law for the concrete case. We should realize that if the forum X considered the validity of the marriage from the viewpoint of the capacity of the bride and groom to marry according to the *lex domicilii,* which was the third law of Y, then, should the court X come to a negative conclusion (that the marriage was not concluded), its decision regarding the right to inherit (which is the principal question) could hardly be recognized in Czechoslovakia as well as in the state Z, whose citizens the bride and groom had been in the decisive period, should the court of that state, as a Czechoslovak court would, consider the capacity of the bride and groom to marry according to the *lex patriae* and should the Czechoslovak judge, as his colleague in Z, have considered the marriage as validly concluded.

The aforesaid example also shows Wengler right when asserting that the term international harmony of decisions should be understood as

meaning conflict harmony,[35]) for it is not important that the decision of the forum should be the same as the decisions issued by all other foreign courts. What is important is only that the decision of the forum on the preliminary question should be based on the same law as would be applied in the consideration of the case by a judge whose law is the statute of the principal question. This would result in a situation where the decision of a particular court regarding the principal question would — or at least should — *always be indentical with the decision of any other foreign court which refers with respect to the principal question to the same lex causae.*

The author believes that the aforesaid arguments do indeed speak in favour of determining the statute of the preliminary question according to the conflict rule of the *lex causae* of the principal question. It should be underlined that the consideration of a preliminary question which arises in connection with a concrete principal question is insignificant for the court adjudicating the principal question outside the given principal issue. It is the purpose and essence of the very existence of private international law to achieve, as much as possible, the same evaluation of the same action by those to whom the respective legal rules apply, of identical motives and of identical facts in all the states that are in some relationship to the principal question and where, therefore, the effects of these factors might be considered in a concrete case.[36])

The advocates of determination of the statute of the preliminary question according to the conflict rule of the *lex causae* of the principal question of course realized that just as in some cases it is not possible to apply an otherwise applicable foreign law — e.g. for reasons of public order — it is not always possible to determine the statute of the preliminary question according to the conflict rule of the *lex causae* of the principal question. In these cases — in keeping with the aforesaid a priori solution of the two alternatives — they admitted and explained the necessity of considering the preliminary question according to the law specified by the conflict rule of the *lex fori.*

The author feels that he must point in the present study to the following cases where it was found necessary to establish a point of contact (with respect to the preliminary question) in keeping with the *lex fori.*[37])

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[35]) Wengler, Die Vorfrage, pp. 196—198.

[36]) *Ibid.*, pp. 198—202.

[37]) I do not list all the imaginable cases; some others can be found in Melchior and in Wengler's *Die Vorfrage* (pp. 213—224). I shall try to disprove the cases of "necessary" application of the conflict rule of the *lex fori* not listed here in the following § 4. For illustration, I list two examples quoted by Wengler (*Die Vorfrage*, p. 222): first is the so-called *conflit mobile.* I shall discuss it in more detail, but let me point out that Wengler completely revised his prewar opinion both in his

a) Cases where there exists a conflict rule of the *lex fori* which is applicable exclusively to preliminary questions. This conclusion is unequivocal but, on the other hand, if we accept that a preliminary question must lend itself to separate consideration in other proceedings, the author is not aware of the existence of such a conflict rule in the law of any state.

b) Cases where the obligation of one person is tied to the obligation of another person, as in the case of subrogation or reciprocal claims; note should be taken in this latter example of the quite obvious case of set-off. The situation is quite clear as regards subrogation. Let us say that the court F considers the obligation of a surety according to the independent statute of A. The surety objects that the principal obligation did not arise under the law of B referred to by the conflict rule of A. The conflict rule of the *lex fori* refers in this case to the law of C under which the obligation with respect of which surety had been established is valid. The forum must refer to the law of C. Otherwise a paradoxical situation would occur, where the court would deny the action against the surety on the ground of non-existence of the principal obligation and in other proceedings would recognize the claim of the creditor with respect to the principal obligation and would confirm the validity of this obligation.

These cases, as well as some cases discussed further under d), partly fall within the scope of Melchior's exceptions (from the principle of establishing points of contact under the conflict rule of the *lex causae* in favour of points of contact under the conflict rule of the *lex fori*) which Melchior considers as *Begriffsnotwendige Bestandteile der Hauptfrage,* as discussed under § 2 above.

Although the above-indicated procedure would be usually adopted for subrogation claims, it would not always have to be unconditionally applicable, if the reader accepts the author's view stated under § 4 below.

c) Cases where either the very conflict rule of the *lex causae* of the principal question or the solution applied under the law specified by this conflict rule are contrary to the public order of the forum. In this case most authors who advocate points of contact under the conflict rule of the *lex causae* of the principal question favour points of contact under

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annotations to some recent judgements and in his latest study devoted to these problems *(Nouvelles réfléxions)*; second is the case where the conflict rule of the lex fori, which refers to the law of the principal question, leads precisely to the *lex fori.* In these cases the conflict rule of the *lex fori* will usually be applied also to the preliminary question because the *lex fori* is at the same time the *lex causae* of the principal question, which means that this is actually not an exception from the principle. However, as I shall try to show in § 4 below, this solution may not be considered as quite necessary precisely in the case of mobile conflicts.

the conflict rule of the *lex fori* (i.e. not the application of the substantive rules of the forum).

From the viewpoint of the Czechoslovak concept of the reservation of public order[38]) a very rare, hypothetical case could occur.[39]) If a Czechoslovak judge regularly applied to a certain category of preliminary questions the conflict rule of the *lex causae* of the principal question, then — should the effects of the application of thus determined substantive law be contrary to the requirements stated in Section 36 of the Act No. 97/1963 — the judge could in fact apply a different substantive rule specified by the conflict rule of the forum, which means that in this case the application of the reservation of public order would not necessarily lead to the usual application of the substantive law of the forum, but to the application of the conflict rule of the *lex fori.* The wording of Section 36 does not preclude this — on the contrary, it does not expressly refer to the substantive law of the forum.[40])

However, in connection with the reservation of public order, we must advance ahead of the following explanation. In a case where the Czechoslovak court finds, after having exhausted all the methods listed under § 4 below, that the settlement of the preliminary question under all the possible laws is unacceptable on the grounds of public order, it should, in the author's opinion, decide in accordance with the substantive rules of Czechoslovak law. This, however, will be discussed later.

We may add that on the question of public order, a unique opinion is held by Lagarde. It is an opinion one would not expect from a French author. As regards the demand that the preliminary question should be considered as it would be considered by the judge of the state whose law is the *lex causae* of the principal question, Lagarde goes as far as claiming that the *lex fori* has no interest in the preliminary question, so that the forum should examine only the public order of the state whose law is the *lex causae* of the principal question.[41])

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[38]) Section 36 of the Act No. 97/1963 provides as follows: "The legal regulations of a foreign State may not be applied if the effects of such application are contrary to those principles of the social and governmental system of the Czechoslovak Socialist Republic and its law, whose observance must be required without exception."

[39]) It is hypothetical because neither Czechoslovak doctrine nor Czechoslovak judicial practice have created any criterion which would be generally applicable to the settlement of a strictly defined category of preliminary questions.

[40]) Melchior speaks of application of the conflict rules of the forum in the case of the application of the so-called *Vorbehaltungsklausel* (Melchior, regel 3, § 176) which is a term that cannot be translated and which also includes, besides the reservation of public order, other reasons for rejecting the otherwise normally applicable law. For the content of this German term also see the Index of Melchior's book.

[41]) Lagarde, *op. cit.*, p. 466.

Both from the viewpoint of the Czechoslovak concept and the opinion of most foreign courts there will be no doubt as to the fact that public order must always be respected in one's own country. On the other hand, the author believes that it is not quite possible to respect foreign public order; to do so is almost excluded in judicial practice. Moreover, public order is based on rules of public law which would mostly not be respected in private-law proceedings — naturally, where foreign rules are involved.

The author's opinion on foreign public order is valid with a few exceptions only. One of these is the case where the court would have to decide with respect to a performance prohibited in the place of performance. However, this does not affect preliminary questions and therefore we need not concern ourselves with this problem.

d) Cases where the establishment of a point of contact under the conflict rules of the forum requires what is known as the material harmony of the forum. The requirement of the material harmony of the forum is the requirement that the possible decisions of several judicial organs of the forum deciding on the same matter in different connections should be the same or should provide the possibility for the forum to decide in the same manner in the future. In this sense, the author deems it necessary to divide the full scope of investigation of this question from the viewpoint of the topic under discussion into two groups of problems:

da) Cases where the fact that certain legal effects have arisen must necessarily bring about — under the concept of the *lex fori* — other legal effects.

Let us say that in a succession dispute considered by the forum F the preliminary question arises of whether the decedent's marriage with A was valid. Under the conflict rule of the foreign *lex successionis,* the preliminary question must be considered according to the law of X under whose rules the marriage was not validly concluded. Under the conflict rule of the *lex fori,* it is necessary to apply the law of Y, according to which the marriage was validly concluded. The decedent and his wife A lived in the state of the forum and had children there, who are considered legitimate under the *lex fori.* The *lex successionis* provides for succession only by legitimate children. If the forum were to apply the law of X, it would thereby also preclude the inheritance claims of these children.

In this case we must agree with the application of the conflict rule of the *lex fori* instead of the conflict rule of the *lex causae* as being warranted. The author will try to show further on that this case can also be settled differently by the application of the substantive rules of the *lex fori.* The result of the decision regarding the principal question will be the same in this concrete case, but it need not always be so.

db) Cases where the existence of legal effects according to the *lex fori*

and its conflict rules is an essential prerequisite of other effects, should these be considered by the same forum.

For example, taking up an alimony action against the child's father A, the forum F must consider the preliminary question of the validity of the marriage between A and B, who is the child's mother (this is necessary because the law governing the child's claim grants the claim only to legitimate children). The conflict rule of the *lex causae* of the principal question refers to the law of X under which the marriage is invalid. The conflict rule of the *lex fori* refers to the law of Y under which the marriage is valid. To this point, the situation is the same as under da) above. If the court considered the preliminary question — the validity of the marriage — under the law of X and on this basis denied the action, its decision could have unacceptable effects in the future. A and B could file at the same court or another court of the state of the forum an action for the invalidity of their marriage. The court would then face the seemingly insoluble problem, namely that on the one hand, their marriage is valid under the law of Y, specified by the conflict rule of the *lex fori*, but, on the other hand, that in the past it had "recognized" the invalidity of the marriage under the law of X.

The author finds this argument quite wrong. As already indicated, the consideration of the preliminary question is important only from the viewpoint of the concrete, principal question. Moreover, as already underlined above on several occasions, the consideration of the preliminary question is not a part of the verdict on the principal question and therefore has no absolute effects and in no case may prejudice the legal position of other parties.[42])

The author holds that no regard can ever be paid to any proceedings that may imaginably be held in the future.

Lagarde conceives the exceptions from the principle of determining the statute of the preliminary question according to the conflict rule of the *lex causae* terminologically in a different way and, perhaps, somewhat more narrowly in favour of the conflict rule of the *lex fori*.[43]) This applies to cases where the preliminary question is very closely related with the law of the forum.

Lagarde distinguishes between two cases of necessary connection under the conflict rule of the lex fori, calling them *l'insertion naturelle* and *l'insertion artificielle*.

The former occurs if the preliminary question must be governed — due to its nature — by the law specified by the conflict rule of the forum.

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[42]) In our example, the alimony case involves other parties than the divorce case.
[43]) Lagarde, *op. cit.*, pp. 479—483.

For example, the object of the preliminary question is the validity of a marriage concluded in the state of the forum.[44])

The construction of *l'insertion artificielle* seems to the author to be somewhat too original. Lagarde gives the following example:[45]) A French citizen who could not obtain a divorce in France stages an artificial litigation (the principal question) before a French court, which must be considered under a foreign law. He is motivated by the fact that the validity of his marriage must necessarily be raised as a preliminary question in the litigation, and under the law which would govern this question on the basis of the conflict rule of the *lex causae* of the principal question, the marriage would have to be considered invalid. As can be seen, this is a "super-special" case of circumventing the law. However, the author believes that this whole matter involves much theorizing about something which is impossible in practice.

As for what Lagarde calls *l'insertion naturelle,* the same applies to it as what has been said about the material harmony of decisions of the forum.

Two more notes must be added to what has been said about the reasons warranting the application of the principle that the statute of the preliminary question is to be determined according to the conflict rule of the lex causae of the principal question.

If the preliminary question had previously been adjudicated by another court as a separate question, Wengler recommends that such a decision should be taken into account only if the case had been considered in accordance with the law which would govern the question as a preliminary one in keeping with what has been said above.[46]) In addition. Melchior recommends that decisions issued by other courts of the forum should be taken into account, and the same opinion is held by French doctrine. English doctrine has no opinion on this matter.

The second note concerns the question whether the determination of the statute of the preliminary question according to the conflict rule of the *lex causae* of the principal question is warranted. The author believes that if there existed only two possible alternatives, the application of the conflict rule of the *lex causae* of the principal question — with the aforesaid exceptions — is theoretically correct and practically suitable. However, his opinion — as he will try to formulate it under § 4 below — goes beyond the scope of two alternatives only, and in this sense will

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[44]) *Ibid.*, pp. 481—482.
[45]) *Ibid.*, pp. 482—483.
[46]) Wengler, *Die Vorfrage,* pp. 202—204.

point to some shortcomings of the concept of establishing points of contact under the conflict rule of the *lex causae* of the principal question. The critical comments given below can, however, in no way, warrant preferential connection according to the conflict rule of the *lex fori.*

Let us now proceed to the advocates of the principle that the statute of the preliminary question should be determined according to the conflict rule of the *lex fori.* The author will be quite brief because, as a rule, only one reason is being given for connecting according to the conflict rule of the *lex fori,* and that is the material harmony of the forum. The author holds this to be an unconvincing reason, especially since the advocates of this concept do not even try to make it convincing. Raape, who does admit determination of the statute of the preliminary question according to the conflict rule of either the *lex causae* or the *lex fori,* generally favours the application of the conflict rule of the *lex fori* (except for cases where the object of the principal question is a probate matter). In doing so, he briefly notes that the material harmony of the forum is more important than the conflict harmony of decisions. The extreme advocates of this theory again merely underline the importance of the material harmony of the forum and it is typical of them that they ignore factual arguments of their opponents (in particular the dominant role of the *lex causae* of the principal question and the duty of the forum to apply the foreign law as it is applied by the judge whose law it is). Kegel does so most authoritatively and admits only one exception in matters of citizenship.[47]) Szászy, besides quoting the material harmony of the forum, presents another argument — quite unacceptable to the author of this study — namely that of the "supremacy" of socialist conflict rules. This was discussed above and one might perhaps only ask what should be done in cases where also the *lex causae* of the principal question is a socialist law. However, it should be noted that in his work published in 1967,[48]) he no longer stresses this point and, on the contrary, admits some small exceptions in favour of the conflict rule of the *lex causae* of the principal question. However, the author feels that these need not be discussed.

It is quite clear from what has been said, that the advocates of both concepts, who view the determination of the statute of the preliminary question exclusively as the answer to the question whether the conflict rules of the *lex fori* or the *lex causae* of the principal question should be applied, concentrate mostly on stressing the privileged role of either the material harmony of the forum or the international (conflict) harmony

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[47]) *Op. cit.,* pp. 102—108.
[48]) *International Civil Procedure,* pp. 155—162.

of decisions.[49]) This is quite pregnantly expressed by Raape when he says: "Ausserer Einklang — innerer Einklang: darum geht es."[50])

In this connection the author asked himself two questions:

i) Is it really correct to claim that in the sphere of preliminary questions it is possible to maintain complete material harmony of the forum by applying the conflict rule of the forum and, on the other hand, to achieve international (conflict) harmony of decisions through the application of the conflict rule of the *lex causae* of the principal question?

ii) Are the two "harmonies" really contradictory?

As regards the first question, the author believes that the material harmony of the forum should be respected only if it is required by the already existing legal situation on the territory of the state of the forum. If this is so, it is really the duty of the court to maintain the material harmony of the forum.

This will be always if, primarily, a certain legal relationship was established on the territory of the state of the forum and *continues* (from the viewpoint of the forum it is not a mobile conflict), or if a certain relationship ceased to exist on this territory and there is nothing to indicate that it would arise again elsewhere.

For example, an Italian citizen who divorced his Italian wife in the United States, let us say, remarried in Czechoslovakia. Since his wedding he lived on Czechoslovak territory until his death. If the Czechoslovak court entertaining the action of his former Italian wife claiming her right to inherit is to consider the preliminary question of the relationship between the decedent and his former Italian wife at the time of his death, it must consider this relationship as extinct, unless the marriage concluded in Czechoslovakia under Czechoslovak law (also its conflict rules) was not established. Similarly, if a marriage was divorced in Czechoslovakia, the court is bound by this decision, as already stated under §§ 1 and 2 above.

However, the first case does not involve an application of the conflict rule of the *lex fori* regarding the determination of the statute of the preliminary question, but the application of the substantive rule of the *lex fori,* which the court would have to apply even if its own conflict rule referred to a law under which the first marriage did not cease to exist. Moreover, the court need not actually concern itself with the relationship between the decedent and his former wife because it is sufficient if it establishes that the latter marriage in Czechoslovakia was

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[49]) *Op. cit.,* pp. 115—116.

indeed concluded. The second case involves a decision which is binding upon the court *ex lege fori*, as discussed under §§ 1 and 2 above.

In all similar cases it is therefore necessary for the court to proceed from the legal relationship respected on the territory of its own state. In contrast to most authors, including Wengler,[50]) the author of the present study narrows the very concept of material harmony of the forum down to cases when it is necessary to accept the settlement of the preliminary question according to the *substantive law* of the forum. That is also why above he separated the cases when it is necessary to make a point of contact according to the *conflict rule* of the *lex fori* — as in the case of reciprocal and subrogation claims — from the discussion concerning the material harmony of the forum.

The cases where a Czechoslovak court is bound by the decision of another Czechoslovak court for reasons of material harmony of the forum were specified under § 1 above and are provided for under the Czechoslovak procedural rules. The other cases must be included within the concept of legal relationships established on Czechoslovak territory and uninterruptedly continuing there *(Dauerrechtsverhältnisse)* until the moment which is decisive from the viewpoint of the consideration of the preliminary question (e.g. the death of the husband).

It was said under § 1 above that a Czechoslovak court must respect *ex lege fori* the decisions issued by *Czechoslovak courts* (and only Czechoslovak courts) in matters of personal status, or Czechoslovak judicial decisions recognizing such foreign decisions. However, the author also expressed his disagreement with this concept of the legislator.

Take, for example, the following case: The Czechoslovak Supreme Court recognizes the divorce of an Italian citizen and his wife, a Czechoslovak citizen, in the United States. Subsequently both these persons leave for Italy and continue to live there as husband and wife. If the Italian citizen dies and a Czechoslovak courts considers the distribution of his estate, and if a preliminary question of the existence of the aforesaid marriage arises, it should not be unconditionally necessary for the Czechoslovak court — in the author's opinion — not to consider the Czechoslovak citizen as the decedent's wife should an Italian court consider her as such for this purpose. We may also imagine the reverse case. The Czechoslovak Supreme Court does not recognize a foreign decree divorcing an Italian citizen and his Czechoslovak wife. Subsequently, another Czechoslovak court is faced with the same preliminary question as in the preceding case. If this Czechoslovak court establishes that the said Italian citizen

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[50]) *Die Vorfrage*, pp. 213–224.

had concluded a valid marriage in another state, it should not be impossible for the Czechoslovak court to recognize the inheritance claim of the Italian's new wife and reject the claim of his former Czechoslovak wife.

These are so-called mobile conflicts which will be discussed in detail under § 4 below and which, the author believes, should be considered individually case by case.

At the same time it must be said that in the author's opinion the material harmony of the forum requires only that the court should consider a previous decision on a particular matter binding for the settlement of the same matter as a preliminary question only if this matter had previously been considered as a separate one, that is not if it had been previously considered as a preliminary question in a different context, even if it is a matter of personal status.[51]) The author deems it extremely important and decisive that although the consideration of a preliminary question constitutes a ground — or one of the grounds — of the decision on the principal question, this consideration is not a part of the verdict and therefore has no absolute effects.[52])

The author does not consider correct even the unequivocal position of Czechoslovak procedural law that a Czechoslovak court is bound by a previous decision of another Czechoslovak court regarding a preliminary question, if that court had considered it earlier as a separate matter (i.e. a recognition of a foreign decision is not involved) at least in cases of so-called negative decisions.

Take, for example a case where a Czechoslovak court of general jurisdiction has denied an action seeking the invalidation of a marriage concluded between A and B. Subsequently the same question arises before another Czechoslovak court as a preliminary one. The second court establishes that *no new decision exists on this matter,* nevertheless, according to the laws that should be applied to the consideration of this question and in view of the substantive rules of the *lex causae* of the principal question (let us say again the wife's claim to inheritance), it is quite clear that the marriage should be considered invalid in particular from the viewpoint of a possible claim to inheritance. For this example see the discussion on Schwebel v. Ungar below; it is not an identical case but the arguments are the same.

The author therefore does not view the requirement of material harmony of the forum as a reason for applying the conflict rule of the *lex*

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[51]) The validity of a marriage as a condition for asserting an alimony title and, in a second case as a preliminary question which is decisive for considering an inheritance title.

[52]) See also Lagarde, *op. cit.,* p. 476.

fori for the purpose of determining the statute of the preliminary question but, on the contrary, where it is essential, a reason for the court "filling in" in certain cases the preliminary concept of the substantive rule of the *lex causae* of the principal question by taking into account the effects of a certain legal relationship as they exist in the state of the forum.

As regards the international (conflict) harmony of decisions, it was noted above that the determination of the statute of the preliminary question according to the conflict rule of the *lex causae* does indeed offer greater hope for maintaining this harmony, i.e. of having the decision recognized in the interested states. This assertion, although correct in principle, should not be given absolute validity because it does not apply to cases of legal relationships which are from the very beginning so-called "limping" relationships.

For example, a Czechoslovak court considers an inheritance case under Italian law. A preliminary question arises, requiring the court to determine whether the decedent's marriage was validly established. This marriage was concluded in France in a civil ceremony. If the court applies the Italian conflict rule, its decision (on the principal question) will have legal effects in Czechoslovakia and Italy but will not be recognized in France. If the court applied Czechoslovak conflict rules, its decision would have legal effects in France, *in Czechoslovakia, too,* but would not be recognized in Italy. This example may be somewhat changed and made more complicated. Let us say that the validity of a marriage of two people who were Italian citizens when they concluded it is tested by a *French court,* again as a condition establishing the wife's right of succession. At the time of his death the decedent was a Czechoslovak citizen. The French court first applies the Czechoslovak law as the *lex causae* of the principal question. Let us say that it will apply Czechoslovak conflict rules to determining the statute of the preliminary question, which means that it will apply the provisions of Sections 19 and 20, pars. 1 and 2, of the Act No. 97/1963. Nevertheless, the court will interpret the provision of Section 20, par. 2, of this Act as meaning that the Czechoslovak legislator, who considers the religious form of marriage concluded by a Czechoslovak citizen as a matter of capacity, admits the same position to be taken by another legislator. It will therefore decide according to the Italian law on the validity of a marriage concluded abroad in a civil ceremony. The result — in the author's opinion — will be clearly wrong because the marriage of the aforesaid individuals would entail legal effects in most countries of the world, whose courts would always respect the *lex loci celebrationis* as to the form of concluding the marriage.[53])

[53]) See on this point Lagarde, *op. cit.*, pp. 467—468.

What has been said in this chapter thus far should indicate — according to the author's intent — that the determination of the statute of the preliminary question only in accordance with the conflict rules of the *lex fori* or the *lex causae* of the principal question with exceptions admitted only from one of the two principles in favour of the other principle does not lead either to the absolute maintenance of either of the two "harmonies", or to the attainment of a "correct" decision on the principal question. If, therefore, one of the two "harmonies" is a purpose to which the means of achieving this purpose is subordinated, this means is not adequate enough, irrespective of the fact that the endeavour to make the purpose absolute may lead to senseless and obviously unjust decisions.

As for the question asked under ii) — is it really necessary to make the two „harmonies" contradictory?

The author has tried elsewhere to point to the necessity of making the decisions of every court in the sphere of private international law truly international.[54])

This means that every court must try to make such decisions, which will have identical legal effects in most countries and whose international character is also given by the manner in which they solve the problem of conflict of laws. In the sphere of the law of conflict of laws this means that the legislator should draw up conflict rules which are applied for the respective case in most states.

This statement may be specified in the sphere of preliminary questions perhaps as follows: If the conflict rules of the *lex fori* and the *lex causae* of the principal question are based on generally recognized criteria, no conflict can actually take place.

Let us say that a preliminary question again involves consideration of the validity of a marriage. If the conflict rules of the *lex fori* and the *lex causae* of the principal question refer to the *lex patriae* as regards capacity to marry and to the *lex loci celebrationis* as regards the form of marriage, the determination of the statute of the preliminary question is quite clear with the exception of mobile conflicts (see below). If, as regards the capacity to marry, the conflict rule of the forum refers to the *lex patriae* and the conflict rule of the *lex causae* of the principal question to the *lex domicilii,* or vice versa, in the worst case the decision on the principal question will be recognized or not recognized in individual states, depending on the group to which this or that state belongs

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[54]) *Úvod do mezinárodního práva soukromého,* 1968, Chapter I, § 4; in the broader see also "Právní úprava mezinárodních obchodních vztahů a systém čs. práva", *Právník,* 6/67.

from the viewpoint of the criterion determining the *lex personalis.*[55]) However, if the conflict rule of the *lex fori* or the *lex causae* of the principal question referred also with respect to the capacity of the bride and groom to the *lex loci celebrationis,* then, if the decision of the forum regarding the principal question *were to have any international significance,* it would be necessary to apply — from the viewpoint of the theory of only two alternatives of establishing a point of contact with the statute of the preliminary question — the conflict rule of that law, which would be based on the usual criteria as regards the capacity to marry.

If it is therefore necessary to choose between the application of an extravagant conflict rule and the usual conflict rule, we must favour the latter conflict rule irrespective of the initial principle; if the reverse were to be done, then, in a concrete case, even the application of the conflict rule of the *lex causae* of the principal question would achieve far "lesser" international harmony of decisions than, for example, through the application of the conflict rule of the forum.

On the other hand, every court which is called upon to decide in the sphere of private international law decides as a municipal court. Thus, if its legislator considers in certain cases a particular manner of settlement under the rules of substantive law to be excluded or, on the contrary, essential, this must be respected. This applies in the sphere of preliminary questions to those cases where — as noted above — it is not possible to deny a certain legal situation existing factually and legally on the territory of the state of the forum.

Both aforesaid principles apply in general and always. That is why the author believes that every court should understand the material harmony of the forum as well as the international (conflict) harmony of decisions uniformly as two inseparable parts of a single principle which underlies decision-making in the sphere of private international law rather than as two incompatible requirements. The author is convinced that every decision in a private-law matter with a foreign element should primarily strive to have a truly international character — i.e. the broadest possible international validity — and at the same time to meet to the most essential extent the requirements of uniform decision-making of the courts of the state of the forum. In the sphere of preliminary question there is greater scope for combining the two requirements than in the case of consideration of independent matters, for the judge can always rely on the fact that the consideration of a preliminary question has no absolute effects,

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[55]) I believe that in this case the court should connect according to the fact whether the bride and groom had at the time they concluded their marriage a closer relationship to the state of their domicile or the state whose citizens they were.

which enables him to consider every preliminary question flexibly with regard to a just and proper adjucation of the principal question according to the law governing it, without being bound by a decision or position of a particular law which could not be placed acceptably into harmony with the requirements of the *lex causae* of the principal question and its most suitable solution both from the viewpoint of the character of the relationship concerned and the viewpoint of the international impact of the decision.

To sum up the present chapter, we can say that *neither the material harmony of the forum nor the international (conflict) harmony of decisions warrant a limitation of the methods of determining the statute of the preliminary question to two alternatives only because insisting on the exclusive or principled application of the conflict rule of the lex fori or the lex causae of the principal question cannot lead, in the absolute sense of the word, to the attainment of either harmony, nor can it lead to a decision-making which would ensure a reasonable settlement of the principal matter.*

§ 4 REASONABLE SETTLEMENT AND THE PROPER LAW OF THE PRELIMINARY QUESTION

The reader has undoubtedly noticed the author's frequent stress on the argument that the court is called upon to decide only on the principal question, which means, taken consistently, that it should consider both the principal and the preliminary questions as a single matter rather than as two separate matters. On the other hand, the author stressed under § 2 above the independent, separate character of the preliminary question — i.e. its "capacity" to stand alone as a principal question in different proceedings — as one of the essential requisites of the concept of preliminary question in Czechoslovak private international law and the respective procedural provisions. We have now come to the point where this seeming contradiction should be explained.

The preliminary question, as conceived by the author, does indeed differ from so-called partial questions *(Teilfragen)* by having the capacity of standing on its own as the principal question in other proceedings. On the other hand, a concrete, unique preliminary question may arise only in connection with a concrete principal question because it arises on the basis of the application of a substantive rule of the *lex causae* of the principal question. Even should the same question appear as a preliminary question in connection with different principal questions, its importance would not always be the same, it would never be considered twice from the same viewpoint, and the application of the identical sub-

stantive rule of the *lex causae* of the principal question would not be dependent on the result of its consideration.

The author has tried to give the reasons supporting the preceding statement above. For example, if the substantive rule of the *lex successionis* requires for the existence of an inheritance title a certain relationship between the decedent and the person A, it is the duty of the forum to establish whether such relationship does exist and whether it has those legal effects, which meet the requirements set by the legislator of the *lex successionis* for the application of the substantive rule of this law. In other words, if the application of the substantive rule of the *lex causae* of the principal question is tied to a certain condition, the effect (i.e. the application of such rule) can take place only if the requirement is met. It is quite immaterial whether the legal term used by the substantive rule of the *lex causae* of the principal question -- which is in this concrete case the preliminary concept — is identical with the legal term whereby the preliminary legal relationship is denoted in the law governing the preliminary question. This means that even if the substantive rule of the *lex causae* of the principal question uses the term "wife", it is necessary to ascertain what relationship was required by the legislator of the *lex causae* as the condition for granting the person specified as "wife" in the respective rule for example the title to inherit based on her marital relationship. If the legal relationship which makes up the condition for the application of the substantive rule of the *lex causae* of the principal question exists, i.e. if this relationship meets the political, economic and, in short, the sociological motives which had led the legislator of the *lex causae* of the principal question to making it the condition for applying the respective legal rule, it is immaterial whether another law denotes such relationship as "valid marriage", "invalid marriage", "putative marriage", "a relationship between a common-law husband and common-law wife", etc.

Every concrete preliminary question is therefore inseparably linked with a concrete principal question and both are interdependent. The relationship existing between them is generally defined in literature by the French term *le lien d'interdépendance.*[56])

Thus, if it is necessary to decide within the framework of the principal question on the inheritance title of a wife, we examine the material relationship exclusively from the viewpoint of whether it has such effects which permit the granting of the inheritance title as it is specified by the substantive rule of the *lex causae* of the principal question. For this

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[56]) E.g. Lagarde, *op. cit.*, p. 460.

purpose, of course, the marital relationship must exist at least as some legal relationship and it is in this sense that we study the preliminary question as a whole, which the author stressed under § 2 above. Nevertheless, if this relationship has some effects in the sphere of the law of succession in the sense required by the substantive rule of the *lex causae* of the principal question, we need not interest ourselves any more in whether it also has some other effects. An invalid or even putative marriage may sometimes constitute a sufficient condition for establishing a title to succession even if the other, usual effects of marriage — such as a certain status of children born out of the marriage, or the mutual obligation of maintenance of the husband and his wife during marriage and after its extinction — may be missing. And it is precisely in this second sense that we examine the preliminary question *non-independently* as a concrete part or factual circumstance of a single matter which is the principal question. This fact brings forth the indivisible link between the cause and the effect of the judicial decision: since the forum considers the preliminary question only from the viewpoint of the requirements of the substantive rule of the *lex causae* of the principal question, this consideration cannot create an effect *erga omnes*; since the result of the consideration of the preliminary question is not valid *erga omnes,* it does not therefore prejudice another consideration of the same matter, nor does it create any other effects than the establishment, change or extinction of another, independent legal relationship, namely that which constitutes the principal question.

If we agree, at least in principle, with what has been said in the present study thus far, we must unavoidably reach the logical conclusion that the forum *must not* consider the preliminary question in isolation from the principal question, that the two question form a single "case", i.e. that the duty of the forum is merely to ascertain whether and which substantive rule of the lex causae of the principal question it should apply, which means that in many cases it would be wrong to consider the preliminary question as if it were an independent, separate question.

It might seem that all the aforesaid arguments point to the determination of the statute of the preliminary question according to the conflict rule of the *lex causae* of the principal question. The author, too, has thus far stressed the role of the conflict rules of the *lex causae* of the principal question and the duty of the forum to decide in the same manner as would the judge whose law is the *lex causae* of the principal question, without having raised any serious doubts in this respect. He has done so purposely because the present study, perhaps as the first in Czechoslovak literature, supports a different initial point of contact

in an independent case (initial because there is no *renvoi* involved) than according to the conflict rule of the *lex fori*. Moreover, the author does believe that the result of a consideration of the preliminary question reached by a judge whose law governs the principal question would be theoretically the most correct at least as regards so-called conflicts in space (see below). Nevertheless, the realization of this principle is excluded in practice and then, it is prevented by the fact that the court which decided as a court of general jurisdiction of a certain state must necessarily introduce into its decision at least some specific, national element, which is manifested also outside the sphere of preliminary question both in some general questions (e.g. the attitude towards *renvoi*, circumvention of the law, the concept of the reservation of public order, etc.) and in special questions (e.g. the position taken by the Czechoslovak legislator on the law governing divorce under Section 22, par. 2, of the Act No. 97/63, which is a typically progressive provision, although it is unknown to most foreign laws). Making decisions as they would be made by the judge whose law is the *lex causae* of the principal question is really almost impossible because most courts in the world do not decide uniformly; in some concrete cases, where the decision depended on the consideration of a preliminary question, some courts even abandoned their own, established practice (see below re Schwebel v. Ungar).

For these reasons, the author has tried to find a solution which would correspond in every concrete case to a reasonable settlement of the principal matter, i.e. to find the proper law of the preliminary question, without making the determination of this law dependent on the principle of applying a certain conflict rule. What is therefore involved is merely finding the reasons for and partly also the method of making decisions according to the nature of the case. Such a result may seem quite meager or inadequate for a study of this extent. But it should be seen that but for a few exceptions, which include in particular the last work of Prof. Wengler,[57]) this is one of the first theoretical denials of the still prevailing theory based on some well-known and universally known authorities. Moreover, even many Czechoslovak authors find this denial of the necessity of uniform points of contact according to the conflict rules of the forum rather strange. While most of the existing theory and practice and, in principle, also Wengler see the determination of the statute of the preliminary question in the answer to the question which conflict rule must be applied, the present chapter will try to choose from several laws which are related to the respective matter in some way the law which

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[57]) Nouvelles réfléxions.

is most closely related to that matter. This is therefore an application of the traditional and attractive theory of the centre of gravity to a new topic, so to say.

In order to do this, it is first necessary to analyze the possible conflict situations and their reasons.

Thanks to a certain similarity of the conflict rules of most states and to some extent also to the uniform development of private international law, there often exists a "normal", or desirable, situation, where the overwhelming majority of courts in different countries admits at least essentially the same effects of the establishment, change or extinction of legal relationships or certain facts occurring on the territory of one state.

For example, if a Frenchman and a Belgian conclude a civil marriage in Germany, their marriage will be considered as valid in all the states of the world, unless its validity is hampered by defects of competence under the *lex personalis* of either the bride or the groom and provided that the form of the marriage meets the regulations of the *lex loci celebrationis*. Similarly, if a married couple domiciled in Hungary is "divorced" according to the Hebrew rite in Italy (see Schwebel v. Ungar below), at the time of the "divorce", their marriage will not be considered extinct either in Italy or in Hungary or any other state.

When similar cases arise as preliminary questions, no special conflict problem will ever arise, at least as regards the establishment, change or extinction of the legal relationship involved.[58])

On the other hand, however, different cogent rules in different laws, as well as different conflict criteria,[59]) create conflicting situations when the very establishment, change or extinction of a legal relationship or certain facts which occurred on the territory of one state are considered differently in other states not only as regards the concrete rights and obligations of the subjects but also as regards the existence itself of the concrete legal relationship or the legal relevancy of a certain fact.

These conflicting situations may be divided into two groups for the purposes of the present study.

i) First are conflicts in space which include conflicts that the author would call intertemporal conflicts, provided that the legal relationship

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[58]) However, in these cases conflicting situations may arise, concerning the effects of the legal relationship — see, e.g. the well-known Maltese case. Although there was no doubt as to the existence of the marriage, there were doubts as regards the effects of this relationship according to two different preliminary questions.

[59]) E.g. the determination of the law of succession, the law governing movables (see Kučera, Mobilní konflikty), etc.

involved is a "limping" one from the very beginning.[60]) Under this term, the author places situations when the legal rules governing a certain legal relationship, or the impact of certain facts, are altered within the scope of the territorial competence of the law of a state by the change of its substantive rules. These cases are provided for in basically every law through the provisions of the new law concerning the future of the subjective rights and obligations established under the repealed law. These provisions are called intertemporal clauses and should be applied as a valid foreign law. There is practically no exception to the principle applied in the sphere of private law, that a new law considers the establishment, change or extinction of legal relationships or facts that occurred while the old law was in force under the old law. On this point there is no special problem of conflict of laws and for this reason the author will not concern himself with intertemporal conflicts any further.

ii) Then there are the mobile conflicts *(le conflit mobile)* for which Z. Kučera used perhaps as the first in Czechoslovak literature the term "dynamic conflicts".[61]) These conflicts may occur only in the case of so-called continuing legal relationships (also used is the term "relationships of long duration").[62]) It should be noted that while these legal relationships of long duration exist, cases may occur, when different states, or rather the laws of different states, which *gradually* acquire an important link with these relationships — e.g. a case is transferred from the territory of one state to another state or a married couple change their citizenship or domicile — adopt different positions on the existence and effects of these relationships, and all this creates a special kind of conflicts in time, known as mobile conflicts.

ad i) *Conflicts in Space.*

Let us say that a Czechoslovak court which is considering the inheritance title of an Italian citizen — A — examines a preliminary question involving the following problem:

The Italian lady married a German citizen — B — in a civil ceremony in Ireland. B had lived for many years in the United States and was considered under American law as a person domiciled in the United States. Ireland, on the other hand, considered B as being domiciled in West Germany and A domiciled in Italy.

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[60]) I have not used the English equivalent of the Czech term "conflicts in time" to make it quite clear that I distinguish them from so-called mobile conflicts. The same was done by Zdenek Kučera in his "Mobilní konflikty při přechodu vlastnického práva podle mezinárodní kupní smlouvy", *Časopis pro mezinárodní právo,* 1/1968.

[61]) *Ibid.*

[62]) *Dauerrechtsverhältnisse, le rapport juridique de longue durée.*

At the time of the wedding the marriage was considered valid (let us presume that as regards defects in capacity, there was only one shortcoming in the case of A who had *no capacity* to conclude a civil marriage) in the United States, France, Belgium and other countries, and invalid in Italy, West Germany,[63]) Greece, Spain and some other countries, including Ireland where marriage may be concluded in a civil ceremony only if the *lex personalis* of either the bride or the groom does not prevent it. Nevertheless, from the formal viewpoint, the form of marriage was in keeping with the provisions of the *lex loci celebrationis.*

Thus the wedding ceremony was a typically "limping" legal act and an obvious conflict in space occurred.

Immediately after their wedding, the newlyweds moved to the United States where B acquired American citizenship but B retained her Italian citizenship. Subsequently the couple emigrated to Czechoslovakia, retaining their citizenship. After five years of residence in Czechoslovakia B died and the Czechoslovak court was called upon to settle the question who would inherit the decedent's estate on the basis of an action filed by his mother; the court also had to consider the question of the validity of the marriage between A and B proceeding from the application of the American substantive law (e.g. that of the State of New York) which is the *lex successionis.*

First, the Czechoslovak court established that from their wedding until the decedent's death A and B had lived together as husband and wife.[64]) It also established that at the moment of the wedding, the given marital relationship had an important link with Italian, American, German and Irish laws. B died intestate and the only possible heirs are his wife A (a decision in her favour was issued by a Czechoslovak notarial office) or his mother (the plaintiff). The American law grants the right of succession in the first place to the decedent's wife (in the absence of any descendants); the prejudicial concept as a general concept *(Rahmenbegriff)* can be interpreted under the *lex successionis* only as requiring a valid marriage at the time of the decedent's death or at least an existing marriage which had not been declared invalid during the decedent's lifetime.

In the author's opinion, the Czechoslovak court should grant A the inheritance title, i.e. consider the preliminary legal relationship as existing from the viewpoint of the requirements of the *lex successionis.* Of

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[63]) See a decision of the Federal Court at Karlsruhe, quoted in *Juristzeitung,* 1964, p. 617.

[64]) This statement of fact is extremely important because in the opposite case a mobile conflict (see below) might be involved.

course, there immediately arises the objection that the same purpose would be achieved by the application of the conflict rule of the *lex successionis* (the American law which governs the principal question). However, we can alter this example somewhat. The basic situation remains the same with one exception, namely that A and B left for another state — X — and there B acquired the local citizenship (subsequently they again emigrated to Czechoslovakia as in the first case). In this case the *lex successionis* is the substantive law of X which grants the title to inherit to the wife under the same conditions as the American law. But the conflict rule of X refers to the *lex patriae* of the bride and groom with respect to the cogent requirements concerning the form of conclusion of marriage. Let us also presume that if the Czechoslovak court applied the conflict rules of the *lex fori*, it would consider the form of the given wedding identically with the Italian law as a matter of capacity. Nevertheless, in this case, too, the author believes that A's inheritance title should be recognized.

Let us take another example: The forum F considers as a preliminary question the relationship of A (the presumed child) to B (the decedent and alleged father of the child). A was a Soviet citizen born in 1950 (i.e. prior to the amendment of the Soviet Family Law) to an unmarried mother who was a Soviet citizen. At the time of the birth, B was a Czechoslovak citizen who at that time acknowledged — in Czechoslovakia — that he was the child's father. The forum F (which is neither a Soviet nor a Czechoslovak court) considers an action filed by A who claims succession under the third law of X where B was domiciled at the time of his death. The substantive rule of X grants the right of succession to the decedent's children; under the law of X this general concept must be interpreted as meaning all children sired by the father. The conflict rules of F and X refer to Soviet law with respect to the status of the child. Should we now consider as excluded that the forum of F would take into account the effects of recognition of paternity under Czechoslovak law in view of the concrete circumstances of the case (e.g. the father took care of the child, etc.)?[65]) The author believes that the forum of F should grant the action of A if the succession rules of X were clearly motivated by the endeavour to grant the right of succession to all the decedent's blood descendants. The forum should also take into account the fact that while the Soviet law then in force did not grant an illegi-

[65]) According to the Soviet law in force in 1950 there was no *legal* relationship between an illegitimate child and its father; it not only did not know the institution of acknowledging a child, but such acknowledgement would not even have been legally relevant.

timate child any rights against its father, it did not in any case intend to exclude such rights that may have been granted by a foreign law. If the relationship between A and B at the time of the child's birth (or at the moment paternity was acknowledged) was linked only with the Soviet and Czechoslovak laws, it should be sufficient that the Czechoslovak law recognizes this link as a *legal* relationship as of the moment of acknowledgement, since the Soviet law could not attach any legal effects thereto.

The author believes that if the forum considered the aforesaid preliminary questions as stated above, this would fully meet the universal idea of a just adjudication of the *principal matter*. The preliminary question would thus be considered according to the only law with which it has an *important link* and this consideration would be fully in keeping with the requirements of the substantive rule of the *lex causae* of the principal question. Under Czechoslovak law, such adjudication could be based on the principle of a reasonable settlement of the matter, which the author will mention at the end of the present part of his study.

The author is of the opinion that the forum should explain the ascertainment of the important link — i.e. the focal point of the preliminary question — in the following manner.

First of all, if the conflict rule of the forum recognizes the right of a foreign substantive law (the *lex causae* of the principal question) to consider the effects of a certain preliminary relationship on the principal question (e.g. the right of succession of a certain person because she is the wife of the decedent), it is necessary that the preliminary relationship should exist as required by the substantive rules of the *lex causae* of the principal question, but it is not necessary that it should also have other effects and that they should be valid everywhere. The most ideal situation occurs when both the principal and the preliminary questions have a link with a single law;[66]) in such a case the solution is not only simple but also the best possible in view of the fact that the foreign court will have generally the maximum possibility of placing into perfect harmony all the legal rules applicable to all the material questions constituting the object of the proceedings. However, if the preliminary legal relationship has an important link with several laws — this situation is described by Wengler as *rattachement multiple*[67]) — and if these laws consider it differently, we are faced with a typical "limping" legal relationship and the hope of realizing it is always smaller than in the case of a *rattachement unique*.[68]) It should not be therefore left to the will of the forum to

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[66]) Wengler calls it *rattachement unique;* see his Nouvelles réfléxions, p. 182.
[67]) *Ibid.*, pp. 182 ff.
[68]) See footnote No. 67 above.

specify by a *uniform* solution only one, particular law among those that have an important link with the matter under consideration, as the law that alone lends itself to the consideration of the preliminary legal relationship. Such a solution must unavoidably make the future of the principal question dependent on the choice of the forum, provided that the plaintiff has the possibility of doing so (i.e. if several courts have the respective jurisdiction). It should be possible, on the contrary, for the final effects of the preliminary relationship to be acknowledged (the application of the substantive rule of the *lex causae* of the principal question) by the mere fact that the desired effects of this "limping" legal relationship are acknowledged by at least one of the laws with which the preliminary question has an important link. As Wengler says, the international character of a legal relationship is by itself a natural consequence of such a solution.[69]) Although it is quite clear that with respect to "limping" legal relationships, in particular if they constitute preliminary questions, we must be satisfied with lesser requirements of effectiveness because it ensues from the very nature of private international law that it is impossible to demand that all laws should always take the same position on a particular case.[70])

Thus, when considering a preliminary question, the forum should consult all the laws which are somehow linked with the preliminary question and either — as proposed by Wengler — join the majority[71]) or consider the case according to the law or laws (when it is necessary to test according to several criteria, e.g. if the validity of a marriage is involved) to which the preliminary question is closely linked and which attach to the preliminary legal relationship such a character or such effects, that are required by the substantive rule of the *lex causae* of the principal question as the condition for its application.

If the forum holds to this conception, it will only be natural that its individuality will manifest itself in its decision-making both as regards the legal evaluation of certain fact and in considering the concrete factual circumstances of the case.

For example, if a Czechoslovak court is to consider the validity of a marriage and if this preliminary question has almost the same link with two different laws which attach to marital relationship a different character or effects on the basis of the form of the marriage ceremony, the Czechoslovak court will most certainly identify itself with the position taken by the law which considers the civil form of marriage as valid,

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[69]) Nouvelles réfléxions, p. 184.
[70]) *Ibid.*, pp. 182–183.
[71]) *Ibid.*, pp. 211–212.

if the other law takes the opposite position.[72]) The Czechoslovak court should similarly make a choice according to the concrete circumstances of the case. If two laws differ in evaluating the validity of a marriage, the court should take into account whether the husband and wife had really lived together or not since their marriage, etc. However, under all circumstances it is necessary to respect the content of the general concept *(Rahmenbegriff)*, which is given by the substantive rules of the *lex causae* of the principal question, and consider the preliminary question in the light of the content of the general concept not only from the viewpoint of the actual wording of the respective rule but also the sociological motivation of the legislator of the *lex causae* of the principal question.

In his 1966 study, Wengler[73]) reached the same conclusion and called this method of determining the statute of the preliminary question adjudication *ex aequo et bono*[74]) namely because he continues to insist on the principle that the statute of the preliminary question should be determined according to the conflict rule of the *lex causae* of the principal question. That is why he bases a different solution on the requirement of "just" decision-making, stressing — as he very frequently does in his new ideas — that testing according to the conflict rule of the forum should be limited to the minimum. The author differs from him in that he rejects any uniform testing and recommends in all cases the consideration of the preliminary question according to the circumstances of every case directly according to the substantive rule of the law with which the preliminary question has an important link. This does away with a *concrete* conflict rule as a concrete and binding connecting factor even though, which is quite natural, the laws with which the preliminary question has an important link can be determined only on the basis of generally recognized conflict criteria.

There would be no sense in ascertaining which laws can have an important link with the individual types of legal relationships (those of succession, obligations, marital relationship, etc.). It may be generally said that as in the other spheres of private international law, it is possible to localize the preliminary question on the basis of the following criteria:

citizenship, domicile or the seat of the subjects of the legal relationship;

the place where the thing constituting the object of the legal relationship is or was located in the decisive period;

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[72]) Naturally, the *lex loci celebrationis* must generally admit the given form; on this point see the initial example quoted in this chapter and concerning a marriage concluded in Ireland.

[73]) Nouvelles réfléxions.

[74]) *Ibid.*, pp. 212–213 and 214–215.

the place where a certain legal or unlawful act was performed *(locus actus, locus delicti commissi)*;

the law under which the decision was made by a court which had already decided on the preliminary question as the principal question; such a judicial decision — unless the forum adjudicating the principal question is bound by it — will be only one, although very strong, factual circumstance of the case;

the law specified by the conflict rule of the lex causae of the principal question, provided that such (foreign) conflict rule is not extravagant from the viewpoint of the court, as well as the law which the court would apply according to its own conflict rule if it considered the preliminary question as a separate one;

the place where a certain event occurred (in contrast to a legal or unlawful act) and sometimes also the place where a certain decision (entry into a register, the conclusion of a marriage) was issued.

However, the author would like to stress once again that the forum must consider the preliminary relationship always from the viewpoint of the content of the general concept of the substantive rule of the *lex causae,* i.e. seek whether a certain law or laws which have an important link with the preliminary question attach to this question such a character and effects as are required by the content of such general concept, and not limit itself to ascertaining whether a law defines, e.g. a marriage valid or invalid. At the same time, unless the "individuality" of the forum prevents it, it would be proper to concentrate in the case of conflicts in space more on those laws, which are closely linked with the preliminary question but which also attach to the object of the preliminary question the effects required by the substantive rule of the lex causae of the principal question. It should be generally accepted that it is sufficient for the preliminary legal relationship to be effectively established and to exist at least according to one law in the required form. Of course, this assertion applies only to conflicts in space, i.e. to situations where the standpoints of different laws differ on the assessment of the preliminary question at the same moment. The situation will be different in the case of mobile conflicts.

It might seem that the author has completely ignored the cases where a court which had adjudicated the preliminary question as a principal one had already previously issued a final decision thereon. However, the author noted already under § 2 above when a Czechoslovak court is bound by such a decision. If it is not bound by it, it considers such a decision as a factual circumstance and the author believes that it will be appropriate to take such a decision as a basis for considering the preliminary question only if it was issued under the law under which the forum would con-

sider the preliminary question should the decision not exist. Otherwise, as already said, such a decision can be viewed as one of a number of equal circumstances of the case (Wengler holds the same opinion; see above).

In conclusion, the author wants to note that in practice there is no court which would view the method proposed by him as a uniform method of solving the problem of preliminary questions. The courts rather accept uniform testing according to the conflict rule of the *lex fori* or the *lex causae* of the principal question. Nevertheless, it happens frequently that the court decides in the manner proposed by the author without theoretically considering the problem of preliminary questions; it has become something of a tradition to comment such a decision on the one hand as a reasonable and just decision, but, on the other hand, as a decision which is "on the edge of the law" and which cannot serve as a precedent. Many authors explain these decisions by inadequate arguments which are easier to disprove than the actual concept of preliminary questions in the aforesaid sense.

This may be documented on a decision issued by the French Court of Cassation on May 22, 1957.[75]) An illegitimate child of a German mother and a French father, born in West Germany, sued the father for maintenance in a French court; the father had acknowledged the child according to German law on West German territory. The question of alimony was the principal question and according to the French conflict rule was governed by German law. The father pleaded invalidity of the acknowledgement, proceeding from French law which was decisive for the case under the French conflict rule. In view of French judicial practice, the father's objection should have been sustained. Nevertheless, the Court of Cassation upheld the decision of the appellate court which had considered the validity of the acknowledgement according to West German law. This decision is undoubtedly correct and is supported precisely by the theoretical concept of preliminary questions. And yet, many authors, trying to explain what they alleged was a "violation" of French law, argued that the question of acknowledgement was a part — or a partial question — of the principal matter; this, the author holds, is an untenable argument.

If the preliminary question is denied its specific character, in particular if it is examined in isolation or if the court ignores it completely, the

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[75]) See *Revue critique de droit international privé*, 1957, p. 466, annotated by Batiffol.

courts frequently make grossly unjust decisions. In Shaw v. Gould,[76]) the court considered the following case:

The decedent left his movables in testamentary trust for the lawfully begotten sons of his granddaughter H who was domiciled in England. H was coerced to marry B who was also domiciled in England. The marriage was not consummated and H and B had never lived together, but in 1846 divorce was impossible in England. The couple (B for a financial consideration) travelled to Scotland where they acquired *domicilium fori* and were duly divorced by a Scottish court under Scots law. H then married S and bore him two sons. The English court was called upon to decide on the right of these two sons to inherit under the aforesaid testament (the principal question). One of the judges, Lord Cranworth, expressly stated that it was not necessary to examine either the effect of the decision of the Scottish court or the effects of H's new marriage, but only the status of her sons from her second marriage and that under English law on the basis of the English conflict rule. The existence of a preliminary question was thus completely ignored and the right to inherit was denied, although the judge voiced his regret over the harshness and injustice of the law, noting that the change of the law (in this case the court proceeded from an Act of Parliament) was a matter for the legislator. In view of the approach taken by the court no other decision was actually possible. However, had the court realized that a preliminary question was involved, it could have saved itself the comment "*fiat iustitia, pereat mundus*".[77])

ii) *Mobile conflicts.*

Above we discussed situations where a "limping" legal act occurs because different municipal laws treat a certain question differently with respect to a single, identical moment. Let us now proceed to the situation where the position taken by different municipal laws differs in the assessment of preliminary questions, whose object is a continuing legal relationship, in different periods of the existence of this relationship. Naturally, even a legal relationship which represents at a certain moment a mere conflict in space or which, on the contrary, is considered at a certain moment the same by all municipal laws may create after some time a mobile conflict.

The author recommends that even in these cases, in so far as they are the object of preliminary questions, their focal point should be sought, i.e. they should be considered individually from case to case according to the law with which they are most closely linked. With the exceptions

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[76]) See Webb and Brown, *A Casebook on the Conflict of Laws*, 1960, p. 75.
[77]) For criticism see Wolff, *op. cit.*, pp. 206 ff.

listed below, the same holds true of these cases, as was said about conflicts in space. That is why the author will discuss only the specific problems of mobile conflicts or of legally important facts constituting the preliminary question.

Let us first take a look at the decision in Schwebel v. Ungar on which it is also possible to demonstrate different questions closely related with the problems under discussion.

The Ontario Court of Appeals entertained an action to declare a marriage concluded in Canada void (the principal question) and on November 4, 1963 denied it.[78]) The court based its decision on the following facts and legal arguments:

The plaintiff moved that her marriage with the respondent should be voited on the grounds that she had been validly married with a Joseph Waktor both at the time of her wedding with the respondent and at the time she filed her action.

The plaintiff and Joseph Waktor, both of Jewish religion, had concluded a marriage according to the Jewish rite in Hungary in 1945. Both were then domiciled in Hungary and their marriage was valid under the then Hungarian law. Soon after their wedding the couple decided to emigrate to Israel. On their way to Israel they stayed in several refugee camps in different European countries, the last one in Italy where they were divorced by a rabbi according to the Jewish rite (gueth). Under both Italian and Hungarian laws the divorce had no legal effect and the same position would most probably be taken by courts in the majority of countries throughout the world. Some weeks later they both reached Israel where they settled permanently. In Israel their divorce was considered valid and both parties were viewed as unmarried. This was confirmed in Israeli documets submitted to the court (including an extract from the register of the regional commissariat in Tel Aviv, dated August 16, 1962), which certified that Joseph Waktor had the status of an unmarried person. In April 1957, when visiting with relatives, the plaintiff married the respondent and, as already stated, precisely this marriage constituted the principal question in the judicial proceedings. Prior to the marriage, they both consulted a Canadian rabbi who assured them that their marriage would be in keeping with Canadian law.

The court first ascertained the domicile of Waktor and the plaintiff at the times decisive from the viewpoint of the proceedings. It accepted as established that Waktor had lived in Israel without interruption since 1948 and the plaintiff uninterruptedly for seven and a half years also

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[78]) Substantial parts of the judgement and a commentary by Prof. Wengler can be found in *Revue critique de droit international privé*, 1965, pp. 321—334.

since 1948. In this connection the court made some important statements on the general rules concerning domicile, namely that on the basis of Waktor's obvious intention to lose the Hungarian domicile of his origin and to acquire a chosen domicile in Israel, it should be considered reasonable to state that in the case of political refugees like Waktor the domicile of origin was lost at the moment he left Hungary and the domicile of choice was acquired upon his arrival in Israel (!). The court also stated that on the basis of the domicile of dependent persons, the plaintiff had also acquired Israeli domicile at the moment of her arrival in Israel (it is quite clear that until that moment the court attached no effects to the Italian divorce — author's note), but since the divorce acquired in Italy was recognized in Israel, the plaintiff acquired the status of an unmarried person at the moment of her arrival in Israel and could therefore establish a domicile of choice of her own will (!), which she did. The court ruled that until her marriage with the respondent she was domiciled in Israel and therefore had acquired the status of an unmarried person and the right to re-marry according to the law of her domicile. *The question the court had to decide was whether by arriving in Ontario she had regained the status of a married woman under the municipal law of Ontario.*

Since under the Ontario law the answer to this question depended on the establishment of the status of the plaintiff according to the law of her domicile as of the date of her second marriage, the court ruled in the negative and decided that the marriage between the plaintiff and the respondent was valid.

To support its decision, the court argued that if it admitted that the personal status of the plaintiff in Israel had to be based on the recognition of the Italian divorce by Israeli law and that this divorce had no effect under the law of the parties at the time of their divorce, should it also admit that in such a case the plaintiff would have unmarried status in Israel *alone* and that it could not be recognized in Ontario. In other words, should the examination of her status go beyond the simple investigation whether she had the status of an unmarried woman at the time of her wedding? The answer was negative and the court noted that *it was not its duty to examine the effects of the divorce in Italy under the Ontario law but according to the domicile of the parties at the time the subsequent marriage was constituted,* that is under Israeli law, *and that the means whereby that status was acquired were therefore quite immaterial.*

The court also noted that if after her arrival in Israel, the plaintiff had
— initiated divorce proceedings, her action would have been denied on the grounds that her marriage had already been divorced;

— re-married, *her subsequent marriage would be recognized in Ontario,* and, finally, if the question of her status were raised before an Israeli court, such court would undoubtedly consider her unmarried. The court therefore agreed that its decision on this matter should not be different merely because her subsequent marriage was concluded in Ontario.

However, the court seems to have felt the weakness of its arguments from the viewpoint of its own law and therefore noted that this case *was an exception from the general rule that a divorce could not be recognized in Ontario if it was not recognized in the states of domicile of the parties at the time of the divorce.*

Nevertheless, the court noted that the unmarried status acquired by the plaintiff in Israel should be considered as an "acquired right" transferred to Ontario upon her arrival there. For this reason the court quoted Prof. Graveson who said in his Philosophical Aspects of English Conflict of Laws[79]) that every right duly acquired on the basis of the law of a civilized country is recognized by English courts and that the nature of the acquired right should be ascertained according to the law which governs its constitution.

Prof. Wengler[80]) unequivocally approves the verdict of the court but at the same time rejects the reasoning behind it.

He also proposes a conflict rule which would be appropriate with respect to continuing legal relationships:

"If the forum is to adjudicate upon a question of a certain status (or a legal relationship of long duration), it is up to its private international law to specify the decisive criterion relating to the moment when the question of the existence of such relationship arises. This moment will be most frequently but not always the moment of adjudication by the forum. With the exception of *renvoi,* the substantive law of the thus specified state will not be applicable if the given relationship was not constituted or extinguished at the moment an effective remittance is made to its substantive law. On the contrary, it will be the private international law of that state . . . which will be decisive if this relationship, constituted already previously under a different law, is to be maintained and its content is to be determined either by the law of that state or by the law under which the said relationship was constituted. Only the private international law of such a state can decide whether this relationship which should possibly continue had already been validly constituted in the past."

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[79]) *International Law Quarterly.*
[80]) See footnote No. 80 above.

The author quotes this rule only because it is interesting and because of its general nature. Basically, were it applied, the Ontario Court of Appeals should have decided in the given case in the same manner as an Israeli court would adjudicate upon the preliminary question on the date on which the Canadian court was making its decision, and all the other considerations of the Canadian tribunal would be excluded.

It should be clear from what has been said above that in the case Schwebel v. Ungar the court was called upon by the very grounds of the motion submitted by the propositus to decide on a preliminary question, namely the existence of a marriage *at the moment when a new marriage was concluded.* It may seem that the court had indeed done so at least in its arguments regarding "acquired rights". But, in fact, it failed to do so, and even a classical advocate of the doctrine of acquired rights would undoubtedly ask how it was actually with the rights "acquired" in Hungary. Had any right been duly constituted in Italy, duly in the sense of Prof. Graveson's definition mentioned above? The question whether a right was constituted in Israel is disputable from the viewpoint of the classical doctrine of acquired rights because the Israeli position is based on the recognition of a religious decision, no matter where such decision was made; the plaintiff could perhaps "acquire" in Israel the right to re-marry. Thus Israel merely recognizes a certain situation or status as it had previously arisen — from its viewpoint — on foreign territory.

The Canadian court operated in its considerations between reason and demands of justice on the one hand, and the rigid requirements of the rules of its own private international law on the other hand. The resulting consideration on which its verdict is based represents, in the author's opinion, a total disregard for the preliminary question and, therefore, a decision on the validity of the marriage concluded in Canada as if the preliminary problem had not arisen at all and here was just the question of validity of the marriage from the viewpoint of capacity and form, i.e. as if there existed no defects of capacity under the *lex domicilii* of both the bride and groom at the time their marriage was concluded. The court need not have considered at such length the question whether at the time of her second marriage, the plaintiff had the status of an unmarried woman under her *lex domicilii*; it could have answered this question by a simple statement of fact. However, it should have asked itself whether the other party, i.e. a person domiciled in Canada, had the capacity to conclude marriage with a person who *may not* have been divorced. The following example will serve as an illustration:

A Greek woman domiciled in Greece (at the time of her marriage and at the time the Canadian court makes its decision) marries a French-

man in France in a civil ceremony. Within a week she leaves for Ontario where she re-marries, pointing out that under Greek law she is considered unmarried. How would the Canadian court act then? It might be argued that in Schwebel v. Ungar, Waktor, too, had been domiciled in Israel and there had the status of an unmarried man, and thus there was a basic difference from our hypothetical case. However, this argument lacks convincing reasoning both from the general viewpoint and in the light of the reasoning of the Ontario court, for the position held by the *lex personalis* of a third person who is not a party to the proceedings (Waktor and the hypothetical Frenchman) is quite immaterial. If a Greek citizen concludes marriage in a religious ceremony in the state X with a woman who is a citizen of that state and is subsequently divorced in X in regular judicial proceedings, the fact that he is considered married under Greek law will not act as an impediment in many states — such as the state X, Canada, Czechoslovakia[81]) and others — preventing his formed wife — a citizen of X — from re-marrying. We may thus, without the need of any further arguments, reach the conclusion that the position taken by the *lex personalis* of person A at the moment X, who had previously concluded marriage with person B, *by itself* has not the least effect on the validity of the marriage concluded between B and C at the very moment X from the viewpoint of other municipal laws.

In the author's opinion (although in general it may be disputed), the grounds given for the judgement in Schwebel v. Ungar would have been proper only if the respondent (Ungar), too, had been domiciled in Israel at the time of the wedding. Then, of course, one laconic sentence would have done instead of lengthy reasoning. In all other cases the court should have considered the preliminary question.

On the basis of what has been said, a strict positivist would undoubtedly reject the decision in Schwebel v. Ungar. Nevertheless, anybody who agrees with the requirements of just and reasonable decision-making must feel that the actual verdict of the Canadian court was correct, as the author does.

How then would it be possible to motivate the above decision somewhat more generally? There seem to be three possible variants.

The *first possibility* is indicated by the reasoning of the Canadian court, if we abstract from it its considerations concerning acquired rights. We may say in general that it is a method involving the endeavour not to consider at all the preliminary question from the viewpoint of the consideration of the principal question and to consider all the questions

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[81]) See the author's article "Uznání pravomocných cizích rozhodnutí", *Socialistická zákonnost*, No. 4/1967.

concerning the status of an individual according to his *lex personalis* at the time the decision on the principal question is being made. The advantage of this variant would be the fact that such decision-making would never disturb the harmony of the forum because the forum would not have to express its views on the preliminary question at all. *Nevertheless, this procedure is quite unacceptable.* In addition to what has already been said above, it may be demonstrated on the following example: A Czechoslovak court applies a foreign succession law and it must determine whether certain heirs are the legitimate children of the decedent. On this point, the conflict rules of the forum and the *lex successionis* refer to Greek law which denies legitimacy to these heirs. However, the marriage in which the heirs were born was valid both under the law of one of the spouses and under the Czechoslovak law, and, moreover, a Czechoslovak court had recognized the wife's claim to alimony during the decedent's life. The children were born out of this marriage and paternity had never been denied.

The *second variant* would be the application of the rule proposed by Prof. Wengler. The author believes that from the viewpoint of the general doctrine of preliminary questions, this rule has its indisputable advantages, at least compared with the traditional concepts, in the case of the so-called continuing legal relationships. Nevertheless, precisely as regards the topic under discussion, it could lead to unwanted results, for it has two rather important weaknesses:

a) In Schwebel v. Ungar, an Israeli court would have issued the same decision as the Canadian court. It is not by chance that Wengler uses in his proposal the term private international law rather than conflict rules; he strictly distinguishes between the two terms. For Israeli private international law contains a substantive rule which essentially approves any decision of Jewish religious organizations in matrimonial matters. But let us presume that such a rule does not exist, that the aforesaid decision will merely be recognized on Israeli territory and that the Canadian judge would apply under the Israeli conflict rule the law of X[82]) which does not recognize divorce. This would again place us in an unwanted position.

b) A strict application of Wengler's rule would inadmissibly disturb the material harmony of the decision-making of the forum. Moreover,

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[82]) What law the court would apply in view of its strange reasoning about domicile is hard to ascertain. Let us recall that the court had actually (tacitly) reached the conclusion that in the interim period after their departure from Hungary and before their entry on Israeli territory Waktor and therefore also his wife had no domicile. This is an absurd conclusion from the viewpoint of Anglo-American judicial practice.

it is obvious from what has been said above that Wengler's rule is nothing but a conflict rule of the law which dominates the relationship constituting the mobile conflict in the decisive stage. Why not apply directly the substantive law?

The *third variant* would rest, in the author's opinion, in adjudication which might be called — in view of the Czechoslovak doctrine of privat international law — adjudication corresponding to the principle of reasonable settlement of the relationship involved, this relationship being the one constituting the *principal question* (see below).

As mentioned above in the discussion on so-called conflicts in space, the court should seek the closest link between the preliminary question and a certain law, i.e. seek the focal point of the preliminary question which in this case is the legal relationship between the Waktors. The court would first establish that this relationship is a typical continuing relationship and that in view of the factual circumstances and the positions held by different municipal laws it may be evaluated differently in three or four subsequent periods of its possible — and at the same time disputable — existence:

a) In the period from its conclusion in Hungary until its "divorce" in Italy, the marriage was considered valid under all municipal laws in the world.

b) Perhaps with the possible exception of Israel, the same was true in the period from the moment of the Italian "divorce" until the moment when Waktor and his wife had acquired domicile in Israel. This means that in this period the overwhelming majority of the world's states, but in particular the main interested states and the municipal laws with which the marital relationship had an important link — i.e. the Hungarian and Italian laws — would consider the Jewish religious "divorce" in Italy ineffective.

c) In the period from the moment when Waktor and the plaintiff acquired domicile in Israel until the moment when the plaintiff remarried in Canada, Israeli law considered the marital relationship nonexistent, but if this relationship were considered as the principal question, most other municipal laws would not recognize the effects of the Italian "divorce" and would support the opinion that the marriage still continued. If we examine this matter from the viewpoint of this particular period alone, the mobile conflict changes into a conflict in space. An important link continues to exist between the case and Hungarian and Italian laws, but newly also by the law of Israel. If this matter becomes within this particular period a preliminary question, the focal point of the relationship will have to be sought with a view to the *lex causae* of the principal question but also with a view to the nature of the whole

case (i.e. both the principal and the preliminary questions). The character of the legal relationship constituting the *principal question,* its effect, the law governing it, the "individuality" of the court, the requirements of reason and justice, all these are factors that will help determine the focal point of the preliminary question. The life, the legal status, the actual relations etc. between the two people are most closely linked in this period undoubtedly with Israeli law. But a court which will *subsequently* consider the respective matrimonial relationship in connection with the particular principal question will view this relationship in its continuity in time and will have to decide according to the character of the whole matter whether to consider the preliminary question — i.e. seek its focal point — as of the moment the two parties lived in Israel or the moment when their "divorce" took place in Italy.

d) The period following the moment the plaintiff re-married in Canada. Even if the marriage had not taken place, this period would begin at the moment the plaintiff acquired a new domicile (or new citizenship from the Czechoslovak point of view). This would add a new municipal law to those which have an important link with the case.

The author has already said that he considers the result of the decision issued by the Ontario court correct. He wants therefore to show how he imagines a Czechoslovak court should act if it replaced the Canadian court in Schwebel v. Ungar.

In the author's opinion, the Czechoslovak court establishes:

a) that the Waktors had lived in Israel for a long time as two strangers and that on the basis of Israeli law they had the full right to assume that their marriage did not exist;

b) that at the time of their wedding, Schwebel and Ungar believed in good faith that their marriage was valid, as shown by the statement of the Canadian rabbi.

The Czechoslovak court would then consider a reasonable settlement of the case and in the end would turn to the Czechoslovak doctrine. In the absence of any direct reference to the object of its consideration, it would turn to pp. 425—426 of Prof. Bystrický's textbook on private international law, which discuss Section 18 of the old Act No. 41/1948, concerning the requirements of justice and good morals for a formal marriage in cases where the *lex personalis* of the spouses precludes their divorce, as well as to many other parts of the same book, noting that existing and effective relations must be given precedence over non-effective and de facto non-existent, past relationships.[83])

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[83]) Bystrický, *op. cit.*

On this basis — in the author's opinion — the Czechoslovak court would note that the principal question must be solved with a view to the principle of reasonable settlement of the case and that the preliminary question has an important link with the Hungarian, Italian and Israeli laws. The court would also note that *the law of Israel is most closely linked with the preliminary question from the factual viewpoint,* that the position taken by this law meets the just and reasonable settlement of the *principal question,* and for all these reasons would *deny* the plaintiff's action. (The author assumed, of course, that when a Czechoslovak court deals with this matter, the *lex causae* of the principal question is Czechoslovak law. It is therefore obvious that the Czechoslovak court would examine the preliminary question from the viewpoint of the *lex causae* of the principal question.)

The situation somewhat resembles the example solved elsewhere.[84]) A married Italian couple A and B is divorced in X under a similar provision as Section 22 of the Czechoslovak Act No. 97/1963 and in a manner essentially the same as required by Czechoslovak substantive law. A later emigrates to Czechoslovakia where he marries and dies intestate. His Czechoslovak wife is his sole heir. His former Italian wife B claims succession before a Czechoslovak court on the grounds that the divorce in X is invalid, that it cannot be recognized even under Section 68 of the Act No. 97/1963. In spite of the provision of Section 68 of the aforesaid Act, the Czechoslovak court must entertain this action, consider the preliminary question, and — in the author's opinion — deny the action.

If, adjudicating upon Schwebel v. Ungar, the Czechoslovak court proceeded as the author imagines, it would apply Israeli law just as the Canadian court *but* it would neither concern itself with acquired rights nor would it apply Israeli law only to considering the status of the plaintiff. *It would adjudicate under Israeli law upon the preliminary question* and in doing so would examine this question exclusively from the viewpoint of adjudication of the principal question. Its decision would in no case constitute a recognition of the effect of the Jewish divorce in Italy. It would decide to examine the preliminary question as of the moment when the two persons and their relationship were indisputably closest to the Israeli law. The consideration of the preliminary question would be expressed in the grounds of the court's verdict and in no case would it have absolute effects. *Nor would the court apply to the preliminary question under consideration either the law specified by the conflict rule of the* lex fori *(the Italian and Hungarian laws) or, as already*

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[84]) See footnote No. 83 above.

said, would it raise the problem of the preliminary question as the problem of recognizing the Italian divorce, for by applying the Israeli law as the law which has the closest link with the preliminary legal relationship, it would consider a preliminary factual question, as already underlined in the present study.

Summing up, we may say that in the case of the so-called mobile conflict the court ascertains not only the law which has at a certain moment the closest link with the given preliminary question, but also the moment which should be considered during the existence of the relationship as the most appropriate basis of examination from the viewpoint of a reasonable settlement of the principal question. The focal point of the preliminary question must be sought with a view to the character and circumstances of the concrete case including both the preliminary and the principal questions, and the examination must proceed from the general concept of the substantive rule of the *lex causae* of the principal question, encompassing also the sociological motivation of the legislator; the "individuality" of the forum would, of course, always assert itself. If the preliminary question had previously been adjudicated as a principal question, it would be appropriate for the forum to base its decisions on such a judgement only if the judgement had been made in accordance with the law with which the preliminary question is most closely linked from the viewpoint of the concrete, principal question (naturally under the assumption that the forum is not bound by such a judgement).

The Czechoslovak Principle of the Reasonable Settlement of the Case.

The author has used on several occasions the term "reasonable settlement of the case" without having explained what it meant. He hopes this has not confused what he wanted to say because it is a term whose meaning is rather obvious. At this point he would like to mention only briefly the legal importance he attaches to this concept in Czechoslovak private international law. The Act No. 97/1963 uses this term only in the provision of its Section 10, par. 1, for stipulating the obligation statute in cases where the contracting parties had failed to make a choice of law. The same was true when the previous Act No. 41/1948 was in force.[85]) In this sense nothing more is involved than the traditional "objective theory", i.e. the doctrine concerning the center of gravity of the obligation relationship, while paragraphs 2 and 3 of Section 10 of the aforesaid Act only stress certain elements of the contract.

Nevertheless, the principle of reasonable settlement is becoming a certain concept in Czechoslovak private international law; in fact, some

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[85]) See Bystrický, *op. cit.*, pp. 249 ff., and, in particular, Kalenský, ***Obligační statut kupní smlouvy v mezinárodním obchodním styku,*** 1960.

authors[86]) hold that a Czechoslovak judge should decide in all spheres of private international law in such a way that his decision is reasonable and just in every concrete case. Thus the principle of reasonable settlement is becoming for certain authors a general principle governing Czechoslovak private international law. The author shares this opinion and feels that it is supported by legal provisions.

Outside the sphere of the law of obligations, the Czechoslovak legislator expressly refers to reason and justice in the provision of Section 35 of the Act No. 97/1963, concerning *renvoi*, where both these factors serve as a guideline for the acceptance or rejection of *renvoi*. In Section 15 of the same Act the legislator offers the *court* a choice between the place where the unlawful act had occurred and the place where the damage was done as the *lex loci delicti commissi*. The judge will undoubtedly choose one of the above criteria depending on what law he feels "better" — i.e. more reasonably and justly — governs the delict. The author believes that the provision of Section 3, concerning capacity and based on the tradition established by the famous Lizardi case, points to the legislator's intent to consider matters justly for both sides. Finally, even the provisions of Sections 11 and 13, par. 2, of the aforesaid Act indicate that in some cases it is necessary also in the sphere of obligations to take into account the character of the case and thus reasonable settlement.

It is possible to find other examples — e.g. the provision of Section 22, par. 2, of the Act No. 97/1963, which favours justice over international harmony of decisions.

With the exception of the provision concerning legal capacity, all the above examples have one, common feature. The Czechoslovak legislator has given the judge the possibility of considering to some extent freely what is reasonable and just, what meets the character of the case, etc., while the scope of this free consideration is limited by the legislator in different provisions to a greater or lesser extent.[87]) At the same time it should be noted that the principle of "reasonable settlement" in the law of obligations and the same principle outside the sphere of this law have a somewhat different character, for in the law of obligations the long,

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[86]) In particular Bystrický, *op. cit.*, Z. Kučera, "Suretyship in Private International Law", *Acta Universitatis Carolinae*, 1967, pp. 54—57.

[87]) In the magazine *Časopis pro mezinárodní právo*, No. 1/1966, the author has tried to show that under certain circumstances the criterion for determining the *lex loci delicti commissi* may be — in addition to the place where the unlawful act occurred and the place where the damage was done — also the place where the damage (i.e. the consequences of the delict) manifests itself "daily", if one may say so. On the other hand, the character of the case — e.g. in suretyship — gives the judge a choice between two alternatives: the *lex causae* of the principal obligation or a separate statute.

practical experience with its application has resulted in considerable uniformity as regards the elements of the contract important for its localization.[88]) On the other hand, in the other spheres of private international law there also exist elements which will always play an important role in localizing the legal relationship (e.g. the *locus celebrationis* in the consideration of the validity of marriage), but there are also elements which may be important only for the localization of a concrete, individual case. For example, the domicile of the injured party will not, as a rule, be important for the localization of a civil-law delict but in a concrete case may become a major factor.[89])

Thus, while in the sphere of the law of obligations a Czechoslovak court will specify the law corresponding to a resonable settlement of the case more or less with regard to the type of the case, in other spheres it will examine all the concrete circumstances of the given case and may reach different conclusions even with respect to cases of the same kind, especially where the law expressly refers to a reasonable settlement. The author believes that even those of his colleagues, who deny the existence of a general principle of reasonable settlement in Czechoslovak private international law, will admit that in certain cases it is in fact necessary to depart from a solution unequivocally provided for by the legislator and will not object to the assertion that such cases should be settled with regard to reason, justice, the legal doctrine, the prevailing practice, etc.

A typical example of this approach in Czechoslovak private international law is the provision of Section 22, par. 3, of the Act No. 97/1963. In this provision, the legislator made a banal mistake by stating that the question of the invalidity or non-existence of marriage must be considered according to the state of affairs existing on the day the respective action is filed. There is no doubt that these matters, if they arise separately as the principal question, must be settled according to the state of affairs existing on the date the marriage was concluded. It may appear obvious that no other solution is in fact possible, but this unequivocal conclusion proceeds precisely from the fact that any other solution would be unreasonable, unjust, etc. However, very few people realize that what is actually involved is the localization of the individual important elements of the legal relationship (capacity, form) in individual municipal laws with regard to the most opportune moment.

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[88]) E.g. the seat of the parties, the place where the contract was concluded, etc. The author discussed this question in detail in his work *Úvod do mezinárodního práva soukromého.*

[89]) See the author's article referred to in footnote No. 89 above.

The author therefore believes that the search for the closest tie between the preliminary question and a particular law in the light of the concrete circumstances of the respective case and with regard to the prevailing practice, tradition, justice, etc., can well be based in Czechoslovak private international law on the principle of the reasonable settlement of the case, as established by Czechoslovak legal doctrine and as respected — at least in the author's opinion — by the legislator as well.

Finally, the author would like to show that the solution of preliminary questions according to the circumstances of the case, based on the Czechoslovak principle of reasonable settlement (of the principal question) may lead to different results in the consideration of the same relationship.

Let us therefore take a look at some of the variants of Schwebel v. Ungar, if this case were adjudicated by a Czechoslovak judge (or local governmental council) along the lines envisaged by the author.

i) The marriage of the Waktors would be considered as the principal question.

a) The Czechoslovak court should decide on the validity of the marriage in a declaratory judgement. It would undoubtedly not recognize the divorce, *not necessarily* only in view of the position taken by Hungarian law on the form of the divorce and the position held by the Italian law on the admissibility of divorce, but also because the divorce does not meet the Czechoslovak views on the form of the respective decision.

b) A Czechoslovak local council would strictly refuse to conclude marriage between either of the Waktors and a third person.

ii) The same marriage would be considered as a preliminary question.

a) Let us assume that the plaintiff did not re-marry and the Czechoslovak court is called upon to decide in a succession case whether her children, born after her marriage to Waktor but also after her Italian "divorce" are legitimate. Paternity was not determined in any way. The Czechoslovak court would again refuse to recognize the divorce.

b) On the other hand, let us now assume that the Czechoslovak court acts in a succession case where Schwebel's right to inherit from Ungar is being denied. For the reasons stated above, the author holds that the Czechoslovak court should recognize Schwebel's right of succession and therefore also recognize that her marriage with Waktor had become extinct.

PART III

INCIDENTAL QUESTIONS IN CZECHOSLOVAK PRIVATE INTERNATIONAL LAW

§ 5 THE CONCEPT AND SCOPE OF INCIDENTAL QUESTIONS AND THEIR STATUTE

The author pointed out already in the Introduction that the concept of incidental question as formed by Czechoslovak legal doctrine and practice differs completely from preliminary questions and/or the scope of incidental questions as formed by Anglo-American practice.

Professor Bystrický mentions incidental questions when he speaks of the scope of the statute of obligations and stresses that incidental questions do not constitute one of the essential points of the contract, since they involve only some acts related with the performance of the contract.[1]) It is obvious that Bystrický finds it indisputable that such questions are governed by the law of the place of performance rather than by the possibly different law of the contract. He further notes that "incidental questions also include the weighing, measuring, expert inspection of the goods, etc.",[2]) there being no doubt as to the fact that such procedures will always be governed by the law of the place where they occur.

Bystrický is therefore concerned rather by those elements of contracts, which are obviously of a non-independent character, which are linked with the performance of the contract and which cannot be "separated" from the place where they occurred. This indicates that they are those elements of the contract, with respect of which the Czechoslovak legislator could not even envisage a separate point of contact under the Czechoslovak conflict rules and which are naturally governed by the *lex loci solutionis*. In addition to the already mentioned weighing, measuring, inspection etc., these elements in the law of obligations may also include such things as consideration whether goods have been accepted with

[1]) Bystrický, *op. cit.*, p. 257.
[2]) *Ibid.*, p. 257.

or without inspection, the method, terms and form of reporting without delay any defects of the goods, office hours, the course of the specified terms with respect to holidays, the meaning of official agents, or agencies, from the viewpoint of placing a thing under official custody, etc. It is quite obvious that even if these acts or elements do not occur in the place of performance, they will be governed by the law of the place where they occurred because their legal assessment is "inseparable" from the *lex loci actus.* The questions which must be unconditionally considered according to the *lex loci solutionis* are specified in great detail by Kalenský.[3]) The Hague draft of the proposed convention on the law governing sales of an international character concerning movables, dating from 1956, also envisages that such matters as inspection of goods and the related questions are governed by the *lex loci actus.*[4])

In addition to the aforesaid questions of a rather technical nature, there may also occur questions of a more essential character, which cannot be considered in a concrete case otherwise than according to the law of the place where they occurred, although, as a rule, it would be appropriate to consider them according to the *lex causae.*

For example, the Court of Arbitration of the Czechoslovak Chamber of Commerce was called upon to settle the following dispute between the German firm Neumann and the Czechoslovak Koospol Corporation: Koospol failed to meet its obligation under a sales contract and with a single exception recognized all the claims for compensation raised by the German firm. The exception under dispute concerned a sum corresponding to a 10 % interest on the purchasing price, for Neumann had borrowed the whole sum representing the purchasing price from a Belgian bank which had granted the firm credit on a 10 % interest which was then (shortly after the second world war) the usual interest rate. Koospol objected to this rate, claiming that under the *lex causae,* which was the Czechoslovak law, an interest rate not higher than 6 % could be demanded, because any higher rate was considered unethical under Czechoslovak law. The arbitrators ruled quite properly that the interest rate charged by a bank could be considered only according to the law of its seat.

Thus we may reach the first conclusion, namely that those elements of the *contract,* which are inseparable from the place where they occurred and which can be considered only according to the law of that place, are considered by Czechoslovak legal doctrine as incidental questions, pro-

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[3]) *Obligační statut,* pp. 234 ff.

[4]) Kalenský, "Kupní smlouva v pracích Haagské konference mezinárodního práva soukromého", *Časopis pro mezinárodní právo,* 3/1957.

vided that the Czechoslovak conflict rules do not envisage a separate point of contact for them, as in the case of capacity, form, etc. They constitute therefore exceptions from the scope of applicability of the *lex causae,* conceived as a uniform statute. From the viewpoint of what was said under § 2 above, we must add that these are non-independent questions which — considered either from the viewpoint of their nature (e.g. measuring) or the practice of the forum (e.g. the interest rate) — cannot even constitute so-called partial question *(Teilfragen).*

The aforesaid type of questions is therefore undoubtedly governed by the *lex loci actus,* which fact is not even disputed in international doctrine. The only interesting point is that they are called incidental questions in the Czechoslovak doctrine. The same that applies to these questions in the sphere of the law of obligations, holds true in the other spheres of law as well. It is obvious that only the *lex loci celebrationis* can determine who is to be considered an official agent, etc.

In this connection, the author has raised — quite freely — the question, whether there do not exist special cases when it is necessary to respect or adjudicate according to the *lex loci actus* also some partial questions *(Teilfragen)* which constitute the object of a separate point of contact according to the conflict rules of the forum, and such conflict rules refer to a different law.

In Czechoslovak law, two types of cases are involved in this respect:

1. Cases where judicial practice has established a uniform conflicts criterion which has not, however, been embodied in legislation. For example, a Czechoslovak court will always consider as a subsidiary question the capacity to commit delicts according to the *lex loci delicti commissi* in spite of the fact that the general conflict rule concerning capacity to legal acts (Section 3 of the Act No. 97/1963) seemingly precludes it with the exception of cases where the *lex loci delicti commissi* is the Czechoslovak law. These cases do not give rise to any doubts and the *lex loci actus* will be applied to all cases of a uniform type; what is involved is filling, in a way, a gap in the law.

2. Cases where the application of the *lex loci actus* would be unusual, forced by the circumstances of a concrete case.

For example, a juristic person which has its seat in Czechoslovakia and a branch office in France concludes a commercial contract with a Chilean citizen who is 22 years old. This Chilean later objects before a Czechoslovak court that the contract is invalid because he had no capacity to conclude it. The court finds that the Czechoslovak firm had acted in good faith. The Czechoslovak conflict rule (Section 3 of the Act No. 97/1963) refers to the *lex personalis* which justifies the Chilean's objection. There is no possibility of *renvoi.* Nevertheless, the author be-

lieves that the Czechoslovak court should deny this objection, referring to the motivation of the famous Lizardi Case. The Czechoslovak court should apply the *lex loci actus,* if this were just according to the nature of the case (a reasonable provision regarding capacity to legal acts, etc.), because a decision to the contrary would be grossly unjust towards the other party.

The Czechoslovak concept of incidental question has induced the author to extend this term freely to all cases where a part of the same matter is so inseparably linked with the *lex loci actus* that it either cannot be considered according to another law, or the application of another law would lead to an obviously wrong and unreasonable result.

If a partial question *(Teilfrage)* is involved, which is the object of a separate point of contact under Czechoslovak law, the author includes it within this category only if the Czechoslovak conflict rule refers to a law which differs from the *lex loci actus.*

The author would like to point out that in this study he has touched upon incidental questions only to show what is a Czechoslovak terminological specialty and to distinguish these questions from preliminary questions. There is no sense in considering this matter in detail because — in the author's opinion — incidental questions are so closely linked with every concrete case and the law governing it, that any generalization would be neither proper nor useful.[5])

The only thing left to be said is that in contrast to preliminary questions, the only disputable point in the case of incidental questions will be the decision whether, in a concrete case, the question involved is indeed an incidental one; the conflicts solution will alway be unequivocal.

[5]) For example, if neither the contract nor the *lex causae* include any provision, concerning effective performance or substitution of currency, the *lex loci solutionis* will have to be applied. In this respect, we are faced with an incidental question as mentioned under (1) above.

RÉSUMÉ

PRELIMINÁRNÍ A INCIDENČNÍ OTÁZKY V ČESKOSLOVENSKÉM MEZINÁRODNÍM PRÁVU SOUKROMÉM

I.

V nauce mezinárodního práva soukromého bylo dosaženo shody v tom, že preliminární otázka, která vznikne při aplikaci hmotněprávní normy lex causae otázky hlavní a která je tak podmínkou rozhodnutí otázky hlavní, vyvolává zcela specifické kolisněprávní a procesněprávní problémy.

Specifikum problematiky preliminárních otázek je dáno zejména třemi faktory:

1. Soud, který posuzuje preliminární otázku v souvislosti s určitou jedinečnou otázkou hlavní, je vlastně povolán rozhodnout jedině otázku hlavní. Posouzení preliminární otázky je pouze nezbytnou podmínkou aplikace určité hmotněprávní normy lex causae otázky hlavní, z čehož plyne, že hmotnému právu, kterým se spravuje otázka hlavní, je třeba přiznat určitý vliv na stanovení rámcového obsahu právního vztahu, který představuje otázku preliminární. Soudce, který rozhoduje otázku hlavní, musí totiž zkoumat, zdali existuje určitý právní nebo skutkový stav, tvořící předpoklad aplikace hmotněprávní normy lex causae otázky hlavní, a nikoliv jaké důsledky spojuje s tímto stavem právo třetí. Hmotné právo lex causae otázky hlavní tudíž vytyčuje základní, rámcové požadavky, které spoluurčují obsah konkrétní preliminární otázky. V tomto smyslu hovoříme o dominantní úloze lex causae otázky hlavní.

2. Jestliže přisuzujeme hmotněprávním normám lex causae otázky hlavní dominantní úlohu při vymezení obsahu konkrétní preliminární otázky, vzniká nám logická otázka, zdali není vhodné určit právo, kterým se řídí preliminární otázka, podle kolisní normy lex causae otázky hlavní. V případě kladné odpovědi, která by vyvolala právě pro oblast preliminárních otázek potřebu aplikace cizích kolisních norem mimo renvoi, je třeba zkoumat, zdali určité právo umožňuje soudci státu, o jehož právo jde, aby v určitých případech nemusel nutně navázat podle vlastní kolisní normy. Autor předpokládané práce se domnívá, že československé mezinárodní právo soukromé nebrání čs. soudci, aby pro případy preliminárních otázek navázal podle jiné než československé kolisní normy.

3. Soud, který má pravomoc rozhodovat věc tvořící otázku hlavní, nesmí — až na nepatrné výjimky — odmítnout posoudit otázku preliminární, i kdyby o této otázce, kdyby se objevila jako otázka samostatná, pro nedostatek pravomoci rozhodovat nemohl. Jestliže však je soud povolán rozhodovat pouze ve věci, která představuje otázku hlavní, je výsledek jeho posouzení o otázce preliminární pouze jedním z důvodů, resp. skutkových okolností, které jsou základem rozhodnutí otázky hlavní. Výsledek posouzení otázky preliminární není proto součástí enunciátu rozhodnutí soudu a nemá absolutní účinky, tj. účinky erga omnes.

Uvedené zvláštnosti, které jsou neodmyslitelné od posuzování preliminárních

otázek v mezinárodním právu soukromém, odůvodňují autorem zastávaný názor, že problematika preliminárních otázek by měla tvořit samostatný problémový okruh tzv. obecné části mezinárodního práva soukromého a procesního.

II.

Obecná nauka mezinárodního práva soukromého nedospěla k jednotnému nebo alespoň převažujícímu vymezení obsahu pojmu preliminárních otázek. Část nauky nazývá tyto otázky otázkami incidenčními a považuje za ně všechny otázky, jejichž řešení je podmínkou rozhodnutí otázky hlavní, a to zejména v případech, kdy podmínka — tj. otázka incidenční — se spravuje jiným právem než otázka hlavní. Část nauky se zároveň zabývá preliminárními otázkami jen potud, pokud vyvolávají kolisní konflikty.

V souladu s československými procesními předpisy a doktrínou, týkající se tzv. otázek předběžných, jakož i v souladu s koncepcí incidenčních otázek, jak se vyvinula v čs. nauce mezinárodního práva soukromého, jsou oba uvedené pojmy v předkládané práci přísně rozlišovány. Vymezení obsahu obou pojmů je založeno na objektivních a obecných kritériích, a pokud jde o otázky preliminární, nepřihlíží k tomu, zdali jde o konfliktní situace z hlediska kolisních řešení. Vymezení obsahu pojmu preliminární otázky v československém mezinárodním právu soukromém a procesním abstrahuje od tzv. ryze procesních otázek předběžných a je postaveno na jednotě hmotněprávních a procesněprávních aspektů problematiky.

Za základní náležitosti preliminární otázky v řízení s cizím prvkem považuje autor následující:

a) může být předmětem samostatného řízení u jiného soudu, existuje tedy nezávisle na otázce hlavní, pročež nemůže být částečnou otázkou právního vztahu, který tvoří otázku hlavní;

b) objevuje se při aplikaci hmotněprávní normy lex causae otázky hlavní a představuje obsah obecného pojmu této hmotněprávní normy. V tomto smyslu je skutečně otázkou následnou, jak se s ní setkáváme v Robertsonově terminologii;

c) je nezbytným předpokladem rozhodnutí otázky hlavní. V tomto smyslu je nezbytným předpokladem aplikace určité hmotněprávní normy lex causae otázky hlavní, normy, která stanoví konkrétní subjektivní právo subjektu vztahu, který tvoří otázku hlavní, a nakonec normy, kterou musí soud v konkrétním sporu aplikovat.

d) pouhým formálně technickým důsledkem ad c) je skutečnost, že soud může rozhodnout otázku hlavní teprve potom, co rozhodne otázku preliminární;

e) rozhodnutí soudu o otázce preliminární není součástí enunciátu rozhodnutí o otázce hlavní, nejde tedy o rozhodnutí v pravém slova smyslu, ale o posouzení preliminární otázky, které se může objevit toliko v odůvodnění rozsudku. *Soud tedy zkoumá otázku preliminární jako otázku skutkovou,* s jedinou výjimkou, kterou tvoří případy, kdy je pro soud ex lege fori závazné rozhodnutí, které o preliminární otázce vydal jiný soud státu fóra, který ji posuzoval jako otázku samostatnou.

Řešení preliminární otázky může spočívat buď v jejím samostatném posouzení, nebo v uznání cizího rozhodnutí, nebo v přihlédnutí k rozhodnutí jiného orgánu aplikace práva státu fora, jestliže jde o rozhodnutí, které bylo vydáno v řízení, kde otázka preliminární byla posuzována jako otázka samostatná. Čs. soud je povinen respektovat dřívější rozhodnutí čs. orgánů aplikace práva o preliminární otázce, resp. rozhodnutí takových orgánů, jímž se uznává cizí rozhodnutí jen tehdy, jestliže mu to lex fori výslovně přikazuje. Autor se v této souvislosti pokusil dokázat, že

v oblasti mezinárodního práva soukromého nesmí čs. soud respektovat předpisy čs. práva procesního, které zakazují posuzování otázek statusových jako otázky předběžné v těch případech, kdy o dané otázce statusové nebylo vydáno pravomocné rozhodnutí jiným čs. soudem.

Za otázky incidenční považuje autor ty části jednoho právního vztahu, které obecně spadají do rozsahu statutu právního vztahu o který jde, ale které jsou v konkrétním případě natolik úzce spjaty s právem místa, kde vznikly, že je lze posuzovat toliko podle práva tohoto místa.

III.

Těžiště problematiky preliminárních otázek spočívá jak v mezinárodní doktrině, tak v předkládané práci v určení statutu preliminárních otázek. Většina autorů je v tomto směru ovlivněna pracemi německých vědců Melchiora a Wenglera a omezuje způsob určení statutu preliminární otázky na dvě možné alternativy, a to na navázání podle kolisní normy fora nebo podle kolisní normy lex causae otázky hlavní, vycházeje přitom z „vážení" významu materiální harmonie fora a tzv. mezinárodní (kolisní) harmonie rozhodování.

Autor předkládané práce se pokusil dokázat, že obě jmenované „harmonie" nelze od sebe oddělovat a tím méně je nelze stavět do kontradikce, ale že tvoří dialektickou jednotu v pravém slova smyslu internacionálního rozhodování soudu, od nějž je ovšem neodmyslitelná určitá specifičnost, „individualita", rozhodujícího soudu. Tato premisa vedla autora k závěru, že v případech, kdy preliminární otázka má významný vztah k více právním řádům, je třeba zkoumat stanovisko všech v úvahu přicházejících právních řádů, pokud se tato stanoviska od sebe liší, jak je tomu v případech tzv. mobilních konfliktů a konfliktů v prostoru.

Autor dospěl k závěru, že v případech, kdy preliminární otázka představuje tzv. „kulhající" právní vztah, je třeba považovat za dostačující, aby tento právní vztah měl takové důsledky, které vyžaduje aplikace hmotněprávní normy lex causae otázky hlavní, alespoň podle jednoho z právních řádů, ke kterému má preliminární otázka významný vztah.

Z tohoto důvodu je určení statutu preliminární otázky postaveno na hledání těžiště preliminární otázky s přihlédnutím k tomu, jak je určen tzv. minimální obsah preliminární otázky hmotným právem, kterým se spravuje otázka hlavní.

Autor předkládané práce navrhuje posuzovat preliminární otázku jen potud a jen z toho hlediska, jak to vyžaduje rozhodnutí o otázce hlavní, s tím, že obě otázky nelze od sebe oddělovat, tj. že je třeba je zkoumat jako jedinou „věc", jako jednotný předmět řízení. V každém konkrétním případě je proto třeba posoudit preliminární otázku podle toho práva, které má k této otázce významný vztah, a které ji zároveň přiznává takové účinky, které umožňují rozhodnout o otázce hlavní tak, aby toto rozhodnutí odpovídalo zásadě rozumného uspořádání věci v tom smyslu, jak je tato zásada pojímána v doktríně čs. mezinárodního práva soukromého.