Efficiency in Private International Law

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CHAPTER I

INTRODUCTION

Naoshima is an island located in Seto Inland Sea in Japan. Naoshima, which was once a forgotten place, is a landmark touristic destination now because of its widely-known modern and contemporary art museums, sculptures and architectures which are easily spotted around the town[1]. Examples of major art works and museums include Art House Project or Honmura which is a collection of abandoned houses, workshops, or even shrines which are now converted into an installation or venue for contemporary art exhibition by Japanese and international artists. There is also an outdoor exhibition of a polka-dotted pumpkin — an iconic work of famous designer Yayoi Kusama. World class architects such as Tadao Ando or Ishii Kazuhiro have been commissioned to design public spaces where arts could flourish in beautiful and tranquil islands.

In March 2005, a seminar to discuss various private international law issues from an economic point of view was organized in Benesse House on Naoshima Island. The speakers spent several days there, presented their research papers and engaged in thought-provoking discussions. Soon thereafter, those papers which were prepared for the Naoshima conference were published in a separate volume[2]. Just like Naoshima island, private international law methodologies need to be revisited and reactivated, and this could be best

[1] See benesse-artsite.jp/en/.

[2] J. Basedow and T. Kono (eds.), *An Economic Analysis of Private International Law* (Mohr Siebeck, 2006).

done by applying various interdisciplinary approaches. That workshop held almost ten years ago was an inspiring event and since then I have been very keen on further elaborating private international law issues from the angle of law and economics.

This work is based on the lectures which were given in 2013 at the Hague Academy of International Law. Efficiency is a corollary normative criterion which lies at the heart of law and economics approach. In the second chapter efficiency criterion is introduced in the context of conflicts revolution which took place in the United States during the twentieth century. The third and fourth chapters provide for a conceptual framework for better understanding of uniform law. Those two chapters aim to elaborate on the question whether uniform law is desirable at all, and, if so, under what conditions. A clear distinction (which has been often disregarded in the previous private international law literature) between uniform private international law and uniform substantive law is made. Chapters V and VI provide for two case studies that help illustrate how efficiency consideration comes into play in reality, especially in the areas where the idea of territoriality has been dominant. I hope this article contributes to the critical studies of private international law and will broaden the range of issues that could be included into the discussions of this discipline.

CHAPTER II

CONFLICTS REVOLUTION THROUGH THE LENS OF EFFICIENCY

Choice of law problems usually arise when two or more relatively advanced legal systems get in touch with each other. Private international law, choice of law, problems have existed for centuries when people from various territories, religious and social groups engaged in mutual contacts. However, some of the most challenging issues of this discipline have been critically reviewed during the so-called conflicts revolution which took place during the twentieth century in the American academic literature and court practice. This chapter provides a short review of some of the main approaches and considerations that define conflicts revolution. This analysis will provide for a stepping stone to enter the discussion about the notion of efficiency which has been introduced in private international law through the writings of law and economics scholars.

2.1. Traditional Approaches

Just as in medieval Italy or seventeenth-century France, the existence of separate territorial units in the United States provided fertile ground for the development of modern private international law. Most of the US states (with the exception of Louisiana) were largely influenced by the English legal tradition. However, since the Declaration of Independence in 1776, the legislation as well as the jurisprudence of courts gradually started to depart from their English roots in order to meet local realities.

The increasing number of personal and trade-related contacts across the state borders of the United States in the nineteenth century brought about various controversies involving conflicting laws from one state to another. Unlike other areas of law, it appeared that English legal sources had little to offer in terms of coping with the complex dilemmas of American conflict of laws. Accordingly, American courts had to look to medieval European doctrines in order to find inspiration to solve its international disputes. As a result, some of the early American cases such as *Robinson* v. *Bland* or *Saul* v. *His Creditors* contained references to the writings of Italian, French, or Dutch authors[3].

The *Saul* v. *His Creditors* case[4] decided by the Louisiana Supreme Court had been a milestone in the development of American conflict of laws for several reasons. In that case, which concerned marital property issues, the losing party's attorney Samuel Livermore submitted an 80-page brief with further references to foreign sources. Soon after the case was decided, Livermore felt incited to publish *Dissertations on the Questions Which Arise from the Contrariety of the Positive Laws of Different States and Nations* which is considered to be the first conflicts book in the United States. This book published in 1828 contained two "dissertations". The first one generally showed what kind of questions could arise due to the conflicting laws of different states and called for the introduction of some settled principles that should be uniformly observed[5]. The second "dissertation" further

[3] F. K. Juenger, *Choice of Law and Multistate Justice* (Boston, Nijhoff, 2001), at p. 27.

[4] 17 Martin R. 569.

[5] S. Livermore, *Dissertations on the Questions Which Arise from the Contrariety of the Positive Laws of Different States and Nations* (B. Levy, New Orleans, 1828; also available on Google Books), p. 19, para. 34.

expounded upon the statutist approach and the delineation between real and personal statutes[6]. Livermore's profound legacy goes beyond this essay: he left a collection of more than 400 valuable books to his alma mater Harvard University that Joseph Story would later expound on in his own work.

Joseph Story (1779-1845) is often considered one of the forefathers of the American conflict of laws. His background as a Supreme Court Justice as well as an academic at Harvard University is clearly evident in his 1834 publication titled *Commentaries on the Conflict of Law*[7]. This 800-page treatise was the first systematic investigation of the subject in the English language, with almost 500 references to Anglo-American and foreign cases[8]. Story's Commentaries were mainly based on the earlier writings of European scholars and several court judgments rendered in England and Scotland. He brought to the attention of American readership the theoretical methods that had been developed by such Continental private international law thinkers as Ulrich Huber (1635-1694)[9] or Louis Boullenois (1680-1762). These distinguished European commentators had greatly influenced Story's perception of the subject. In *Commentaries* Story discussed the differences between local and personal statutes, and favoured the prevailing maxims of that time. For instance, he argued that "every nation pos-

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[6] See also R. De Nova, "The First American Book on Conflict of Laws", 8 *American Journal of Legal History* (1964), pp. 136-156.

[7] J. Story, *Commentaries on the Conflict of Laws* (4th ed., 1852).

[8] S. C. Symeonides, *American Private International Law* (Kluwer Law International, 2008), p. 66, para. 110.

[9] Huber's essay was translated and published in the United States Supreme Court Reports, see 3 US (3 Dall.) 370 (1797).

sesses exclusive sovereignty and jurisdiction within its own territory" and that its laws "affect and bind directly all property, whether real or personal, within its territory, and all persons who are resident within it" as well as contracts concluded and acts committed in it[10]. Similarly, the laws of States cannot affect or bind any properties out of their own territories or persons resident therein[11]. With regard to the notion of comity, Story noted that "every nation must be the final judge for itself"; comity of nations was deemed "to express the true foundation and extent of the obligation of the laws of one state within the territories of another". Story also clearly stated that foreign laws are inadmissible whenever they are contrary to the domestic policy or State's interests[12].

Story's attempt to put heterogeneous opinions generated by European writers over five centuries into a single treatise has been criticized as being too indiscriminate[13]. Nevertheless, he has been often attributed with the authorship of the phrase "private international law" as well as praised for advocating the multilateral approach[14]. Some commentators regard Story as a pioneer in combining civil law doctrines with English and American precedents[15]. Indeed, it is true that Story laid the solid foundation for further studies on the conflict of laws both in the United States as well as in Europe. Yet, one should be reminded that it took more than five decades before the next big chapter was

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[10] Story, *supra* footnote 7, para. 18.
[11] *Ibid*., para. 20.
[12] *Ibid*., paras. 33 and 38.
[13] F. Harrison, *On Jurisprudence and the Conflict of Law* (Oxford, Clarendon, 1919), pp. 119-120.
[14] Juenger, *supra* footnote 3, at pp. 29-30.
[15] H. E. Yntema, "The Historic Bases of Private International Law", 2 *Journal of American Comparative Law* (1953), at p. 307.

written by another prominent Harvard scholar called Joseph Beale.

2.1.1. Joseph Beale and the vested rights doctrine

The American industrial development gained its momentum after the end of the Civil War (1861-1865). Intense and pervasive industrialization facilitated American expansion to the west. New railways and roads were built which opened new horizons for social and economic development. Such industries as iron and steel, which had already been established earlier, played an instrumental role in such newly emerging industries as drilling and refining petroleum, automobiles, and electricity. The industrialization process would not have also been possible without major inventions in the field of telecommunications (telegraph and telephone in 1876). Economic expansion took place simultaneously with urbanization and the growing mobility of people. An increasing number of multi-state transactions often involved legal controversies that had to be brought to the courtroom where judges suddenly found themselves facing conflicting regulations in cross-border contractual, family and inheritance, tort or other disputes. Yet, the absence of prevalent approaches or sources of reference on how to resolve problems concerning conflicting substantial laws resulted in a situation where a body of incongruent court decisions were rendered.

The conceptual foundations of conflict of laws in the United States were further explicated by Joseph Beale. He was the first to offer a specialized course on the subject called conflict of laws in 1893 and taught around 10,000 students during his 48 years at Harvard Law School[16]. During years of teaching, Beale dealt

[16] S. C. Symeonides, "The First Conflicts Restatement through the Eyes of Old: As Bad as Its Reputation?",

with an increasing number of conflicts cases and consequently he collected those judgments and compiled them in a very systemized three-volume casebook. This monumental work was published in the period of 1900-1901 and contained almost 500 cases from the United States, the United Kingdom and other jurisdictions[17]. This book had a great influence as it became the main teaching material in other law schools as well as a handy source of reference for practitioners[18]. Beale's contribution to the conflicts scholarship was widely appraised and was compared to the works of such great legal minds of the time as John Austin or Arthur V. Dicey[19].

Joseph Beale lived in a time when the international community was dominated by nation States. The prevailing political and economic theories emphasized the role of the central Government in building strong national economies and strengthening cultural identity. This kind of international landscape sheds some light on Beale's perception of conflict of laws which was founded on two general maxims: the principle of territoriality and the so-called vested rights doctrine. The principle of territoriality in Beale's theory could be explained as emanating from national sovereignty and

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32 *South Illinois University Law Journal* (2007), pp. 41-42.

[17] See J. H. Beale, *Selection of Cases on the Conflict of Laws* (Cambridge, 1900-1902). Since Story's Commentaries, only two books on the subject appeared in the United States: see Francis Wharton, *A Treatise on the Conflict of Laws, or Private International Law* (The Lawyers Co-operative Publishing Co., Rochester, 1872), and Raleigh Minor, *Conflict of Laws, or, Private International Law* (Little, Boston, 1901).

[18] Symeonides, *supra* footnote 16, pp. 45-46.

[19] F. L. de Sloovère, "On Looking into Mr. Beale's Conflict of Laws", 13 *New York University Law Quarterly* (1936), at p. 368.

the idea that substantive rights are created by national laws. The second principle of vested rights aims to explain why foreign States are obliged to recognize and enforce such a right. More precisely, the principle of territoriality was defined as the operation of law by extending its power over every act done throughout the territory[20]. Only one law of that particular State can apply, and based on that law new rights and obligations are created[21]. Moreover, Beale strongly objected to the so-called personality principle by stating that foreigners coming to that State cannot claim the application of their own personal law[22]. Accordingly, the law of the place of injury was deemed to be applicable to tort actions whereas contracts were governed by the law of the place of the despatch of the acceptance. Moreover, such a rigid conflicts framework left no space for party autonomy to choose applicable law even in the contract area. This was a consequence of Beale's doctrinal emphasis on the notion of territoriality which mirrored the relationship between the State and the individual.

The second principle espoused in the Beale's theory is known as the vested rights doctrine. The vested rights doctrine was first proposed by the famous constitutional law scholar Dicey[23]. One of the underlying premises of this doctrine was the distinction between laws that are in force and individual rights that are created by virtue of such territorial laws. The legal consequences of certain transactions or events which occur in a particular territory are determined by the laws of that territory; subjective rights or duties can be

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[20] J. H. Beale, *A Treatise on the Conflict of Laws* (3 vols., 1935), at pp. 45-46.

[21] *Ibid*.

[22] *Ibid*., at p. 29.

[23] See A. V. Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (Stevens, London, 1927).

acquired according to the appropriate territorial law. Once a right is created, "it itself becomes a fact . . . [and] should everywhere be recognized; since to do so is to recognize the existence of a fact"[24].

The principle of territoriality together with the vested rights doctrine reshaped the perception of how the sovereign interests of the States should be balanced. This has been done by rejecting the comity doctrine espoused by Joseph Story and supplanting it with a duty to recognize individual rights rightfully acquired in a foreign State. The vested rights doctrine left no room for ample discretion of the courts and thus formed a conceptual justification for a rather rigid scheme of choice of law which culminated in the adoption of the First Restatement. Beale insisted that such a rule-oriented approach should enhance predictability, certainty and uniformity of results in multi-state cases[25].

2.1.2. The adoption of the First Restatement

One of the remarkable turning points in American legal history occurred in 1923 when the American Law Institute ("ALI") was established. At the beginning of the twentieth century it became obvious that there was a need to improve the law. The most distinguished legal minds of that time (including Roscoe Pound, Benjamin Cardozo and Judge Learned Hand) identified that there were two great defects — uncertainty and complexity — that caused "general dissatisfaction with the administration of justice" in society[26]. It was indi-

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[24] Beale, *supra* footnote 20, at pp. 1968-1969. This doctrine of vested rights was espoused in court practice, see, e.g., the opinion of Justice Holmes in *Slater* v. *Mexican Nat. R.R. Co.*, 194 US 120.

[25] Beale, *supra* footnote 20, pp. 1286-1292.

[26] See ali.org/index.cfm?fuseaction=about.creation and Edward White, "The American Law Institute and the

cated that the law's uncertainty stemmed from the lack of agreement on fundamental principles of the common law; whereas the complexity was due to the variations in laws of different States[27]. The ALI was founded in order to fix those grave defects by promoting "the clarification and simplification of the law and its better adaptation to social needs", securing the better administration of justice, encouraging and carrying on scholarly and scientific legal work[28].

Since the early days of establishment, Restatements have been the defining feature of the ALI. The ambitious mandate of the ALI to "promulgate the American legal tradition" was entangled in the unique federal government system. The US Constitution and Federal Laws have supremacy thus they pre-empt conflict state laws. Such a supreme authority of federal laws is rather limited to matters expressly mentioned in the Constitution (e.g., money, tariffs, intellectual property, foreign affairs or mail). Most of the major areas of law including contracts, torts, family or criminal law are regulated by the separate laws and constitutions of particular states. In such a legal context it was quite understandable that the most optimal way of accommodating existing differences among doctrines and practices of different states was by adopting non-binding sets or recommendatory guidelines. This was exactly the purpose of Restatements. Restatements do not create new law, they merely re-state already existing rules and principles. Restatements also do not have a binding force, but usually aim to serve as a reference point to prevailing doctrines and approaches.

Triumph of Modernist Jurisprudence", 15 *Law and History Review* (1997), 1-19; K. D. Adams, "Blaming the Mirror: The Restatement and the Common Law", 40 *Indiana Law Review* (2007), pp. 205-270.

[27] See ali.org/index.cfm?fuseaction=about.creation.

[28] See ali.org/doc/charter.pdf.

Conflict of laws was one of the subjects added to the agenda of the ALI[29]. Despite the few monographs which were published at the turn of the century, the subject of conflict of laws was not a popular topic. Judge Cardozo once referred to conflict of laws as "one of the most baffling subjects of legal science"[30]. The preparation of the First Restatement of Conflict of Laws was entrusted to Joseph Beale who served as a Reporter. The drafting process took place in a small group of ten advisers: seven of whom were academics, one judge and two attorneys[31]. The drafts of the Restatement prepared by this group were further discussed during eight annual meetings of the ALI in 1925, 1927-1932 and 1934 when the Restatement was finally adopted[32]. The task for the drafters of the Restatement was relatively easy because many of the conflicts rules were not clearly determined and were subjects of controversy[33]. In his role as a Reporter of the working group, Joseph Beale remained faithful to his definite convictions[34]. He favoured the view that the whole structure of the Restatement should be based on the principle of territoriality and the vested rights

[29] Matters that were addressed in the so-called "First-Generation" Restatements adopted in during the period of 1932-1944 are agency, contracts, torts, restitution, property, trusts, securities, conflict of laws and judgments.

[30] B. N. Cardozo, *The Paradoxes of Legal Science* (Columbia University Press, New York, 1928), p. 67.

[31] Symeonides, *supra* footnote 16, p. 66.

[32] *Ibid*., p. 68.

[33] 56 *Harvard Law Review* (1946), at p. 692; E. G. Lorenzen and R. J. Heilman, "The Restatement of the Conflict of Laws", 83 *University of Pennsylvania Law Review* (1935), at p. 555.

[34] H. F. Goodrich, *Yielding Place to New: Rest Versus Motion in The Conflict of Laws* (The Association of the Bar of the City of New York 1950), at p. 11.

doctrine. This opinion was adopted without much objection and the principle of territoriality became the cornerstone of the First Restatement. Section 1 provided that:

> "No state can make a law which by its own force is operative in another state; the only law in force in the sovereign state is its own law, but the law of each state rights or interests in that state may, in certain cases, depend upon the law in force in some other state or states . . ."

The principle of territoriality was further mirrored in special conflict rules dealing with particular matters: the validity and effects of a contract were governed by the law of the place of contracting (*lex loci contractus*, § 332)[35]; torts — by the law of the place of wrong (*lex loci delicti*, § 377)[36]; property by the law of the place where a thing is located *(lex rei sitae)*; and the right to divorce is governed by the law of the forum (§ 135). The operation of the vested rights doctrine could be best illustrated by Section 384 of the Restatement which provides that

> "if a cause of action in tort is created at the place of wrong, such cause of action will be recognized in other states. On the other hand, if no cause of action is created at the place of the wrong, no recovery can be had in other state."

This provision was based on the assumption that the plaintiff's right to compensation was vested at the time of injury; therefore, the law of the place of the injury

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[35] See *Sturiano* v. *Brooks* 523 So. 2d 1126 (1988) (upholding *lex loci contractus* rule).

[36] See, e.g., *Alabama Great Southern Railroad Co.* v. *Carroll*, 11 So. 803 (1892); *Fitts* v. *Minnesota Mining & Manufacturing Co.*, 581 So. 2d 819 (1991) (upholding the *lex loci delicti* rule).

should govern the action[37]. It should be noted that the First Restatement did not envision any possibility for party autonomy to designate the law that would govern their contract.

By adopting such a territorial approach, the First Restatement reflected the preferred principle in the Anglo-American world in the first part of the twentieth century[38]. Although the principle of territoriality together with the vested rights doctrine were inherited from continental European writers, the First Restatement was a manifestation of the growing chasm between American and European conflict of laws. This could be explained by the fact that European conflict of laws statutes usually provided for some exceptions from the territoriality principle especially with regard to such matters as personal status, personality, or succession, and left these matters to be governed by personal laws[39]. However, the conflict rules of the First Restatement did not yield to any exceptions. Despite the growing criticism in academic literature, the Restatement was followed to varying degrees in all the states of the United States[40]. It should also be noted that the Restatement was never intended to be the last word and merely reflected the trend of the time[41]. The First Restatement was firmly drafted in the spirit of multilateralism. In addition, the choice of law rules entrenched in the Restatement were "external to the forum's sub-

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[37] See S. E. Thiel, "Choice of Law and the Home-Court Advantage: Evidence", 2 *American Law and Economics Review* (2000), at p. 292.

[38] Beale, *supra* footnote 20, at p. 52.

[39] Symeonides, *supra* footnote 16, p. 59.

[40] See Symeonides, *supra* footnote 8, p. 72, para. 121 who also indicates that such adherence to the Restatement was due to the overload of court dockets and "episodic" frequency of cross-border cases.

[41] Goodrich, *supra* footnote 34, at p. 14.

stantive law": this meant that such jurisdiction-selecting rules guided the court to find governing laws without further alluding to potential differences that might result from competing substantive laws[42]. The underlying conceptual rationales of the Restatement were further elucidated in Beale's *Treatise* which was published one year after the adoption of the Restatement[43], and thus provided fertile ground for further critical assessments of "traditional" approaches.

2.1.3. Criticism of the First Restatement

In the 1930s and 1940s a number of shortcomings of Beale's approach were identified by a group of law experts belonging to the so-called "legal realism" and "local law" movement[44]. Oliver Wendell Holmes, Walter Wheeler Cook and Judge Learned Hand were among those leading figures who emphasized "what Massachusetts or English courts are likely to do in fact"[45]. Legal realism was a broader movement against a formalistic approach to law and legal reasoning. Overly dogmatic legal regulation and rigid rules were among the key features of the American legal system which legal realists aimed to do away with. The sustained criticism by legal realists challenged the notions of territoriality and vested rights as well as decision-making methods which were prevalent at the time. The ideas put forward by the proponents of legal realism

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[42] Cf. P. J. Borchers, "The Choice-of-Law Revolution: An Empirical Study", 49 *Washington and Lee Law Review* (1992), at pp. 86-87.

[43] Beale, *supra* footnote 20.

[44] L. Brilmayer, "The Role of Substantive and Choice of Law Policies in the Formation and Application of Choice of Law Rules", 252 *Recueil des cours* (1995), at pp. 19-20.

[45] W. W. Cook, "The Logical and Legal Bases of the Conflict of Law", 33 *Yale Law Journal* (1924), at p. 460.

formed a solid foundation for the choice of law revolution which was to begin in the middle of the twentieth century.

The opposition to Beale's conceptualism was very obvious in the discussion about the practical application of the vested rights doctrine[46]. Legal realists tried to reconcile the application of foreign law with the sovereignty of the forum state[47] and argued that in cross-border cases the courts should neither apply foreign law nor give effect to foreign vested rights. Rather, the court should recreate a foreign right by fashioning local remedies available under the forum law. By doing so the court provides the legal effects that could be possible under the foreign law via legal remedies under the forum law[48]. The vested rights doctrine was criticized for its artificial circular reasoning[49] and because its conceptual generalities did not help to address the practical considerations involved in specific cases[50]. Thus, one should not be surprised that the courts also tried to avoid the quandaries inherent in the

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[46] C. Lorenzen, "Territoriality, Public Policy and the Conflict of Laws", 33 *Yale Law Journal* (1924), pp. 736-751; and H. E. Yntema, "The Hornbook Method and the Conflict of Laws", 37 *Yale Law Journal* (1928), pp. 468-483.

[47] See D. F. Cavers, "A Critique of the Choice-of-Law Problem", 47 *Harvard Law Review* (1933-1934), at p. 178; E. E. Cheatham, "American Theories of Conflict of Laws: Their Role and Utility", 58 *Harvard Law Review* (1945), at pp. 379-385; Lorenzen, *supra* footnote 46, at pp. 746-749; Yntema, *supra* footnote 46, at pp. 474 *et seq*.

[48] Walter W. Cook, *The Logical and Legal Bases of the Conflict of Law* (Massachusetts, Cambridge, 1942), at pp. 20-21; also *Guinness* v. *Miller*, 291 Fed. 769, 770 (SDNY 1923) (Justice Learned Hand).

[49] See C. G. von Wächter, "Über die Collision der Privatrechtgesetze verschiedener Staaten", 26 *Archiv CP* (1842), at pp. 1-9, and C. F. von Savigny, *System des heutigen Römischen Rechts* (1849), Vol. 8, at p. 132.

[50] Yntema, *supra* footnote 46, at pp. 482-483.

vested rights theory[51]. Walter W. Cook suggested that conflicts cases should be decided by following the so-called "domestic method" which is "the same as actually used in deciding cases involving purely domestic torts, contracts, property, etc."[52] Justice Learned Hand in one tort case noted that:

> "When a court takes cognizance of a tort committed elsewhere . . . no court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs."[53]

More generally, opponents highlighted the fact that the First Restatement was far removed from the actual practice of courts in multi-state cases. The asserted goals of uniformity and predictability were obsolete because judges could utilize various escape devices such as the local public policy exception, the concept of "fraud on the law", characterization[54], or the substance/procedure dichotomy[55] in order to justify the

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[51] For cases before *Babcock* v. *Jackson* see: e.g., *Richards* v. *United States*, 369 US 1, 12-13; *Grant* v. *McAuliffe*, 41 Cal. 2d 859; *Schmidt* v. *Driscoll Hotel*, 249 Minn. 376; *Haumschild* v. *Continental Cas. Co.*, 7 Wis. 2d 130.

[52] Cook, *supra* footnote 48, at p. 43.

[53] *Guinness* v. *Miller*, 291 Fed. 769, 770 (SDNY 1923) (Justice Learned Hand).

[54] See *Levy* v. *Daniels' U-Drive Auto Renting Co.*, 143 A. 163 (Conn. 1928), or *Haumschild* v. *Continental Cas. Co.*, 95 NW 2d 814 (1959).

[55] See *Grant* v. *McAuliffe*, 41 Cal. 2d 859, or *Kilberg* v. *Northeast Airlines Inc.* 9 NY 2d 34, 172 NE 2d 526 (1961); W. W. Cook, "'Substance' and 'Procedure' in the Conflict of Laws", 42 *Yale Law Journal* (1933), at pp. 333 *et seq.*

application of the law which was more preferable. Hence, simple and static rules entrenched in the First Restatement cannot provide workable solutions for complex cases. During this early criticism of the First Restatement several important distinctions were crystallized: namely, the distinction between rules and approaches as well as the competition between choice-of law rules and the state's interests. These discussions provided a firm starting point for the so-called conflicts revolution[56].

2.2. The Choice of Law Revolution

2.2.1. Departure from traditional approaches

Until the 1950s the US conflict of laws was permeated with imported European approaches on territoriality and vested rights. However, the American courts did not feel very comfortable when they had to follow the multilateral conflict rules of the First Restatement which often mandated the application of foreign laws. This kind of "leap into the darkness"[57] posed serious psychological challenges for judges who often felt a loss of control over the case. The academic resentment against the multilateral conflict rules of the First Restatement unfolded as soon as it was adopted and only continued to intensify. Numerous changes in the socio-economic reality, such as the increase of interstate commerce, new means of transport and the movement of persons, eroded the territorial boundaries between the states. The federal structure of the US law provided a fruitful setting to scrutinize continental choice-of-law concepts. The following sections discuss two court cases *Auten* v. *Auten*[58] and *Babcock* v.

[56] Juenger, *supra* footnote 3, p. 31.
[57] L. Raape, *Internationales Privatrecht* (1961), at p. 90.
[58] *Auten* v. *Auten*, 308 NY 155.

Jackson[59] that moved the debate about reforming American conflict of laws from academic circles to court practice.

(a) Auten *v.* Auten

The action in *Auten* v. *Auten* concerned the recovery of instalments for support and maintenance under a separation agreement. In this case, a couple had married in England in 1917 and lived there with two children until 1931. Then the husband deserted to Mexico and obtained a divorce. In order to come to some kinds of terms regarding the discontinuation of their marriage, the couple once again met in New York where they signed a separation agreement in 1933. The husband was obliged to pay a monthly support to the wife and children who would continue to live in England. Furthermore, the agreement provided that neither of the parties should sue "in any action relating to their separation" and that the wife should not lodge any complaint against the husband in any jurisdiction as dictated by the said alleged divorce or remarriage. However, the husband failed to comply with the terms of the agreement and made only a few payments to his ex-wife and children.

One year later, the wife brought a petition for separation in an English court, charging the defendant with adultery. The action was instituted upon the advice of English counsel that it "was the only method" by which she "could collect money" from the defendant. In other words, the plaintiff sought to enforce the separation agreement and not to repudiate it. Although the defendant was actually served in New York, the English proceedings never went to trial. Later, the wife

[59] *Georgia W. Babcock* v. *Mabel B. Jackson*, 12 NY 2d (1963) 473.

brought another action in New York seeking to recover the amount due. The defendant countered by arguing that an action in an English court violated the terms of the agreement and ended the wife's rights to obtain payments.

At the time of the decision, the prevailing view was that all contract-related matters should be determined by a single conflicts rule; however, it was not clear which rule should be followed. Some courts and authors favoured the application of the law of the place of contracting; others — the law of the place of performance or the law intended by the parties[60]. Judge Fuld who wrote the majority opinion in the present case recognized the chaos among the available approaches and suggested to resolve the difficulties by adopting the so-called "grouping of contracts" test. This test allowed the court to apply the law of England which had "the most interest in the problem"[61]. Acknowledging that such an approach might "afford less certainty and predictability", Judge Fuld indicated that the "grouping of contracts" approach enables the court to give effect to parties' intentions as well as consider which rule produces the best practical results. In *Auten* v. *Auten*, English law was applied despite the fact that the separation agreement was signed in New York. The court took into consideration that the parties spent 14 years living together in England and the fact that the plaintiff continued to live there with her children after the separation agreement was signed. In the opinion of the court, England had "the greatest concern" in determining the obligations between the parties.

The importance of the court's decision in *Auten* v.

[60] W. L. M. Reese, "Chief Judge Fuld and Choice of Law", 71 *Columbia Law Review* (1971), at p. 548, with further references.

[61] *Auten* v. *Auten*, 308 NY, at p. 160.

Auten rests upon several points. Firstly, a nebulous distinction between the validity and performance of contract issues has been eliminated by the court's acknowledgment that these matters are often intertwined with each other. Secondly, the Court's opinion in *Auten* v. *Auten* marks a milestone towards a modern PIL regime by liberating the courts from the shackles of the place of contracting rule[62]. The grouping of contracts approach was welcomed for its increased flexibility[63] and swiftly gained support by the courts in other US states[64]. This new doctrine suggested that, in matters related to contract, choice of law rules should be developed on a case-by-case basis rather than rest upon a conceptualistic reasoning[65].

(b) Babcock *v*. Jackson

Similar to choice of law rules for contracts, traditional territorial approaches to solving multi-state torts disputes became overshadowed with criticism. However, for more than three decades since the adoption of the First Restatement, most of the US state courts continued to follow the traditional conflict-of-laws principles. Such practice continued until 1963 when the New York Court of Appeals rendered a decision in the landmark *Babcock* v. *Jackson* case[66]. This case is often referred to as the most important case in the American

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[62] W. L. M. Reese, 63 *Columbia Law Review* (1963), at pp. 1233-1235.

[63] Cf. Reese, *supra* footnote 60, at p. 550.

[64] See, e.g., *Jansson* v. *Swedish Amer. Line*, 185 F. 2d, 212, 218-219; *Barber Co*. v. *Hughes*, 223 Ind. 570, 586; *Kievit* v. *Loyal Protective Life Ins. Co*., NJ 475, 491-493; *Estate of Knippel*, 7 Wis. 2d 335, 343-345.

[65] Reese, *supra* footnote 62.

[66] *Georgia W. Babcock* v. *Mabel B. Jackson*, 12 NY 2d (1963) 473 at 477. See also *Kilberg* v. *Northeast Airlines*, 9 NY 2d (1961) 34 at 39.

conflict of laws history and remains a thought-provoking exercise not only in the classroom but also for policymakers. Moreover, it is considered the watershed decision that "at last moved the modern choice-of-law revolution out of the academic journals into the courts"[67].

The facts of *Babcock* v. *Jackson* are well known: the plaintiff and the defendant who both were residents in Rochester (a city in Northwest New York State) went for a weekend trip to Canada in the defendant's automobile. While driving in the Canadian Province of Ontario, there was an accident allegedly caused due to the negligence of the defendant who was driving. The plaintiff brought an action and sought compensation for injuries arising from the automobile action under New York law. The defendant moved to dismiss the complaint arguing that the law of the State of Ontario should be applied and that Ontario's guest statute should prevent the recovery[68].

The Court reversed its previous choice of law practice and held that the plaintiff may bring an action in New York for damages despite Ontario's statute providing that the owner or driver of a motor vehicle is not liable for damages resulting from injury to the guest. Such a decision was based on the consideration that the traditional choice of law rule leads to "unjust and anomalous results"[69]. The Court noted that a rule

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[67] H. J. Korn, "The Choice-of-Law Revolution: A Critique", 83 *Columbia Law Review* (1983), at p. 827.

[68] Highway Traffic Act of Province of Ontario § 105 [2] which was in force at the time of decision provided that

> "the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in . . . the motor vehicle".

[69] *Babcock* v. *Jackson*, 12 NY 2d (1963) 473 at 479-480.

mandating the application of the law of the place where the tort occurred is too restrictive and suggested a substitution by the "centre of gravity" or "grouping of contacts" doctrine.

Moreover, such principles as justice, fairness and best practical results may best be achieved by giving control of the effect over to the law of the jurisdiction which, because of its relation or contact with the occurrence or the parties, has the most interest for the specific issue raised in the litigation.

In the *Babcock* case, the interest of the State of New York was found to be greater than that of the State of Ontario: the injuries were sustained by a New York guest as the result of the negligence of a New York host. The car was garaged, licensed and insured in New York; the weekend journey began and was to end in New York, hence the interest of Ontario was minimal[70]. The Court went on to consider the policy considerations of the state legislations. It found that while New York's legislation required a tortfeasor to compensate his guest for injuries caused by his negligence, the object of Ontario's guest statute was "to prevent the fraudulent assertion of claims by passengers, in collusion with the drivers, against insurance companies"[71].

The departure from an earlier strict choice of law rule was generally welcomed in academia; some authors said that this is "worth the price" because a case-by-case approach could provide possibilities to seek more practical solutions[72]. Although the immediate effects of *Babcock* were impossible to anticipate, at the time when the decision was rendered some of the most distinguished commentators agreed that the case

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[70] *Op. cit. supra* footnote 69, at 482-483.
[71] *Babcock* v. *Jackson*, 12 NY 2d (1963), at 482-483.
[72] See Reese, *supra* footnote 62.

was "decided in the most reasonable and objective way" possible. Others were more careful and warned that such a flexible rule may lead to a situation where a court in most cases would find the centre of gravity "in its own backyard"[73].

Moreover, it has been argued that the identification of contacts that may be relevant to the determination of the applicable law is a "highly subjective fiat" and therefore the whole theory proposed in *Babcock* could be considered as too elusive[74]. Be that as it may, *Babcock* greatly stimulated the discussion on "competing state interests", case-specific considerations and the question of whether courts were better placed to deal with particular controversies than legislators[75].

The following sections discuss some of the notable theories which define the main lines of reasoning prevalent during the conflicts revolution: Currie's government interest analysis, Leflar's better law approach, and Cavers's principles of preference. One of the crucial points of the conflicts revolution was an attempt to replace the mechanical choice-of-law rules and associated manipulations with a more appropriate method that would allow the courts to actually consider the tension between the policies underlying conflicting laws.

2.2.2. Government interest analysis

Lex loci contractus and *lex loci delicti* rules were multilateral choice of law rules. However, their rejection in some states' court practice ignited new waves of discussion about the need to reform the system of conflict of laws. Among the outstanding theories proposed

[73] R. A. Leflar, pp. 1251-1255.

[74] See B. Currie, "Comments on Babcock v Jackson — A Recent Development in Conflict of Laws", 63 *Columbia Law Review* (1963), at pp. 1255-1257.

[75] See Reese, *supra* footnote 62, at pp. 1233-1235.

in the conflicts literature the most prominent was the so-called government interest analysis which primarily emerged from the writings of Brainerd Currie. One of the main assumptions in Currie's theory was that states have their own governmental interests embedded in the policies of domestic laws which have to be safeguarded if a particular transaction or controversy bears a close relationship with such a state policy[76]. States' interests are best enforced when courts apply their own law in resolving multi-state cases. In other words, whenever a given factual situation was considered to fall within the spatial scope of the application of a domestic law, it was deemed that the state has an interest in the case. It should be noted that the idea of state interests was not new: it was already used in a number of Supreme Court decisions in the 1930s when the Court had to interpret constitutional aspects of the Full Faith and Credit Clause[77]. Also early critics of the First Restatement (mainly Cook and Cavers) also employed the notion of state interests. Just as his predecessors did, Currie vigorously criticized the vested rights theory and the approaches adopted in the First Restatement. However, in a series of articles published in the 1950s and 1960s[78] Currie aimed to propose a new approach to the conflict of laws. He used the notion of state interests in order to highlight his argument that in the absence of one central Government in the world, separate states have their own interests and aim to maximize their benefits at the expense of other states' policies.

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[76] Cf. B. Currie, *Selected Essays on the Conflict of Law* (Durham, 1963), at p. 64.

[77] Symeonides, *supra* footnote 8, para. 179; see also *Kilberg* v. *Northeast Airlines, Inc.*, 9 NY 2d 34 (1961), or *Loucks* v. *Standard Oil*, 224 NY 99 (1918).

[78] Currie, *supra* footnote 76 which contains most of the relevant articles.

Currie had serious concerns about the method used to handle choice of law problems. He also disapproved of the specific choice of law rules embodied in the First Restatement and argued that they "have not worked and cannot be made to work"[79]. His criticism was not particularly targeting the territoriality-pronged structure of the First Restatement, but extended to the choice of law rules in general. In particular, choice of law rules not only created false problems that did not exist before, they also nullified states' interests. He argued that the application of such rules struck down such policy considerations as certainty and predictability[80]. Currie's extreme position could perhaps be best reflected in the quotation where he argued that "we would be better off without choice-of-law rules"[81]. In the opinion of some present-day scholars, this anti-rulist attitude of Currie had been presented as one of the main causes as to why American private international law rejected the route of reform and entered the stage of revolution[82].

The rejection of choice of law rules created a conceptual gap with regard to the determination of the governing law. Currie was aware of the existing lacuna and suggested to fill it by employing the "ordinary process of construction and interpretation"[83]. This method was supposed to be used in order to determine the spatial reach of domestic statutes. Building on the assumption that cases with a foreign element are not that much different from domestic controversies, Currie

[79] See, e.g., B. Currie, "Notes on Methods and Objectives in the Conflict of Laws", 8 *Duke Law Journal* (1959), at p. 174; Currie, *supra* footnote 76, at p. 180.

[80] Currie, "Notes", *supra* footnote 79, at pp. 174-175.

[81] Currie, "Notes", *supra* footnote 79, at p. 177, and Currie, *supra* footnote 76, at p. 183.

[82] Cf. Symeonides, *supra* footnote 8, para. 177.

[83] Currie, *supra* footnote 76, at pp. 183-184.

found it sound to apply the same method of construction and interpretation when determining the spatial and temporal applicability of a certain substantive law rule[84]. In other words, for the purposes of governmental interest analysis, it was not necessary to make a very clear distinction between purely domestic cases and cases with a foreign element. According to Currie, courts refer to foreign laws for a number of reasons, some of which have nothing to do with conflict of laws. For example, disputes about the succession of property located in a third state after the death of a relative.

In Currie's conceptual framework, if one of the parties is requesting the court to apply foreign law, the court will first investigate the underlying state policies and whether it is reasonable for each state to assert interest in the dispute. Once the state policies are identified, the court then has to analyse the relationship between the existing contacts of the dispute with the state policies. Currie identified three possible situations: *(a)* when only one of the states is interested in the application of its laws ("false conflict"); *(b)* when more than one state is interested ("true conflict"); and *(c)* when none of the states are interested in the application of their laws ("unprovided-for" case). Such policy-oriented theory is "sufficiently sophisticated to generate confusion"[85]; many questions arise with regard to the definition of state interests when determining to what degree the state has sufficient interest. Regardless of potential ambiguities, Currie's taxonomy found wide acceptance because it offered a common vocabulary as well as a methodological framework for dealing with multi-state cases.

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[84] Currie, "Notes", *supra* footnote 79, at p. 178.

[85] This approach has been suggested by W. M. Richman, "Diagramming Conflicts: A Graphic Understanding of Interest Analysis", 43 *Ohio State Law Journal* (1982), pp. 317-333.

As for the choice of applicable law, Currie's main argument was that in normal circumstances the court should apply the law of the forum even if a case at hand involves foreign elements[86]. The court should determine whether the forum state has an interest in the application of its law and then, if necessary, ascertain whether a foreign state has an interest in the application of its foreign law. Should the court determine that the forum state has no interest in the application of its law, then the foreign law should be applied. However, if the forum state has an interest, that law should be applied even if it is determined that the foreign state is also interested in the application of its law[87].

(a) *False conflicts*

Currie argued that a court is not only entitled to but also should apply its own law in cross-border disputes. Foreign law should be applied only in exceptional cases when the forum state has no real interest in the application of its own law or when the dispute constitutes a matter which is subject to constitutional limitations. In the case of false conflicts, the law of the sole interested state should be applied. Practically, in most cases the interested state happens to be the forum state. However, if the interested state is a foreign state, then the law of that foreign state would be applied. Currie's proposed approach of applying the forum law in false conflict situations was a significant departure from the traditional system which would have usually sacrificed the interests of the forum state by applying the law of uninterested foreign state[88].

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[86] Currie, "Notes", *supra* footnote 79, at p. 178.

[87] *Ibid*.

[88] See Symeonides, *supra* footnote 8, p. 99, para. 183, and B. Currie, "The Disinterested Third State", 28 *Law and Contemporary Problems* (1963), at pp. 754 *et seq*.

A practical illustration of the so-called "false conflict" situation could be the above-mentioned *Babcock* v. *Jackson* case where all but one connecting factor were located in New York and only the place of injury was in Ontario. A closer look at the facts of the case demonstrate that the underlying policy goal of Ontario's guest statute was to avoid insurance fraud: namely, to pre-empt fraudulent assertion of claims by injured passengers which would be brought in collusion with the driver's claims against insurance companies. However, the goal of the New York statute was to ensure that the victim is compensated for injuries caused due to the fault of the tortfeasor. The graph below helps illustrate the policies of Ontario and New

FIGURE 1: FALSE CONFLICTS IN *BABCOCK* V. *JACKSON*[89]

York. Both arrows in the graph below point to the connecting factors situated in New York; which makes it clear that there is no conflict of underlying state policies. In particular, it is obvious that the interests of

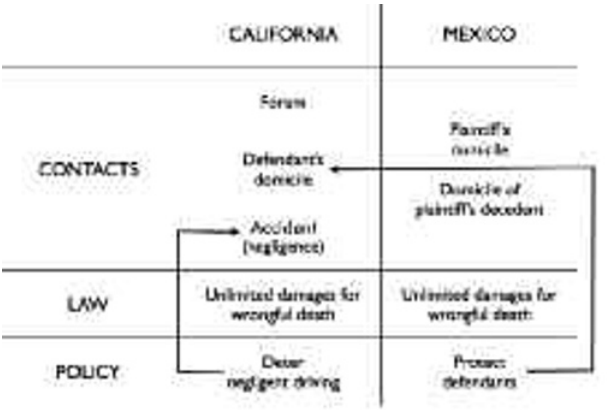
[89] Richman, *supra* footnote 85, at p. 319.

Ontario are not facilitated by the application of its law since the automobiles that were involved in the car accident were garaged and insured not in Ontario, but in New York. Actually, it is New York whose interests are advanced by applying its law. This is so because the objective of New York's statute is to compensate the victim who also happened to be domiciled in New York. In other words, although the underlying policies of Ontario and New York differ, both of them ultimately point to the connecting factors in New York; therefore Currie regarded such a situation as a "false conflict" in which the law of New York would have to be applied.

The case of *Hurtado* v. *Superior Court*[90] is another illustration of false conflicts concerning an action for the compensation for wrongful death. In that case the plaintiff (and plaintiff's decedent) were domiciled in Mexico; but the accident and defendant's domicile were in California. The action with the claim for compensation was also brought before the courts of California. In fact, Mexican law provided for a limitation of $1,946 for wrongful death recoveries; the policy goal of instating such a limitation was to avoid impoverished tortfeasors. On the contrary, Californian law did not provide for any limitations for wrongful death recoveries as their objective was to deter negligent driving. The diagram opposite shows the existence of false conflict: the application of Mexico's law in the *Hurtado* case could not advance governmental interest because the relevant connecting factor points to the territorial contact in California. Conversely, the Californian interest is further bolstered because the relevant contact (the place of accident) was in California[91].

[90] 11 Cal. 3d 574 (1974).
[91] Cf. Richman, *supra* footnote 85, at p. 320.

FIGURE 2. FALSE CONFLICT
IN *HURTADO* V. *SUPERIOR COURT*[92]



(b) *True conflicts*

In the case of "true conflicts", more than one state has an interest in the application of its own law. True conflicts arise because each state has a particular contact that is attached to the underlying policy behind its substantive rule. Following Currie's approach, in a true conflict the court should give preference to the policy or interest of the forum state and apply its own law. In other words, Currie vehemently supported the idea that forum state interests cannot be subjected to the interests of another state[93]. This line of reasoning was based on the assumption that courts neither have constitutional powers nor the ability to weigh colliding governmental interests, and should merely give preference to the forum law[94].

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[92] Cf. Richman, *supra* footnote 85, at p. 320.

[93] See Currie, *supra* footnote 74, at p. 1233, and especially pp. 1237-1238.

[94] Currie, "Notes", *supra* footnote 79, at p. 176.

Lilienthal v. *Kaufman* serves as a telling example[95]. In *Lilienthal*, the defendant was domiciled in Oregon State whose court issued a declaration that the defendant was a spendthrift and therefore had to be placed under guardianship. Despite the court's order, the defendant concluded a loan agreement with a Californian plaintiff. The defendant borrowed some money in order to finance a joint venture. Later the guardian declared the loan contract void and the plaintiff brought an action in Oregon. In its judgment the court noted that two conflicting governmental policies were at the heart of the dispute: while the Californian interest was to facilitate the security of contracts; the interest of Oregon was to protect the family of the spendthrift as well as the state treasury. The "true conflict" between these colliding policies arises due to the fact that there are contacts both in Oregon and California; hence both laws of the states could be poten-

FIGURE 3. TRUE CONFLICT IN *LILIENTHAL* V. *KAUFMAN*[96]

[95] 239 Or. 1, 395 P. 2d 543 (1964).
[96] Cf. Richman, *supra* footnote 85, at p. 321.

tially applied. Yet, in *Lilienthal* v. *Kaufman* the court followed Currie's system and applied the law of the forum.

(c) *"Unprovided-for" cases*

The so-called "unprovided-for" case is a situation where neither state has an interest and where the application of the law of any state would not advance the interest of that state. Such a situation may arise due to the mismatch of state policies and the location of the contacts. Following the reasoning of Currie, forum law has to be applied in disputes where neither of the state's interest could be advanced by the application of that state's law[97]. Forum law has to be applied despite the fact that the forum state has no interest in having its own law applied to the case. This approach has been explained by offering a pragmatic reason, namely, that courts should not trouble themselves by ascertaining foreign law[98].

This "unprovided-for" constellation could be again better explained by an actual case. In *Erwin* v. *Thomas*[99], a man who was domiciled in Washington was injured in Oregon by negligent acts of an Oregon defendant. The victim's wife who was also domiciled in Washington sued the defendant in Oregon seeking compen-

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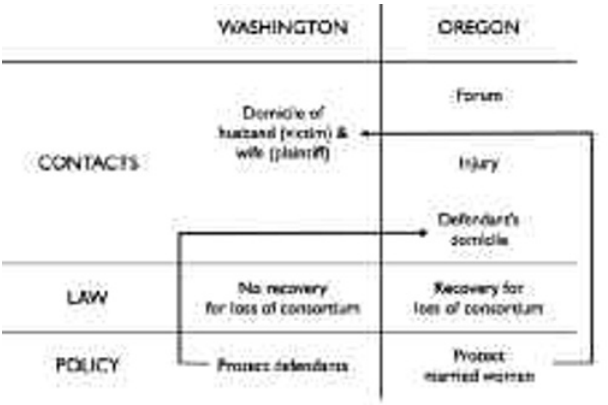
[97] B. Currie, "Survival of Actions: Adjudication versus Automation in the Conflict of Laws", 10 *Stanford Law Review* (1958), pp. 205-252.

[98] Currie, *supra* footnote 76, at pp. 152-156.

[99] 264 Or. (1973) 454. Another notorious case was *Neumaier* v. *Kuehner*, 335 NYS 2d 64 (1972) concerning a car accident in Ontario where neither New York (the place of the car driver's residence) nor Ontario (the place of the victim's residence) were interested in the application of their laws. See Aaron D. Twerski, "Neumeier v. Keuhner: Where Are the Emperor's Clothes?", 1 *Hofstra Law Review* (1973), p. 104, for a critical review.

sation for loss. Pursuant to the law of Oregon, the wife was able to recover damages from a tortfeasor for the loss of consortium; such a claim would have not been successful under the law of Washington. In its decision, the court identified that the underlying objective of the Washington law was to protect defendants, while the policy behind Oregon's law was "solicitude for the rights of married women"[100]. The graph below illustrates that neither of the state's interest would be

FIGURE 4. "UNPROVIDED-FOR" CASES[101]



advanced by the application of their laws respectively. The arrows clearly show that neither Oregon nor Washington has a policy which would be linked to an in-state contact. The application of Oregon's law does not advance its interest because the underlying policy consideration to protect married women leads to the plaintiff who is domiciled in Washington. Similarly, the policy interest of Washington to protect the defen-

[100] 264 Or. (1973), at 458-459.
[101] Cf. Richman, *supra* footnote 85, at p. 323.

dant could be advanced by the application of its law because the defendant had his domicile in Oregon.

2.2.3. Criticism of the interest analysis

The governmental interest analysis epitomized the controversies surrounding the conflict of laws in the federal system. This theory attracted as many supporters as it had opponents. Interestingly, the most spirited resistance came not from the defenders of the conventional *lex loci delicti* approach, but from those who strongly believed that interest analysis is the wrong path[102]. The intensity of the debate surrounding the government interest analysis gained momentum for several decades. Moreover, as it was illustrated above, interest-oriented considerations eclipsed not only academic circles by also permeated into the judicial practice of the US courts[103]. The following sections will dwell on some of the main arguments that were raised by opponents to the government interest analysis.

Conflicts scholars and practitioners who were not fascinated by the interest analysis criticized it from different angles. It was argued that the government interest analysis is intuitive and spontaneous[104] and does not offer any remedy for the disease it was designed to cure[105]. Although it was clear that interest analysis was rooted in the earlier movement against legal formalism and rigid Bealean choice of law rules, the rejection of choice of law rules proposed by Currie

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[102] Cf. G. R. Shreve, *A Conflict of Laws Anthology* (Anderson Publishing, Cincinnati, 1997), p. 85.

[103] See also *Reich* v. *Purcell* 67 Cal. 2d 551 (1967).

[104] P. J. Kozyris, "Interest Analysis Facing Its Critics — And, Incidentally, What Should Be Done about Choice of Law for Products Liability?", 46 *Ohio State Law Journal* (1985), p. 570.

[105] L. Brilmayer, "Interest Analysis and the Myth of Legislative Intent", 78 *Michigan Law Review* (1980), p. 392.

was met with suspicion. The suggestion to replace choice of law rules with broad standards of judicial discretion was opposed for not providing any justification that could explain why it was necessary to depart from established choice of law methodology[106]. The suggestion to replace choice of law rules with the method of statutory construction and interpretation was also on trial. The critics submitted that statutory construction is merely a "slogan"[107]. Furthermore, it was indicated that interest analysis is just one side of the coin: while the First Restatement clearly gave preference to territorial contacts, Currie placed an emphasis on personal laws by conceptualizing governmental interests as being concerned only with the protection of local parties who may be affected by a certain transaction or occurrence[108].

Such a shift in approach was identified as resembling the discussion which had already been espoused by medieval European scholars who were concerned with the dichotomy of territorial and personal statutes.

The difficulties related to the identification of underlying policy considerations of a particular statute or legislative intent become obvious in court practice[109]. It is often the case that a statute does not clearly articulate any policy goal as statutes adopted in democratic societies represent the outcome of the legislative compromise and therefore lack a clear policy[110]. Similarly, courts may face difficulties because state interests have to be determined not on the basis of the submissions of authorized state officials, but on the basis of evidence

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[106] Cf. Kozyris, *supra* footnote 104, p. 576.

[107] Kozyris, *supra* footnote 104, p. 569.

[108] Cf. F. K. Juenger, "Conflict of Laws: A Critique of Interest Analysis", 32 *American Journal of Comparative Law* (1984), at pp. 10-12.

[109] Brilmayer, *supra* footnote 105.

[110] See Juenger, *supra* footnote 108.

presented by the attorneys of private parties, which increases the risk of misinterpretation by the deciding courts[111]. Additional problems may arise due to multiple competing goals that may underlie the statute. For example, tort rules may aim to achieve several objectives of compensation and deterrence. Moreover, such policies may have unequal weight: e.g., policies behind a tort liability rule may be of a lower hierarchy than the policies of the Bill of Rights. Combining policies of different hierarchies as if they were equal was considered another weakness.

Even if the underlying policies could be identified, further problems arise at the stage when the court has to establish whether or not a state has an interest in a particular matter. Many opponents to Currie's approach are of the opinion that the triadic structure of true and false as well as "unprovided-for" conflicts has no relevance outside of the realm of the interest analysis[112]. Examples from court practice were called upon in order to show that proponents of the interest analysis had failed to specify with some precision what kind of relationship between the state and a person is necessary and sufficient to activate state interests in a case[113]. For example, interest analysis had turned a blind eye to the fact that in some cases residents of one state may hold closer emotional and personal ties to another state (e.g., guest workers).

It was also argued that the determination of states' interests is closely associated with three biases: pro-resident, pro-forum and pro-recovery bias[114]. Pro-resident bias arises out of the assumption that only the

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[111] H. G. Maier, "Finding the Trees in Spite of the Metaphorist: The Problem of State Interests in Choice of Law", 56 *Albany Law Review* (1993), at pp. 754-755.

[112] Kozyris, *supra* footnote 104, p. 571.

[113] Juenger, *supra* footnote 108, p. 13.

[114] Brilmayer, *supra* footnote 105.

forum residents can rely upon the compensatory policies envisioned in the forum law[115]. Legal mechanisms such as guest statutes or other substantive law regulations that foresee compensation in tort cases or validation in contract disputes are deemed by the proponents of the interest analysis as applicable only in cases when they would actually benefit forum residents. Furthermore, if the statute embodies several policies, Currie's choice-of-law system assumes that any of those policies may give rise to the interest of the state in a cross-border dispute. This assumption was also criticized as facilitating pro-recovery and pro-forum biases[116]. Some critics even submitted that the application of domestic laws which only favour the residents of the forum is discriminatory and unconstitutional[117]. Opponents of interest analysis questioned whether there is any need to give preferential treatment to plaintiffs at the substantive law level when plaintiffs already have the opportunity to select the jurisdiction for bringing their claims[118].

The proposed approach was criticized for giving such broad effects to forum law. One prominent conflicts scholar defined Currie's approach as fastening "upon the international and inter-state communities . . . a legal order characterised by chaos and retaliation"[119]. Rather than favouring federalism and internationalism, the interest analysis was accused of favouring "con-

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[115] Brilmayer, *supra* footnote 105, at p. 408, and Twerski, *supra* footnote 99, at pp. 106-108.

[116] Brilmayer, *supra* footnote 105, at pp. 397-400.

[117] Kozyris, *supra* footnote 104, pp. 572-574, and J. H. Ely, "Choice of Law and the State's Interests in Protecting Its Own", 23 *William and Mary Law Review* (1981), at p. 173.

[118] Kozyris, *supra* footnote 104, at p. 575.

[119] A. T. von Mehren, "Book Review", 17 *Journal of Legal* Education (1964), at p. 97.

flicts chauvinism" and eliminating any incentives for affirmative co-operation of the states[120].

Defenders of the interest analysis managed to identify the pitfalls of the critique and tried to respond by highlighting some valuable points about the choice of law methodology espoused by the interest analysis. First, it was submitted that the argument about the impossibility of determining the underlying policies of national laws is not valid because national courts have always been interpreting statutes[121]. On the contrary, it was argued that the ability of the courts to understand the underlying policies of foreign states is growing gradually; the same is true for attorneys of parties who are assisted by capable legal teams. Moreover, it was emphasized that the government interest analysis does not oblige courts to apply foreign laws, the purposes of which they do not understand. The simplified approach of construction and interpretation was explained as a pragmatic solution: statutory construction is often apparent from the facts and the applicability and legislative intent are often easily determined from the relevant statutes (e.g., income tax, grounds for divorce, registration and licensing requirements, etc.)[122].

In addition, the defenders of Currie's approach argued that the practical outcome of the First Restatement was a practice of lawyers and courts to use other choice-of-law techniques such as characterization, *depeçage* or public policy to escape from the application of the unfavourable choice of law rule[123]. The interest

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[120] Kozyris, *supra* footnote 104, at p. 575.

[121] R. J. Weintraub, "A Defence of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability", 46 *Ohio State Law Journal* (1985), p. 493.

[122] R. A. Leflar, "Choice of Law Statutes", 44 *Tennessee Law Review* (1977), pp. 955-956.

[123] Cf. R. J. Weintraub, *supra* footnote 121, at p. 500.

analysis aims to mend this abusive practice and puts one of the main escape devices — public policy — to the forefront of the choice-of-law mechanism rather than it being a last-minute consideration[124].

The proponents of the government interest analysis also tried to show how their theory contributes to the predictability of results and the infusion of rationality in the choice of law mechanism[125]. Since the lawmaker could not anticipate whether a given law would apply certain facts, government interest analysis entrusts the courts to identify policies and determine their applicability to a given factual situation[126]. The rationality of the interest analysis was explained not as an aspiration to produce a uniformity of results, but to enable the courts to render sensible judgments in actual cases[127].

With regard to the issue of multi-state justice, the advocates of the interest analysis emphasized that their approach respects the sovereignty of states. Accordingly, a preference for the forum law is not irreconcilable with the ideals of multi-state justice. Actually, the remedies sought by the plaintiffs are generally accepted in fundamental policies behind the substantive laws of most of the states, and are more or less the same (compensation for injury, deterrence of wrongful acts or enforcement of contracts). Hence, the idea of forum law preference is in line with justice considerations[128]. Furthermore, such shared policies should not be disturbed if one State occasionally adopts a different

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[124] Weintraub, *supra* footnote 121, at p. 496.

[125] R. J. Weintraub, *supra* footnote 121, at p. 495; Bruce Posnak, "Choice of Law: Interest Analysis and Its 'New Critics'", 36 *Am. J. Comp. L.* (1988), at pp. 684-685.

[126] B. Posnak, *supra* footnote 125, at p. 685.

[127] *Ibid*., at p. 686.

[128] L. Weinberg, "On Departing from Forum Law", 35 *Mercer Law Review* (1983), at p. 598.

ideology. In any case, it was indicated that traditional choice of law approaches as well as interest analysis in effect lead to the preference for forum law[129]. What really matters is whether court decisions lead to functionally sound results; and if such results are achieved by employing interest analysis, then this demonstrates the validity of the interest approach[130].

2.2.4. Leflar's "better law" approach

Governmental interest analysis was only one of the emerging approaches in the US conflicts revolution scholarship. Many scholars engaged in the ambitious task of trying to identify certain factors that guide courts in determining the governing law. Some leading private international law scholars tried to give workable guidelines for the courts which would help to determine the applicable law. For instance, Cheatham and Reese identified nine policy factors whose effect should be taken into consideration when making a choice of law decision[131]. One of the most outstanding

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[129] R. A. Sedler, "Reflections on Conflict-of-Laws Methodology", 32 *Hastings Law Journal* (1981), p. 1628.

[130] *Ibid*., at p. 1630.

[131] These are (i) the needs of the interstate and international systems; (ii) a court should apply its own local law unless there is a good reason for not doing so; (iii) court should seek to effectuate the purpose of its relevant local law rule in determining a question of choice of law; (iv) certainty, predictability, uniformity of result; (v) protection of justified expectations; (vi) application of the law of the State of dominant interest; (vii) ease in determination of applicable law, convenience of the court; (viii) the fundamental policy underlying the broad local law field involved; and (ix) justice in the individual case. See E. E. Cheatham and W. L. M. Reese, "Choice of the Applicable Law", 52 *Columbia Law Review* (1952), at p. 959; also H. E. Yntema, "The Objectives of Private International Law", 35 *Canadian Bar Review* (1957), at pp. 734-735.

figures in this endeavour was Robert Leflar who was strongly against general conflict of laws methodologies such as *depeçage*, procedure/substance dichotomy or public policy, considering them as gimmicks. Instead, Leflar argued that courts too often try to cover up the real reasons why the law of a specific state is applied. Therefore, he found it necessary to figure out the actual reasons involved in the decision-making process.

Leflar strongly supported the idea that the interests of the states should be carefully considered. He is mostly known for five choice-influencing considerations: (i) predictability of results; (ii) maintenance of interstate and international order; (iii) simplification of judicial task; (iv) advancement of the forum's governmental interests; and (v) application of the better rule of law[132]. These choice-influencing considerations were meant to provide for as practical tools to assess the rightness of choice-of-law rules and decisions[133]. There was no hierarchical order among these considerations and their importance may vary depending on the area of law[134]. Noticing that the approaches proposed by previous writers covered numerous overlapping factors, Leflar tried to reduce the number of choice-influencing considerations to a manageable number. Such a set of choice-influencing considerations was intended to provide a balanced alternative to mechanical choice of law rules of the First Restatement[135].

According to Leflar, some of the main objectives of conflict of laws have been the predictability and uniformity of results. In litigation, the predictability of

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[132] R. A. Leflar, "Choice-Influencing Considerations in Conflicts Law", 41 *New York University Law Review* (1966), at p. 267; and R. A. Leflar, "Choice of Law Statutes", 44 *Tennessee Law Review* (1977), p. 973.

[133] *Ibid*.

[134] *Ibid*.

[135] *Ibid*.

results is that a decision should be the same regardless of where the proceedings take place and that neither of the parties could avail of the forum shopping[136]. Predictability and uniformity of results is especially significant in contractual and property-related matters. Parties entering into a mutually binding transaction should be able to foresee that the reference to a particular set of rules brings them anticipated results[137]. The protection of parties' justified expectations has even broader socio-economic implications which should legitimize parties' anticipation that a transaction is valid[138]. Predictability of results may also be relevant in situations after the tortious act has been committed. The materialization of such objectives in court practice would further broaden social policies of legal certainty as well as maintenance of international order[139].

The second consideration of maintenance of interstate and international order was meant to capture the idea that both states, as well as nations, are keen in promoting the "orderly legal control of transactions" that cross the territorial borders of sovereign states[140]. Free movement of goods and persons are essential to modern civilization and the existence of any federal system. At the same time, even though the interests of private affairs are essential to the economy, they should not interfere with the sovereign interests of the states. In the context of conflict of laws, national courts dealing with particular facts of a given case should not deem domestic law as superior over the law of the state which appears to have a more justified concern over

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[136] R. A. Leflar, "Conflicts Law: More on Choice-Influencing Considerations", 54 *California Law Review* (1966), at p. 1586.
[137] *Ibid*.
[138] *Ibid*., p. 1588.
[139] *Ibid*., p. 1586.
[140] *Ibid*.

the facts[141]. By advancing such line of reasoning, Leflar obviously aspired to offer a refined position towards the interest analysis. Rather, he argued that forum preference should be kept in line with the needs of interstate and international intercourse.

Leflar strongly believed in the need to simplify judicial tasks. Hence, he noted that one of the main aspects of this choice-influencing consideration is the distinction between procedural and substantive law matters. In a cross-border case, the needs of justice can be equally well served if the courts decide cases following their own procedural standards[142]. The choice of substantive law could be facilitated if the courts are provided with easy-to-apply mechanical rules (although such rules may be subject to other choice-influencing considerations). Further, he subscribed to the idea of the advancement of the forum's governmental interests. Courts should normally act in accordance with the policies of their state. The policies may change although the laws from olden days might not represent the current policies of states[143]. Although Leflar gives strong preference to the forum law, this preference was not absolute and left the possibility for the application of the law of other states if strongly pervasive reasons necessitate it[144].

Leflar himself acknowledged that his fifth choice-influencing consideration mandating the application of the better rule of law is the most controversial. Nevertheless, he also argued that it could have great potential because courts are actually aware of the existing conflicts among the rules. Therefore, he argued that it would be imprudent to turn a blind eye to the reality of

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[141] Cf. Leflar, *supra* footnote 136, p. 1586.

[142] Leflar, "Choice of Law Statutes", 44 *Tennessee Law Review* (1977), p. 973.

[143] Leflar, *supra* footnote 136, at p. 1587.

[144] Leflar, *supra* footnote 142, at p. 974.

courts' choice of law practices[145]. Forum preference could be explained by the personal feeling of a judge that the law of his own state is better than the law of the other state. However, Leflar argued that a reasonable judge should not merely try to apply his own law but rather "prefer rules of law which make good socio-economic sense" at the time when the decision is made[146].

In his subsequent works Leflar portrayed how the above-mentioned choice-influencing considerations could affect decisions in various conflict cases even if there are no relevant rules formally applicable to the issue[147]. Arguable, those five considerations could offer pragmatic indications about the way courts reach their decisions. Choice-influencing considerations could be also particularly useful for they identify arguments that may become relevant for coming to majority or dissenting opinions, depending on which values are given more weight[148]. Leflar's ideas had been quite persuasive: the five choice-influencing considerations were applied by various courts in different states[149].

2.2.5. Principles of preference

Another figure who stood out among conflict revolution thinkers was David Cavers. Originally influ-

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[145] Leflar, *supra* footnote 136, at p. 1587.

[146] *Ibid*., at p. 1588.

[147] *Ibid*., pp. 1584-1598, and Leflar, *supra* footnote 142, p. 952.

[148] Leflar, *supra* footnote 136, at p. 1598.

[149] See, e.g., *Milkovich* v. *Saari*, 295 Minn. 155, 203 NW 2d 408 (1973); *Mirchell* v. *Craft*, 211 So. 2d 509 (Miss. 1968); *Clark* v. *Clark*, 107 NH 351, 222 A. 2d (1966); *Woodward* v. *Stewart*, 104 RI 290, 243 A. 2d 917 Cert. denied, 393 US 957 (1968); *Heath* v. *Zellmer*, 35 Wis. 2d 578, 151 NW 2d 664 (1967). See also Thiel, *supra* footnote 37, at p. 294.

enced by the ideas of Walter Cook, Cavers continued to ambush the traditional choice of law approach. In one of his law review articles he attacked the mechanical nature of conflicts methodology by comparing it to a slot machine metaphor; for Cavers, traditional contacts such as place of contract or place of tort in the First Restatement operated merely as a coin, which "when inserted in the doctrinal slot machine, produces the appropriate jurisdiction"[150]. He criticized such a mechanical approach and argued that courts, dealing with a particular case, should not keep their eyes closed to the substance of the chosen law, but rather try "to do justice in the particular case"[151]. In criticizing the principle of territoriality and the vested rights doctrine, Cavers wondered whether they could survive the judicial scrutiny[152]. In one of his essays he rhetorically noted that the "court is not idly choosing a law, it is deciding a controversy. How can it choose wisely without considering how that choice will affect that controversy?"[153] Territorial connecting factors produced collateral effects because they restrain courts and preempt them from making wise decisions.

In order to overcome the territoriality-pronged problems, Cavers argues that instead of choosing states or jurisdictions, courts should rather focus on choosing which of the competing rules to apply. In other words, Cavers called for a careful examination of the content of each of the relevant rules as well as the outcomes produced by pertinent rules. Therefore, the courts should focus not on the blind choice of territorial connecting factors, but seek to do justice to the parties by looking into specific circumstances of the case and

[150] Cavers, *supra* footnote 47, at 178.
[151] David F. Cavers, *The Choice of Law Process* (1965) at p. 121.
[152] Cavers, *supra* footnote 47, at p. 176.
[153] *Ibid*., at p. 189.

consider the competing rules and underlying policies. Distancing himself from the governmental interest analysis, Cavers developed the so-called "principles of preference" that seek to solve choice of law problems[154]. Cavers came up with these "principles" because he did not agree that false conflicts should be solved by routine application of the forum law; moreover, he feared that the application of the law of the place of trial might lead to injustice. Arguably, these principles of preference should lead to just outcomes and should be especially useful when other doctrines such as statutory construction or the case law do not give a clear answer as to how the conflicts case should be resolved. But differently from Leflar, Cavers refused to consider "better law" as one of the principles of preference because is not easy to ascertain and in practice it is quite unlikely that courts will find the law of a sister state better than the forum law. Cavers was opposed to the "better law" criterion because he also deemed it as an "inevitable psychological reaction in marginal cases"[155]. Cavers admitted that his methods favour "territorial bias" and called his approach "neo-territorial"[156]. How-

[154] Cavers came up with seven principles, five of which were designed for torts cases and two for contract cases. For example, the first principle could explain Cavers's reasoning:

> "1. Where the liability laws of the state of injury set a higher standard of conduct or financial protection against injury, than do the laws of the state where the person causing the injury has acted or had his home, the laws of the state of injury should determine the standard and the protection applicable to the case, at least where the person injured was not so related to the person causing injury that the question should be relegated to the law governing their relationship." See Cavers, *supra* footnote 151, at pp. 139 *et seq*.

[155] Cavers, *supra* footnote 151, at pp. 84-87.

[156] *Ibid*., pp. 134 and 139.

ever, the departure from the traditional territorial approach was that his principles of preference were not simply founded on a system of territorial contacts, but looks at the factual circumstances of the case and the presence of the "right".

2.3. The Second Restatement

The remarkable feature of the conflicts revolution in the United States was that it encompassed both academic circles as well as legal practices. Theories and approaches developed in scholarly writings soon found their way to the legal opinions of distinguished justices. This process brought to the light the need to reevaluate the First Restatement. As it soon became clear, the drafting of the Second Restatement was a daunting task. After 17 years of intense deliberations, the Second Restatement was adopted in 1971. The drafters of the Second Restatement tried to reconcile criticisms and new approaches with the emerging court practice. Bealean "contact"-based considerations were subject to scrutiny. In some cases such as *Auten* v. *Auten* and *Babcock* v. *Jackson* discussed above, the courts tried to do away with the requirement to focus on one single connecting factor and sought to establish the place with the "dominant contacts" with the dispute. This approach was known as the "centre of gravity" or "grouping of contacts" and was gaining more acceptance in the court practice, particularly when it was necessary to determine which state bears the "most significant relationship" with the parties and the transaction.

The Second Restatement adopted this more flexible approach requiring the identification of the "most significant relationship". In principle, the Second Restatement requires a court to follow statutory choice of law rules of its own state (§ 6 (1)). However, where there

are no such statutory choice of law rules, in deciding which law governs the matter, the court is required to take into consideration the following factors: *(a)* the needs of the interstate and international systems; *(b)* the relevant policies of the forum; *(c)* the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; *(d)* the protection of justified expectations; *(e)* the basic policies underlying the particular field of law; *(f)* certainty, predictability and uniformity of result; as well as *(g)* ease in the determination and application of the law to be applied (§ 6 (2)). The factors listed in § 6 of the Second Restatement have to be taken into consideration in determining governing law for various specific situations (e.g., in the absence of choice of law by contracting parties, § 188; or rights and liabilities of the parties with respect to tort, § 145).

The "most significant relationship" test adopted in the Second Restatement was described as a "compromise" of the various competing theories[157]. Such an approach was also supported in at least 20 states[158]. At the same time it should be recalled that the Second Restatement did not mean the end of the conflicts revolution in the United States. On the contrary, a number of scholars criticized such a flexible approach of the Second Restatement and urged for a return to more mechanical rules which were better suited to the practical needs of societal situations[159]. Since the adoption of the Second Restatement, the discussion has been continuing with regard to new approaches to deal with

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[157] Thiel, *supra* footnote 37, p. 294.

[158] See Symeonides report for 2000 in *American Journal of International Law* (2001) who also footnotes that there are 13 states that follow the First Restatement.

[159] See, e.g., A. Ehrenzweig, "The Second Conflicts Restatement: A Last Appeal for Its Withdrawal", 113 *University of Pennsylvania Law Review* (1965), p. 1230.

emerging choice of law dilemmas. Some scholars argued for a dramatic retreat to the territoriality-based approaches, while others tried to modify the previous doctrines (e.g., comprehensive interest analysis[160]) or propose more equity-oriented approaches[161]. The conflicts revolution in the United States had a spillover effect with an increasing number of private international law scholars from around the world engaging in the discussion[162].

As the previous overview illustrated, the rigid approaches of the First Restatement provided for much *ex ante* certainty, yet failed to assure that choice of law rules could be compatible with swiftly changing social realities. In order to fine-tune traditional approaches, American courts became more prone to follow ingenious solutions proposed in the conflicts revolution literature. The methodological shift towards choice of law which occurred during the conflicts revolution could be explained as follows. Relatively general conflict rules which aim to provide *ex ante* legal certainty seemingly lost their normative power; instead, it was gradually recognized that much more attention should be given to case-specific considerations. This has been especially emphasized in the works of Cheatham, Reese and Leflar. It became clear that rigid rules do not always provide for optimal solutions and should be accompanied, if not replaced, by more open provisions

[160] L. L. McDougal III, R. L. Felix and R. U. Whitten, *American Conflicts Law* (5th ed., 2001).

[161] See W. Tetley, "A Canadian Looks at American Conflict of Law Theory and Practice, Especially in the Light of the American Legal and Social Systems", 38 *Columbia Journal of Transnational Law* (1999) p. 299; or H. P. Southerland, "Sovereignty, Value Judgments, and Choice of Law", 38 *Brandeis Law Journal* (2000), at p. 451.

[162] See, e.g., R. Michaels, "The New European Choice of Law Revolution", 82 *Tulane Law Review* (2008), pp. 1607-1644.

which would at least enable choice depending on given factual circumstances. The conflicts revolution epitomized by the adoption of the Second Restatement aimed at rectifying the traditional choice of law approaches and fine-tuning them to the dynamically changing needs of the society. The Second Restatement serves as a telling example of the need to seek a balance between competing interests as well as legal certainty and flexibility.

2.4. Economic Analysis of Conflict of Laws

In the US legal scholarship, law and economics had gained momentum more or less at the same time as the US conflicts revolution. The roots of law and economics movement can be traced back to the writings of Jeremy Bentham's (1748-1832) utilitarian ideas. Bentham pushed to the forefront individual and economic freedoms and the notion of greatest happiness ("utility")[163], which were then further elucidated by other scholars in the economic and legal fields. Among the key figures who contributed to the law and economics movement were John Stuart Mill[164], Judge Oliver Wendell Holmes[165], Ronal Coase[166] and Richard Posner[167]. Each of them, and many of their followers, espoused

[163] See J. Bentham, *The Principles of Morals and Legislation* (Clarendon Press, Oxford, 1879).

[164] J. S. Mill, *On Liberty* (Pearson Longman, New York, 2007), and his *Utilitarianism* (Broadview Press, Peterborough, 2011).

[165] He is known for the so-called "prediction theory of law". See his works *The Common Law* (The Lawbook Exchange, New Jersey, 2005), and *The Path of the Law* (Kaplan Publ., New York 2005).

[166] R. Coase, "The Nature of the Firm", 4 *Economica* (1937), pp. 386-405; and his "The Problem of Social Cost", 3 *Journal of Law and Economics* (1960), pp. 1-44.

[167] R. Posner, *Economic Analysis of Law* (Aspen Publishers, New York, 8th ed., 2011).

the virtues of utilitarianism and further investigated how various regulatory measures could influence the behaviour of individuals and increase welfare within society.

For instance, clear delineation of property rights is one of the key preconditions for efficient market transactions and the development of national economies. Both lawyers and economists have been also concerned with the efficient enforcement of property rights. In everyday life there are many instances where individual property rights are infringed. Damage to property, trespass, burglary or nuisance is just a few possible situations where third parties cause harm to others' property. Therefore, it is in the interest of the society that certain means of redress are available. Much law and economics literature investigates possible means to protect property. Most notably, scholars have been discussing about two kinds of rules which would *(a)* help prevent direct damage to the property by means of injunctions and *(b)* order compensation or damages for the loss caused to the property [168].

Another example is a car accident. Damage could be caused not only to colliding vehicles, but also to the drivers and passengers. Hence, in the field of tort law, the main question for lawyers as well as economists has been the identification of the "best" liability rule. The literature is full of theoretical and empirical studies surrounding two main functions of tort law — the compensation for damage and deterrence of risky behaviour [169]. Should the tortfeasor be always liable?

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[168] G. Calabresi and D. A. Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral", 85 *Harvard Law Review* (1972), pp. 1089-1128.

[169] S. Shavell, "Liability for Harm versus Regulation of Safety", 13 *Journal of Legal Studies* (1984), pp. 357-374; W. Landes and R. Posner, *The Economic Structure of Tort Law* (Cambridge, Massachusetts, Harvard University Press, 1987).

Or should the liability and the amount of damages be determined taken into consideration whether the victim acted negligently? The discussion in legal and economic literature also whirled around the question if strict liability rule should be always preferred to negligence rule[170]. The discussion about the choice of between strict liability and negligence rule highlighted some of the peculiar features of regulation and the implications of those rules to the behaviour of the parties. Namely, strict liability provides for a strong incentives for potential tortfeasors to take due care because they would always be held liable regardless of their fault. However, the victims only take due care if the tort law system has contributory negligence provision[171].

Furthermore, law scholars as well as economists who deal with tort law problems are aware of the problem related to the implications of strict liability rule and negligence rule to litigation: negligence rule reduces the likeliness of litigation because before instituting court proceedings the victim will consider possible chance of winning the case. If the likelihood of success is low and litigation costs are high, the victim of a tort may be less inclined to sue.

Much research has been conducted with regard to the regulation of economic activities by legal scientists as well as proponents of the law and economics approach. The most notable areas where there is a close interaction of these two groups of scholars are related to the regulation of competition[172], corporate

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[170] See M. A. Polinsky, *An Introduction to Law and Economics* (Wolters Kluwer, 4th ed., 2011), pp. 43-55.

[171] See *ibid*.

[172] R. A. Posner, *Antitrust Law* (University of Chicago Press, Chicago, 2001); R. H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books, New York, 1978).

law[173], taxation and social welfare. These areas usually have ramifications that effect the interests of various stakeholders. Hence the regulation of economic activities often poses challenging choices and requires solid policy justifications. Due to the nature of such activities, there has been much confluence of legal and economic approaches in regulatory decision-making[174].

Similar considerations in the growing law and economics literature also have permeated the conflicts scholarly debates. Many of the conflicts scholars developed complex approaches concerning the resolution of increasingly diverse types of multi-State disputes. The values of various propositions accentuated by scholars during the conflicts revolution could be well explained by using law and economics terminology. Two aspects will be elaborated in the following sections.

2.4.1. Public and private utilities

One of the main questions raised by law and economics scholars concerns the motives that convince individuals to act in a particular way. Individuals make choices to act in one way or another depending on whether such acts would increase or diminish their personal pleasure or happiness. Law and economics scholars also noted that utility could have several dimensions: utility on an individual and on the community level. Communities usually consist of multiple individuals, most of which have their own personal preferences. Hence, the utility of the whole community is understood as a sum of individual preferences.

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[173] R. Kraakman *et al*. (eds.), *The Anatomy of Corporate Law* (Oxford University Press, Oxford, 2nd ed., 2009).

[174] J. Drexl, W. Kerber, R. Pudszun (eds.), *Competition Policy and the Economic Approach: Foundations and Limitations* (Elgar, Cheltenham, 2011).

In the conflicts revolution debate such a dichotomy of utilities has also been reflected. On one side, some conflicts revolution scholars laid emphasis on the relations between the states in dealing with cross-border controversies. States were deemed as being the only rational actors in the international scene and private international law was considered an extension of public international law[175]. Accordingly, some theories focused on the interests of states and the potential conflicts that may arise between the laws and the underlying policies of particular states. Being rational actors, states aim to enforce their own policies in cross-border situations, and in order to do that states try to shape choice of law rules in a way that would maximize their own interests.

Already present in the early writings of Joseph Story, the application of foreign law was considered inadmissible when it runs counter to the sovereign interests of the forum state[176]. Currie's governmental interest analysis serves as a perfect example of an attempt to give preference to the sovereign interests. Similarly, proponents of the comparative impairment approach would argue for the application of the law of the state whose interests would be more affected if its law was not applied. One of the possible justifications for focusing on the interests and policies of states, when determining the governing law, is that states are better placed to determine the sum of domestic utilities (i.e., values and policies) which have to be preserved and enforced.

On the other side, some authors in the conflicts revolution scholarship have identified the need to take into

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[175] A. O. Sykes, "The Economics of Public International Law", *Chicago John. M. Olin Law and Economics Working Paper No. 215* (2004), available at: law.uchicago.edu/files/files/216-aos-handbook.pdf.

[176] See, e.g., Story, *supra* footnote 7, §36 where he refers to the "mutual utilities" of States.

consideration the interests of private stakeholders. Private actors (natural persons and legal entities) also seek to increase their utilities by entering into transactions which are more advantageous. Some choice of law rules and principles had been subject to criticism because of their failure to adequately take into consideration the interests of private individuals. Rigid territoriality-based approaches embodied in the First Restatement, as time had shown, sometimes failed to accommodate the interests of private actors and case-by-case justice. Rather than focusing on the interests of states, choice of law rules should be drafted in a way so as to provide private individuals optimal incentives to maximize their utilities [177].

Gradual awareness of the multiple layers of utilities of states and private individuals prompted the discussion on the functions or objectives of choice of law methodology. In the conflicts literature, discussions concerning the utilities of states and private individuals in choosing the governing law took various new shapes. When Joseph Beale was preparing the first Restatement, nation States mainly dominated and there were relatively few cross-border controversies. It soon became clear that the choice of law process involves a consideration of multiple interests. Among the finest illustrations of this could be Cheatham and Reese's nine policy factors that affect choice of law or Leflar's choice-influencing considerations.

A closer look at the practice of the US courts also reveals the gradual acknowledgment of the need to reconcile different interests of various stakeholders. In some cases courts tried to refrain from tying their own

[177] R. Michaels, "Two Economists, Three Opinions? Economic Models for Private International Law — Cross-Border Torts as Example", in Basedow and Kono, *supra* footnote 2, p. 149.

law to any specific choice of law doctrine, but instead sought to adopt a functional approach that responded to the interests of the parties, states involved as well as the interstate system as a whole[178]. In the terminology of law and economics, such a consideration of all utilities is often described as globalwelfare[179].

2.4.2. Legal certainty or flexibility: rule versus standard

As mentioned previously, the scholarly conflict of laws discussions regarding the underlying goals of choice of law aimed to reconcile such normative objectives as predictability and uniformity of results with conflicts justice in case-by-case situations. In the law and economics literature, a debate emerged over the choice between legal certainty and flexibility[180]. Economists started to analyse in what circumstances individual/social utilities could be facilitated by adopting a flexible standard or fixed rules. If the aim of the lawmaker is to establish a clearly prescribed regulatory framework, then the preference should be given to *rules*. Rules provide for legal certainty, which means that both regulator and those to whom the rules are addressed know in advance *(ex ante)* what behaviour is permissible and what is tantamount to a breach of law. The simplest example of such a rule is a traffic requirement not to exceed an 80 km/h speed limit. In such a case, it is clear *ex ante* that driving faster than 80 km/h is illegal. However, if the lawmaker aims to provide for a more flexible regulatory framework, then the prefer-

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[178] See, e.g., *Bushkin Assoc. Inc.* v. *Raytheon Co.*, 393 Mass. 622, 643 (1985).

[179] K. Kagami, "The Systematic Choice of Legal Rules for Private International Law: An Economic Approach", in Basedow and Kono, *supra* footnote 2, pp. 15-31.

[180] See, e.g., L. Kaplow, "Rules vs. Standards: An Economic Analysis", 42 *Duke Law Journal* (1992), pp. 557-629.

ence should be given to standards. In the case of *standards*, the regulation does not explicitly constrain the behaviour of individual actors. In our speed limit example, an open standard would require one to choose a reasonable and prudent speed. Differently from rules, standards leave it open for individual actors to choose the most optimal behaviour depending on the given circumstances at hand.

The ramifications of rules and standards could also be seen when it comes to law enforcement. A rule positing an 80 km/h speed limit is relatively easy to apply: any driver who exceeds 80 km/h infringes the law. Yet, the situation is rather different when it comes to the application of standards. Consider a case where a fatal accident is caused by a driver who was driving a car at a speed of 150 km/h, but the law required drivers to choose a "reasonable speed". In such a case, it will be up to the parties (driver and victim) to prove whether a speed of 150 km/h is deemed reasonable and whether the victim did not contribute to the occurrence of the accident (especially, if the accident was caused by negligence of the victim).

Rules provide *ex ante* legal certainty and are easy to apply. On the contrary, the application of a standard will require a more thorough examination of the particular circumstances of a given case.

Similar issues had been at the centre of debates among conflicts revolution scholars. The proponents of states' interests have to deal with "muddy entitlements" of regulatory and adjudicatory powers[181]. Since states are sovereign, each of them possesses ultimate powers within their own territorial domains. Hence, states prefer certain *rules* which clearly prescribe the rights

[181] See J. P. Trachtman, "Economic Analysis of Prescriptive Jurisdiction", 42 *Virginia Journal of International Law* (2001), at p. 45.

and duties of the citizen and designate the governing law. Such clear-cut choice of law rules were favoured by proponents of the vested rights theory and were later enshrined in the First Restatement: contracts had to be governed by the law of the state where the contract is concluded *(lex loci contractus)* and the law of the place of injury was applied for torts. Such a clear allocation of sovereign interests justifies the desire to have *ex ante* certainty with regard to the limitations of a state's jurisdiction. The reference to the law of the place of injury allows the state to maximize its utilities by applying its own law[182]. It could also explain why the First Restatement does not give private parties any freedom to designate the law which governs their contract.

On the other hand, every day people enter into various forms of legal transactions: people cross state borders, conclude contracts, get married or may suffer in accidents while being abroad. It is virtually impossible for the lawmaker to provide a comprehensive legal framework which would cover all possible situations. Accordingly, standards often appear in legal statutes. Focusing on the interests of private actors justifies why flexible choice of law *standards*, such as the "most significant relationship" test in the Second Restatement, are viewed as being more apt in dealing with case-specific situations[183,184].

2.4.3. Criticism of economic analysis and emergence of pragmatic approaches

Over last few decades there has been a proliferation of law and economics scholarship focusing on specific issues of conflict of laws. Among the general themes,

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[182] Michaels, *supra* footnote 177, pp. 168-169.
[183] *Ibid*., pp. 168-169.
[184] Restatement (Second) of Conflict of Laws (1971), pp. 7-9.

scholars focused on the efficiency considerations related to the application of laws[185]. In particular, the economics of choice debate tried to identify the costs and benefits associated with the application of forum law versus that of foreign law[186]. In this context, there is much debate surrounding the economic justifications of the principle of party autonomy and its limits[187]. Some research has been conducted on the efficiency of choice of law rules in particular fields of law (contracts[188], torts[189], consumer contracts[190], etc.) as well as regulatory competition between various States[191]. Some attention was devoted to the comparative analysis of the economics of the uniform law process[192].

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[185] M. E. Solimine, "The Law and Economics of Conflict of Laws", 4 *American Law and Economics Review* (2002), pp. 208-226.

[186] See, e.g., Thiel, *supra* footnote 37, E. O'Hara and L. Ribstein, "Conflict of Laws and Choice of Law", available at: papers.ssrn.com/sol3/papers.cfm?abstract_id=1499311.

[187] L. Kramer, "Rethinking Choice of Law", 90 *Columbia Law Review* (1990), pp. 277-345; A. T. Guzman, "Choice of Law: New Foundations", 90 *Georgetown Law Journal* (2002), pp. 883-940; E. O'Hara and L. Ribstein, "From Politics to Efficiency in Choice of Law", 67 *University of Chicago Law Review* (2000), pp. 1151-1232.

[188] See, e.g., G. Rühl, *Statut und Effizienz* (Mohr Siebeck, Tübingen, 2011), pp. 425-543.

[189] See, e.g., M. Whincop and M. Keyes, "The Market Tort in Private International Law" (1999); B. L. Hay, "Conflicts of Law and State Competition in the Product Liability System" (1992); Michaels, *supra* footnote 177.

[190] G. Rühl, "Consumer Protection and Choice of Law", 44 *Cornell International Law Journal* (2011), pp. 570-601, and Rühl, *supra* footnote 188, pp. 543-590.

[191] A. Guzman, "Public Choice and International Regulatory Competition" (2002); E.-M. Kieninger, *Wettbewerb der Privatrechtsordnungen im europäischen Binnenmarkt* (Mohr Siebeck, Tübingen, 2002).

[192] L. Kramer, "On the Need for a Uniform Choice of Law Code", 89 *Michigan Law Review* (1991), pp. 2134-

This said, there are a number of aspects of the conflicts of laws that are still underexplored, especially considering the status quo of law and economics literature concerned with other branches of law.

Interdisciplinary perspective undoubtedly broadens the understanding of legal issues. However, there has been also notable resistance in legal scholarship to broaden the perspective and embrace the efficiency perspective. In so far as choice of law matters are concerned, a number of arguments against economic perspective could be identified. First, it is often submitted that economic abstractions do not help in solving specific private international law problems. The economic approach is usually based on "oversimplified" solutions that do not reflect the complex reality[193]. More generally, it has been argued that there is even a discrepancy among current law and economics approaches that aim to address conflict of laws issues[194]. In trying to illustrate the point, some authors referred to the fact that focusing on different stakeholders presupposes conflicting normative objectives and leads to different outcomes[195]. Secondly, it has been also argued that the notion of efficiency — which is at the heart of the costs and benefits perspective — has multiple meanings and therefore is intrinsically ambiguous[196]. The application of the efficiency cri-

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2149; J. Linarelli, "The Economics of Uniform Laws and Uniform Lawmaking", 48 *Wayne Law Review* (2003), pp. 1387-1447; J. Wool, "Economic Analysis and Harmonised Modernisation of Private Law", *Uniform Law Review* (2003), pp. 389-394; O'Hara and Ribstein, *supra* footnote 186; S. Kozuka, "The Economic Implications of Uniformity in Law", in Basedow and Kono, *supra* footnote 2, pp. 73 -84.

[193] Michaels, *supra* footnote 177.

[194] *Ibid*., p. 145.

[195] *Ibid*., at pp. 145-146.

[196] *Ibid*., at p. 147.

terion could be criticized by taking into consideration the fact that there is no alternative mechanism on an international law level which would provide for tools to re-allocate wealth (e.g., such as taxes or subsidies on a domestic law level). The efficiency criterion offers little help in making a choice between difficult policy questions; it can only suggest which economic model applies and therefore is inconclusive[197]. Hence, it has been suggested that the law and economics perspective is just a refined comparative law method and is too abstract to provide any guidance for lawyers[198].

As with every methodology, law and economics has also shortcomings and limitations. Nevertheless, some of above-mentioned criticisms do not necessarily undermine the added value of the efficiency perspective to conflict of laws. It should be noted that the efficiency perspective does lend itself as a "one-size-fits-all" approach; instead, it provides for a distinctive normative framework to identify and analyse legal issues which otherwise would remain a "black box". Critics of the economic approach which uses assumptions to build hypothetical models tend to ignore the fact that abstract provisions often appear in legal statutes. Moreover, simplified models which are applied in law and economics literature are not necessarily unrealistic. On the contrary, various levels of simplification and abstraction are necessary depending on the specific purposes (e.g., large- and small-scale maps could be used in different occasions). By placing emphasis on the utilities of various stakeholders, timing and information asymmetry, economic analysis enables us to have a different perspective from what

[197] Michaels, *supra* footnote 177, at p. 183.

[198] R. Michaels, "The Second Wave of Comparative Law and Economics?", 59 *University of Toronto Law Journal* (2009), p. 158.

could be considered optimal regulation. The following chapters will show the value of the efficiency perspective not only in fostering the debate with regard to the uniformity of laws but also in actual lawmaking activities on an international level.

CHAPTER III

UNIFORM LAW AND PRIVATE INTERNATIONAL LAW — IS UNIFORM LAW MORE DESIRABLE THAN PRIVATE INTERNATIONAL LAW?

3.1. Critical Analysis of the Conventional Arguments

The United Nations Commission on International Trade Law (hereinafter UNCITRAL) describes the significance of uniform law, referring to its successful project, the Convention for International Sales of Goods (hereinafter the CISG), as follows:

> "The adoption of the CISG provides modern, uniform legislation for the international sale of goods that would apply whenever contracts for the sale of goods are concluded between parties with a place of business in Contracting States. In these cases, the CISG would apply directly, *avoiding recourse to rules of private international law* to determine the law applicable to the contract, *adding significantly to the certainty and predictability* of international sales contracts." (Emphasis added.)

This statement shows UNCITRAL's view that avoiding the mechanism of private international law raises the certainty and predictability of contracts. Dogauchi shares the same stance and states that uniform law is the best option, and that private international law is the second best[199]. Such an argument that uniform law is categorically more desirable than pri-

[199] T. Sawaki and M. Dogauchi, *Kokusai Shihō Nyūmon (Introduction to Private International Law)* (Yūhikaku, Tokyo, 7th ed., 2012), pp. 2 and 5.

vate international law posits that the space for private international law in cross-border private disputes would shrink if uniform law were to develop and expand[200]. Even if some authors may have reservations in adopting such a conclusion, they do not always make it clear how the relationship between uniform law and private international law should be understood[201].

UNCITRAL's above statement raises a number of questions regarding this traditional viewpoint. For example, for whom would a contract become more certain and predictable? What is the timing for judging certainty and predictability? What are the criteria for making such a judgment? However, the more fundamental questions are whether and how certainty and predictability as mentioned in UNCITRAL's statement could be justified from an economic vantage point.

In this regard, a document prepared by the European Commission in 2001, *Communication from the Commission to the Council and the European Parliament on European Contract Law*[202] (hereinafter the 2001 Communication) provides useful insights and outlines some background considerations on the necessity of uniform law. The 2001 Communication points out that as a result of divergences in contract law between Member States disparate national law rules may lead to higher transaction costs, especially information and possible litigation costs for enterprises in general and

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[200] E. von Caemmerer, "Rechtsvergleichung und Internationales Privatrecht", in E. von Caemmerer, H.-J. Schlochauer and E. Steindorff (eds.), *Probleme des europäischen Rechts: Festschrift Hallstein* (Klostermann, Frankfurt am Main, 1966), at p. 69.

[201] For example, C. von Bar and P. Mankowski, *Internationales Privatrecht* (Beck, Munich, 2003), Vol. 1, p. 50, state only "Unabhängig davon, ob diese Ansicht zutrifft oder nicht" (irrespective of whether this view is true or not), without clarifying their own view.

[202] COM (2001) 398 final.

small and medium-sized enterprises and consumers in particular[203]. Moreover, it can be deemed a competitive disadvantage for a foreign supplier[204].

The 2001 Communication sees divergences between contract laws of Member States as the source of problems and proposes a regional uniform law (new "comprehensive legislation at European level") as one possible solution[205]. If divergence is taken as the cause of the problem, and hence viewed negatively as the 2001 Communication seems to do, a focus would inevitably be placed on the costs aspect. If the costs are high, the reduction of divergences by unifying private laws on regional and international levels would be desirable. Thus uniform law should be categorically preferred.

This logic must be also the basis of the aforementioned statement by UNCITRAL. Hence certainty and predictability as rationale of categorical preference of uniform law, as noted in the statement, are justified by their consideration for the costs aspects. If such a consideration for costs aspects is indeed valid, private international law in many countries would have been replaced by uniform laws in various fields of law, and the number of uniform laws would have increased.

However, as the following tables show, among the twenty-four Conventions adopted by UNCITRAL and the International Institute for Unification of Private Law (UNIDROIT), only four Conventions have more than 50 Member States. Fifteen Conventions have only single-digit (even zero) Member States.

If the criterion to measure the success of a Convention is deemed to be the number of participating Member States, it would appear most of these Conventions have been unsuccessful.

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[203] COM (2001) 398 final, para. 31.
[204] *Ibid*., para. 32.
[205] *Ibid*., para. 46.

TABLE 1. UNIDROIT INSTRUMENTS AND THEIR CURRENT STATUS AS OF 1 MAY 2013

Year	*Conventions*	*Number of MS*	*Entry in Force*
1964	Convention relating to a Uniform Law on the International Sale of Goods	4	yes
1964	Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods	4	yes
1970	International Convention on Travel Contracts	7	yes
1973	Convention providing a Uniform Law on the Form of an International Will	12	yes
1983	Convention on Agency in the International Sale of Goods	5	no
1988	UNIDROIT Convention on International Leasing	10	yes
1988	UNIDROIT Convention on International Factoring	7	yes
1995	UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects	33	yes
2001	Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment	51	yes
2001	Convention on International Interests in Mobile Equipment (the Cape Town Convention)	57	yes
2007	Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock	1	no
2009	UNIDROIT Convention on Substantive Rules for Intermediated Securities	0	no
2012	UNIDROIT Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets	0	no

TABLE 2. UNCITRAL INSTRUMENTS AND THEIR CURRENT STATUS AS OF 1 MAY 2013

Year	*Conventions*	*Number of MS*	*Entry in Force*
1958	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)	149	yes
1974	Convention on the Limitation Period in the International Sale of Goods	22 (as amended by the Protocol of 11 April 1980)	
		29 (not amended)	yes
1978	UN Convention on the Carriage of Goods by Sea (the Hamburg Rules)	34	yes
1980	Amending Protocol of the 1974 Convention	22 (see above)	yes
1980	UN Convention on Contracts for the International Sales of Goods (the CISG)	79	yes
1988	UN Convention on International Bills of Exchange and International Promissory Notes	5	no
1991	UN Convention on the Liability of Operators of Transport Terminals in International Trade	4	no
1995	UN Convention on Independent Guarantees and Stand-by Letters of Credit	8	yes
2001	UN Convention on the Assignment of Receivables in International Trade	1	no
2005	UN Convention on the Use of Electronic Communications in International Contracts	3	no
2008	UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules)	2	no

These considerations clarify that the argument on costs aspects (certainty and predictability) alone cannot explain why uniform law should categorically be preferred to private international law. Recently, a group of Japanese scholars examined 170 uniform laws in the field of private law. They have expressed their view that the scope of the traditional understanding, i.e. divergence of contents of laws on the State level would hamper smooth development of international trade, so that the removal of such divergence by unifying law is crucial, must be revisited[206]. In my opinion, their view contains good empirical evidence to justify our analysis.

Furthermore, the argument on costs aspects in the conventional argument, such as the above-cited statement by UNCITRAL, is too simplistic and does not elaborate on the costs aspect.

In addition, the conventional argument did not pay enough attention to the possible benefits that divergences of law might bring about. This chapter categorizes uniform law as a "one-size-fits-all" model. It then argues that uniform law as a one-size-fits-all model does not have the benefits that private international law can realize through the diverse options of law, and that uniform law should not be taken as categorically more beneficial than private international law. A number of academic works on uniform law[207] and private inter-

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[206] H. Sono *et al*., *Shihō Tōitsu no Genjō to Kadai (The Current State and Issues of Unification of Law)*, (2013), pp. 1-97, its preface.

[207] See, for example, P. B. Stephan, "The Futility of Unification and Harmonization in International Commercial Law", 39 *Virginia Journal of International Law* (1999), pp. 743-797; Linarelli, *supra* footnote 192; L. E. Ribstein, "An Analysis of the Revised Uniform Limited Liability Company Act", 3 *Virginia Law and Business Review* (2008), pp. 35-80; J. Basedow, "Actors: The State's Private Law and the Economy — Commercial

national law[208] from an economic viewpoint have recently been published, but almost no work has presented the argument on the benefits of having choices[209].

As indicated above, the aspect of costs analysis of the conventional argument needs more elaboration. This must be done especially by differentiating creation and maintenance of institution. This is because related parties, their interests and the subject matters

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Law as an Amalgam of Public and Private Rule-Making", 56 *American Journal of Comparative Law* (2008), pp. 703-721; D. Snyder, "Actors: Contract Regulation, with and without the State: Ruminations on Rules and Sources. A Comment on Jürgen Basedow", 56 *American Journal of Comparative Law* (2008), pp. 723-742; B. H. Kobayashi and L. E. Ribstein, "The Non-Uniformity of Uniform Laws", 35 *Journal of Corporation Law* (2009), pp. 327-361; J. F. Coyle, "Rethinking the Commercial Law Treaty", 45 *Georgia Law Review* (2011), pp. 343-407; J. Wool, "Economic Analysis and Harmonised Modernisation of Private Law", 1 *Uniform Law Review* (2003), pp. 389-394.

[208] See, for example, M. J. Whincop and M. Keyes, "Toward an Economic Theory of Private International Law", 25 *Australian Journal of Legal Philosophy* (2000), pp. 1-35; O'Hara and Ribstein, "From Politics to Efficiency in Choice of Law", *supra* footnote 187; H.-B. Schäfer and K. Lantermann, "Choice of Law from an Economic Perspective", in Basedow and Kono, *supra* footnote 2, pp. 87-119; G. Rühl, "Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency", in E. Gottschalk, R. Michaels, G. Rühl and J. von Hein (eds.), *Conflict of Laws in a Globalized World* (2007), pp. 153-183.

[209] T. Kono and K. Kagami, "Is Uniform Law Always Preferable to Private International Law? A Critical Review of the Conventional Debate on Uniform Law and Private International Law from the Viewpoint of Economic Analysis", 56 *Japanese Yearbook of International Law* (2014), pp. 314-337, seems to be the first work which stresses this aspect. This chapter further elaborates on the analysis of this co-authored article.

that they have to deal with are different in their creation aspect and maintenance aspect.

From the viewpoint of the creation of uniform law, the following questions could be raised: who unifies the law; how unification should take place; who would take part in the unification process; what field of law and what subject should be dealt with in a uniform law; how long should the unified law be sustained; what types of costs and benefits issues emerge?

On the other hand, from the viewpoint of maintenance, another group of questions could be raised such as: who uses the unified law; who would be influenced by using uniform law; what types of costs and benefits issues emerge out of maintenance-related activities? An example of the maintenance aspect can be found under the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (hereinafter the "1924 Convention"). Under this Convention, each Member State could stipulate in its domestic law the unit for calculating the upper limit of a shipper's liability in their own currency. In Japan, for instance, it was 100,000 yen versus 100 pounds Sterling in the United Kingdom. The Kobe District Court[210] applied the upper limit of liability of the UK law in a judgment. Based on the exchange rate at that time, it was lower than that under Japanese law. Such non-uniformity in the framework of uniform law existed in practice until the Protocol amending the 1924 Convention was adopted in 1979[211]. This case illustrates the maintenance aspect of a uniform law, but not the creation.

The certainty and predictability brought about by

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[210] Kobe District Court, Judgment, 14 April 1970, *Hanrei Taimuzu* (288) 283 [1973].

[211] Art. II (2) of this Protocol provides that the unit shall be the Special Drawing Right as defined by the IMF.

the removal of divergence of laws, the ostensibly relative advantage of uniform law, is primarily concerned with the costs of the maintenance aspect. The conventional argument admits that the creation of uniform law raises transaction costs. Costs mean not only more expenditure, but also more time, effort, and anxiety to be expended[212]. But the costs for maintenance — such as the cost to foresee the applicable law, to deal with irregularities in implementation, to enforce uniform law, to maintain uniformity — seem to be *presumed* less than that of private international law.

However, as Table 2 above shows, in terms of the 1974 Convention on the Limitation Period in the International Sale of Goods and its 1980 Protocol, Member States were divided into two groups. Twenty-two member countries adopted the 1980 Protocol, while 29 countries are still under the 1974 Convention. As this example shows, even if a uniform law is created, maintaining the uniformity of the regime can be difficult and costly[213]. Hence a simple presumption that the costs of uniform law on the maintenance aspect are less than that of private international law is not well grounded.

To the extent that the conventional argument is based on such an unfounded presumption, we should compare uniform law and private international law in terms of the maintenance aspect of institutions. In order to do so, we presume that the costs for creating

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[212] The costs for creation could be so large, that the costs of the lack of unification may be less in a commercial trade situation. See Kozuka, *supra* footnote 192, at p. 76.

[213] See T. Fujita, "Kaiji Kokusai Shihō no Shōrai" (A Future of Maritime Private International Law), *Kokusai Shihō Nenpō (Yearbook on Private International Law)*, Vol. 2 (2000), at p. 181. Also see, Kozuka, *supra* footnote 192, at p. 78.

uniform law and private international law are zero, i.e. we presume that the most appropriate uniform law and private international law are created. These presumptions enable us to compare exactly the costs and benefits of uniform law and private international law solely on the aspect of maintenance[214].

This issue has not been well analysed thus far because most of the preceding works on the economic analysis of uniform law have focused on the creation aspect of uniform law. For example, Kobayashi and Ribstein drew attention to the creation process of uniform law (as "hard law"), applying public choice theory to the law-making process of uniform law[215]. According to them, uniform law is produced through negotiations of various stakeholders who pursue only their own interests. Under such circumstances, when agency costs are very high, no desirable uniform law could be created[216].

The certainty and predictability that the conventional argument stresses as relative advantages of uniform law would be improved, when the law to be applied has a clear scope of application, detailed requirements and effects. This type of law, with a high degree of strict normative character, could be characterized as "rule"-based as opposed to a "standard" with a lower degree of such character[217]. The conventional argument seems to presume that uniform law generally has the features of a "rule". In reality, however, there

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[214] Sono *et al*, *supra* footnote 206, p. 77, shares a similar view.

[215] Kobayashi and Ribstein, *supra* footnote 207, p. 359.

[216] *Ibid*., p. 7. The National Conference of Commissioners on Uniform State Laws (NCCUSL) has failed to pursue a uniformity-maximizing strategy, since NCCUSL drafting committees attract participants who have their own agenda separate from the uniformity-maximizing goals of the organization.

[217] See L. Kaplow, *supra* footnote 180.

are many uniform laws that can be categorized as "standards". For example, most of the recent works of UNCITRAL belong to the category of "standards", such as model laws[218], recommendations[219], and guides[220]. These "standards" are not binding instru-

[218] For example, Model Law on International Commercial Conciliation (2002); Model Law on International Commercial Arbitration (1985, amended in 2006); Model Law on Cross-Border Insolvency (1997); Model Law on Cross-Border Insolvency: The Judicial Perspective (2011); Model Law on International Credit Transfers (1992); Model Law on Electronic Commerce with Guide to Enactment (1996) with additional Article 5*bis* as adopted in 1998; Model Law on Electronic Signatures with Guide to Enactment (2001); Model Law on Procurement of Goods and Construction (1993); Model Law on Procurement of Goods, Construction and Services (1994); Model Law on Public Procurement (2011).

[219] For example, Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules (1982); Recommendation regarding the interpretation of Article II (2), and Article VII (1), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2006); Recommendation to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules (as revised in 2010) (2012); Recommendation on the Legal Value of Computer Records (1985).

[220] For example, Legal Guide on International Countertrade Transactions (1992); Legislative Guide on Secured Transactions (2007); Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property (2010); Legislative Guide on Insolvency Law (2004); Practice Guide on Cross-Border Insolvency Cooperation (2009); Legislative Guide on Insolvency, Part Three: Treatment of enterprise groups in insolvency (2010); Legislative Guide on Drawing Up International Contracts for the Construction of Industrial Works (1987); Legislative Guide on Privately Financed Infrastructure Projects (2000); Guide to Enactment of the UNCITRAL Model Law on Public Procurement (2012).

ments, so that each State has the liberty to design its own laws. As a result, there would be a certain degree of divergence among laws even under a uniform law. Thus, in reality, the advantageousness of certainty and predictability of uniform law would be undermined.

Besides certainty and predictability, some authors see advantages in other aspects of uniform law. For example, since the content of uniform law must be acceptable for many stakeholders who take part in negotiations, the fact that uniform law might eliminate "extreme" contents could be seen as an advantage[221]. However, private international law usually has a tool (public policy) to exclude the application of "extreme" foreign law. Applying this tool is much less costly than creating a uniform law. Therefore reducing the risk of exposure to foreign contents cannot be seen as an advantage of uniform law.

Another argument made is that uniform law is designed for international transactions, while national laws are made for domestic use only, therefore uniform law contains more suitable provisions for international transactions. However, the creation process of uniform law can be easily biased due to the diverse interests and strategic behaviour of various stakeholders, and as such no one could guarantee that uniform law always contains desirable norms[222]. In addition, such an argument could be criticized from the viewpoint of costs, that if a State integrates the uniform law into its domestic law, the State could amend and improve it with much fewer costs than amending the uniform law. Such legislation could be as equally good as a uniform law or even better than the uniform law which could hardly be amended. Hence, it is difficult to conclude

[221] Kozuka, *supra* footnote 192, pp. 80-82.
[222] See Kobayashi and Ribstein, *supra* footnote 207.

that uniform law is generally a better law than laws chosen by private international law.

The analysis so far clarifies that the conventional argument, such as the statement by UNCITRAL, categorically premises a *perfect* uniform law, disregarding the distinctions between the creation and the maintenance aspects of uniform law as well as between "rule" and "standard", and compares it with an *imperfect* private international law in the real world. Needless to say, the result of such a comparative analysis would be imprecise. In this article, we premise therefore a perfect uniform law and a perfect private international law in order to clearly and exactly identify the pros and cons of uniform law and private international law. In order to do so two things have to be clarified: one is the nature of decision-making body and the other is the static and dynamic views.

Law and its functions are inseparably linked to its decision-making authority. Decision-making authority here is defined as an authority which makes, applies and/or enforces rules in order to change the state or acts of other parties to reach certain social goals. Theoretically these three powers (making, applying and enforcing law) could be vested in one authority. In the modern world the concentration of these three powers in one authority is excluded and each function is usually allocated to a different authority. Each power can be further allocated to not only one, but more authorities. For example, one authority monopolizes the power for making law, but the power to apply law could be allocated to multiple bodies. Even if one of the powers is allocated to multiple bodies, these multiple bodies can co-operate and co-ordinate to exercise their divided powers unitarily or act independently, and therefore be dispersed. The important point here is not the singleness of authority, but its functional uniformity. Thus even if there are several bodies, as far as

they have functional uniformity through coordination, we shall call them a unitary authority.

The preceding literature on uniform law and private international law have not paid sufficient attention to this nature of authority, i.e. unitary or dispersed. But we should reflect on this aspect in the comparative analysis of uniform law and private international law so that we can differentiate variables that arise from differences of authorities and those from divergence of laws.

For this purpose, we will presume that the decision-making authority for both uniform law and private international law is always unitary throughout the three stages (making, applying and enforcing law). This will allow us to focus on the differences between uniform law and private international law without having to consider possible differences in decision-making bodies.

This presumption is based upon the following consideration: courts in each State usually apply and enforce both uniform law and private international law without co-ordination or co-operation. Therefore, the decision-making authority for application and enforcement is dispersed to many States. Thus there is no unitary authority on a global scale for the stages of application and enforcement[223]. On the other hand, the law-making authority that makes uniform law should be unitary since it is unthinkable that several international organizations would make uniform laws on the same subject matters. The law-making authority that creates private international law can be either unitary, if an international organization such as the Hague Conference on Private International Law makes rules

[223] European Court of Justice is not counted here as an international unitary authority since it is a regional authority.

in the field of private international law, or dispersed, if national legislators independently make private international law rules.

We could illustrate this situation in Table 3, assuming two possible situations, i.e. the one is a world only with uniform laws, the other is a world with private international law and various national laws. We assume these two situations in order to highlight differences, although the real world would probably lie somewhere in-between.

TABLE 3

Type of Decision-making Authority	*Nature of Authority in a World Only with Uniform Law*	*Nature of Authority in a World Only with PIL*
Legislation — Substantive law	Unitary (international organization)	Dispersed (national legislators)
Legislation — Choice of law	N/A	Unitary (international organization) OR Dispersed (national legislator)
Application	Dispersed (national court)	Dispersed (national court)
Enforcement	Dispersed (national authority)	Dispersed (national authority)

As explained above, we presume that the decision-making authority for both uniform law and private international law is always unitary throughout these three stages.

This presumption is indispensable in making as precise a comparison as possible.

Under this presumption, Table 3 should be modified as follows:

TABLE 3 *BIS*

Type of Decision-making Authority	*Nature of Authority in a World Only with Uniform Law*	*Nature of Authority in a World Only with PIL*
Substantive law Legislation	Unitary	Dispersed (national legislators)
Choice of law	N/A	Unitary
Application	Unitary	Unitary
Enforcement	Unitary	Unitary

Based on this presumption, we would not have to pay attention to variables that arise from differences of authorities and can concentrate on the purely substantial differences between uniform law and private international law.

Secondly, institutions appear static at a certain time, but usually they evolve. Law is not any different but uniform law has less adaptability to social changes due to the high costs. In consequence, it tends to be more static. Where laws are competing, they evolve[224]. Uniform law, which aims at eliminating divergence among different national laws, replaces them and excludes competition, innovation and this form of evolution of law. Indeed, to analyse legal institutions in a globalized world, such a dynamic perspective with a certain time span seems crucial. Considering the costs to create a new institution, constant evolution of existing laws would be more efficient to cope with rapid societal changes. In this respect, private international law would be more desirable since it incorporates the com-

[224] See B. H. Kobayashi and L. E. Ribstein, "Delaware for Small Fry: Jurisdictional Competition for Limited Liability Companies", *University of Illinois Law Review* (2011), pp. 91-142.

petition of law in its system[225]. However, we do not take such a dynamic perspective because our interest lies in evaluating uniform law and private international law from the viewpoint of parties in an international civil dispute or of the authority which should resolve the dispute. For these parties or players, it is not important whether a law is more suitable for innovation or would be valid even decades after. The priority for them is the utility of the law to cope with the dispute. Furthermore, as explained above, we presume that costs to create a uniform law and a private international law is zero, to allow us to focus on the maintenance aspect. Thus we do not adopt the argument of the necessity of innovation from a dynamic perspective.

The analysis so far can be summed up as follows: that the conventional argument has neglected some important issues that arise in comparing uniform law and private international law. In particular, we have cast some doubt over the view that uniform law is categorically more desirable than private international law. We are of the opinion that uniform law and private international law are two alternatives without categorical desirability. It is important to identify such circumstances or conditions under which uniform law becomes more desirable, and other circumstances or conditions where private international law may be preferable. As such, we want to evaluate the functions and effects of uniform law and private international law that regulates international civil disputes. Hence,

(1) we focused on the maintenance aspect, presuming that no cost would arise at the creation stage;

[225] E. Carbonara and F. Parisi, "Choice of Law and Legal Evolution: Rethinking the Market for Legal Rules", 139 *Public Choice* (2009), pp. 461-492, at pp. 464-468.

(2) we presumed that uniform law is not a "standard", but a "rule" with a clearly defined scope of application and specified requirements and effects;
(3) we presumed that the decision-making authority for both uniform law and private international law is unitary; and
(4) we did not take a dynamic perspective.

In this way we can eliminate the ambiguity of the conventional argument and make our arguments lucid. Furthermore, the conventional argument does not offer any answer to the question whether uniform law always offers more beneficial rules than private international law. In other words, the benefit aspect of uniform law has been somewhat neglected. However, both the costs and benefits aspect should be equally taken into consideration.

Thus the conventional argument can be characterized as involving three tendencies: firstly, a failure to differentiate between the creation aspect and the maintenance aspect of institutions (uniform law and private international law); secondly, a focus on the costs issue only, without reference to the benefits aspect; and, thirdly, a presumption that the costs of maintenance of uniform law are always less than those of private international law.

3.2. Costs and Benefits Analysis

3.2.1. Mapping of issues

We begin this section with a table, which shows that uniform law and private international law are not two prototypes, but several variations. We adopt two positions to classify uniform law and private international law; one is the uniformity of law and the other is the unitary nature of the decision-making authority. The uniformity of law is a matter of the degree of unifor-

mity, which is continual from one extreme to another. It could typically be classified into three levels: a single substantive rule, multiple substantive rules with a choice of law rule, and multiple substantive rules only. The nature of authority can be divided into two types: one involving a unitary authority and the other a non-unitary authority.

TABLE 4[226]

Norm / *Authority*	*Uniform*	*Multiple*	
		Choice of law	*No choice of law*
Unitary	I	II	III
Non-unitary	IV	V	VI

I in this table shows the situation where one authority makes and uses one single substantive rule as uniform law, while V indicates the situation where diverse bodies make and use multiple substantive laws as well as multiple choice of law rules. The conventional argument seems to have compared I and V in this table. As we stressed in the previous section, even if I and V are compared, it does not clarify whether differences stem from the uniformity of law or the unitary nature of authority. For a more precise analysis of the effect of the uniformity of law, comparison should have also been made between I and II, or between IV and V. The conventional argument has failed to do so.

Even in situations where multiple substantive rules exist, II and III must be differentiated. The conventional argument that the divergence of rules would bring about uncertainty may apply to III where no

[226] See Kono and Kagami, *supra* footnote 209, p. 327.

choice of law rule exists, but such argument may not apply to II if a clear choice of law rule is established and no deviance would occur.

As explained above, we presume that the decision-making authority is unitary. Thus we compare I and II (not I and V, as in the conventional argument). I is the situation where a single substantive rule is created and applied by a unitary authority, while II is the situation where multiple rules are established by various legislators, and private international law is created and applied by a unitary authority. Only under such a simplified and idealized situation can we compare the real differences between the application of uniform law and the application of a law chosen out of multiple ones through the mechanism of private international law. Issues in the real world (for example, where the decision-making authority is *not* unitary), should be dealt with only after making precise comparisons.

3.2.2. Uniformity and diversity: costs and benefits analysis

Since we presume that the decision-making authority for both uniform law and private international law is unitary, the focal point of this chapter is to analyse the pros and cons of the uniformity and the diversity. We will apply a costs and benefits analysis as a tool. In order to facilitate understanding, we present the following hypothetical cases:

Suppose that there are two T-shirt shops. One sells three sizes (Small, Medium, and Large) and another sells only Medium size. If we want to buy a T-shirt, which store should we choose? If we do not like spending time choosing a T-shirt, or if we are not sure that we would make the right decision, we should go to the latter shop which sells only Medium size T-shirts.

If we enjoy choosing a T-shirt, or if a shopkeeper will assist in making a good choice, we should go to the former shop which offers multiple sizes of T-shirts.

This metaphor of the diversity of size implies that having options materializes a better "fitting" of a rule to the particular case. But this is not always the case as there is the risk of ending up with an incorrect "fit" by making a bad choice, or even if you do make a good choice, there are additional costs if research is required to make an informed decision.

A higher degree of uniformity, on the other hand, neglects opportunities to improve fit but is offset by the costs, involved in making a choice, being avoided or reduced.

Hence, diversity would bring about a better fit with higher costs, while uniformity tends to sacrifice fit for lower costs.

The dual aspect of diversity (better fit and higher costs) was not elaborated on in preceding works, which focused only on the cost aspect. We should however compare both costs and benefits of uniformity and of diversity.

In order to evaluate happiness (welfare as net), costs should be deducted from benefit (gross). Thus we could decide which T-shirt shop we should enter in order to increase our happiness.

Suppose that there are three groups of people, i.e. NS as people who prefer Small size, NM as people who prefer Medium size, and NL as people who prefer the Large size.

We assume that each group would obtain 2b (as benefit) if a size fits them very well. If the size is just satisfactory, they would gain b as benefit.

If the size is too big or too small, they would not obtain any benefit. If we present all possible scenarios, we get Table 5.

TABLE 5

Type of people	*Benefit from the Size*		
	Small	*Medium*	*Large*
NS	2b	B	0
NM	b	2b	B
NL	0	B	2b
Total	3b	4b	3b

If only one size should be offered, it should be Medium, since it would bring about the greatest benefit (4b in Table 3). If three sizes were offered, the total benefit would be maximum 6b, if each group could get their ideal size (2b for NS + 2b for NM + 2b for NL). But if none of them got their ideal size due to a bad selection, i.e. NS got L size (benefit is 0), NM got S or L (benefit b), NL got S size (benefit 0), the total benefit would be b only. This suggests that the amount of benefit depends on the choice. The benefit of a multiple-size model could be greater (6b) or smaller (b) than a one-size-only model (maximum 4b), depending upon how the size is chosen.

Table 6 illustrates this.

TABLE 6

	Benefit for NS	*Benefit for NM*	*Benefit for NL*	*Total Benefit*
S size only	2b	b	0	3b
M size only	B	2b	b	4b
L size only	0	b	2b	3b
Multiple sizes	From 0 to 2b	From b to 2b	From 0 to 2b	From b to 6b

However in order to make an appropriate choice, it is necessary to obtain good and sufficient information by, for instance, "Googling", looking around various shops, or trying on several T-shirts, and then analysing the obtained information. It takes time, effort, and money, as well as involving opportunity costs. Thus, making a "good" choice raises costs. If we describe such costs as c, the greatest benefit under the multiple-size scheme should be 6b–c. A multiple-size scheme (its greatest benefit being 6b) could bring about 2b more than the maximum benefit under the single-size-only scheme (4b). Thus, if the cost of making a good choice is less than 2b, the multiple-size scheme is more beneficial than a single-size-only scheme.

We can draw two conclusions from this analysis. First, the argument that uniform law is always more beneficial than private international law does not hold. Divergence (i.e. diversity) improves "fit" so that, under certain conditions, the multiple-size scheme could be more beneficial than the single-size-only mechanism. Second, which scheme is more beneficial fully depends upon the function of the mechanism adopted in making the choice. Thus our next task is to identify under what conditions private international law might be more beneficial than uniform law.

3.2.3. Under what conditions might private international law be more beneficial?

As the T-shirt metaphor in the previous section shows, the costs of uniform law at the maintenance stage could be small. However, the likelihood of a good "fit" is low due to the one-size-fits-all nature of uniform law. On the other hand, private international law could raise costs when choosing an applicable law, but its fit might be better due to a diversity of options. Thus, private international law could be more benefi-

cial than uniform law under two conditions: firstly, if a law with a better fit can be realized with low costs, and secondly if the chosen law reaped greater benefits. The first condition could be satisfied if precise and abundant information on applicable laws is easily obtainable and if a decision-making authority is rational and properly incentivized (not biased). These circumstances would exist when similar cross-border cases repeatedly occur, and when the decision-making authority has rich experience in dealing with such cross-border cases. Furthermore, when the decision-making authority is committed to the international community and unlikely to be influenced by lobbying by self-interest-oriented stakeholders, it would be more likely that such circumstances would exist.

Concerning the second condition, suppose that only one type of meal is offered to a group of people with different religious backgrounds from various countries. A small number of people in this group would be happy with the meal offered. If they are given a choice regarding their meal, more people would be happy. As this metaphor implies, the effect of having options could carry more significance in cases where goals or backgrounds of rules are diverse.

If making an appropriate choice is difficult and if the effect of choosing a law is inconsequential, uniform law would be more desirable. For instance, when a cross-border legal relationship is so complex that obtaining precise information might be very difficult; or when private international law is still so underdeveloped, that the result of its application is uncertain or unpredictable; or when strong tensions exist among related parties, making an appropriate choice with small costs very difficult.

Furthermore, if there is little diversity in a society, there is no reason to retain diversity in the legal systems. Hence, uniform law might be justified. If cross-

border relationships were very similar, if opinions among parties or countries resembled each other, or if cross-border relationships largely depended upon internationally common conditions rather than domestic circumstances, the advantage in maintaining diversity would be smaller, and hence a uniform law would be preferred.

We have repeatedly stressed the necessity of weighing not only costs, but also benefits. To examine benefits, network externality plays a crucial role[227]. Network externality means that the benefit each player obtains in a system depends upon the size of the system and/or the number of participants[228]. The larger the size of the system, the more the benefit each player obtains. This has nothing to do with transaction costs such as certainty and predictability.

We presume that there are two legal systems, X and Y. System X is more beneficial than Y for the participants in the system when each system has only 10 participants. However if Y get 100 players, system Y would be more beneficial than X. As the size of a legal system grows, the more experiences with cross-border cases can be accumulated in the system. In addition, related legal services are further developed and the quality of such services improve. More services could be offered and prices may go down. The growth of a system would lead to further expansion. Thus a larger system tends to be preferred. In our example, system X would further grow and not only become more bene-

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[227] See M. L. Katz and C. Shapiro, "Systems Competition and Network Effects", 8 *Journal of Economics Perspectives* (1994), pp. 93-115.

[228] We do not use the term "player" in this sentence, because we intend to exclude those players who are outside of the system, but could obtain benefit from the system, in order to clarify a criterion to judge the size of network.

ficial for its participants already in the system, but also attract more people to join. This would further accelerate a virtuous circle. Such a virtuous circle would occur irrespective of whether a particular legal system was "best" from a legal point of view or the normative preferences of individual actors.

How should we understand network externalities in the context of the debate on uniform law and private international law? If a uniform law is designed with a high degree of uniformity, it might discourage some countries from ratifying it and the network created by the uniform law would remain small. On the other hand, the system of private international law is potentially able to choose any law out of all the laws in the world. Thus, private international law has the potential to integrate some or all of these diverse laws into its system. This all-encompassing feature of private international law would invite more countries to be a part of the system. In this way, the basis of the network externality would be present, so that it would be likely that a positive outcome of the network externality is achieved. Therefore, from the viewpoint of network externalities, the opinion that uniform law is always legally better than private international law does not hold.

3.3. Empirical Analysis

(1) Even if an international treaty has excellent legal contents and devices, it is meaningless if no State ratifies that treaty. Thus the scheme of uniform law should be made attractive to as many States as possible and encourage participation[229]. In this regard, the number

[229] Y. Zasu and I. Sato, "Providing Credibility around the World: Effective Devices of the Cape Town Convention", 33 *European Journal of Law and Economics* (2012), pp. 577-601, at p. 595.

of Member States is an important index of the success of uniform law. Table 1 showed that there are only a few successful uniform laws and that the number of Member States participating in the majority of uniform laws remains relatively small. In this section, we will discuss two uniform laws that are considered successful examples to identify the key of their success: one is the UN Convention on Contracts for the International Sales of Goods (1980) (hereinafter the CISG)[230], the other is the Convention on International Interests in Mobile Equipment (2001) (hereinafter the CTC).

(2) The CISG has 79 States parties at the moment of writing. This membership encompasses a large number of the important global players in international trade. For instance, 14 out of the 19 State Members of G-20 are Member States of the CISG[231]. This figure is striking especially when compared to the number of States Parties of preceding instruments, such as the Uniform Law on the International Sales of Goods (ULIS) and

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[230] If we do not apply the number of Member States as a criterion, we get a different picture. For example, G. Cuniberti, "Is the CISG Benefiting Any Authority?", 39 *Vanderbilt Journal of Transnational Law* (2006), pp. 1511-1550, argues that the CISG is no use for the vast majority of contractual parties and it has at best a limited use for the others. Also Coyle, *supra* footnote 207, at p. 374 states "commercial actors are not particularly enamored with the CISG".

Cuniberti suggests that if "one adds the small number of potential beneficiaries to the costs of pursuing the enterprise for the society, a wise conclusion would be to direct such efforts to an industry more likely to benefit from them." (p. 1550). In our view, "such efforts" is nothing but the costs to implement/maintain a system of a created uniform law.

[231] As of writing this paper, Indonesia, India, United Kingdom, South Africa and Saudi Arabia are not yet Member States of CISG.

Uniform Law on the Formation of Contracts for the International Sales of Goods (ULFIS) by UNIDROIT in 1964. ULIS and ULFIS were ratified by nine countries[232], and apply only in four countries[233]. Interestingly, ULIS and ULFIS adopt a genuine form of uniform law that the conventional argument presumes, i.e. a uniform substantive law that excludes domestic law for those matters dealt with and imposes an autonomous interpretation and application (Art. 17, ULIS) that leaves no room to intervene by local private international law. The CISG, on the other hand, contains quite a few possibilities for deviating from the provisions of the CISG. In the process of the preparation and the negotiation of the CISG, a compromise solution was found stretching the uniform substantive model whilst retaining a place for domestic law and private international law, which has been described as an "eclectic model"[234]. The CISG incorporated, to a limited extent, other sources of law (domestic sales law) and a different methodology (private international law)[235]. Article 7 (2)[236] of the CISG clearly shows such an approach. Its non-monopolistic stance in terms of

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[232] Belgium, Germany, Gambia, Israel, Italy, Luxembourg, the Netherlands, San Marino, and the United Kingdom.

[233] Gambia, Israel, San Marino and the United Kingdom.

[234] F. De Ly, "Sources of International Sales Law: An Eclectic Model", 25 *Journal of Law and Commerce* (2005), pp. 1-12.

[235] *Ibid*., p. 3.

[236] Art. 7 (2) of the CISG:

> "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

international obligations is reflected in Article 90[237,238]. Furthermore, Article 6[239] allows contractual parties to exclude the CISG in whole or in part. Article 9[240] recognizes commercial custom or usage as a source of international sales law[241]. In addition, the CISG makes several types of reservation available (Art. 92 through Art. 96)[242] as a confirmation of the eclectic nature of the CISG.

We see the reason for the success of the CISG in its eclecticism or diversity, compared to the disappointing results of ULIS and ULFIS, where a genuine substantive uniform law scheme was adopted. Diversity in the CISG invited many States to join the network of the CISG. If diversity is the key to the success of the CISG as *uniform* law, it is inappropriate to categorically prioritize uniform law against private international law, since diversity is the core concept of private international law. Differences between uniform law and pri-

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[237] Art. 9:

"This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement."

[238] De Ly, *supra* footnote 234, p. 3.

[239] Art. 6 of the CISG:

"The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."

[240] Art. 9 (1) of the CISG:

"The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves."

[241] De Ly, *supra* footnote 234, p. 5.

[242] According to De Ly, these reservations options confirm the eclectic model of the CISG. See De Ly, *supra* footnote 234, p. 11.

vate international law then are not absolute ones, but relative ones. We therefore argue that if the mechanism of choosing a law is well designed, private international law could be more beneficial than uniform law.

(3) The CTC has 57 States parties at the moment of writing [243]. The Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, adopted in the same year, has 51 States parties [244]. These instruments are successful in terms of the number of States parties that ratified these instruments in only 12 years after their adoption [245].

The CTC was adopted with the objective of facilitating asset-based financing and leasing of high-value mobile equipment. The categories of mobile equipment encompassed by the CTC include *(a)* airframes, aircraft engines and helicopters, *(b)* railway rolling stock, and *(c)* space assets [246]. A protocol is prepared for each category [247]. The Convention and each protocol

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[243] Available at: unidroit.org/english/implement/i-2001-convention.pdf.

[244] Available at: unidroit.org/english/implement/i-2001-aircraftprotocol.pdf.

[245] See R. Goode, "From Acorn to Oak Tree: The Development of the Cape Town Convention and Protocols", *Revue de droit uniforme* (2002), pp. 599-607; J. Wool, "Treaty Design, Implementation, and Compliance Benchmarking Economic Benefit — a Framework as Applied to the Cape Town Convention", *Revue de droit uniforme* (2002), pp. 633-653.

[246] Art. 2 (3) of the Cape Town Convention.

[247] Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock, adopted in 2007, has been ratified only by Luxembourg and not yet in force, at the moment of writing. Available at: unidroit.org/english/implement/i-2007-railprotocol.pdf.

Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets

are read and interpreted as a single instrument[248,249], and together they govern the asset-based financing and leasing of the concerned category. "International Interest" as an original concept is introduced and rigidly defined[250]. A separate registry is established for each category of equipment[251]. The status of each interest can be registered in the International Registry for public notice.

Given the divergence in the contents of personal property law among countries, the CTC introduced the system of declarations, under which a Member State has the option to either retain the effect of a specific right or interest in its domestic law[252], or give a spe-

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was adopted in 2012. It has no State Party at the moment of writing. Available at: unidroit.org/english/implement/i-2012-spaceassets.pdf.

[248] Art. 6 (1) of the Cape Town Convention.

[249] See H. Rosen, M. Fleetwood and B. von Bodungen, "The Luxembourg Rail Protocol — Extending Cape Town Benefits to the Rail Industry", 17 *Uniform Law Review* (2012), pp. 609-632.

[250] Art. 2 (2) of the Cape Town Convention:

> "For the purposes of this Convention, an international interest in mobile equipment is an interest, constituted under Article 7, in a uniquely identifiable object of a category of such objects listed in paragraph 3 and designated in the Protocol:
>
> *(a)* granted by the chargor under a security agreement;
> *(b)* vested in a person who is the conditional seller under a title reservation agreement; or
> *(c)* vested in a person who is the lessor under a leasing agreement."

[251] Art. 16 of the Cape Town Convention.

[252] Art. 39 (1) of the Cape Town Convention:

> "A Contracting State may at any time, in a declaration deposited with the Depositary of the Protocol declare, generally or specifically:
>
> *(a)* those categories of non-consensual right or interest (other than a right or interest to which Article 40

cific right or interest in its domestic law the same effect as that of an international interest under the Convention[253].

The CTC has two specificities as uniform law: firstly, the Convention does not adopt the "one-size-fits-all" model, which would apply to all types of mobile assets. Instead, through its "dual instrument" approach (the Convention and a Protocol for specific type of asset), a Member State can take up the scheme that satisfies its particular financing needs. This dual-instrument approach contributes to improving the fit of the CTC's regime to the needs of individual contracting countries. Second, the CTC gives Member States the option to choose the effect of a right or interest in domestic law under its declaration. The possibility of being able to make such a choice loosens the *ex-ante* conditions and facilitates participation. It also provides certain benefits to Member States, as only those countries that choose the set of options are included on the

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applies) which under that State's law have priority over an interest in an object equivalent to that of the holder of a registered international interest and which shall have priority over a registered international interest, whether in or outside insolvency proceedings; and

(b) that nothing in this Convention shall affect the right of a State or State entity, intergovernmental organisation or other private provider of public services to arrest or detain an object under the laws of that State for payment of amounts owed to such entity, organisation or provider directly relating to those services in respect of that object or another object."

[253] Art. 40 of the Cape Town Convention:

"A Contracting State may at any time in a declaration deposited with the Depositary of the Protocol list the categories of non-consensual right or interest which shall be registrable under this Convention as regards any category of object as if the right or interest were an international interest and shall be regulated accordingly. Such a declaration may be modified from time to time."

list of the OECD's CTC Discount[254], which offers a reduction of the risk premium charged for export financing by the export credit agencies of the OECD countries.

Thus the possibility of being able to make a choice brings benefits to Member States also in the CTC, and therefore having a choice can be understood as an important factor in its success. The conventional argument for categorical prioritization of uniform law against private international law does not hold also in the context of the CTC.

3.4. Conclusion

Uniform law has been considered an efficient tool for crossborder transactions, while private international law brings about uncertainty and unpredictability. If we follow this logic, should private international law be replaced with uniform law? Such a view was proposed in the 1960s and is still being discussed today[255]. There is a common idea between a small number of successful uniform laws (the CISG and the CTC) and private international law, i.e. diversity, which seems to provide the key to their success as a uniform law. It is important to identify the conditions under which private international law can be more beneficial than uniform law. For this purpose, ambiguities of the conventional argument should be removed. Some hypothetical conditions would help in clarifying what and where real issues lie. Thus we distinguished firstly the uniformity

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[254] Available at oecd.org/tad/xcred/ctc.htm.

[255] See, V. Espinassous, *L'uniformisation du droit substantiel et le conflit de lois* (LGDJ, Paris, 2010), p. 374; K. Boele-Woelki, *Unifying and Harmonising Substantive Law and the Role of Conflict of Laws* (Brill, 2010); U. P. Gruber, *Methoden des internationalen Einheitsrechts* (Mohr Siebeck, Tübingen, 2004), Chap. I.

of norm and the unitary nature of the decision-making authority, secondly the dynamic and the static perspectives, and thirdly the aspect of the creation of institution and that of its maintenance. Furthermore, we clarified the importance not only of costs, but also of benefits which could be brought about by the uniformity and the diversity. We then examined conditions that could impact the costs and the benefits. This analytical framework can well explain the empirical fact that a uniform law remains much less implemented than private international law when it disregards diversity. We also made it clear that categorical prioritization of uniform law does not hold, and that private international law could be more beneficial than uniform law under certain conditions. We believe that our framework is useful to rigidly analyse, evaluate and design uniform law and private international law.

CHAPTER IV

UNIFORM PRIVATE INTERNATIONAL LAW

4.1. Introduction

As clarified in the previous chapter, the categorical ordering of uniform law as a more desirable law than private international law does not hold. More focus should instead be placed on diversity as the key to success even in uniform law. How shall we then evaluate the unification of private international law?

The Hague Conference on Private International Law (hereinafter "the Hague Conference") was established "for the progressive unification of the rules of private international law"[256]. Although the Organization has recently sought new alternatives such as model laws, conventions still remain the most typical type of instrument for the Hague Conference[257]. However there is very little explanation on rationale of unification to be found in textbooks[258]. We could assume that it is based on a simple analogy of a categorical preference of uniform substantive law to private international law. Its main argument should be then certainty and predictability. In fact, Kramer explains that

> "if states employ different approaches to choice of law, the parties cannot know what law governs their conduct until after they have acted. The resulting

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[256] Article 1 of the Statute of the Hague Conference on Private International Law.

[257] The Hague Conference on Private International Law Strategic Plan (April 2002), p. 36. hcch.net/upload/wop/stratplan_e.pdf.

[258] See, e.g., K. Boele-Woelki, *Unifying and Harmonising Substantive Law and the Role of Conflict of Laws* (Brill, 2010).

> uncertainty is unfair, and it discourages desirable interstate activity."[259]

As we saw in the previous chapter, the argument based on certainty and predictability is the costs[260] aspect in the maintenance phase of uniform law. In fact, if we were to have only one private international law regime in the world which all countries used, the total costs incurred to obtain the necessary information to identify the applicable law could be substantially reduced on a global scale. In this sense, a costs reduction in the maintenance phase would be a convincing argument.

However, this argument does not pay due attention to the creation phase of uniform private international law and presumes that a uniform private international law could be created with no or very little costs. If the costs to create a uniform private international law were prohibitive, no uniform private international law could be produced, hence there would be no room for discussion on its maintenance aspect. Therefore, before we can discuss a costs reduction in the maintenance phase, we have to analyse the creation phase.

4.2. Incentive Analysis on the Unification of Private International Law — Focusing on the Maintenance Phase

(1) We will assume the following case: there are two countries X and Y in the world[261] and that there is

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[259] L. Kramer, *supra* footnote 192, at p. 2137.

[260] Costs here mean not only economic expenditure, but also time, stress and other negative impacts.

[261] Here we assume that the world consists of two countries X and Y. Criticism often raised against the economic approach is that the model is unrealistic. However it is not rare to find such a simplified grouping of countries, for example developed countries and developing countries, or common law countries and civil law countries. Differences in each group are disregarded.

no unitary decision-making body. Thus each country exercises its own legislative and adjudicatory powers. In front of a court in country X, a case is pending with the parties of the litigation being A (X national, resident in X) and B (Y national, resident in Y).

In the first scenario, we assume that benefits obtained from applying the law of X and those from applying the law of Y are the same. For example, both laws are equally appropriate for a specific type of business (e.g., IT business), so that stakeholders in the IT industry could equally have enough incentive to apply the law of X or the law of Y. With this assumption of equal benefits, we could focus on the costs aspect of applying a foreign law. There could be several types of costs, depending upon who bears the costs, for example, costs for parties[262], costs for courts[263], and costs for State[264]. When a reference is made to "costs" without any further specification, it means the total of these costs.

The application of one's own law is usually less costly for the parties, courts and State than when applying a foreign law. For instance, parties would have more options to choose a law firm within their budget. Judges know their own law so well that they can conduct a more speedy trial. The State can maintain its existing legal education without the need for special expenditure. The same would apply to country Y.

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[262] For example, fees of law firms that deal with cross-border cases are usually higher than those who handle domestic cases.

[263] For example, it can usually be more time-consuming for a court to hear a case with a cross-border nature than a similar, but purely domestic case.

[264] For example, a State Government may have to introduce a new legal education system to study foreign laws in order to nurture attorneys and judges who could use such foreign laws.

Hence, the courts in each country would continue to apply its own law, based on a purely domestic costs calculation. Applying the law of X would usually tend to be more costly for country Y and for B, as a resident and national of country Y, who would have to defend himself/herself in country X in accordance with the law of X. Country X, however, would not care how costly it would be for country Y. The same applies to courts in country Y. Hence the application of *lex fori* is a stable choice of law policy[265].

If courts in country Y were to apply the law of X, would it affect country X and would courts in country X apply the law of Y? In other words, would the choice of law rule in one country affect the *lex fori* policy in another country? If applying a foreign law could bring about greater benefits and/or substantially reduce costs, courts could have enough incentive to do so. However, applying a foreign law is in most cases more costly than *lex fori*. Since we assume that benefits by the law of X and Y are equal, there is no real incentive to apply a foreign law. Hence, regardless of what the other country's policy of the application of law is, the forum State would continue to apply its own law.

In the second scenario, we assume that benefits obtained by applying the law of X are different from those by applying the law of Y. For example, the law of X brings about more benefits to a specific type of business (e.g., agriculture), while the law of Y is more appropriate for another type of business (e.g., IT busi-

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[265] Guzman, *supra* footnote 191, p. 914, "A government seeking to maximize the welfare of its own residents will fail to take into account an activity's costs and benefits to the extent they are felt outside the borders of the country"; Kramer, *supra* footnote 187, at p. 342, "if both states act rationally, the analysis above suggests that they will both choose to apply forum law".

ness). Legislators in each country usually design their laws to increase benefits in accordance with their country's specific circumstance. Thus its own law has better "fit". Courts in that country have better access to relevant information on their own law, while such information on a foreign law may not be easily obtainable. Accordingly, if benefits in country X can be increased by applying the law of X, courts in country X would not have any incentive to apply a foreign law.

Hence, from the first and second scenarios we could conclude that, at any rate, courts usually apply their own law based on a domestic costs and benefits consideration[266].

(2) Even if courts in both X and Y have incentive to apply their own laws respectively and their strategy is dominant, it does not mean that it should be the ideal situation for the world. Country X could reduce its costs and get greater benefits by applying its own law. But if this surplus for country X is less than the costs to be imposed on country Y, the global total of costs and benefits would be minus. Needless to say, it is not desirable worldwide.

In order to prevent such a situation, first, applicable

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[266] Each country has two options as applicable law: *lex fori* or foreign law. Thus there are four combinations, i.e. [X: *lex fori*, Y: *lex fori*], [X: foreign law, Y: foreign law], [X: *lex fori*, Y: foreign law], [X: foreign law, Y: *lex fori*]. Among these four, the Nash equilibrium here is [X: *lex fori*, Y: *lex fori*]. On top of that, the strategy for the choice of law rule here is dominated by the rule to apply *lex fori*. See Kaznaki Kagami, *Kokusai shakai ni okeru shiteki kankei no kinitsu to funsō kaiketsu [Regulation of Private Relationships in International Society and Conflict Resolutions]* (2009), p. 222. Concerning game theory see D. G. Baird, R. H. Gertner and R. C. Picker, *Game Theory and the Law* (Harvard University Press, Cambridge, 1994) at p. 330.

law should not be limited to *lex fori*. Second, the choice of law rule should not depend upon the forum. A global perspective through harmonization or unification is necessary. A question is how the State could have enough incentive to depart from *lex fori* and to co-ordinate with other States concerning the choice of law policy. In the past, it seems to be simply presumed that, following the conventional argument on uniform law[267], we should not adhere to *lex fori* nor the forum's own choice of law. But simple presumption does not sufficiently weaken the strong incentive to stick to *lex fori*. Thus an analysis is necessary to identify what would be sufficient incentives.

To begin with, we focus only on specific parties. Even if disputes between them may repeatedly occur, since litigation does not last forever, each country would have little incentive to change its policy of applying *lex fori*. However, if disputes could occur between *all* residents of country X and Y, and if one country insists on applying its own law, it may impose enormous costs on the other country's individuals and entities. Even if it is unrealistic to assume disputes are between *all* residents in both countries, it could be possible to assume that a *great number* of disputes between residents in X and Y could really or potentially occur. Then these countries may consider whether they should reduce such costs by adopting a choice of law rule and promoting mutual coordination concerning applicable law[268].

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[267] See, e.g., Gruber, *supra* footnote 255, Chap. 3, where it is shown that the advocates of uniform law tend to argue in favour of autonomous (i.e., independent from national or international legal systems) methodologies of uniform law.

[268] Kramer, *supra* footnote 187, p. 342, states that

> "The prediction above applies to a game that is played only once. But game theory further posits that if

Each country's incentive to apply *lex fori* is based on concerns for reducing costs and increasing benefits of that country, i.e. raising welfare of that country. According to Guzman, since "choice-of-law rules determine which countries' laws govern a particular transaction, they can influence the efficiency of the global legal system" [269]. The following chart shows all possible combinations of national and global welfare, provided that the applicable law is the law of X.

Welfare by applying X law in X	*Welfare of applying X law in Y*	*Global welfare of applying X law*	*Appropriate applicable law for X*	*Appropriate applicable law for the world*
Up	Up	Up	X	X
Up	Down	Up	X	X
Up	Down	Down	X	Y
Down	Up	Up	Y	X
Down	Up	Down	Y	Y
Down	Down	Down	Y	Y

The following is a brief explanation of each row.

[1] First row means that (1) applying the law of X raises X's welfare, (2) applying the law of X raises Y's welfare, (3) thus global welfare is raised by

A and *B* are forced into this situation repeatedly, they will find the cooperative solution and adhere to it."

"If *A* and *B* must 'play' the prisoner's dilemma repeatedly, the costs of not cooperating on many plays become greater than the costs of being the only player to cooperate on a single play. At some point then, one or both participants will likely take a chance by cooperating."

[269] See Guzman, *supra* footnote 191, at p. 900.

applying the law of X, therefore (4) the appropriate applicable law for country X is the law of X, and (5) the appropriate applicable law for the world is the law of X.

[2] Second row means (1) applying the law of X raises X's welfare, (2) but applying the law of X decreases Y's welfare, (3) still global welfare is raised by applying the law of X, therefore (4) the appropriate applicable law for country X is the law of X, and (5) appropriate applicable for the world is the law of X.

[3] Third row means (1) applying the law of X raises X's welfare, (2) but applying the law of X decreases Y's welfare, (3) global welfare is decreased by applying the law of X, therefore (4) the appropriate applicable law for country X is the law of X, but (5) the appropriate applicable law for the world is the law of Y.

[4] Fourth row means (1) applying the law of X decreases X's welfare, (2) but applying the law of X raises Y's welfare, (3) and global welfare is raised by applying the law of X, therefore (4) the appropriate applicable law for country X is the law of Y, (5) but the appropriate applicable law for the world is the law of X.

[5] Fifth row means (1) applying the law of X decreases X's welfare, (2) but applying the law of X raises Y's welfare, (3) but global welfare is decreased by applying the law of X, therefore (4) the appropriate applicable law for country X is the law of Y, and (5) the appropriate applicable law for the world is the law of Y.

[6] Sixth row means (1) applying the law of X decreases X's welfare, (2) applying the law of X decreases Y's welfare, (3) global welfare is decreased by applying the law of X, therefore (4) the appropriate applicable law for country X is

the law of Y, and (5) the appropriate applicable law for the world is the law of Y.

In the case of Row 1, both X and Y have enough incentives to harmonize the applicable law to the law of X, since all stakeholders would be happier to apply the law of X, and there is no negative factor against it. The same applies to harmonize to the law of Y in the case of Row 6. In the case of Row 5, country X has good reasons to harmonize to the law of Y, since neither X nor the world would be happy with the law of X. In these three scenarios, there could be enough incentives to harmonize choice of law rules to lead to the same applicable law.

The scenario of Row 4 would be very unlikely, because in this scenario country X would not wish to apply its own law, while the world would prefer the law of X.

In the case of Row 2, country X has no incentive for harmonization, since country X and the world would be happier with the law of X. If Y decides to harmonize choice of law rules despite the decrease of Y's welfare, only then would unification occur. In the case of Row 3, the law of X will raise the welfare of X, but it will decrease global welfare. Only if X, despite the decrease of its own welfare, decides to harmonize with the law of Y for the sake of global welfare will unification occur.

The position of X in this scenario is equivalent to that of Y in the scenario of Row 2.

A crucial question for us is therefore when would Y, in the case of Row 2, and X, in the case of Row 3, decide in favour of unification. More precisely, we should identify conditions under which States would be motivated to move toward global welfare, even if their own welfare would be sacrificed, as in the cases of Rows 2 and 3.

4.3. Conditions for Harmonization and Unification

This section analyses several conditions which could motivate States to move toward harmonization and unification of private international law, despite the loss of their own welfare. It should be noted that this list of conditions to be analysed here is not exhaustive.

4.3.1. Interactions

First, let us suppose that country X is much smaller than country Y in terms of GDP and population. The impact of country X on the international flow of goods and services would therefore be smaller than that of country Y. From a global perspective, taking specific situations of country X might be less efficient. Thus applying the law of X might be less desirable for global welfare than the law of Y. The courts of country X would however stick to applying its own law due to its own benefits and cost reduction. If the number of cross-border cases brought to the courts of country X is much smaller than the courts of country Y, it means that, from a global perspective, the law of X would be used much less frequently than the law of Y. An undesirable situation for global welfare caused by the application of the law of X would remain less problematic. However the number of cross-border cases in front of the courts of country X could be larger than those in front of the courts of country Y. For example, the people in both countries tend to agree on the jurisdiction of the courts in country X, since country X is well equipped with good legal institutions and the litigation costs are much lower than in country Y. In this case, the law of X would be used more frequently by its courts, but global welfare would suffer. The situation looks different if due attention is paid to interactions between the two countries. It is only when countries X

and Y have regular contacts that the costs aspect could become an obstacle in their relationship. Thus we have to pay attention to interactions between countries X and Y in order to identify conditions under which global welfare could be better achieved[270].

4.3.2. Long-term relationship

Paying attention to interactions is necessary, but not sufficient. Paying due attention to the long-term relationship is indispensable. Because although departing from *lex fori* may not be an optimal solution for a specific case, taking the long-term process between two countries into consideration, two countries would think that unifying their choice of law rules could bring about greater benefits. Each country would calculate based on what they anticipate will occur in their relationship in the future and constantly revise their estimate accordingly. If each country considers that their relationship would not last much longer, they would not have any motivation to harmonize their choice of law rules. Signing a convention is a firm commitment to harmonize their choice of rules for (quasi-)forever. Such commitment occurs only when each country is convinced that their relationship will be eternal and harmonization would bring about greater benefits in the long run. In other words, "the states are players in a repeat-play game and have long-run incentives to cooperate over choice of law"[271].

4.3.3. Multiple contacts

A country-to-country relationship has usually many dimensions. The flow of goods and services between X

[270] Concerning game theory and conflict of laws, see L. Brilmayer, *Conflict of Laws, Foundations and Future Directions* (Little, Brown, 1991), at pp. 155-175 and p. 240.

[271] Guzman, *supra* footnote 191, p. 1225.

and Y involves many individuals, entities and state institutions. Having multi-layered contacts on a regular basis would drive X and Y to foster closer co-operation and more stable harmonization. This is because, in a relationship with multiple contacts, if country X adopts a decision that will disadvantage country Y, country Y may take some measures in direct response to it. If there are multilateral contacts in their relationship, country Y has numerous options for countering X's decision. As a result, even though X's decision was a disadvantage to Y, the repercussions of Y's response could present a greater disadvantage to X.

Therefore it would be prudent of X to reconsider adopting decisions that disadvantage Y as long as there are multiple contacts contained in its relationship with Y. It would facilitate the co-operation toward harmonization and unification.

4.3.4. Benefits of co-operation

A long-term relationship with multiple contacts between countries X and Y is a necessary condition for them to shift their domestic perspective to a global one. However it is not yet sufficient enough for them to change their choice of law policy to apply *lex fori*. Such a decision requires greater incentives. In addition, since harmonization and unification is not a single incident but a process[272], further incentive is required to ensure sustainability of a policy that adopts these goals. Such change and maintenance of the choice of law policy could be possible, if co-operation could bring about benefits.

For countries X and Y, there are three options in a long-term relationship, i.e. co-operation, non-co-operation and betrayal. Betrayal here means the situa-

[272] See the section on adoption and maintenance of uniform law in the previous chapter.

tion where a country takes the option "co-operation" once, but later change to "non-cooperation" to benefit only its own interests. Before delving into the analysis of benefits calculation, an illustration of betrayal in a concrete case would help our understanding of the issue on hand.

On 27 March 1996, the European Commission introduced an extensive ban on the export of beef from the United Kingdom, due to its suspected contamination with Bovine Spongiform Encephalopathy (so-called mad cow disease)[273]. The United Kingdom announced, on 22 May 1996, "the Policy of Non-Cooperation with the EU"[274]. This "Policy" should affect "any matters requiring consensus or a unanimous vote"[275] and "non-cooperation would continue until the partial ban had been lifted and a framework was in place for the total lifting of the ban"[276]. As a result, signature of an Insolvency Convention was blocked[277]. This Convention was concluded on 23 November 1995. This Convention, concerning a matter in Article 220 of the Treaty establishing the European Economic Communities, required signature and ratification by all Member States in order to become effective and would occur only six months after the last ratification. But it could not enter into force, "because one EU country failed to sign it within the time limit"[278].

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[273] europa.eu/about-eu/eu-history/1990-1999/1996/index_en.htm (last visited, 28 February 2014).

[274] V. Miller, "The Policy of Non-Cooperation with the EU", Research Paper 96/74, 18 June 1996, pp. 1-30, available at: parliament.uk/business/publications/research/briefing-papers/RP96-74/policy-of-noncooperation-with-eu.

[275] *Ibid*., p. 9.

[276] *Ibid*., p. 11.

[277] *Ibid*., p. 27.

[278] See at europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33110_en.htm.

This "non-cooperative Policy" of the United Kingdom could be a good example of betrayal, which pursues its own interest, sacrificing co-operation[279]. The situation like the United Kingdom versus other EU countries could be shifted to country X versus country Y in our hypothesis.

Bearing such an example in mind, we proceed with the analysis of benefits of co-operation. We assume the benefits of co-operation, non-cooperation and betrayal options as follows:

(1) Benefits of co-operation are 10.
(2) Benefits of non-cooperation should be always lower than those of co-operation, otherwise co-operation would be impossible in any case. But we should distinguish three levels of benefits of non-cooperation which would affect incentives, i.e., 8 (high), 1 (low), and minus 100 (very low).
(3) Benefits of betrayal should be always higher than those of co-operation, otherwise there would be no incentive to betray the long-term partner. But we could distinguish two levels of benefits of betrayal which would affect incentives, i.e., 100 (high) and 20 (low).

We assume that country X calculates its benefits to be obtained, during the ten-year period starting from the year 2014, via co-operation, non-cooperation and/or betrayal strategies. To be noted here, the calculation of accumulated benefits during the entire period is usually not a simple addition of benefits in each year. Because there is always uncertainty in the future such as political stability of the country, epidemic risk or economic turmoil, future benefits should usually be

[279] This "Policy" contains preceding examples of non-cooperation among European countries. See *supra* footnote 276, pp. 11-16.

calculated more conservatively than current benefits. However, in order to facilitate understanding, we assume that benefits in the future remain the same as current benefits.

Four possible scenarios could be identified. Others would be combinations of these four.

Case 1.1

	2014	*2023*
Co-operation	10	10*10=100
Non-cooperation	–100	
Total		*100*

The first scenario is a case where co-operation produces a benefit of 10, while non-cooperation produces minus 100.

If the relationship lasts ten years, then the total benefits by co-operation would be 100 (10 multiplied by 10 years), while the current outcome of non-cooperation would be minus 100.

This shows that there is good reason and incentive to take the co-operative policy as it yields a benefit of 100 in ten years rather than a minus 100.

Case 1.2

	2014	*2023*
Co-operation	10	10*10
Non-cooperation	1 or 8	1*8 or 8*10
Total		*8 or 80 or 100*

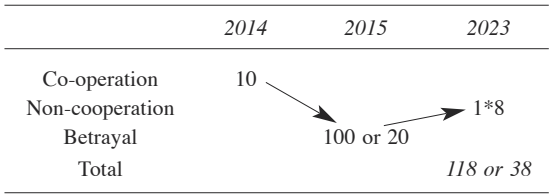
In this case the question here is whether country X would take the co-operative policy or remain non-cooperative. This scenario includes two further possi-

bilities. If the outcome of non-cooperation is 8, its total is 80. If the outcome is just 1, the total benefits would be only 8.

This total benefits of 8 in ten years might be tolerable as at least it is not minus, but still slightly on the plus side.

The total benefits of 80 is not bad in comparison to the 100 as benefits of co-operation.

Case 2.1



This chart illustrates the scenario where country X takes co-operation as its choice of law policy, but changes shortly thereafter to betray country Y, and then remains non-cooperative.

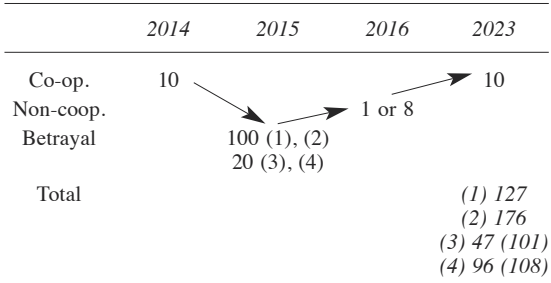
This scenario could be further divided into situations where benefits by betrayal is as high as 100, while in the other as low as 20.

Total benefits for the entire period would be either:

(1) 118 [10 + 100 + 1*8] (10 in the year 2014, 100 in the year 2015 and 1 every year during the next eight years until 2023), or
(2) 38 [10 + 20 + 1*8] (10 in the year 2014, 20 in the year 2015 and 1 every year during the next eight years until 2023).

Under this scenario, if benefits of betrayal are 100, country X would change its co-operative policy to a non-cooperative one.

Case 2.2



In this scenario, country X takes co-operative strategy first, changes to the betrayal strategy in 2015, then remains non-cooperative, then changes once again back to the co-operative strategy in 2023. There are four possible combinations under this scenario.

First, if benefits of betrayal are 100, and non-cooperative strategy was changed later (e.g., in 2023), the total benefits would be:

(1) 127 [10 in 2014 + 100 in 2015 + 1*7 years + 10 in 2023] (benefits of non-cooperation is 1)
(2) 176 [10 in 2014 + 100 in 2015 + 8*7 years + 10 in 2023] (benefits of non-cooperation is 8)

If the decision to go back to the co-operative strategy is made sooner (e.g., in 2016), the figures become like this:

(1′) 181 [10 in 2014 + 100 in 2015 + 1 in 2016 + 10*7 years] (benefits of non-cooperation is 1)
(2′) 188 [10 in 2014 + 100 in 2015 + 8 in 2016 + 10*7 years] (benefits of non-cooperation is 8)

Second, if benefits of betrayal is 20 and non-cooperative strategy was changed later (e.g., in 2023) total benefits would be:

(3) 47 [10 in 2014 + 20 in 2015 + 1*7 years + 10 in 2023]
(4) 96 [10 in 2014 + 20 in 2015 + 8*7 years + 10 in 2023]

These figures would change to the following if the switch to the co-operative strategy occurs sooner (e.g., in 2016):

(3′) 101 [10 in 2014 + 20 in 2015 + 1 in 2016 + 10*7 years]
(4′) 108 [10 in 2014 + 20 in 2015 + 8 in 2016 + 10*7 years]

We could draw the following hypothesis from the analysis above. First, if non-cooperation would bring about a largely negative outcome (minus 100 in our case), country X will tend to co-operate (see Case 1.1). Second, if the difference between the benefits of non-cooperation and co-operation is big (1 and 10 respectively in our case), country X might have enough incentive to co-operate (see Case 1.2). However, third, if the benefits of betrayal are very large (100 in our case), it may change the game and that country would change its co-operative policy to a non-cooperative one and remain so (see Case 2.1). But the greatest benefits could be obtained by the co-operative-then-non-cooperative-again-co-operative strategies (see Case 2.2 (1) and (2)). This is even more so the case if the decision to change back to the co-operative policy occurs sooner (see Case 2.2. (1′) and (2′)). Even if the benefits of non-cooperation are smaller (20 in our case), the early position change to co-operation could be more beneficial than remaining non-cooperative (compare Case 2.1 (2) and Case 2.2 (3′) and (4′)).

As long as there exist possibilities to obtain greater benefits by betrayal than remaining co-operative, each country may want to avoid a firm commitment to being constantly co-operative. However, as the analysis above shows, even if the benefits of betrayal is very big, countries who go back to a co-operative policy at an earlier stage reap more benefits than if they remain non-cooperative after their betrayal.

4.4. Analysis

In this section, we apply the conditions identified above to examples to see their usefulness. Let us take a look at the table below. The Hague Conference has produced 38 instruments since 1954, among which 16 Conventions and one Protocol[280] were adopted as instruments to determine applicable law. The following table below illustrates the current state of these instruments[281].

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[280] Convention of 15 June 1955 on the Law Applicable to International Sales of Goods; Convention of 15 April 1958 on the Law governing Transfer of Title in International Sales of Goods; Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations towards Children; Convention of 5 October 1961 concerning the powers of Authorities and the Law Applicable in Respect of the Protection of Infants; Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions; Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions; Convention of 4 May 1971 on the Law Applicable to Traffic Accidents; Convention of 2 October 1973 on the Law Applicable to Products Liability; Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations; Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes; Convention of 14 March 1978 on the Law Applicable to Agency; Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition; Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods; Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons; Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children; Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary; Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

[281] Available at hcch.net/index_en.php?act=text.diplay&tid=25.

Subject Matter	*Year*	*Entry into Force*	*Number of SP*	*EU Members as SP*	*Non-EU Countries in Europe as SP + Non-member of the HCCH in Europe as SP*	*Non-European Member Countries as SP + non-member of the HCCH as SP*
Sales of goods	1955	◯	7	5	2[282]	0
Transfer of title	1958	x	1	1	0	0
Maintenance children	1956	◯	12 + Macao	9	2[283] + 1[284]	2[285]
Protection of minors	1961	◯	13 + Macao	11	2[286]	1[287]
Form of wills	1961	◯	42 + HK	18	9[288] + 1[289]	6[290] + 9[291]
Traffic accidents	1971	◯	21	13	6[292]	1[293]
Products liability	1973	◯	11	7	4[294]	0

[282] Switzerland, Norway.
[283] Switzerland, Turkey.
[284] Lichtenstein.
[285] Macao, Japan.
[286] Switzerland, Turkey.
[287] Macao.
[288] Albania, Bosnia, Macedonia, Montenegro, Norway, Serbia, Switzerland, Turkey, Ukraine.
[289] Moldova.
[290] Australia, Hong Kong, Israel, Japan, Mauritius, South Africa.
[291] Antigua and Barbuda, Armenia, Botswana, Brunei, Fiji, Grenada, Lesotho, Swaziland, Tonga.
[292] Belarus, Bosnia, Macedonia, Montenegro, Serbia, Ukraine.
[293] Morocco.
[294] Macedonia, Montenegro, Norway, Serbia.

Subject Matter	*Year*	*Entry into Force*	*Number of SP*	*EU Members as SP*	*Non-EU Countries in Europe as SP + Non-member of the HCCH in Europe as SP*	*Non-European Member Countries as SP + non-member of the HCCH as SP*
Maintenance	1973	◯	15	11	3[295]	1[296]
Matrimonial property	1978	◯	3	3	0	0
Agency	1978	◯	4	3	0	1[297]
Trusts	1985	◯	9 + HK	6	1[298]	3[299]
Sales contracts	1986	x	2	0	0 + 1[300]	1[301]
Succession	1989	x	1	1	0	0
Protection of children	2007	◯	39	27	5[302]	4[303] + 3[304]
Securities held with intermediaries	2006	x	2	0	1[305]	1[306]
Protocol on maintenance	2007	◯	1 + EU	EU	1[307]	0

[295] Albania, Norway, Turkey.
[296] Japan.
[297] Argentina.
[298] Switzerland.
[299] Australia, Canada, Hong Kong.
[300] Moldova.
[301] Argentina.
[302] Albania, Montenegro, Russia, Switzerland, Ukraine.
[303] Australia, Ecuador, Morocco, Uruguay.
[304] Armenia, Dominican Republic, Lesotho.
[305] Switzerland.
[306] Mauritius.
[307] Serbia.

As we saw above, interactions between countries play a crucial role for the unification of private international law. Hence it is indispensable to carefully look at the composition of the members of each instrument. Thus the chart identifies the total number of:

(1) States parties of each instrument,
(2) States parties as EU members,
(3) States parties as non-EU members in Europe,
(4) States parties as non-EU members and non-member of the Hague Conference in Europe,
(5) States parties as non-EU members outside of Europe,
(6) States parties as non-EU members and non-member of the Hague Conference outside of Europe.

From the viewpoint of the total number of States parties, only three Conventions (form of wills, traffic accident, protection of children) and one Protocol (protection of children) have more than 20 States parties. Five Conventions (maintenance of children, protection of minors, product liability, maintenance, trusts) have ten or more, but fewer than 20 States parties. From a purely quantitative viewpoint there are not many successful examples of the unification of private international law. We will come back to this point later.

A striking feature is the fact that, for almost all of these instruments, the most dominant players have been countries in Europe. Such an observation could be further supported, when we recall the fact that some instruments presently in force in Macao and Hong Kong were ratified by Portuguese or British authorities.

The biggest number of non-European countries was found to have reacted to the issues on form of wills, and a few countries with a common law tradition reacted to trusts. Otherwise the ratio of ratification by non-European countries is very low in general.

Besides such involvements with various Hague projects, the European Union has further pursued the unification of private international law on a regional level. The 1997 Treaty of Amsterdam[308] introduced the competence regarding "judicial co-operation in civil matters".

When the Treaty of Amsterdam entered into force in 1999, the European Community was afforded competence to take measures in the field of private international law.

Article 81 of the Treaty of the Functioning of the European Union (TFEU) provides the legal basis for private international law matters[309] which include international jurisdiction, the applicable law and the recognition and enforcement of foreign judgments (Art. 81 (2) *(a)* and *(c)* of TFEU).

Since 2000, several Regulations which contain provisions on choice of law have been promulgated. They include, in the area of non-family and succession, Insolvency Regulation (No. 1346/2000)[310], Rome I Regulation (No. 593/2008)[311] and Rome II Regulation (No. 864/2007)[312], and in the area of family law and

[308] Available at eurotreaties.com/amsterdamtreaty.pdf (last visited on 2 March 2014).

[309] European Parliament Directorate General for Internal Policies; Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, *Current Gaps and Future Perspective in European Private International Law: Towards a Code on Private International Law?* (2012), p. 7. *(Current Gaps.)*

[310] Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings.

[311] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

[312] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

succession[313], Maintenance Regulation (No. 4/2009)[314], Rome III Regulation (No. 1259/2010)[315] and Succession Regulation (No. 650/2012)[316]. The importance of further harmonization of private international law in Europe has been stressed[317]. Filling gaps in still uncovered fields by using separate instruments is advised[318], while further collaboration with the Hague Conference is desired[319].

Such a strong incentive of European countries for harmonization and unification can be well explained with the conditions identified in previous sections. First, long-term relationships among Member States are institutionalized by various European Conventions with comprehensive scope, such as the 1957 EEC Treaty and those Treaties which have amended the 1957 Treaty[320]. Institutionalized long-term relationships incentivize stakeholders to consider interests analysis from broader perspectives.

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[313] In the area of family law, a special legislative procedure requiring unanimity will in principle have to be followed (cf. Art. 81 (3), TFEU), *supra* footnote 309, p. 7.

[314] Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition of decision and cooperation in matters relating to maintenance obligations.

[315] Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced co-operation in the area of the law applicable to divorce and legal separation.

[316] Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession,

[317] *Supra* footnote 309, p. 7.

[318] *Ibid*., p. 18.

[319] *Ibid*., p. 11.

[320] Treaty establishing the European Economic Community, europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_eec_en.htm.

Second, in Europe such long-term relationships are built up in various aspects. The list of institutions and bodies which have been proceeding with integration in the European Union[321] shows that the integration takes place on multiple levels.

Third, co-operation is more beneficial than non-cooperation. As we saw above, if non-cooperation would bring about a largely negative outcome, country X will tend to co-operate (see Case 1.1). Non-cooperation with other countries means, for example, that country X should set up all institutions by itself and this would be very costly, especially for smaller countries. Even if non-cooperation were not costly, as long as there is a big difference between benefits of non-cooperation and co-operation, country X could have enough incentive to co-operate (see Case 1.2). Participation in a single bigger European market via co-operation will bring about much larger benefits than keeping to one country's domestic market.

If the benefits of betrayal are very large, it may change the game and that country would change its co-operative policy to a non-cooperative one and remain so (see Case 2.1). But the greatest benefits could be obtained by co-operative-non-cooperative-co-operative strategies (see Case 2.2 (1) and (2)). This is even more so the case if the decision to change back to the co-operative policy occurs sooner (see Case 2.2 (1′) and (2′)). Even if benefits of non-cooperation are smaller (20 in our case), the early position change to co-operation could be more beneficial than remaining non-cooperative (compare Case 2.1 (2) and Case 2.2 (3′) and (4′)).

Perhaps more importantly, benefits to be obtained in the future should usually be calculated less than

[321] See the list available at europa.eu/legislation_summaries/institutional_affairs/institutions_bodies_and_agencies/index_en.htm.

current benefits due to uncertainties in the future. However the single market in Europe has been expanding, so that such a reduction could be less than usual or benefits in the future could be even larger than today. Thus, there are good reasons for the harmonization and unification of private international law in Europe.

On the other hand, the conditions identified above could explain why the number of ratifications of the Conventions concerning applicable law adopted by the Hague Conference has been small outside of Europe. First, as we saw above, each country's incentives to apply its own law are so strong that long-term and multi-layered relationships are a necessary condition to invite countries to pay more attention to the global perspective. But such relationships do not exist on a global level. Instead of producing global conventions on applicable law, focusing on regionally or bilaterally emerging long-term relationships and providing consultation for legislative works for such relationships could yield more possibilities. For this purpose, a model which could be adapted to the specific circumstances of that relationship would be needed. From this viewpoint, recent policy changes of the Hague Conference to take more flexible approaches than before which do not exclude to draft soft laws[322] and more regionally oriented approaches[323] seem to make sense.

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[322] Draft Hague Principles on the Choice of Law in International Contracts, available at hcch.net/upload/wop/gap2013pd06en.pdf; see also R. Michaels, "Non-State Law in the Hague Principles on Choice of Law in International Contracts" (forthcoming, 2014), available at: papers.ssrn.com/sol3/papers.cfm?abstract_id=2386186; S. Symeonides, "The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments", 61 *American Journal of Comparative Law* (2013), pp. 873-899.

[323] E.g., the establishment of Asia Pacific Regional Office in Hong Kong; see hcch.net/index_en.php?act=text.display&tid=184.

Another possible mission would be to show the benefits of co-operation more clearly, without depending upon such a traditional assumption that unification is always better. Non-negotiated reciprocity is considered a possibly useful tool that could be expected "to reduce the risk of betrayal" and lead to co-operation[324]. More important it seems to show that, after betrayal, a return to the co-operative policy should occur sooner.

[324] Kramer, *supra* footnote 187, p. 344, stresses reciprocity as a trigger strategy.

CHAPTER V

UNIFICATION OF INTELLECTUAL PROPERTY LAW

5.1. Intellectual Property across the Borders

In the twenty-first century, IP rights have become one of the most valuable assets for corporations which seek to compete in the global market place. Besides protecting core technologies against third-party infringers, IP rights help to strengthen the position of the proprietors of IP vis-à-vis other competitors and increase returns for earlier investments in R&D[325]. The rise of digital communication technologies opened enormous opportunities for large and small firms as well as individual creators to exploit their works. The capability to separate the production process coupled with modern management strategies contributed to the emergence of intermediate markets where IP rights could be traded as distinct packages of commercially valuable assets[326].

From a legal point of view, cross-border transactions for the exploitation of IP as a distinguished asset are complex and costly. For instance, a corporation which enters into a R&D contract with a foreign entity has to incur high costs, such as due diligence costs (e.g., examine the economic activities of the

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[325] S. Baldia "The Transaction Cost Problem in International Intellectual Property Exchange and Innovation Markets", 34 *Northwestern Journal of International Law and Business* (2013), 1-52.

[326] Robert P. Merges, "The Emerging Patent Market: What Do We Know, and What Should We Do?", *Media Institute* (15 November 2011), available at: mediainstitute.org/IPI/2011/111511.php.

potential partner) and bargaining costs which would include attorney fees. After the conclusion of the contract, additional costs may be incurred (for example, the monitoring of the activities of the other contracting party, compliance with terms of licence or even a potential litigation)[327]. Ideally, laws and regulations should facilitate various forms of co-operation between individuals so that new valuable content could be developed. Paradoxically, the current IP regime is quite unyielding: IP laws are largely territorial and efforts to harmonize IP-related legal matters have been only partially successful.

This chapter contains three main sections. The first section provides for a short overview of problems which concern the protection of intellectual property across borders. It explains how principles of territoriality, national treatment and choice of law have developed over time and outlines what core issues are still pending for the harmonization of the international IP agenda. The second section briefly addresses the most recent developments, i.e. academics, together with practising lawyers, prepared various sets of principles that aim to clarify and smoothen the process of exploitation of IP rights on the private international law level. The third section engages in an analysis of the costs and benefits of having a unification of IP laws. That section explains in what cases diversity is more preferable than unification and also delves into the rationale of recent scholarly projects.

5.2. A Rocky Road towards International Harmonization of IP

(1) *Territoriality and harmonization*. The principle of territoriality of IP law has deep historical roots. In

[327] Baldia, *supra* footnote 326, p. 24.

many countries it is possible to trace back to a period when various privileges were granted by kings or princes to a particular merchant or tradesman[328]. Such privileges were usually issued in a written form and these merchants or tradesman were conferred titles, offices or allowed to undertake certain economic activities. Often such privileges were related to the printing or producing of certain goods (e.g., alcohol). Privileges were important also for monarchs who were able to secure a share of the income to their royal coffers while at the same time retaining the powers to exercise certain control over the patented activities[329]. Such royal privileges had effects only within the territorial boundaries of the town-States or monarchies simply because granting kings had no sovereign powers in foreign territories.

This idea of individual privileges granted by sovereign kings underwent a remarkable transition during the time of the industrial revolution. Case-by-case granting of privileges gradually turned into a more formalized system where copyright protection was enshrined in domestic statutory provisions. The first English Statute of Anne dates back to 1709; and by the mid-nineteenth century almost all countries in Europe and some in the Americas had their own copyright legislation[330]. Although domestic copyright statutes

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[328] J. Basedow, "Foundations of Private International Law in Intellectual Property", in J. Basedow, T. Kono and A. Metzger (eds.), *Intellectual Property in the Global Arena: Jurisdiction, Applicable Law, and the Recognition of Judgments in Europe, Japan and the US* (Tübingen, Mohr Siebeck, 2010), at pp. 3-29.

[329] P. Goldstein and B. Hugenholtz, *International Copyright: Principles, Law, and Practice* (OUP, Oxford, 3rd ed., 2012), pp. 15-19.

[330] For further details see S. Ricketson and J. C. Ginsburg, *International Copyright and Neighbouring Rights* (OUP, Oxford, 2005), para. 1.05.

aimed to achieve similar objectives, the means for realizing them varied from State to State. Significant differences existed with regard to the kinds of works that were protected, the requirements for and terms of protection, the rights conferred, and the restrictions for the exercise of the rights[331].

The real problem in the nineteenth century was related to the piracy of creative works. Books, music, and other forms of intellectual expressions know no national borders. For example, the works of French author Victor Hugo were not only popular in francophone countries, but were also widely disseminated among the elite of Czarist Russia. The counterfeiting of books and unauthorized translations to foreign languages were happening on a regular basis. In European countries such exploitation of works without the permission of the author was considered an honourable practice which contributed to the spreading of enlightenment to local societies[332]. The actual problem for authors was that most national laws did not protect works created by foreign creators so that such popular intellectuals could practically have no efficient means to enforce their rights abroad. Most notably, Goethe had to approach 39 sovereign kings in order to obtain privileges for the exclusive exploitation of his works in those German-speaking States, yet his attempt was not successful merely because of the fact that these States were inclined to grant protection for only their own nationals.

Yet, disturbing piracy activities and a lack of protection for foreign authors raised much public concern. Consequently, some countries with thriving creative ecosystems such as France or Belgium decided to take unilateral steps and also extend copyright protection to

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[331] See *op. cit. supra* footnote 320, paras. 1.07-1.19.
[332] *Ibid*., paras. 1.20-1.21.

creators from abroad, even though it did not mean that other States would follow suit and adopt such courtesy amendments in their own domestic laws. Nevertheless, as time passed by, it became clear that a closer co-operation among States was inevitable. The first steps taken were among States which shared the same language used for daily communication. The first bilateral agreements were concluded by German-speaking States, which agreed to protect the works of foreign authors on the basis of reciprocity. This wave of bilateral agreements gained momentum leading to a rather dense net of bilateral treaties[333].

Most bilateral treaties of the nineteenth century were based on the reciprocity requirement and national treatment, which obliged contracting States to grant foreign authors some of the rights that national authors enjoyed. Bilateral treaties also addressed certain formalities such as the deposit or registration of a work both in the country of origin as well as in the country where protection is sought. Protection was limited to those rights which were provided in a bilateral treaty (as a principle, rights of reproduction and reprinting). Bilateral treaties also contained some restrictions with regard to the exercise of rights, e.g., the author was not allowed to request a protection that was broader than what was granted in the home country[334].

The practical effects of nineteenth-century bilateral treaties was sometimes disrupted by geopolitical changes, which led to frequent modifications or denunciations. For instance, although the Russian Empire entered into conventions with France (1861) and Belgium (1862), they were largely dissatisfied because

[333] E.g., a bilateral treaty between Austria and Sardinia of 22 May 1840. For more detailed account see Ricketson and Ginsburg, *supra* footnote 330, para. 1.30.

[334] Silke von Lewinski, *International Copyright Law and Policy* (OUP, Oxford, 2008), para. 2.07.

they deemed such international obligations stemming from those treaties as being imposed upon them[335]. Accordingly, the Russian Empire denounced those two treaties in 1885 and did not conclude any more international agreements in copyright-related matters. Further difficulties in the operation of bilateral treaties were related to the notion of "the most favoured nation" which led to an extremely complex legal system and dissatisfaction from the viewpoint of various stakeholders. Such regulatory chaos prompted further debates over the possible avenues available to improve the protection of creators on an international level.

At the second half of the nineteenth century it became clear that unification of IP laws on an international level was desirable. A great number of congresses were held to further discuss possible ways to secure international protection of IP rights. In the case of copyright works, it soon became obvious that international recognition and protection should be granted to literary and artistic works even without reciprocity, full national treatment and any further formalities. There was a need to harmonize certain rights which should be granted (i.e., rights related to publication, reproduction, distribution, translation, musical arrangement as well as public performance)[336]. Similarly, in the case of patents, States had to carefully deliberate and find a consensus as to what rights should be granted to the proprietors of industrial property rights. In reality, however, the differences among national laws were too great. French or German representatives at international congresses were more inclined towards the universality of IP rights, because they considered

[335] Ricketson and Ginsburg, *supra* footnote 330, para. 1.31.

[336] See von Lewinski, *supra* footnote 334, para. 2.28.

them closely related to the personality of the creator. On the other hand, experts from common law countries were more concerned with the pragmatic aspects of the exploitation of creative works. The idea of unification of substantive laws — despite its attractiveness[337] — was not actually feasible. Accordingly, a decision was made to keep to the idea of national treatment, conjoined with minimum rights, that should be conferred to proprietors of IP rights who had protection in foreign States[338].

After lengthy deliberations, the first international treaties were adopted. Issues related to the protection of industrial property rights were harmonized in the Paris Treaty of 1883[339], while the protection of literary and artistic works was subject to the regulations of the Berne Convention of 1886[340]. These two major treaties were subsequently amended several times in order to address the gaps in earlier texts and also align those treaties to the changing realities of the exploitation of IP rights. Many more multilateral conventions were drafted at the second half of the twentieth century both

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[337] In 1837 Jobard wrote:

> "What a magnificent era of progress will open before us, when an international law will regulate the property of thoughts, when the work of genius will receive its worldwide passport and will be submitted to the protection of countries, whether friends or allied, as stated in the passport." Cited from von Lewinski, *supra* footnote 334, para. 2.02.

[338] Ricketson and Ginsburg, *supra* footnote 330, para. 2.02, and von Lewinski, *supra* footnote 334, para. 2.44.

[339] Paris Convention for the Protection of Industrial Property, as last revised at the Stockholm Revision Conference, 14 July 1967, 828 *UNTS* 303.

[340] Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, as last revised at Paris on 24 July 1971, 1161 *UNTS* 30.

on an international level as well as a part of regional endeavours for economic integration[341].

(2) *Creation and enforcement*. Under the current IP regime, TRIPS and a number of international treaties for the protection of IP enable the inventors or creators to obtain protection for their inventions or works provided that certain requirements are met. The minimum requirements for obtaining IP protection are harmonized internationally. For example, work created by an individual is protected in all members of the WTO without any registration of the work: it suffices that the work is original and is expressed in a material form.

The Patent Cooperation Treaty (PCT)[342] enables an inventor to obtain protection for newly developed technologies in multiple States by filing a single application. In the same vein, WTO Member States are also committed to protect other forms of IP such as trade secrets and know-how without further registration requirements[343].

International co-operation has been expanded. If a corporation intends to obtain a patent in Japan and the United States, it traditionally would have had to file separate patent applications before the Japanese Patent Office (JPO) and the US Patent and Trademark Office (USPTO). However, over time the patent offices of major economic areas (firstly Japan, the European Union and the United States) developed closer ties with each other and worked towards the harmonization

[341] Universal Copyright Convention (1952); Rome Convention for the Performers, Producers of Phonograms and Broadcasting Organisations (1961); TRIPS (1994); WIPO Copyright Treaties (1996); European Patent Convention (1973); Benelux Convention on IP (TM and design) (2005).

[342] 9 *International Law Materials* (1970), p. 978.

[343] Arts. 1 and 2 of the TRIPS.

of patent granting procedures. One of the major steps forward was taken in 2006 when the so-called Patent Prosecution Highway (PPH) programme was proposed by Japan.[344] For example, in the case of PPH between Japan and the United States, the JPO would review the application and make a decision with regard to patentability before granting a patent in Japan. Then, under the PPH, the USPTO could examine the same file in what would be a speedy and simplified procedure.

Although the granting of IP rights has been harmonized to a significant extent, the rights conferred nevertheless remain territorial. In other words, a patent granted by the JPO is effective only within Japan and is separate from a patent granted by the USPTO. The same is true for other kinds of registered and non-registered IP rights. In other words, international treaties administered by WIPO mainly deal with the granting aspect of IP rights and leave the enforcement for national laws. Long-lasting attempts to achieve international harmonization of substantive laws have usually failed because of the conflicting interests of various stakeholders[345]. The most crucial controversies surround the competing interests of developed countries which usually are exporters of IP-protected goods and those of developing countries which import technologies, know-how and other forms of creative content[346].

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[344] Japan concluded agreements with 30 countries. There are several types of PPHs.

[345] See generally about the issues underpinning the WTO J. P. Trachtman and C. Thomas, *Developing Countries in the WTO Legal System* (OUP, Oxford, 2009).

[346] See, e.g., D. Gervais (ed.), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS Plus Era* (OUP, Oxford, 2009).

5.3. Territorial Rights in the Global Market

(1) *Three principles*. International IP treaties harmonize various aspects that are vital for the protection of creative products across borders. As it was briefly alluded to before, the main objectives of the forefathers of the treaties were to make sure that a creator of an intellectual product would be able to enjoy equal protection in all foreign countries despite the differences of nationality or country of origin. In order to achieve that, international treaties successfully provide for a set of minimum requirements to be met to qualify the creative work or protected subject matter for protection. The international treaties in the field of IP aim to draw a finely balanced line between the possibility to obtain protection of IP rights in foreign States and national policy considerations.

Three main principles underpin the functioning of international IP treaties. First, the principle of national treatment aims to make sure that foreign nationals can trust that they will enjoy similarly favourable national treatment as domestic creators. This is true both for works of literature or artistic works as well as for various kinds of industrial property[347]. Different from mid-nineteenth century bilateral treaties, modern multilateral conventions no longer require reciprocity as a precondition for protection[348]. The second principle common to multilateral IP conventions is territoriality[349]. Just like medieval privileges, IP rights obtained

[347] Cf. Paris Convention, Art. 2 (2); Berne Convention, Art. 5 (1); WPPT, Art. 4 (1); TRIPS, Art. 3 (1).

[348] Stephen P. Ladas, *The International Protection of Literary and Artistic Property* (New York, Macmillan, 1938), p. 365.

[349] See, e.g., G. Dinwoodie, "Developing a Private International Intellectual Property Law: The Demise of Territoriality?", 51 *William and Mary Law Review* (2009), pp. 711-800.

in a Member State of a treaty have legal effects within that particular country. For example, a novel created by a French author and first published in France is legally protected under French law. The Berne Convention also allows the French author to enjoy the protection of the novel in other Member States; however the rights conferred as well as the extent of the protection in those countries will be determined by the laws of the place for which protection is sought[350]. Similarly, in the case of industrial property rights such as trademarks or patents, the proprietor of a trademark or patent must register those rights in each and every country for which protection is sought. The third principle which is crucial for the functioning of the international IP system is the so-called independence of IP rights: the fact that country A confers the protection to a particular work or invention does not *per se* oblige other Member States to grant protection for the same creative product. This principle is intended to leave some level playing field for States and their economic, social and cultural interests. For example, the independence of national IP rights systems means that countries may not protect creations that would be against their public policy (e.g., pornographic works or patents related to human genome even if those creative products are legally protected in some other countries)[351].

(2) *Some cases on cross-border exploitation*. The most challenging issue in the current international IP regime concerns the cross-border exploitation of IP rights. Nowadays, authors of bestselling books as well as composers and performers of music hits often conclude agreements authorizing the exploitation of copy-

[350] See Art. 5 of the Berne Convention; Sam Ricketson and Jane C. Ginsburg, *International Copyright and Neighbouring Rights* (OUP, 2005), Chap. 20.

[351] See Art. 5 of the Berne Convention.

righted works in multiple countries, and on all continents in the world. Similarly, trademarks play an important role in global business models. Small and large corporations seek to obtain patents in multiple States for their new-generation inventions. Even though the creators are able to obtain protection of their works in foreign States, there are multiple hurdles that are related to the actual enforcement of those rights. Such problems arise mainly because international treaties in the area of IP do not provide for a comprehensive mechanism to help proprietors efficiently protect their rights on an international level. The territoriality of IP rights dictates that the right holder has to take active steps before each and every State in which protection is sought. The following sections will introduce some of the underlying problems that arise in such crossborder disputes over IP rights. In particular, crossborder exploitation and enforcement of IP rights involves intricate private international law questions: Which court decides? Which State law should be applied?

One of the early cases which became a landmark precedent for international adjudication of multistate IP cases was decided by the High Court of Australia in 1905. In the case of *Potter* v. *Broken Hill*[352] the plaintiff (Mr. Potter) was an Englishman who moved to Australia and settled in the state of Victoria. In 1901 Potter created many inventions, including a chemical process to separate sulphide ores from valuable metals. The "Delprat-Potter flotation process" was a landmark invention which continues to be utilized today in the mining industry. Potter understood the commercial significance of his invention and obtained patents in two Australian states (New South Wales and Victoria) which at that time were independent regions with sepa-

[352] *Potter* v. *Broken Hill Proprietary Company Ltd.* (1906) 3 CLR 479.

rate governments. Later in 1902 Potter met a manager of the Broken Hill Corporation who soon thereafter patented a very similar process. Potter sued Broken Hill in a court of the defendant's domicile which was in Victoria and sought an injunction to restrain infringement of the patent. The plaintiff also argued that his patents in Victoria and New South Wales had been infringed and therefore damages for the infringement should be compensated. On its behalf, Broken Hill argued that the patents were invalid and that claims pertaining to the New South Wales patent are not justiciable before courts of Victoria.

In its decision, the High Court adopted a distinction between local and transitory actions which was first introduced by British Courts in the late nineteenth-century case *Moçambique*[353]. Local actions were related to the facts occurring in a particular place (e.g., land, trespass). Such local actions were subject to the jurisdiction of the courts where those facts occurred. Transitory actions did not necessarily have to be connected to a particular place, e.g., breach of contract; and therefore could be adjudicated by any court. In *Moçambique*, it was held that English courts could not assert jurisdiction over an action for *(a)* the determination of a title to, or the right of the possession of, any immovable situated outside of England; nor *(b)* the recovery of damages for trespass to such an immovable. Similar logic was applied by the Australian court in the *Potter* case where patent rights were deemed to be tantamount to land rights. Consequently, the Court considered New South Wales and Victoria as different states and decided that an action for an infringement of a patent granted in New South Wales cannot be justiciable in Victorian courts. In the opinion of the Court, the "act

[353] *British South Africa Co* v. *Compania de Moçambique* [1893] AC 602.

of state" doctrine prevented the courts of one state to decide upon the validity of the sovereign acts of another state (which in that case was related to the validity of a patent in New South Wales).

The *Potter* case became a pivotal precedent in commonwealth countries for the determination of the subject-matter jurisdiction of a court. In subsequent judgments, common law countries all around the globe followed the *Potter* rationale and usually adhered to the non-justiciability of the foreign IP rights idea[354]. This was true not only for cases involving patents of foreign States, but also other IP rights, regardless of whether their existence depends on registration or not. In other words, for more than a century, common law courts consistently refused to adjudicate claims concerning foreign IP rights, indicating that they do not possess subject-matter jurisdiction[355]. Accordingly, the proprietor of a patent in multiple States had to institute legal proceedings in every state where protection was sought.

The US courts would exercise jurisdiction over infringements of IP rights only if the infringing acts occurred in the United States. For instance, the case of *Subafilms Ltd*. v. *MGM-Pathe Communications Co*. concerned the exploitation of the Beatles' single *Yellow*

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[354] As for the United Kingdom, see, e.g., *Tyburn Productions Ltd* v. *Conan Doyle* (1990) 19 IPR 455; *Coin Controls Ltd*. v. *Suzo International (UK) Ltd*. [1997] 3 All ER 45, 52. See also G. W. Austin, "The Concept of 'Justiciability' in Foreign Copyright Infringement Cases", *International Review of Intellectual Property and Competition Law* (2009), pp. 393-412.

[355] See, e.g., *Mars Inc*. v. *Nippon Conlux Kabushiki-Kaisha*, 24 F. 3d 1368 (Fed. Cir. 1994) 1373 where the court held that that a "statute purporting to confer subject matter jurisdiction should be narrowly constructed; and ambiguities must be resolved against the assumption of jurisdiction".

Submarine in a cartoon. The terms of the licence clearly stipulated that the rights were transferred only for the display of the cartoon in cinemas and TV. Later, when videocassette recording technology emerged in the 1980s, the licensee started to distribute video recordings of the aforementioned cartoon. The right holder Subafilms sued in the United States seeking compensation for monetary relief for the infringements which occurred in the United States as well as in foreign States. The court held that it could grant the plaintiff monetary relief only for infringements which occurred within the United States[356].

In common law countries, in order to assert jurisdiction over the dispute, a court must not only have competence over the substance matter, but also it must establish that it would have power over the parties. This latter aspect is called personal, or *in personam*, jurisdiction. The question of whether a court possesses personal jurisdiction over the defendant has to be verified at the beginning of the proceedings. This could be problematic when the defendant is not domiciled or resident in the forum State. In complex IP cases, it may happen that the IP rights are infringed by multiple parties (e.g., manufacturer, assembling factory, and distribution may occur in different countries). The plaintiff has a big burden to identify whom and where to sue.

The approach taken by the US courts could be best illustrated by a decision in *Voda* v. *Cordis*[357]. In that case, the plaintiff, Voda, owned patents for identical inventions which were granted under the Patent Cooperation Treaty ("PCT") in a number of countries

[356] *Subafilms Ltd*. v. *MGM-Pathe Communications Co*., 24 F. 3d 1088 (9th Cir. 1994) and the introductory part of the US Report.

[357] *Jan K. Voda* v. *Cordis Corp*., 476 F. 3d 887 (Fed. Cir. 2007).

(the United States, Canada, the United Kingdom, Germany and France). The defendant, Cordis, was a US-based corporation established in Florida with foreign affiliates in France, Germany, Italy, and the Netherlands. Voda instituted judicial proceedings against all related corporate infringers before a US court alleging infringements of its American, British, French, German and Canadian patents. The district court decided it had supplemental jurisdiction pursuant to 28 USC §1367 *(c)* to hear foreign patent infringement claims. Yet, regardless of Voda's arguments that a consolidated multinational patent adjudication would be more efficient, the Federal Circuit ruled that the district court abused its discretion by asserting jurisdiction and held that considerations of comity, judicial economy, convenience, fairness and other exceptional circumstances constituted compelling reasons to decline jurisdiction. In coming to this conclusion, the Federal Circuit relied on such notions as the independence of national patents, stating that "only a British court, applying British law, can determine the validity and infringement of British patents"[358]. Similar restrictions apply with regard to other kinds of IP such as copyrights and related rights[359].

Problems arise in more complex IP disputes which concern multiple plaintiffs or multiple defendants. In the twenty-first century, copyright may be infringed by making certain works available to the public on the Internet without the right holder's authorization.

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[358] *Supra* footnote 357.

[359] See *Ortman* v. *Stanray Corp*., 371 F. 2d 154 (7th Cir. 1967); *Packard Instrument Company Inc*. v. *Beckman Instruments Inc*., 346 F. Supp. 408 (1978); *Subafilms Ltd*. v. *MGM-Pathe Communications Co*., 24 F. 3d 1088 (9th Cir. 1994); also *Boosey & Hawkes Music Publishers Ltd* v. *Walt Disney Co*., 934 F. Supp. 119 (SDNY 1996) at 124-125.

Alleged infringers may use file sharing platforms developed by third parties (e.g., YouTube or torrents). Also in the case of industrial property rights, patents or trademarks protected in several States may be infringed by a number of persons who co-ordinate their actions in each of the States where the rights exist. Efficiency considerations may facilitate the right holders to seek the consolidation of claims concerning multistate infringements of substantially identical IP rights. However, in practice the possibility of suing multiple foreign defendants before one court are very limited.

Such a strictly territorial approach towards the adjudication of multistate IP disputes has been an object for disagreement. The dissatisfaction with mosaic State-by-State litigation leads to high costs; yet, common law courts did not show much inclination to depart from the long-standing jurisprudence. However, the recent *Lucasfilm* case decided by the UK Supreme Court in 2011 offers some hope for flexibility in the future. At the centre of this dispute was the protection of some of the Imperial Stormtrooper helmets that were used in *Star Wars* — a 1977 movie which won an Academy Award for Best Costume Design. George Lucas, the creator of the concept of Imperial Stormtroopers, brought an action against Andrew Ainsworth who used his original tools to make Imperial Stormtrooper helmets and armour for sale to the public. The UK Supreme Court found that there are no impediments for English courts to hear actions for the infringement of foreign IP rights[360]. It held that the act of State doctrine was outdated and that the traditional approaches should be reconciled in the light of changing market realities. This path-breaking decision of the UK Supreme court has been welcomed by those

[360] [2011] UKSC 39, at paras. 53-80.

who seek to establish a more efficient adjudication system; however, it remains to be seen whether courts in other commonwealth countries will follow this new path[361].

Even if the court finds that it has jurisdiction over the case, several additional complications may arise with regard to the determination of the governing law. *Card Reader* is one of the more thought-provoking disputes to have reached the chambers of the Supreme Court of Japan[362]. In that dispute, the plaintiff was a Japanese national residing in Japan who owned a patent in the United States. Neuron, a Japanese company with its principal place of business in Japan, produced an infringing product in Japan and exported it to the United States through its wholly owned subsidiary. Having found that the infringing product was sold in the United States, the proprietor of the patent sued in Japan seeking an injunction against production and export of the infringing products to the United States; destruction of the infringing products; and compensation for damages. Since both parties were Japanese, the Supreme Court of Japan had no doubt about its jurisdiction to hear the case. With regard to the motion for an injunction, the Court held that the country where the patent is registered should be applied to the question of an injunction. According to Section 271 of the US Patent Law, both the infringer and the person who

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[361] See J. Blom, "Canada", in T. Kono (ed.), *Intellectual Property and Private International Law* (Hart, Oxford, 2012), at pp. 424-476; P. Torremans, "The Sense or Nonsense of Subject Matter Jurisdiction over Foreign Copyright", 33 *European Intellectual Property Review* (2011), pp. 349-356.

[362] *Fujimoto* v. *Neuron Corporation* ("*Card Reader* case"), 56 *Minshū* 1551, abbreviated English translation available at courts.go.jp/english/judgments/text/2002.9.26–2000.-Ju-.No.580.html.

induced the infringement overseas are liable. However, the Japanese Supreme Court was of the opinion that extraterritorial application of the US Patent law would undermine the fundamental values and public policy of Japan and refused to grant the injunction. The claim for damages was also denied.

The cases discussed above indicate some of the problems that arise when it comes to the actual enforcement of IP rights. The principles of national treatment, territoriality and independence of IP rights are the main pillars for the international protection of IP rights. However, the lack of harmonization with regard to the enforcement of IP rights leads to quite burdensome and costly situations. Even though it is possible to obtain protection for multiple States, the exercise of those rights remains territorial. In this context it is easy to note the clear conflict between the global market and territorial jurisdiction. The open question remains how should the principle of territoriality be adjusted to meet the needs of the global market[363].

5.4. Unification of International IP Law: Cost and Benefit Analysis

The evolution of international IP protection mechanisms offers a valid argument for the examination of the efficiency of such harmonization efforts. As has been shown, there are two parallel layers of harmonization of international IP law: a set of multilateral and regional conventions that could be categorized as a body of uniform substantive laws, while recent legislative proposals prepared by various expert groups could be classified as a body of uniform private international law.

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[363] R. Kojima, R. Shimanami and M. Nagata, "Applicable Law to Exploitation of Intellectual Property Rights in the Transparency Proposal", in Basedow, Kono and Metzger, *supra* footnote 328, at p. 183.

Starting from the territoriality of IP, the international community has been developing uniform substantive laws for over a hundred years, while uniform private international law has just started to emerge. This legal status quo could be further visualized by using the table from Chapter III of this work.

Norm / *Authority*	*Uniform*	*Multiple*	
		Choice of Law	*No Choice of Law*
Unitary	I		III
Non-unitary	IV		VI

Boxes I and IV refer to the situation where there are uniform substantive laws. Box I defines a situation where uniform substantive law is ordained by a unitary law-making authority, whereas box IV defines a situation where the uniform substantive law is posited by multiple law-making authorities. One could deem box IV as being quite close to the present regulatory framework because those treaties that are in force were adopted by various law-making authorities. The WTO has been pushing its Member States to move from Box IV to Box I. Boxes III and VI refer to a situation where a strict territorial approach applies and no private international law exists. Box III shows such a situation where diverse substantive laws are made by one decision-making body or countries with co-ordination, while Box VI represents a situation where countries follow different substantive laws. When Victor Hugo was making efforts to create the Berne Convention, the situation at that time was Box VI. In reality, however, the status quo of the international IP framework could be perceived as somewhere halfway between uniform law (Boxes I and III) and a situation where there are multiple laws with some choice of law rules, even if

those choice of law rules are ambiguous (therefore II and V are blank).

Simply speaking, the international community has been working on the unification of substantive IP law over one hundred years, starting from Box VI toward Box IV, then on to Box I. Based on the dichotomy between situations where there is uniform or significantly harmonized body of substantive law and a situation where such harmonization is lacking, it is possible to distinguish two types of diversities. The first type of diversity would be a situation where there is a manifest conflict of principles. The best illustration of such a conflict between fundamentally different principles could be drawn from patent law, i.e. the first-to-file principle and the first-to-invent principle. Even if States are obligated to grant patent rights, provided that prescribed requirements are met, the novelty of the invention may depend on the rule which is adopted in the granting State: for example, an inventor of the technology in one State which follows the first-to-invent principle may not be entitled to protection in another State which follows the first-to-file principle. The second type of diversity refers to a situation where both rules aim to achieve the same objective, but differ on some formal point (e.g., in some countries copyright protection may be granted for 50 years, in others for 70 years *post mortem autoris*)[364]. Should we move in any case from Box VI to Box IV then to Box I? Or does this difference matter in terms of unification?

A cost and benefit analysis of these two types of diversities offers some informative observations for better understanding of unification or harmonization of laws. In the case of the first type of diversity where certain rules are fundamentally different, the costs of

[364] Japan belongs to the former, while EU Member States the latter.

creation of a harmonizer regime may be extremely high. This was actually the case with the recent regulatory change in the United States. Until 2013, the United States adhered to the first-to-invent system; however, the United States was the only one in the world which was following this kind of rule. It took much time to discuss the pros and cons of possibly changing the patent granting system. From a global welfare point of view, the existence of two conflicting patent granting systems was associated with great uncertainty and additional costs. From the viewpoint of the American lawmaker the system was adequate and functioning well, however, for international business the divergent regulation always increased procedural costs; therefore, the international community urged the United States to amend it. Changing the system was not an easy endeavour as the costs of making such a transition were significant. However, once the system was reformed, the costs at the maintenance level had become relatively low regardless of the fact that the approach adopted in the American Invents Act is still quite different from institutional settings in other jurisdictions. The low costs of maintenance could be explained by the fact that after the shift towards a universally accepted system, market players could enjoy more predictability and international patent applications could be examined more efficiently[365]. More importantly, it would encourage more patent applications, which would lead to more innovations, and this benefit would last almost for ever. The same can be said about the formal requirement of copyright and the Universal Copyright Convention (1951, 1972). Hence

[365] See, e.g., R. G. Braun, "America Invents Act: First-to-File and Race to the Court", 8 *The Ohio State University Entrepreneurial Business Law Journal* (2013), pp. 63-64.

it could be concluded that harmonizing laws is appropriate as long as such fundamental principles are considered.

On the other hand, if we were to depart from the second type of diversity, compliance with diverse IP laws in different jurisdictions would cause various costs, including costs to get information on these laws, costs to arrange different licence agreements, and costs of multiple litigations (for example, *Apple* v. *Samsung* litigations worldwide). At the same time, each country could design IP laws suitable for its domestic policies, i.e. high level of suitability (fits). For example, some countries which want to protect artists could introduce resale rights or some countries may wish to introduce special rules to protect their cultural industries from IP infringement in a ubiquitous environment. If the total of these benefits are bigger than the total costs, it is appropriate to maintain the second type of diversity. Uniform law is not always the panacea of conflict of laws.

5.5. Unification of Private International Law of IP

5.5.1. Scholarly initiatives

Several scholarly projects have published draft principles or draft legislation. The first was a project under the auspice of the American Law Institute. The ALI Principles on Intellectual Property[366] were adopted in 2007 at the meeting of the ALI General Assembly. The ALI Principles provide for a comprehensive set of rules concerning various issues on international jurisdiction, applicable law and the recognition of judg-

[366] The American Law Institute, *Intellectual Property: Principles Governing Jurisdiction, Choice of Law and Judgments in Transnational Disputes* (Chestnut, ALI Publishers, 2008).

ments in IP disputes. One of the focal objectives of the ALI Principles was to restrict possible jurisdictional grounds in cross-border IP disputes and to facilitate coordination and consolidation of the proceedings[367].

Parallel to the ALI initiative, the Max Planck Institute in Munich initiated a project which published draft principles on jurisdiction in intellectual property in 2004[368]. This academic initiative further developed into a follow-up project, the so-called "CLIP" (European Max Planck Group for Conflict of Laws in Intellectual Property). The CLIP working group was founded by the Max Planck Institute for Intellectual Property, Competition and Tax Law (Munich) (at that time) and the Max Planck Institute for Comparative and International Private Law (Hamburg). Members of the CLIP working group consisted of six different countries on both sides of the Atlantic. Within five years the CLIP working group had drafted the so-called "CLIP Principles" which, similarly to ALI, deal with international jurisdiction, applicable law as well as the recognition and enforcement of foreign judgments in IP matters. The CLIP Principles were finalized in 2011[369] and published together with commentary in 2013[370].

Two more specialized working groups to tackle private international law problems relating to the cross-

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[367] R. C. Dreyfuss, "The American Law Institute Project on Intellectual Property: Principles Governing Jurisdiction, Choice of Law and Judgments in Transnational Disputes", in S. Leible and A. Ohly (eds.), *Intellectual Property and Private International Law* (Mohr Siebeck, Tübingen, 2009), pp. 15-30.

[368] European Max Planck Group on Conflict of Laws in Intellectual Property, *Conflict of Laws in Intellectual Property: The CLIP Principles and Commentary* (OUP, Oxford, 2013).

[369] Available at www.cl-ip.eu.

[370] CLIP, *supra* footnote 368, pp. 560.

border aspects of IP rights were formed by legal academics in East Asia. Their creation was inspired by legal developments across the Pacific and in Europe. The first group was initiated under the auspices of the "Transparency of Japanese Law Project", with the intention of drafting a proposal of special rules dealing with private international law aspects of IP[371]. Similar to the ALI and CLIP Principles, the Transparency Proposal deals, *inter alia*, with grounds for general, special and exclusive jurisdiction in IP disputes, consolidation of claims and co-ordination of parallel proceedings; applicable law to IP infringement, licensing and other related issues as well as recognition and enforcement; and recognition of foreign judgments rendered in IP disputes[372]. The Japanese and Korean Project was initiated with the objective of drafting a proposal on the jurisdiction and applicable law for the whole East Asian region by a group of scholars from the two countries.

In 2010, the Committee on IP and Private International Law was established under the auspice of the International Law Association (the ILA Committee). Since 2011, this Committee has been drafting guidelines which would be valid worldwide, covering the outcomes of the preceding projects as well as new issues that the preceding projects did not deal with[373].

5.5.2. Rationale from an economic perspective

These scholarly projects have tried to fill Boxes II and V: the Transparency Projects tries to fill Box V, while others aim at proposing drafts of international soft instruments for Box II.

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[371] www.tomeika.jur.kyushu-u.ac.jp.

[372] See Basedow, Kono and Metzger, *supra* footnote 328.

[373] The list of members and reports are available at ila-hq.org/en/committees/index.cfm/cid/1037.

From an economic viewpoint, each single rule of private international law for IP should theoretically be examined by applying a costs and benefits analysis, but we should wait to do so until the ILA Committee finalizes the guideline, since it will present guidelines with universal coverage. In this chapter, we should pay attention to three fundamental aspects that require clarification: first, if and why private international law is necessary for IP; second, what is the economic rationale of the most basic rule of private international law for IP, i.e. *lex protectionis*; third, what is the economic rationale of the soft-uniform law approach, in other words why Box II instead of Box V?

First, under the current situation, private international law in the field of IP is still under development. Keeping the diversity of laws under territorialism means that the world remains in Box VI. The question as to whether we should have a private international law for IP or not requires a consideration of the costs and benefits. If we don't have private international law for IP, it is likely that some courts in one country may apply only its own IP laws, but other courts in the same country may apply foreign IP laws[374]. If the level of predictability on applicable law is low, information costs would rise in order to identify compliant laws. On the other hand, if we do have private international law for IP, there will still be costs incurred, i.e. costs to create a rule. But it would at the same time bring benefits: even if a case closely related to country X is pending in country Y, the fits of the IP laws of country X cannot be shared in country Y under territorialism.

[374] The *Card Reader* case in Japan was a good example. The Supreme Court (26 September 2002; *Minshū*, Vol. 56, No. 7, at p. 1551) accepted private international law for IP, but the Tokyo High Court as the second instance (27 January 2000; *Hanrei Jihō*, No. 1711, p. 131) *a priori* rejected to apply private international law to IP.

Only with private international law can the fits of the IP laws of country X be reflected in global welfare.

Creation costs might be high for some new issues. For example, to create a private international law rules on infringement of IP in ubiquitous environment might be time-consuming. But certain IP-related private international law rules could easily be accepted by most countries that would be cost-efficient in terms of creation. Once private international law for IP is created, its maintenance would be easy and not costly, while the costs of not having a private international law would have repercussions that would last almost eternally. Thus, it is appropriate to have a private international law for IP. It means we need to fill Boxes II and V in the table above; this task has been taken care of by the abovementioned scholarly groups.

Second, all scholarly projects adopt the rule *"lex protectionis"* as the general private international law rule for IP. Why do we adopt *lex protectionis* as the general private international law rule for IP? As a typical *lex protectionis*, the CLIP Principles Article 3:102 provides for:

> "Article 3:102: *Lex protectionis*
>
> The law applicable to existence, validity, registration, scope and duration of an intellectual property right and all other matters concerning the right as such is the law of the State *for which* protection is sought."

Its outcome is that, for each country where protection is sought, the law of that country is applicable. It means that the laws of all countries where that infringement caused damages should be applicable. It applies also to IP infringement which occur in ubiquitous environment. It would be impossible to apply the laws in all countries where the internet is available in one case. But from an economic point of view, the costs to apply

lex protectionis are not so prohibitive because, for the purpose of litigation, the important countries (e.g., the main markets of the plaintiff) would be selected as fora.

As for the benefits aspect, *lex protectionis* has very high fits. In the case of a patent, the country of registration contains the most knowledge on the patent and thus is the most efficient place to make a decision on it. As copyright, such countries are important market countries, so that albeit necessary costs return is high.

Third, if we develop private international law rules for IP, they could be national rules. It means remaining in Box V in the table. So why then should we move toward Box II? We saw in Chapter II that there must be certain conditions met to give enough incentives to apply foreign laws. In the field of IP, uniform laws on a global level have been developing for more than a century, starting with the Paris Convention of 1883 and the Berne Convention of 1886, and later further strengthened by TRIPS[375], WIPO treaties[376] and regional agreements[377]. Hence long-term and multiple relationships in terms of IP protections have been institutionalized by these instruments. The benefits of co-operating with other countries have been already realized and institutionalized by PCT, although it concerns only the creation aspects of IP. The number of Member States of PCT has been rapidly increasing[378]. Other types of co-operation have been also put into practice[379]. Thus the conditions to move toward the unification of pri-

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[375] Art. 4 of TRIPS provides for most-favoured-nation treatment.

[376] See wipo.int/treaties/en/.

[377] See for example wipo.int/wipolex/en/profile.jsp ?code=EU.

[378] Patent Cooperation Treaty of 1970 had 45 Member States in 1990, but has 148 Member States in 2014.

[379] See wipo.int/cooperation/en/index.html#countries.

vate international law are gradually being satisfied on a global level. Therefore it is appropriate to seek possibilities for soft uniform private international law for IP. The preceding academic projects and the current ILA Committee have good reasons for their activities.

CHAPTER VI

CROSS-BORDER INSOLVENCY AND PRIVATE INTERNATIONAL LAW

6.1. Three Approaches to Cross-Border Insolvency

As a result of globalization, many corporations have expanded their activities throughout the world. These corporations have and will have their assets in many jurisdictions. Through deregulations, entities and individuals can obtain assets more easily than before. But if an owner of overseas assets cannot generate sufficient revenue to satisfy his debt obligations, we will then have a cross-border insolvency case. There is no uniform law on the global level to deal with cross-border insolvency. Currently, international insolvency has to be handled with domestic insolvency laws. Insolvency laws differ across nations, because while "any insolvency law reflects some concern with efficiency, other interests, such as redistribution to favored groups, shape the final legislative product"[380]. We are faced with two questions under such circumstances. The first question is how to design a legal mechanism to cope with cross-border insolvency. The second question is how to decide the jurisdiction of an insolvency proceeding[381].

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[380] R. K. Rasmussen, "Resolving Transnational Insolvencies through Private Ordering", 98 *Michigan Law Review* (2000), at p. 2253, "scholars who embrace efficiency as the sole goal of bankruptcy law have yet to reach consensus on the optimal bankruptcy system".

[381] The places which have jurisdiction over an insolvency case and to which the applicable law belongs *(lex*

On a regional level, a good example of such a system is the European Regulation on cross-border insolvency [382]. This Regulation adopts a mechanism combining insolvency jurisdiction (Art. 3) and the recognition of foreign insolvency proceedings (Art. 16), and provides for general and special rules on applicable laws (Arts. 4-15).

How shall we approach insolvency cases on a global level? In this section, three approaches for cross-border insolvency and their pros and cons will be illustrated.

6.1.1. Territorialism

Once an insolvency proceeding is commenced following a debtor's non-payment, his creditors are in principle not allowed to individually exercise their rights to claim and enforce. The trustee appointed by a court should collectively exercise their rights on behalf of all creditors. The trustee is usually provided with such power that, under certain conditions, he could even cancel a debtor's prior transactions for the collective interests of creditors. The insolvency proceeding thus has the nature of collective enforcement. When such collective and mandatory aspects of an insolvency proceeding are emphasized, territorialism becomes the basic principle of cross-border insolvency. Since the insolvency proceeding as an enforcement represents

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fori concursus) are in principle the same due to the territorialism of insolvency proceedings. Only for some special issues, such as contracts for employment, special applicable law could be chosen.

[382] The Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings. Its Recital (3) states "The activities of undertaking have more and more cross-border effects", and "there is a need for a Community act requiring coordination of the measures to be taken regarding an insolvent debtor's assets".

the sovereign power, its scope and effects should be limited to the territory of the particular State[383]. If the debtor has assets in several jurisdictions, his insolvency proceeding should commence in each of these jurisdictions.

Territorialism is currently the international law of bankruptcy[384]. It also provides local creditors with better protection as well[385]. A good example of territorialism was Article 3 of the Japanese bankruptcy Act before the amendment in 2000[386].

6.1.2. Universalism

Under universalism, ideally, there should be only one forum which deals with all assets of a debtor, irre-

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[383] L. M. LoPucki, "Cooperation in International Bankruptcy: A post-Universalist Approach", 84 *Cornell Law Review* (1999), at p. 760, "territoriality permits the local country to effectuate its rules of priority to the maximum extent of its sovereignty".

[384] L. M. LoPucki, "The Case for Cooperative territoriality in International Bankruptcy", 98 *Michigan Law Review* (2000), at p. 2219. When

> "the debtor's financial problems are confined to the entities located in a single country, the distressed entity or entities reorganize or liquidate in that country, and the foreign entities are unaffected. When a multinational company's financial problems extend across borders, each financially distressed entity files for bankruptcy in each country where estates negotiate and obtain court approval of an agreement ('protocol') that provides the terms for cooperation in the particular case."

[385] LoPucki, *supra* footnote 383, at p. 760, "most extenders of credit likely will contract in anticipation of local priorities".

[386] A bankruptcy adjudged in Japan shall be effective with respect to only the bankrupt's properties existing in Japan; a bankruptcy adjudged in a foreign country shall not be effective with respect to properties existing in Japan.

spective of their location and their distribution, and only one country's laws should govern the insolvency. The proponents of universalism identify two ways that a universalist system would promote greater efficiency than a territorial system[387].

First, a territorialist legislation would lead to a sub-optimal investment decision[388]. The first argument concerns the following situation[389]: country X has a territorialist regime in place, where country Y has a universalist regime. A firm has debts in country Y with an interest rate of 5 per cent borrowed from a creditor A. The firm wants to invest in either X or Y by borrowing from a new creditor B. If the investment is successful, return from country X would be 10, while return from Country Y would be 11. If it goes badly, the firm has to file for bankruptcy. It is assumed that the payoff to the firm is physically located where the investment took place and that production and the firm's output is located there. If both countries have bankruptcy laws that treat all creditors equally, then the old and new creditors A and B will each get 2 in the event of a bankruptcy. Knowing that creditors will each get a pro rata share in the event of bankruptcy, lenders from both X and Y will offer the firm the same interest rate. The firm's investment decision will depend upon the return to the investment. In this case, the new investor B will opt for country Y, since B will get 11.

If, however, country X has laws that favour creditors from country X in the event of insolvency, for example local creditors have a preferred status to

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[387] Rasmussen, *supra* footnote 380, at p. 2256.

[388] L. A. Bebchuk and A. T. Guzman, "An Economic Analysis of Transnational Bankruptcies", 42 *Journal of Law & Economics* (1999), at pp. 787-789.

[389] Simplified case from Bebchuk and Guzman, *ibid*.

receive dividend, the creditor from country X will receive more than the creditor from country Y. A higher payoff in insolvency implies that the contractual interest rate will be lower. Then the creditor from country X will offer a rate of interest that is below the rate demanded under universalism. In choosing its investment location, the firm will take account of the effect of its choice on the available interest. Hence the new creditor B would opt for country X despite getting a lower return for his investment.

Second, a universalist rule has the potential to bring more returns to all creditors. More precisely, the preservation of going concern values by global reorganization and the maximization of liquidation values by co-ordinated liquidation under universalism will likely increase returns to creditors greatly[390]. In addition, a universalist system would produce more equality of distribution among creditors[391]. Since equality of distribution is a central principle of the default management in every country, universalism would serve a global notion of fairness[392].

6.1.3. Contractualism

The third opinion has a different perspective and urges that more attention be paid to parties and not only post-insolvency aspects, but also *ex ante* aspects. The major goal of business law is the maximization of social wealth.

That can be realized in bankruptcy law by maximizing the value of bankrupt estates. But requiring parties

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[390] J. L. Westbrook, "Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum", 65 *American Bankruptcy Law Journal* (1991), at p. 465.

[391] *Ibid*., at p. 466.

[392] *Ibid*.

to use a single bankruptcy system provided by the State does not achieve this goal, since a State-dependent system is not suitable for parties in all States of the world[393].

"In the world of bankruptcy, one size cannot fit all."[394]

Hence parties should be free to choose a preferred bankruptcy systems for their lending agreements[395] or for their corporate charters[396]. A proponent of this view would further argue that bankruptcy law should not deal with social issues, such as the protection of employee's interests, since society has better means for handling such issues than bankruptcy[397]. Mandatory rules except automatic stay should be limited, since they do not give enough incentives for larger investment[398].

The bankruptcy law supplied by the State should be taken as the default system and the State should provide a set of additional systems among which parties can choose[399].

Under the current legal systems in the world, a bankruptcy contract is illegal[400]. But a proponent for a bankruptcy clause in a firm's charter would argue that contractualism allow for a better fit: firms that would benefit from a single reorganization proceeding can place a term in the corporate charter of each affiliate

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[393] A. Schwartz, "A Contract Theory Approach to Business Bankruptcy", 107 *Yale Law Journal* (1998), at p. 1850.

[394] *Ibid*.

[395] *Ibid*., at p. 1810.

[396] Rasmussen, *supra* footnote 380.

[397] Schwarz, *supra* footnote 393, at p. 1819.

[398] Automatic stay is necessary, but not other mandatory rules which regulate assumption and assignment of contracts, Schwarz, *supra* footnote 393, p. 1850.

[399] Schwarz, *supra* footnote 393.

[400] *Ibid*., p. 1833.

specifying which nation will adjudicate any insolvency proceeding involving the firm[401]. Firms with discrete operations can contract for a territorial approach by specifying in each corporate charter that the country of incorporation will handle any bankruptcy situation[402]. If firms have two such aspects, only the integrated entities could select the same jurisdiction to handle an insolvency while the remaining entities could select the jurisdiction where they are incorporated[403]. Thus the bankruptcy selection clause approach allows firms to tailor the transnational insolvency system to best meet their particular needs. It would bring about more gains than universalism or territorialism[404].

6.1.4. Pros and cons

Proponents of each of the above three opinions are quick to point out the shortcomings of the others, thus illustrating that none of these opinions stands free from criticism[405]. First, as for territorialism, the bankruptcy literature tends to equate territoriality with "a lack of co-operation between countries"[406]. Thus a proponent of territorialism modifies the term "territoriality" as "co-operative territoriality". This implies possible co-operation in many matters through a treaty or convention and serves as a foundation for mutually beneficial co-operation by the representatives of particular bankruptcy estates[407]. Still the following four points are

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401 Rasmussen, *supra* footnote 380, at p. 2260.
402 *Ibid*.
403 *Ibid*.
404 *Ibid*.
405 This section aims at showing that none of these opinions stands without modification. Thus criticism and counter-criticism in this section is not exhaustive.
406 LoPucki, *supra* footnote 383, at p. 702.
407 *Ibid*., at p. 742.

indicated as the weakness of co-operative territoriality: first, creditors have to file and prosecute claims in all jurisdictions where bankruptcy proceedings were pending against their debtors; second, co-operation among courts and representatives is needed to effect a multinational reorganization or liquidation; third, a strategic removal of assets from the country on the eve of bankruptcy could occur; and fourth, involuntary creditors have to be protected[408].

Concerning universalism, its first argument, i.e. the suboptimal investment problem under territorialism hypothesized by Bebchuk and Guzman, is so heavily criticized that it has little relevance to the territorialism-versus-universalism debate.

This suboptimal investment problem is a variant of the problem that arises whenever a firm with existing debt issues senior debt[409].

As for the second argument, i.e. there is more return via universalism than territorialism, the transnational firm would have to generate excess value from the combination of its constituent members to get more return.

However, in a world where firms constantly change

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[408] LoPucki, *supra* footnote 383, at p. 753. Counter-arguments, see *ibid*., at pp. 753, 755, 758, and 759, are as follows: the first problem is clerical, *ibid*., p. 753; concerning the second problem, universalism assumes that nations will do in bankruptcy what they are unwilling to do in other countries, i.e. grant foreign judgments the full faith and credit, *ibid*., p. 755; as for the third problem, large creditors could contract for non-removal and enforce the contract by monitoring the debtor and filing a bankruptcy before the threatened removal occurs and local law could criminalize it, *ibid*., p. 758; concerning the fourth problem, territoriality recognizes that the problem requires specific adjustment between countries rather than moralizing about international co-operation, *ibid*., p. 759.

[409] Rasmussen, *supra* footnote 380, at p. 2258.

their business strategy and sell off subsidiaries, it is not obvious that such a relationship exists for many firms[410]. Pure universalism, under which only one insolvency proceeding should be commenced and other nations should co-operate, does not work under the current legal systems in the world, so that universalism requires certain modifications. Thus modified universalism accepts the central premise of universalism, i.e. worldwide collection and distribution of assets, but reserves to local courts the discretion to evaluate the fairness of the home country's procedures and to protect the interests of local creditors[411].

Contractualism has been criticized as follows: first, in order to choose an appropriate insolvency law, firms would have to conduct comprehensive research to obtain necessary information, but its transaction costs would be enormous[412]; second, contractualism could affect non-contractual third parties[413]; third, a bankruptcy clause would give some nations incentives to create debtor heavens whose insolvency laws contain too debtor-friendly rules[414]; fourth, contractualism put so much emphasis on the parties' roles that the role of the courts seems to be neglected.

Needless to say, fresh investments are crucial for a firm to start anew. New investors' main concern when they make an investment is that the insolvent debtor does not hide any debt obligations. It is the role of the courts to keep the entire proceeding as transparent as possible. If parties' choice of insolvency laws makes the overall proceedings less transparent, this would

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[410] Rasmussen, at p. 2259.

[411] J. L. Westbrook, "A Global Solution to Multinational Default", 98 *Michigan Law Review* (2000), at p. 2301.

[412] LoPucki, *supra* footnote 384, p. 2243; Westbrook, *supra* footnote 411, pp. 2302-2303.

[413] LoPucki, *supra* footnote 384, pp. 2245-2246.

[414] Rasmussen, *supra* footnote 380, at pp. 2264-2265.

badly affect new investors' judgments and reorganization proceedings.

Thus all three opinions have some shortcomings and none of them holds without some modification. We should approach these debates from a new angle. In this context, it should be indicated that these preceding opinions seem to pay less attention to the fact that insolvency is a part of a series of business judgments in a broader context. Insolvency rules should not only aim at *ex post* efficiency, but also at the *ex ante* stage in order to give the debtor enough incentives to make appropriate judgments throughout the process.

6.2. Incentive Analysis

6.2.1. Mapping of issues

When we turn our attention to the *ex ante* phase, the liability of executives is a good example of the impact that an insolvency law has on this phase. If an applicable insolvency law allows the executives of an insolvent debtor to continue to run the debtor's business and their liability in the event of insolvency is mild under the insolvency law, the executives would have less incentive to conduct good management of their firms.

If their liability is very strict, it might be difficult to find suitable persons for these executive positions and it would make their business more difficult. If we disregard such impacts on the *ex ante* phase and focus only on *ex post* efficiency, i.e. collecting more assets and distributing more return, we would overlook the fact that business is a continuous process that requires appropriate decisions to be made at each important phase and that an insolvency law could affect these decisions.

When we observe an insolvency case through the lens of a business process, we are able to break down

the process into at least the following four phases: (1) investment judgment, (2) contract, (3) eve of insolvency (i.e. the period where insolvency is becoming unavoidable) and (4) insolvency and after. The first phase is the stage where a debtor evaluates the business environment and decides to invest. The player in this phase is the debtor only. His decision is evaluated as being appropriate, if he expects a positive return from his investment.

In the second phase, the debtor proceeds with institutionalizing his business judgment of the first phase through contracting with a creditor. There are two players at this stage, debtor and creditor. If the expected costs and benefits from this contractual relationship yield a plus, then entering into this contractual relationship is an appropriate choice.

In the third phase, it is becoming evident that the debtor's business cannot be continued as it has been.

The debtor has to either completely close down his business or downsize it to prepare to start anew. The executives of the debtor have to swiftly make important decisions in order to avoid worsening the situation.

Among their decisions, a crucial one is to choose the most appropriate insolvency scheme. The criterion to evaluate the appropriateness of such a decision is whether the expected benefits of continuing his business will be in the positive or the negative. If his firm has no chance at all, they should swiftly move to liquidation, while there is a good chance for revival, they should reorganize his firm. If they err on this judgment, they might destroy a firm that actually had great potential or let a zombie firm survive.

Phase four, upon an insolvency decision, could be further distinguished by at least four dimensions. The first dimension is the relationship between the debtor

and his multiple creditors. Various adjustments to their respective original relationships should be made. The appropriateness of such adjustments should be evaluated by the criterion that such an adjustment serves to appropriately liquidate or reorganize, with the goal of increasing returns to creditors.

The second dimension is the relationships among creditors. Creditors are usually not connected before the commencement of insolvency proceeding. In addition, in the case of reorganization, post-insolvency investors would appear as new creditors. The adjustment of the relationships among old creditors and between old and new creditors should be appropriately conducted. The criteria of such an adjustment are the reduction of transaction costs and mutual coordination among creditors.

The third dimension is the relationships between the debtor and the third parties. In this dimension, concealment, outflow and/or deterioration of debtor's assets could happen. Appropriate actions should be taken to prevent such events. The criteria should be the reduction of transaction costs and the deterrence of unjust acts.

The fourth dimension is the relationships between creditors and third parties. For example, if post-insolvency investors are foreign firms, their investments may conflict with regulations governing the upper limit of foreign investments in that particular business sectors. Appropriate adjustments should be made to obtain the right balance between private and public interests.

If appropriate actions are taken in all phases, global welfare could be achieved as a result of this whole process. Insolvency law and applicable law should be designed to give enough incentives so that these appropriate actions are taken. The preceding three opinions should be revisited from this perspective. The following chart gives an overview of the analysis above.

Phase	*Stakeholders*	*Activities*	*Criteria*
I Investment decision *(ex ante)*	Debtor benefits	Business judgments	Expected from investment
II Contract *(ex ante)*	Debtor-Creditor	Institutionalization of business judgments	Expected benefits from the contract
III Eve of insolvency	Debtor-Creditor	Choice of insolvency proceeding	Expected values by continuing firms
IV-1 Insolvency *(ex post)*	Debtor-Creditors	Adjustment of relationships between the players	Appropriate liquidation/ reorganization; increase of return
IV-2 Insolvency *(ex post)*	Creditors-Creditors	Adjustment of relationships between the players	Reduction of costs; co-ordination between the players
IV-3 Insolvency *(ex post)*	Debtor-Third Parties	Prevention of outflow of assets	Reduction of costs; deterrence of unjust acts
IV-4 Insolvency *(ex post)*	Creditors-Third Parties	Adjustment of investments	Balance between private and public interests

6.2.2. Mapping of the three opinions

A logical outcome of territorialism is that the location of assets automatically determines the jurisdiction of the insolvency proceeding. Why a debtor invested and owns assets in that location is not a main issue for territorialism. Territorialism does not presume the transfer of assets from one country to another[415].

[415] This aspect would be slightly different in co-operative territorialism.

Whether insolvency laws in each location of the assets are an appropriate tool for insolvency is not at stake either. Their main interest seems to be the minimization of transaction costs after an insolvency proceeding commences. Their main interests therefore seem to be limited to phases IV-2 and IV-3 in the table.

The feature of universalism is the singleness of insolvency proceeding[416]. In order to identify this single venue, universalism applies the notion "Centre of Main Interest" (COMI)[417]. If this notion were clearly defined, it would provide sufficient information about laws applicable to the debtor's possible insolvency. The debtor and other stakeholders could know in advance what kind of insolvency schemes would be available. Stakeholders could devise strategies, bearing possible insolvency schemes. Thus universalism could affect incentives in *ex ante* phases as well. But if the COMI remains unclear, universalism would only basically impact *ex post* efficiency.

If we follow contractualism and allow the insertion of a bankruptcy clause in a corporate charter, it could affect incentives and strategies in all four phases. Because, before entering relations in each phase, parties could know what scheme would be applicable in the event of debtor's insolvency. However, stakeholders in insolvency proceedings are not the only contractual parties. Creditors in phase IV-2, for example, could include victims of tortious acts of the debtor. In addition, as long as the debtor could change the bankruptcy clause, those who entered into relationships with the debtor should be protected from the change. Hence incentives given by the bankruptcy clause are limited to certain stakeholders only.

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[416] This would be the singleness of "main" insolvency proceeding in modified universalism

[417] Westbrook, *supra* footnote 411, at p. 2316.

6.2.3. Departure from one-size-fits-all approach

As we saw above, each of the preceding opinions has limits and needs modification. If we dismiss these opinions based on their shortcomings, none of them would be a valid option. To achieve global welfare, we should not stick to just one opinion. Instead, we should take an inclusive approach and identify the conditions under which each opinion could be valid. From this perspective, we should revisit these three opinions.

First, the shortcoming of territorialism is that it does not give any incentive in the *ex ante* phase, because the venue would be determined purely on the location of assets. No attention is paid to the debtor's considerations and decisions for the investment. In other words, in those cases where incentives in the *ex ante* phase are less important, territorialism could be valid. For example, if a debtor's investment is expected to be exclusively in one country due to the specific nature of his business, it is not so useful to ask questions like why business judgment was made to invest in that country (phase I), if the contractual agreement was appropriate (phase II) or how an insolvency law would have affected these decisions. Or if the costs to transfer the debtor's assets from one country to another are so prohibitive that the result of the costs and benefits calculation would be negative, it would be more appropriate not to move the assets. In these cases, territorialism could apply. Stakeholders could focus only on the current location of the debtor's assets.

Universalists may say that the same result could be reached by universalism, but the location of assets under territorialism has the advantage of providing more clarity than COMI under universalism.

As for universalism, first of all, it should be clear why an insolvency proceeding should be the sole proceeding. For example, if the credit-dividend ratio is so

diversified under territorialism due to different applicable insolvency laws in different countries, that such a discrepancy may discourage new investments, an insolvency proceeding concentrated in one country could be considered sensible. Or if collecting assets from various parts of the world is indispensable to the restart of a business despite the high costs of assets transfer, concentrating on a single insolvency proceeding could also make sense. Second, international cooperation is indispensable. Such co-operation premises close, multiple and multi-layered economic relationships among concerned countries. Mutual trust in judiciary is essential as well.

Perfect contractualism would be an agreement for the choice of an insolvency jurisdiction by all parties, who obtain in advance all information in a useable form, with no possibility of renegotiations in the future. But this would be impossible in the real world. However it should not mean to exclude contractualism *a priori*. When the debtor's assets are disperse in many different countries and no international co-operation can be expected among the concerned countries, neither territorialism nor universalism would be optimal. Contractual arrangement may be useful to fill the gap as the last resort. In this case, the composition of the parties of agreement could be different from that of regular contracts. For example, it is worth considering that only the main creditors could determine where an insolvency proceeding should be commenced.

If no condition for territorialism or universalism is fulfilled and if no agreement could be made in advance, we would need the fourth option. Possible and worth considering would be a unilateral determination of the place for the insolvency proceeding. Let us suppose that assets of a debtor are dispersed and international co-operation is not to be expected, for example, due to the lack of appropriate insolvency law and that

only a few lenders could be found due to extremely difficult investments. If, in this case, the lender would be allowed to choose the insolvency law, it could promote more investments. Or in the case where many possible lenders could be found, but co-ordination among lenders would be very costly, the borrower should be able to choose the insolvency law. If there is an imbalance of information obtained by lender and by borrower, we could let the borrower choose insolvency law. Because if the borrower is confident about the success of the project, he may choose a strict bankruptcy scheme[418], which could lead to more disclosure. The borrower's choice could make sense in another scenario as well: if a firm in a country without an advanced insolvency scheme wishes to expand its business internationally and could choose the US bankruptcy law, investors would welcome this choice.

A shortcoming of contractualism is how to treat post-agreement creditors such as victims of a debtor's tortious acts. A possible solution would be to allow the victim to choose the jurisdiction. The victim would choose the most convenient place for him to execute his claim against the debtor. If such a treatment is uncomfortable for the debtor, the debtor would try to prevent similar acts in the future. Universalists may argue that similar effects could be achieved by launching an ancillary proceeding, but it should be reminded that an ancillary proceeding itself is exceptional for universalism.

6.3. Analysis

Territorialism is still the international law of bankruptcy. However universalism has been influential since the adoption of the UNCITRAL Model Law on

[418] It is known as the signalling effect.

Cross-Border Insolvency[419] in 1997. The Model Law was drafted with a universalist approach and has been influencing Insolvency laws in 20 countries[420] so far, including some important ones.

The Model Law has four features, i.e. access[421], recognition[422], relief[423], and co-operation[424]. The "centrality of co-operation" in cross-border insolvency cases is emphasized in the Guide to Enactment and Interpretation of the UNCITRAL Model Law (the Guide)[425] in order to achieve the efficient conduct of

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[419] Available at uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html.

[420] Australia, Canada, Chile, Colombia, Eritrea, Greece, Japan, Mauritius, Mexico, Montenegro, New Zealand, Poland, Republic of Korea, Romania, Serbia, Slovenia, South Africa, Uganda, United Kingdom, United States, uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html.

[421] A foreign representative is entitled to apply directly to a court in this State (Art. 9) and to commence a proceeding if the conditions for commencing such a proceeding are met (Art. 11). Foreign creditors in principle have the same rights regarding the commencement of and participation in a proceeding (Art. 13 (1)).

[422] A foreign representative may apply for recognition of the foreign proceeding where he was appointed (Art. 15 (1)). A foreign proceeding shall be recognized, when it satisfies certain conditions (Art. 17).

[423] The court may grant relief of a provisional nature from the time of filing an application for recognition until the application is decided upon (Art. 19). Recognition of a foreign main proceeding has effects which include stay of individual actions and execution against debtor's assets as well as suspension of the right to transfer debtor's assets (Art. 20).

[424] The court shall co-operate to the maximum extent possible with foreign courts or foreign representatives (Arts. 25, 27). When parallel proceedings are pending, co-operation and co-ordination are expected (Arts. 28, 29, 30).

[425] Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency (2014), pp. 19-112.

proceedings and optimal result[426]. But the Model Law does not specify how that co-operation and communication might be achieved, but rather leaves that up to each jurisdiction and the application of its own domestic laws and practices[427].

Hence we could easily understand why, in 2010, the United States proposed to review and clarify some basic concepts and ideals of the Model Law[428]. Especially noteworthy for us is the fact that, among others, the COMI was taken up for clarification. As we saw above, the COMI is the key to universalism being able to provide enough incentives to have stakeholders make appropriate decisions. If the COMI remains unclear, we could not expect sufficient incentives in the *ex ante* phase.

Also in the Model Law, the COMI plays a crucial role: it is the decisive factor for a foreign proceeding to be a foreign "main" proceeding (Art. 2 *(b)*).

Thus the representative appointed in that foreign proceeding could be recognized and reach the debtor's assets located in other jurisdictions. The Model Law presumes the debtor's registered office as the COMI (Art. 16 (3)). But after the adoption of the Model Law, due to diverse judgments in some important jurisdictions, clarification became necessary[429]. The Working

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[426] UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (updated 2013) (2014), p. 10.

[427] *Supra* footnote 426.

[428] A/CN.9/WG.V/WP.93/Add.2, p. 2.

[429] The following questions were raised by the United States, *ibid*., pp. 16-17:

> "4. The Model Law clearly sets forth a presumption that the registered office of the debtor company is presumed to be its COMI.
>
> *(a)* Should the criteria be clearly established as to what evidence is necessary to overcome the presumption that debtor's COMI is its registered office?

Group V submitted a paper on this issue in 2013[430] and it is reflected in the latest version of the Guide[431].

The Guide confirms that the "concept of a debtor's centre of main interests is fundamental to the operation of the Model Law"[432]. However, in the event where the debtor's COMI may not coincide with the place of registration, the COMI will be identified by other factors[433]. In most cases, the location *(a)* where the central administration of the debtor takes place, and *(b)* which is readily ascertainable by creditors could be identified as COMI[434]. If this does not work, a number of additio-

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(b) Should specific factors, such as, for example, the location of the 'nerve center' of the debtor, be developed for rebutting the presumption?

(c) Is the physical location of operations a factor to be considered?

(d) Should the location in which management decisions are made and from which the company is operated be utilized as a determinate?

(e) Should the location of the debtor be predictable and readily ascertainable by creditors?

5. Should the time period in which a company maintains its COMI in a jurisdiction be a factor in determining the COMI of a debtor?

(a) Should the COMI of a debtor be determined as at the date on which the company was actually transacting business and conducting business operations prior to insolvency or thereafter when the company is insolvent and under the direction of a liquidator?

(b) Should a location of a debtor business that is ascertainable by third parties be an important factor for overcoming the presumption of the debtor's COMI?"

[430] Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (COMI), A/CV.9/WG.V/WP.112.

[431] *Ibid*.

[432] *Ibid*., p. 70.

[433] *Ibid*.

[434] *Ibid*., p. 71.

nal factors concerning the debtor's business[435] may be considered. Such an approach of the Model Law implies that the COMI could eventually be determined *ex post*, because taking various factors into consideration to fix the concept could be done only *ex post* on a case-by-case basis. If this is the case and only the *ex post* phase is at stake, we should not exclude territorialism, since it has the advantage of providing clarity in an insolvency jurisdiction. If universalism fails to give incentives in *ex ante* phase, contractualism should not be excluded either, as long as, under certain circumstances, contractualism gives incentives in the *ex ante* phase.

Also in 2010, another issue was taken up based on the proposal of the United Kingdom[436] and INSOL[437]; the responsibility and liability of directors and officers of an enterprise in insolvency and pre-insolvency cases. The Working Group V submitted a report[438] on this issue in 2013 and the report is published as the Legislative Guide on Insolvency Law, Part four: Directors' obligations in the period approaching insolvency

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[435] They include the location of the debtor's books and records; the location where the cash management system was run; the location in which the debtor's principle assets or operations are found; the location of the debtor's primary bank; the location of employees; the location in which commercial policy was determined; the site of the controlling law or the law governing the main contracts of the company; the location from which purchasing and sales policy, staff, accounts payable and computer systems were managed; the location from which contracts (for supply) were organized; the location from which reorganization of the debtor was being conducted; the jurisdiction whose law would apply to most disputes; the location whose law governed the preparation and audit of accounts and in which they were prepared and audited. *Op. cit. supra* footnote 430, p. 71.

[436] A/CN.9/WG.V/WP.93/Add.4.

[437] A/CV.9/582/Add.6.

[438] A/CN.9/WG.v/WP.113.

(the Legislative Guide IV) in 2013[439]. Good corporate governance should provide incentives for the board and management to pursue objectives that are in the interests of the company and its shareholders[440]. Effective insolvency laws should permit an examination to be made of the circumstances giving rise to insolvency and in particular the conduct of directors in the period before insolvency proceedings commence[441]. Competent directors should understand the company's financial situation and possess all available information necessary to enable them to take appropriate steps to address financial distress and avoid further decline[442]. They are faced with choosing the course of action that best serves the interests of the enterprise as a whole, having weighed the interests of the relevant stakeholders in the circumstances of the specific case[443]. Their early action must be facilitated by ease of access to relevant procedures[444]. If that action cannot be directed towards relevant and effective procedures, there is little to be gained[445]. From our perspective of "business decisions as a process", the proposal made by the United Kingdom and INSOL is natural and predictable. It exactly concerns decisions in phase III of the table above. Due to the many policy options[446] and existing diverse laws[447] UNCITRAL adopted some

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[439] Available at uncitral.org/pdf/english/texts/insolven/Leg-Guide-Insol-Part4-ebook-E.pdf (last visited on 28 March 2014).

[440] *The Legislative Guide*, p. 3.

[441] *Ibid*., p. 5.

[442] *Ibid*.

[443] *Ibid*.

[444] *Ibid*.

[445] *Ibid*.

[446] For example, concerning the time when the obligations arise, see *ibid*., p. 14.

[447] For example, the standard to be met in order to be liable, see *ibid*., p. 18.

recommendations[448] on directors' liability. Following these recommendations, relevant national laws could obtain more clarity, and provide enough incentives to executives to take appropriate actions in the eve of insolvency. At the same time, with the soft approach of harmonization by the Legislative Guide IV, the diversity of laws could be preserved. Hence more choices are provided. However without clear definition of the COMI, such clarification on the level of national laws may have limits.

The considerations so far have presumed that the debtor is one (natural or juridical) person. However, large business could be operated by a group of enterprises, each of which is an independent juridical entity. A key question is how to conceptualize the COMI for this entire group. One view states that the COMI should be adapted as it applies to an individual debtor to the situation of an enterprise group, enabling all proceedings with respect to group members to be commenced in, and administered from, a single centre through one court and subject to a single governing law[449]. Another suggestion is to identify a co-ordination centre for the group, which might be determined by reference to the location of the parent of the group or to permit group members to apply for insolvency in the State where proceedings have commenced with respect to the insolvent parent of the group[450]. Insolvency of such a group has been debated between terri-

[448] Recommendations 255-256 on the obligations; 257 on the time at which the obligation arises; 258 on persons owing the obligations; 259-261 on liability and elements of liability and defences; 262-266 on remedies, conduct of actions for breach of the obligation, funding of actions for breach of the obligation and additional measures.

[449] *The Legislative Guide*, Part Three, enterprise group, p. 85.

[450] *Ibid*.

torialists and universalists, but the latter view, which allows group members to apply for insolvency in the State where proceedings of the insolvent parent were commenced, seems similar to contractualism. We could confirm again here that the one-size-fits-all approach is less useful. We should keep all three opinions and identify under what conditions each opinion is valid. The examples from recent works of UNCITRAL are good examples of the utility of the incentive analysis.

6.4. Conclusions

With the acceleration of globalization, cross-border insolvency has become common business phenomena. Three opinions have been argued so far, but none of them holds without criticism. It is important that the *ex ante* aspect be also taken into consideration, not just the *ex post* efficiency, since insolvency should be part of business decision-making process. An incentive-based analysis is helpful for this exercise. Instead of relying on one opinion, we should take a more inclusive approach and identify conditions under which each opinion could be valid. The UNCITRAL Model Law on Cross-Border Insolvency of 1997 and the outcomes of the follow-up activities show that modified universalism does not solve the shortcomings of universalism. Continuous efforts to fix such short comings have been and most likely will have to be made.

CHAPTER VII

CONCLUDING REMARKS

Although it has traditionally been understood that uniform law is more desirable than private international law, I have been asking myself whether this is true or not. In answering this simple question, the legal literature has provided only ambiguous concepts such as certainty and predictability. The traditional legal-concept-based approach has various limitations in conducting a more precise and detailed analysis.

This study has applied a cost-and-benefit method in order to illustrate the missing element in the current debate concerning the unification of law. Transaction costs and efficiency considerations employed in this study cast greater light on the fact that legal scholars have taken a rather narrow perspective and have therefore failed to capture the differences between efficiency of creation and maintenance of uniform law instruments.

This study has highlighted how the current literature has mainly focused on the harmonization of substantive laws and failed to consider the question when and under what conditions the unification of law is desirable. In addition, this study has highlighted a rather fundamental part of the question: is uniform substantive law desirable (efficient) at all? It has been argued that the costs of the creation and maintenance of uniform law may be so high that in some instances the unification of law may not lead to an efficient outcome at all. Furthermore, this study has raised another aspect of the issue which has been disregarded in the extant unification discourse. The example of T-shirts was used to explain the "fits" argument: i.e., that the existence of

several different legal systems may be actually more desirable than a single uniform substantive law. The existence of different laws enables private actors to make a choice which they deem more efficient for their preferred form of transaction.

The value of the efficiency perspective was further illustrated in discussing uniform private international law. The prevailing opinion in the conflict of laws simply presumes that a uniform private international law is desirable. This study tried to illustrate that the unification or harmonization of private international law is a game, and that applying *lex fori* is the dominant strategy for its players. This study elaborates several criteria for unification or harmonization, i.e. long-term relationships, multiplicity of relationships and benefits of co-operation, which could motivate the players to depart from the strategy to apply *lex fori* and to co-operate with other players.

The example of intellectual property has shown that, in some instances, having diverse substantive laws could actually be more desirable than the unification of substantive laws. This is so because countries may have essentially different moral or policy virtues that are deeply rooted in the culture of a particular nation. Yet, not having private international law for IP should be avoided. To answer the question to what extent such rules should be unified needs further consideration, until the Committee on IP and Private International Law at the International Law Association will publish its guidelines. The example of cross-border insolvency explained the limits of rigid approaches (territorialism and universalism) and called for a more inclusive approach. Different local economic and social conditions in various jurisdictions clearly suggest that a "one-size-fits-all" approach cannot survive dynamic realities, and that more choice-oriented solutions should be preferred.

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