CONFlict OF LAWS

PROJECT
ON
UNIFICATION
OF
PRIVATE INTERNATIONAL LAW

RESPECTFULLY SUBMITTED TO: Mrs. Kislay Soni

SUBMITTED BY-
SUKRITI GHAI
12LLB074
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INTRODUCTION

Unification of private law is principally a task undertaken by the Institute for the Unification of Private Law (UNIDROIT). Private international law is that part of the law of any State which comes into operation when a court is called upon to determine a suit containing a foreign element. Harmonization, unification, codification and reform in international law have long been the centre of international efforts to facilitate international transactions with lower costs to enterprises and higher legal certainty. Private international law is one the instruments regulating social relations in a situation of conflicting legal orders, in other words, social relations with a foreign element.¹

Need of private international law arises because the internal laws of different countries differ from each other. If the internal laws of the countries of the world lay down uniform rules, then probably there will not be any need for private international law. But then, difference is not only in the internal laws of the different countries, but also in the private international laws of different countries, on account of which sometimes conflicting decisions are pronounced by the courts of different countries on the same matter. Thus, need for Unification of Private International law Rules arise.

However, despite the numerous benefits associated with uniform rules of private international law, such an approach towards unification has had few takers. The different systems of law prevalent in the countries make efforts towards unification of a practical impossibility.

¹ http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1223&context=pubs
PRIVATE INTERNATIONAL LAW

MEANING & BASIS

Rules of private international law are applied in matters where some foreign element is present. In such cases, the first question that arises before the courts is what would be the applicable law and thus comes the need of private international law.

“Private International Law” or “The Conflict of Laws” is that branch of law which deals with the cases in which some relevant fact has a geographical connection with a foreign country or if there is some foreign element involved in the case. There may exist a foreign element because the parties may be citizens of a foreign country, or domiciled in a foreign country, and the dispute may relate to their status or their property situated in that country; or the dispute may relate to a contract between parties living in 2 different countries; or a suit may relate to a tort committed. In all such cases, there exists a foreign element.  

And in all such cases where a foreign element is involved, the principles of conflict of laws are applied. These principles are applied by the courts as a part of applicable rules of domestic law.

Almost every country, in the modern era, has not only its own system of municipal law but also its own system of conflict of law. And there is need for rules of conflict of laws because the world is divided into several territorial units with different legal systems containing different rules on subjects such as contracts, torts, succession to property etc., and people move from unit to unit or enter into personal or commercial relations in such units or with people in such units. When this happens, courts voluntarily apply the conflict of law rules of their country to resolve

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the problem. While certain rules of conflict of laws are accepted in most countries, other rules differ.³

The basis or foundation of the rules of conflict of laws is principally the need to do justice. It would be unjust if a dispute with, say, a French element is decided by an Indian court applying only the rules of law in force in India merely because it is an Indian court which is deciding it. The result would have been different had a French court decided it applying the rules of French law.⁴

In the matter of *Stephens vs. Falchi⁵*, it was correctly held by the court that

“Whether or not the conditions are such as to require the application of the rules of law of another country is a question that must be decided by court under their own law”

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³ Viswanathan R vs. Rukn-Ul-Mulk Syed Abdul Wajid; AIR 1963 SC 1
⁴ See Technip S A vs. SMS Holding (P) Ltd. (2005) 5 SCC 465
⁵ 1938] 3 DLR 590
The dictionary meaning of unification is "being united or made into a whole."\(^6\)

A hundred years ago, many lawyers believed that the law of individual nations could, and would, eventually become unified. In a well-known speech made in 1888, Ernst Zitelmann advanced a case for "global law" (Weltrecht). According to his argument, because the formalities of legal provisions are common everywhere and the policy goals are, or are going to be shared by every civilized nation, the law of every nation will in end converge.\(^7\)

Now, it has been said earlier that the need for private international law arises because the internal laws of different countries differ from each other. If the internal laws of the countries of the world lay down uniform rules, probably there will not be any need for private international law. But then, difference is not only in the internal laws of different countries but also in the private international laws of countries, on account of which sometimes conflicting decisions are pronounced by the courts of different countries on the same matter. Thus, the need for the unification of rules of private international law arises.

There are two modes for unification of private international law:

1. Unification of the internal laws of the countries of the world, and
2. Unification of the rules of private international law

### 1. Unification of the Internal Laws of the Countries of the World

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\(^6\) Meeriam-webster online dictionary

\(^7\) Ernst Zitelmann, Die, (1916)
The first step in the direction of the unification of internal laws was taken by the Bern Convention of 1886 under which an international union for the protection of rights of authors over their literary and artistic works was formed.\footnote{Since then the convention has been amended several times.}

After the First World War, an international institute for Unification of private laws was established at Rome.\footnote{The institute is now closely linked with the United Nations and the Council of Europe.} The institute has achieved some success in the field of unification of civil laws of different countries of the world. The Warsaw Convention of 1929 which has been amended by the Hague Convention of 1955 is a landmark in this direction. This convention provides for uniform rules relating to carriage of goods and persons by air.

If looked at in the background of fundamental differences in the various systems of law in the world, this achievement is not very poor, though looked at in the overall perspective, it is quite insignificant.

There has also been an attempt at the unification of civil law between the Soviet Union and the People’s Democracies of Eastern Europe. These countries have also attempted to unify certain laws with the West European Countries. For instance, Convention on Economic Assistance.\footnote{Convention on Economic Assistance, 1956} But this method of unifying laws is not successful due to reasons such as the kind of society of one nation differs from society of another nation. Public policy is also one such illustration, due to which unifying internal laws of all the nations of world in not practically possible.

\section*{2. Unification of Rules of Private International Law}

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On account of basic ideological differences among the countries of the world, it is not possible to achieve unification of all private laws. Therefore, another method of avoiding the situation where courts in different countries may arrive at different results on the same matter is the unification of the rules of Private International Law. Considering the importance of the unification of rules of Private International Law, several serious international efforts have been made in this direction, some with success.\textsuperscript{11}

Before 1951, the main effort was directed at the unification of rules of private international law of European Continental countries, since most of them follow civil law systems. On the other hand, nothing could be done towards the unification of rules of private international law of the commonwealth countries and the United States on the account of fundamental differences between the two systems of law.\textsuperscript{12} However, after 1951, some serious attempts have been made with some success at the unification of rules of private international law of all countries of the world. In 1951, a permanent bureau of Hague Conference was constituted to look after this issue. The purpose of the Hague Conference on Private International Law (HccH) is to work for the broad unification of the rules of private international law. HccH develops and supports international conventions in the domains of protection of children, family and property relations, legal cooperation and litigation, as well as commercial and finance law.

Today, the International Institute for Unification of Private Law (UNIDROIT) looks after this matter. It is an independent intergovernmental organization with its seat in Villa Aldobrandini in Rome.\textsuperscript{13} And its purpose is to study the needs and methods for modernizing, harmonizing and coordinating private, and in particular commercial law, as between states and group of states and to formulate uniform law instruments, principles, and rules to achieve those objectives. It was set up in 1926 as an auxiliary organ of the League of Nations. The Institute was re-established in 1940 on the basis of multilateral agreement, the UNIDROIT Statute. As of 2014, UNIDROIT has 63 state members from over 5 continents.\textsuperscript{14}

\textsuperscript{12} Conflict of Laws, J.G Collier, Cambridge University Press, Third Ed. 2001
\textsuperscript{13} Available at- www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010.pdf
\textsuperscript{14} Available at- www.unidroit.org/about-unidroit/overview.
BENEFITS DERIVED FROM UNIFICATION

✓ If such rules are unified then there would be no conflicting judgments on the matter involving foreign elements by different courts.

✓ Secondly, unification of laws will make the court proceedings less time consuming, as the courts will be aware of what laws are applicable in a matter, and would not have to spend time in deciding the applicable substantive law in the matter.

✓ Thirdly, as it is the era of globalization and people get involved in personal and commercial relationships often, therefore, if there is unification then there would be less conflict at the first place, and if it is still there, then it would be easy to settle the dispute quickly.\(^\text{15}\)

✓ Also, due to unification world can be brought up on same platform. If states have contradictory rules, and benefits of avoiding the contradiction are large enough then there will be an incentive for states to choose to unify their laws.

✓ A simple example is the traffic rule providing which side of the road a car shall drive on. Neither the right side rule in continental Europe nor the left side rule in Japan and Britain has proven to be superior. However, the coexistence of both rules may be harmful to the facilitation of international traffic.

\(^{15}\) Available at- www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/commercial-law-and-practice/hague-conference-on-private-international-law/
PROBLEMS AND CHALLENGES IN UNIFICATION

Major problem is that, although internal laws of countries are different from each other as per their requirements. Now even the private international law rules are different and not similar in all the countries then the matter involving foreign elements is difficult to solve. The court of any nation will face the same dilemma of what laws would be applicable in a matter if there is involvement of foreign element. Also, many a times courts will give up conflicting judgment on same matter as it is up to the court to find appropriate applicable law and thus is discretion of court. Thus, unification is very necessary in serving justice.

Now, challenge in unification is,

1. making the state agree of at least signing the unification conventions and then later making them rectify such conventions.
2. meeting the demands of states. As every state wants to architect the convention as per their own requirements.
3. enforcing such unification rules in all the countries of the world and then monitoring the process and courts.

16 THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW: Current problems and perspectives by HANS VAN LOON Secretary General of the Hague Conference on Private International Law p. 22
The rules of private international law resolve the issues concerning conflict of laws, which arise because of differences between the law of the country of nationality of a person and that in which that person may reside, or of which he may acquire nationality. In case of India, difficulties also arise because while in India the applicable personal law relating to these matters is determined by the religion of the individuals concerned, most countries in which there is substantial presence of Indian nationals do not have personal laws based on religion and a unified civil code applies to all persons residing there.\textsuperscript{18}

Currently India is a member of The Hague Conference on Private International Law (member since 13/03/2008). And India has signed 3 Hague Conventions out of its 24 Conventions on Unification of Private International Law.\textsuperscript{19}

**Hague Conventions signed by India are:**
1) Abolishing the requirement of legalization for foreign public documents (signed 14.7.2005)
2) Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters, 1965
3) Taking of Evidence Abroad in Civil or Commercial Matters, 1970.

\textsuperscript{18} Conflict of laws, Atul M Setalvad, Lexis Nexis Butterworths Wadhwa, Second Ed. 2009
\textsuperscript{19} Available at - www.hcch.net/index
Hague Conventions ratified by India are:

1) Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents
2) Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters
3) Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters
4) Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption
CONCLUSION

Unification of internal laws of all countries is not practically possible as the municipal laws of every nation are made as per the need and requirements and circumstances of their society. And thus, municipal or internal laws differ from country to country. But if rules for private international law are unified then it would solve the dilemma of deciding the applicable laws in a matter involving foreign element. As private international law rules are applied as the domestic rules of a country. With the help of unification all the countries could be bought at same platform in this era of globalization. Thus, with the help of unification of rules of private international law justice could be served at a rapid rate and conflicting judgments on same matter by different courts of different countries can be avoided.
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1 Since then the convention has been amended several times.
1 The institute is now closely linked with the United Nations and the Council of Europe.
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