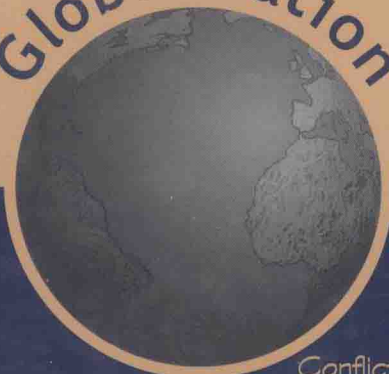


Legal Aspects *of* Globalization



*Conflict of Laws, Internet,
Capital Markets and Insolvency
in a Global Economy*

Edited by
Jürgen Basedow
and
Toshiyuki Kono

KLUWER LAW INTERNATIONAL

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KLUWER LAW INTERNATIONAL
THE HAGUE – LONDON – BOSTON

Published by Kluwer Law International

P.O. Box 85889
2508 CN The Hague, The Netherlands
sales@kli.wkap.nl
<http://www.kluwerlaw.com>

Sold and Distributed in North, Central and South America by:

Kluwer Law International
657 Massachusetts Avenue
Cambridge, MA 02139, USA

Sold and Distributed in all other countries by:

Kluwer Law International
Distribution Centre
P.O. Box 322
3300 AH Dordrecht, The Netherlands

Printed on acid-free paper

Cover design and typesetting: The Bears Communications, Amsterdam

ISBN 90 411 1332 0

© 2000 Kluwer Law International

Kluwer Law International incorporates the publishing programmes of Graham & Trotman Ltd, Kluwer Law and Taxation Publishers and Martinus Nijhoff Publishers

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PREFACE

As economic and social developments all over the world are getting increasingly interconnected the social sciences are being confronted with new issues. They are reflected in a growing body of literature in economics, sociology and political science. So far, legal scholarship has taken little notice of the changes brought about by globalisation. These changes may be summarised by the observation that law still is to a large extent rooted in national sovereignty, whereas its object, i. e. social and economic conflicts, is more and more characterised by a transnational dimension.

When the editors of this volume met in Berlin in early 1997 we decided that the scholarly debate on the repercussions of globalisation on law should be fostered by a German-Japanese conference which would not focus on differences in legal culture as reflected by comparative law, but on the common experience of legal developments under the impact of globalisation. This conference took place at the university of Kyushu at Fukuoka on March 28th and 29th, 1999. Scholars from both countries have scrutinised the effect of globalisation on various aspects of the legal framework of international commerce: on the conflict of laws, on the laws of internet and capital markets, and on international insolvencies. The collected papers of that conference are published in this book which is met to inspire further discussions about globalisation and law.

The editors are debted to Dr. Mark Dalton Fenwick, Ms. Sumi Sakata and Ms. Monick T. Paul for the linguistic revision of the papers, to Moritz Bälz and to Frau Ingeborg Stahl for the preparation of the manuscript.

Hamburg and Fukuoka, October 1999

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ABBREVIATIONS

AASCO	Inter American Association of Securities Commissions
ADR	Alternative Dispute Resolution
art.	article
Art.	Article
B.C.	Bankruptcy Code (US)
B.R.	Bankruptcy Reports (US)
BGB	Bürgerliches Gesetzbuch (Germany)
BGBI.	Bundesgesetzblatt (Germany)
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen (Germany)
BMJ	Bundesministerium der Justiz (Germany)
BVerfG	Bundesverfassungsgericht (Germany)
cf.	confer
Cir.	Circuit
CMR	Convention on the Contract for the International Carriage of Goods by Road
Columbia-VLA J.	Columbia – VLA Journal of International Law & the Arts (US)
Int'l L. & Arts	
D.L.R.	Dominion Law Reports (Canada)
DJT	Deutscher Juristentag
e.g.	for example
EC	European Community
EEC	European Economic Community
EFT	Electronic Fund Transfer
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch (Germany)
EGInsO	Einführungsgesetz zur Insolvenzordnung (Germany)
e-money	electronic money
Ent. L. R.	Entertainment Law Reporter (US)
et seq.	et sequens
EU	European Union
EWiR	Europäisches Wirtschaftsrecht (Germany)
FESCO	Forum of European Securities Commissions
fin.	finis
FRC	Financial Reconstruction Commission (Japan)

FSA	Financial Supervisory Agency (Japan)
Fschr.	Festschrift
GDP	General Domestic Product
GesO	Gesamtvollstreckungsordnung (former East Germany)
Hrsg.	Herausgeber (editor)
I.L.M.	International Legal Materials (US)
IA	Insolvency Act (Great Britain)
IC card	integrated circuit card
Id.	idem
InVo	Insolvenz & Vollstreckung (Germany)
IOSCO	International Organisation of Securities Commissions
IP adress	Internet Protocol address
IPrax	Praxis des Internationalen Privat- und Verfahrensrechts (Germany)
ISD	Investment Services Directive
Jb. f. OstR	Jahrbuch für Ostrecht (Germany)
JCP	Juris-Classeur Périodique (France)
KEPCO	Korean Electric Power Company
KG	Kammergericht (Germany)
KO	Konkursordnung (Germany)
KTS	Zeitschrift für Insolvenzrecht (Germany)
LG	Landgericht (Germany)
LSE	London Stock Exchange
MLAT	Mutual Legal Assistance Treaties
MOU	Memorandum of Understanding/Memoranda of Understanding
Nat'l L.J.	National Law Journal (US)
NBL	New Business Law (Japan)
No.	number
NYSE	New York Stock Exchange
NZG	Neue Zeitschrift für Gesellschaftsrecht (Germany)
NZI	Neue Zeitschrift für das Recht der Insolvenz und Sanierung (Germany)
O.J.	Official Journal (of the EC)
OLG	Oberlandesgericht (Germany)
ÖSGRUM	Österreichische Schriftenreihe zum gewerblichen Rechtsschutz, Urheber- und Medienrecht
p.	page
para.	paragraph
paras.	paragraphs
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht (Germany)
RIW	Recht der internationalen Wirtschaft (Germany)
SEC	Securities and Exchange Commission (US)

sec.	section
SPC	Special Purpose Company
SPV	Special Purpose Vehicle
subs.	subsection
TRIPs Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
U. Chicago Legal Forum	University of Chicago Legal Forum (US)
U. Pittsburgh L. Rev.	University of Pittsburgh Law Review (US)
U.K.	United Kingdom
U.S.	United States (of America)
U.S.C.	United States Code
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
URL	Uniform Resource Locator
US	United States (of America)
USA	United States of America
Vanderbilt J. of Transnat'l L.	Vanderbilt Journal of Transnational Law (US)
var.	variant
VglO	Vergleichsordnung (Germany)
vol.	volume
vs.	versus
WIPO	World Intellectual Property Organisation
WW I	World War I
WW II	World War II
ZinsO	Zeitschrift für das gesamte Insolvenzrecht (Germany)
ZIP	Zeitschrift für Wirtschaftsrecht (Germany)

TABLE OF CONTENTS

Contributors.....	ix
Abbreviations	xi
The Effects of Globalization on Private International Law	
<i>Jürgen Basedow</i>	1
Part 1: The Internet, Private Law and International Private Law	
Electronic Money and Information Society	
<i>Mitsuru Iwamura</i>	13
Private Law in the Era of Internet	
<i>Shinichiro Hayakawa</i>	27
Electronic Commerce and Law—Some Fragmentary Thoughts on the Future of Internet Regulation from a German Perspective	
<i>Thomas Hoeren</i>	35
Law Applicable to Torts and Copyright Infringement through the Internet	
<i>Masato Dogauchi</i>	49
Part 2: The Law and International Finance	
Globalization of Capital Markets: A Perspective from Japan	
<i>Hideki Kanda</i>	69
Globalizing Capital Markets and Possible Regulatory Responses	
<i>Harald Baum</i>	77

Globalization of Finance: How to Deal with Mandatory Rules <i>Yoshiaki Nomura</i>	133
Part 3: International Insolvency and International Private Law	149
UNCITRAL Model Law and the Comprehensive Reform of Japanese Insolvency Laws <i>Junichi Matsushita</i>	151
International Bankruptcy from the viewpoint of Private International Law and International Civil Procedure <i>Yoshihisa Hayakawa</i>	165
German International Insolvency Law under the New Insolvency Code: Continuity and Evolution <i>Alexander Trunk</i>	175
Choice of Law in International Insolvencies—A Proposal for Reform <i>Peter von Wilmowsky</i>	197
The Recognition of Foreign Insolvency Proceedings and Private International Law <i>Toshiyuki Kono</i>	213
Index	227

THE EFFECTS OF GLOBALIZATION ON PRIVATE INTERNATIONAL LAW

by Jürgen Basedow, Hamburg

Contents

- A. Introduction
- B. Globalization: Concept and Origins
- C. The Impact on Governance
- D. Consequences for Private International Law in General
 - I. New Problems
 - II. Uniform Law and Principles
 - III. Party Autonomy and *lex fori*
- E. Consequences for Specific Areas of Private International Law
 - I. Personal Status and the Nationality Principle
 - II. Economic Regulation

A. Introduction

One of the most conspicuous features in the world-wide development of modern society is what people usually refer to as globalization. Its very name indicates that it must have some bearing on international affairs and their legal framework. In the field of public international law this aspect is very clearly witnessed by the acceleration of world-wide treaty making activities and by the creation of new international tribunals. Despite this there does not seem to be much discussion upon the influence produced by globalization on private international law. This may be due to the fact that scholars in this field are very often seduced by the intellectual niceties of an ever increasing number of cases bearing transnational elements, and by the flood of legislation which usually responds to national problems without taking into account the international dimension. Thus, discussions are devoted more to a refined criticism of legal

practice than to an assessment of the long-term developments of the whole discipline.

While private international law, by its very nature, is much more closely connected with the every day problems of the courts we can safely assume that general changes in international relations also have some repercussions on this discipline. The following remarks are meant to be an initial glimpse at the interrelation of globalization and private international law. Part II contains a general description of globalization. In Part III, I will focus on the effect that globalization produces on the role of states and the characteristics of legislation in the field of private law. In Parts IV and V, there will be a general analysis of these observations and I will detail some consequences for the adjudication of private law in transnational cases.

B. Globalization: Concept and Origins

Globalization has become a very popular word in the social sciences in recent history. It is generally used to describe the fact that an increasing number of social problems have a global dimension today and can no longer be solved by national solutions. For example, John Baylis and Steve Smith, two British political scientists, define globalization as 'the process of increasing inter-connectedness between societies such that events in one part of the world more and more have effect on people and societies far away. A globalised world is one in which political, economic, cultural, and social events become more and more interconnected . . . In each case, the world seems to be "shrinking", and people are increasingly aware of this.'¹

As described in this definition, globalization refers rather to the economic, cultural, political, and social effects of the process than to its origin and reasons. Those origins are due to technical changes, in particular to the tremendous acceleration and cost reduction of the transport of passengers, goods and data. The construction of the first wide-body passenger aircraft thirty years ago led to considerable overcapacity in civil aviation which paved the way for deregulation and intense competition in that sector. As a consequence the cheapest return tickets on the North Atlantic market today cost only half as much as the lowest airfares that were available twenty years ago. Over the same period of time the per capita income has at least quadrupled in industrialised nations.² This means that today, large portions of the population can afford long

¹ John Baylis/Steve Smith (eds.) *The globalization of world politics*, Oxford 1997, p. 7. Various similar definitions are cited at p. 15.

² See for example the data reported in *Gustav Fochler-Hauke* (ed.), *Der Fischer Weltalmanach* 1976, Frankfurt am Main 1975, p. 279 and *Mario von Baratta* (ed.), *Der Fischer Weltalmanach* 1996, Frankfurt am Main 1995 col. 955; the per capita cont. ...

distance travel, and the soaring growth rates of international civil aviation tell us that many people make effectively use of that opportunity.

A similar development is going on in the world-wide transport of goods. This is mainly due to the so called container revolution and to the new organization of shipping and of multimodal transport. Traditionally the handling of cargo depended heavily on human labour for the loading, trimming, stowing and discharge of goods. Today, the use of standardised boxes has considerably reduced labour costs and at the same time contributed to an unprecedented acceleration of terminal operations, which used to account for a very important part of the overall transportation time. Huge vessels carrying thousands of containers on intercontinental shipping routes now call only at major ports around the world where only a few hours are needed for the transshipment of containers, which are then distributed by smaller feeder vessels or by land transport to destinations in that region of the world. These changes have brought about a continuous and extraordinary decrease in the rate index of container shipping.³ The reduction in freight rates means that traders can reach out for more distant markets without incurring additional transportation costs. In other words, this is tantamount to an extension of the geographical scope of the relevant markets.⁴

Not everyone is aware of the changes reported so far. These changes are creeping along gradually. The situation is quite different with regard to the transport of data. The enormous progress of the communication sector as evidenced by the World Wide Web and the transmission of television and telephone signals by satellite is a striking feature of contemporary society. The transfer, within seconds, of large quantities of electronic data to remote parts of the world has brought about a qualitative change in economic, social, and political thinking. Capital markets have become practically interconnected, and share values can hardly differ in different parts of the world. As news spreads all over the world within moments, distance loses its importance in the formation of political judgements. The violation of human rights or the destruction of the environment are of equal importance, whether they occur in a neighbouring country or at the other end of the world.

This outline of the technological background of globalization should make it clear that the true motive behind these developments is the eternal desire of mankind for mobility. History tells us that mobility has always been one of the driving forces of economic and social development. From this point of view

income in the USA has soared from 6600,-- US-\$ to 24.750 US-\$, that of Switzerland from 5.780,-- US-\$ to 36.410,-- US-\$.

³ Cf. *Der Bundesminister für Verkehr* (ed.), *Verkehr in Zahlen 1994*, 1994, p. 265: the rate index calculated by the Federal Ministry of Transport and fixed at 100 for the year 1985 moved up to 179 in 1993 for tanker shipping, to 125 for trampshipping, but dropped to 74 for general goods and even to 64 for containers.

⁴ Cf. *Gerd Aberle*, *Transportwirtschaft*, München 1996 p. 1 seq.

globalization is much more than a fashionable concept used by social scientists at the end of 20th century, it rather appears to be another decisive step in the irreversible development of human society.

C. The Impact on Governance

For several hundred years the European, and later the world order, has been characterised by the central role of the sovereign nation state.⁵ The world is divided into territorial units housing permanent populations each of which is subject to the exclusive and comprehensive rule of an apparatus consisting of various agencies – including those responsible for legislation, adjudication and administration – which is called a sovereign state.⁶

This model of the world order turning upon the nation state as the supreme source of an all-embracing governance is reflected in many legal concepts and rules. Take the very name of public international law and private international law – although the number of non-state organisations which are recognised as subjects of international law is increasing from year to year the discipline is still called inter-*national* law. This name assumes that nations are the only persons addressed by its rules. The confusion is even greater in private international law. Here again, the name suggests that the nation state is the cornerstone of private law. While it is true that nationalism had some impact on the development of private law throughout the 19th century,⁷ it appears somehow contradictory that the term private international law in Germany replaced the former denomination ‘conflict of laws’ (*conflictus legum*) at a time when there was neither a nation state nor a uniform private law in Germany.⁸ Another strange consequence of the nation-centred approach to the world legal order is that a small country like the Principality of Liechtenstein which has a population of not more than 30,000 inhabitants and never claimed to be a nation, recently has enacted a statute on

⁵ Cf. for example *Ian Brownlie*, *Principles of Public International Law*, 4th ed. Oxford 1990, p. 60 who regards this category as ‘the most important’.

⁶ Cf. *Brownlie*, supra n. 5, pp. 72–73 and 287 seq.

⁷ See *Erik Jayme*, *Nation und Staat im Internationalen Privatrecht—Einführung*, in: *Erik Jayme/Heinz-Peter Mansel* (eds.), *Nation und Staat im Internationalen Privatrecht*, Heidelberg 1990, p. 3, 6 with further references, in particular to Mancini.

⁸ See *Wilhelm Schaeffner*, *Entwicklung des Internationalen Privatrechts*, Frankfurt am Main 1841, p. 1 who writes in note 1 that the term private international law needs no justification. Some years later, *Carl Ludwig von Bar*, *Theorie und Praxis des Internationalen Privatrechts* vol. 1, reprint of the 2nd ed. Hannover 1889, Aalen 1966, p. 1, n. 1 explicitly points out that the basic issues of private international law equally come up when the laws of different ‘legal communities’ get into conflict.

private international law.⁹ The focus on the nation state also emerges within the content of various conflict rules which refer to a national law although the respective state does not have a uniform private law system and perhaps not even the legislative jurisdiction to enact such a uniform private law. In many cases such choice of law rules are highly unsatisfactory and have to be supplemented by additional conflict rules which allow the identification of the relevant sub-system of private law.¹⁰

It is safe to assume that the structures of governance will change in the course of globalization.¹¹ The general quest for more mobility and efficiency will put pressure on nation states to open up their borders and allow globalization to expand. But nations will not limit themselves to the simple permission of the free movement of goods, services, information, capital and persons. They still want to maintain a certain grip upon the economic and social conditions in their respective countries. If this is no longer possible at a national level they will therefore try to enact supra-national regulations, either at a global or at a regional level. Many international regulations are conceived as international conventions which require the ratification of the contracting states. Since these conventions may be terminated at a later stage they appear to maintain the formal quality of national law. In reality, however, nations make very little use of the right of termination because the fallback position of a purely national law is no viable alternative. In practice the difference between international conventions and the binding supranational law of regional organisations such as the European Community is less important than it may appear at first sight.

The new world order which is to emerge from globalization will thus be characterised by four groups of regulations:

- (1) world regulations which in most cases will be contained in international conventions;

⁹ Gesetz vom 19.9.1996 über das internationale Privatrecht, Liechtensteinisches Landesgesetz 1996 Nr. 194 vom 28.11.1996, also printed in *RabelsZ* 61 (1997) 545 with an introductory article by *Alexander Appel*, Reform und Kodifikation des Liechtensteinischen Internationalen Privatrechts: *RabelsZ* 61 (1997) 510; see also the contributions by *Jürgen Basedow*, *Monique Jametti Greiner*, and *Axel Flessner* in *Benedikt Marxer/Fritz Reichert-Facilides/Anton K. Schnyder* (eds.), *Gegenwartsfragen des Liechtensteinischen Privat- und Wirtschaftsrechts*, Tübingen 1998.

¹⁰ See for example art. 4 section 3 of the introductory law of the German Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch, EGBGB) and art. 18 of the Italian Act of 31.5.1995 no. 218 for the reform of the Italian Private International Law, suppl. ord. n. 68 of the *Gazzetta Ufficiale* no. 128 of 32.6.1995, German translation in *Wolfgang Riering* (ed.), *IPR-Gesetze in Europa*, Bern and München 1997, p. 43.

¹¹ For the following see *Jan Aart Scholte*, The globalization of world politics, in *Baylis/Smith*, supra n. 1, pp. 13, 21 seq.

- (2) regional regulations, such as those of the European Union, which may go beyond the model of the international convention and produce a binding effect on the member states and their respective populations;
- (3) traditional national regulations, and
- (4) regulations at a sub-state level, such as the laws of states within a federation.

Private international law, or rather the conflict of laws, will have to cope with these different categories of legislation.

D. Consequences for Private International Law in General

I. New Problems

The new problems created by globalization, and which private international law will have to accommodate in the future, are twofold. In the first place, the increased interconnectedness of individuals, societies and economies will produce a sharp rise in the number of legal conflicts bearing transborder elements. The share of such transborder operations has grown ever since World War II. For example, a foreign spouse is involved in one out of ten marriages celebrated in Germany, requiring the application of foreign marriage laws under the nationality principle. Due to modern communication and the introduction of the EURO as a transnational currency we can expect a similar growth of cross-border operations in other fields such as capital investment, insurance, or consumer transactions. It should be clear that this development may pose serious problems to the whole judicial system, if it entails a corresponding increase of the number of cases decided on the basis of foreign law. Neither lawyers nor the courts are prepared to apply foreign law as speedily and easily as they give advice on and enforce their national laws; thus the mass application of foreign law may eventually threaten the functioning of the whole court system. It will therefore be necessary to think about conflict rules which restrict the application of foreign law to the degree required by the protection of vested rights.

The second problem posed by globalization is that of the dislocation of legislative powers which has been described in the preceding section. If private law legislation no longer hinges upon the nation state, but is distributed among several levels, it is difficult to understand why conflict rules always should refer to the private law of a certain nation. Moreover, the denomination as private international law itself is losing its justification. We should sooner or later return to the former denomination of the 'conflict of laws'. This is not equivalent to a return to unilateral conflict rules, but it implies the formulation of conflict rules which may refer to a foreign supranational law, to a foreign national law, or to a foreign sub-national law, as the case may be. Some more recent conventions in the field of private international law in fact contain general provisions which directly refer to the private law of a sub-national unit

in the respective field.¹² Similar conflict rules should provide for the application of foreign supra-national private law.

II. Uniform Law and Principles

The solutions to problems described above have many aspects and can only be outlined here. In the first place it is safe to assume that we will witness increased activities in the field of unification and harmonisation of laws in those areas where transactions are inherently world-wide and have little or no connection with a particular legal system. In particular, some transactions related to the internet call for a progressive unification since their roots in a given national system are purely casual.¹³

Uniform law is never comprehensive. Gaps and exceptions from its scope of application cannot be avoided altogether. Courts have traditionally filled these gaps by having recourse to a national law, either the *lex fori*, or more correctly, the *lex causae*. In practice this method of composing the applicable law from two sources, i. e. the convention and the national law, has turned out to be overly complicated and to threaten the uniform enforcement of the convention. More recent conventions have therefore introduced an intermediate level of rules between the convention and the national law: the general principles of law. The best known example is that of Art. 7 of the UN Sales Convention which mandates the filling of gaps 'in conformity with the general principles on which [the convention] is based'. Recourse to the applicable national law can only be had where such principles are absent.

There is a broad discussion on the question of how to find such principles. It should be recalled that UNIDROIT, the Rome based Institute for the Unification of Private Law has adopted, in 1994, so-called principles of international commercial contracts which purport to set forth general rules to be used as an aid to interpret or supplement international uniform law instruments.¹⁴ It is submitted that the UNIDROIT Principles can effectively help to clarify the meaning of uniform law conventions and moreover fill in gaps at least in so far as the relevant questions in principle are covered by the scope of the convention (so called 'internal gaps'). The gap filling role should not be limited to

¹² See for example art. 19 of the Hague Convention on the Law applicable to agency of 14.3.1978; art. 19 of the Rome Convention on the Law applicable to contractual obligations of 19.6.1980.

¹³ Cf. *Herbert Kronke*, *Electronic Commerce und Europäisches Verbrauchervertrags-IPR*: RIW 1996, 985.

¹⁴ See the preamble; the UNIDROIT Principles are reproduced and commented upon by *Michael Joachim Bonell*, an international restatement of contract law, 2nd ed. Irvington-on-Hudson, New York, 1997.