THE LAW OF INTERNATIONAL TRANSACTIONS

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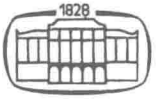
THE LAW OF INTERNATIONAL TRANSACTIONS

By

FERENC MÁDL, LL. D.



AKADÉMIAI KIADÓ, BUDAPEST 1982

A revised edition of the original

Összehasonlító nemzetközi magánjog — A nemzetközi gazdasági kapcsolatok joga

published by Közgazdasági és Jogi Könyvkiadó, Budapest

Translated by
J. DECSÉNYI

ISBN 963 05 2932 7

Printed in Hungary

CONTENTS

Preface		9
PART ONE		
To the foundations of comparative private international law and legislative practice. Comparative law synthesis theory *versus* private transnational law as a new concept in private international law		13
Chapter I	Introductory remarks	15
Section 1	On the new and the earlier concepts of private international law	15
Chapter II	Thesis: The new concepts summarized	19
Section 2	The earlier concepts might be unsatisfactory	19
Section 3	Transnational commercial law in a positive exposition	23
Chapter III	Antithesis: Where the transnational law fails	31
Section 4	General and minor objections	31
Section 5	Decisive arguments	39
Section 6	The newness of transnational commercial law; why EHRENZWEIG's approach is more acceptable	44
Chapter IV	Tentative synthesis: The comparative law synthesis theory	48
Section 7	Realistic theories combined	48
Section 8	The theory pure	55
Section 9	The theory in experimental verification	73
	(a) Party autonomy	73
	(b) *Renvoi*	76
	(c) Reciprocity	77
	(d) Juristic persons	79
	(e) Torts	84
	(f) Sovereign immunity	88

PART TWO

The law of international economic relations. To the theoretical foundations—with an outlook to practice 101

Chapter V — Introduction 103

Section 10 — For the value of a reasonable order and the propositions 103
Section 11 — The revolt of facts against the earlier order 105

Chapter VI — The unsatisfactory metamorphosis of private international law—new systems emerge 108

Section 12 — In the western countries: practice with little theory or pragmatism prevails 108
Section 13 — In the socialist countries: practice is looking for a theory and theory for a place 121

Chapter VII — Some general conclusions resulting from the revolt 131

Section 14 — Facts in legal science 131
Section 15 — Agreements and disagreements in the offer of theories 133
Section 16 — Name-war and correct definitions 135
Section 17 — The facts in Hungary and the answer of legal science so far 137

Chapter VIII — The new answer 139

Section 18 — System-theory requirements 139
Section 19 — Private international law is not a comprehensive solution, but turns classic again 141
Section 20 — The term branch of law *(Rechtszweig)* in its closed meaning does not hold 143
Section 21 — Conceptual scope 146

(a) The normative side 147
(b) Boundaries, borderland co-operation, inner differentiation 150
(c) The discipline and its reasons 153
(d) The name without war 154

Section 22 — Main positive law elements 155

Chapter IX — The reality of the law of international economic relations in Hungary: the new regulation of foreign trade management 163

Section 23 — General remarks 163

Section 24	The reform, its economic policy motives, and the principles of the new regulation	165
Section 25	International background	168
Section 26	Legislative process	169
	(a) The unity and the phases of the legislative process	169
	(b) The new Civil Code and its amendment for international application	171
Section 27	Principal elements	176
	(a) Foreign trade monopoly today: differentiation and rearrangement of the competences	176
	(b) Greater independence of enterprises and their liability in foreign trade processes	181
	(c) The forms of State management	191
Section 28	Concluding remarks	196
References		199

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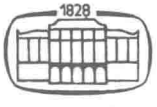

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Section 11 — The revolt of facts against the earlier order 105

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Section 13 — In the socialist countries: practice is looking for a theory and theory for a place 121

Chapter VII — Some general conclusions resulting from the revolt 131

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Section 25	International background	168
Section 26	Legislative process	169
	(a) The unity and the phases of the legislative process	169
	(b) The new Civil Code and its amendment for international application	171
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	(c) The forms of State management	191
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References		199

PREFACE

"Recanati, the playful billows of my thoughts in the rhymes; the jewel of my poetic lines"—the attraction and the love felt for Recanati radiate in harmony with the endlessly undulating hills of the scenery through the poetry of LEOPARDI, son of Recanati. Such or any other similar words are not unwonted as the opening lines of a legal discourse. This is the case partly because legal writing is in itself somewhat of an art, and what is more a quotation such as the one above may act as an invitation to read the work it introduces. By way of contrast to the soft and dreamy opening lines, let us consider another kind of picture: when SIR EDWARD HILLARY, the first conqueror of Mount Everest, was asked to discourse upon the human and moral considerations that prompted him to set out in the venture, in other words, why had he decided to climb Mount Everest, he simply replied: "Because it was there."—His reply demonstrated his spiritual strength in deheroizing the all too heroizing picture the press had drawn of him.

When now the reasons are given for this presentation of the theory of comparative private international law and of the law of international economic relations, these similes are not meant to impart that private international law or the law of international economic relations are in need of a new theory because so far it has not had one, or as if a dreamy approach or exacting task of climbing the peaks or mildly undulating hills of these laws and of formulating them into a theory were a necessity only because so far very few authors have done anything in this respect. Such a statement could be made only by one who was the first solitary wanderer of the hills and peaks of private international law or the law of international economic relations, and—what is more—who looking downwards could safely state that all that his predecessors had seen or said represented a colossal error or at least that from the new heights of theory everything looked differently. Having said this we must quickly "unsay" it by stating that this discourse has not been written with the intention of making any such statement. There are no unclimbed peaks of this or that kind in private international law, nor do they exist in the law of international economic relations; there are no such peaks that could simply be climbed by anyone who then, on retrieving the philosophers' stone, would proclaim new truths. What we have is a more or less featured relief or almost infinite expanse shaped by practice (municipal and international legislation, forensic and contractual practice), concerning which theory, in particular when going its way with the attraction and love of Recanati, may act in a twofold manner. First, it may itself discharge nature-

shaping functions. This is the case because theory with its elaborated opinions may, directly or indirectly, influence the formation of the norms and other regulatory systems emerging in practice. Secondly, it may form a systematizing and comprehensive picture of this relief expanding almost without bounds; in reality this is the first step of any discipline and at the same time the condition for its proceeding meaningfully in its above given role.

There are, of course, many theories in private international and in comparative law as well as in the law of international economic relations. The scientific value of these theories varies according to whether they offer—and if so, to what extent—something new for the cognition and shaping of reality. Since SAVIGNY, the first great figure and perhaps still the greatest scholar of this discipline, theories have cropped up in vast numbers, so that in this connexion we have long been able to write of too much theoreticism, of 'theories in the wake of theories', and at present quite an amount of scientific force needs to be taken for the very effort of judging their social utility and reason on the soil of reality. In comparative law much has taken place since ARISTOTLE who studied about hundred fifty constitutions to acquire theoretical conviction for establishing the best constitution. In the law of international economic relations, ever since RABEL formulated his modern law merchant concept decades before, we have been in the thick of the process where, by discarding the earlier framework, for example, of private international law, ever newer theories are put forward so that the new reality may be expressed (hence the system or rather the conceptual rhythm of this study, how in its intrinsic metamorphosis private international law partly develops to comparative private international law, partly becomes the cradle of the law which has grown out of it, viz. the law of international economic relations). The old treasures of this kind or another of the fields of jurisprudence, in particular the earlier theories, are as a matter of course known, and partly are extant in modern thinking of international law and exercise their effect on it. Their critical analysis and their transmission to one's national jurisprudence and legal thinking may of course be considered a useful undertaking by itself. This holds, and perhaps even more than is the case in the present study, when on transgressing all that appears to be superannuated and on integrating all that proves useful we present the old theories in a new formulation; they appear in the theoretical conceptions born in the sign of new relations and new tasks as well-thought-over antecedents of the new concepts. It is true though that irrespective of this the principal issue will continue to exist, namely, whether in the case of theories abounding there is any need for new ones at all. This work has been written because its author has, notwithstanding what has been set forth, thought there was a need of it. It was called for not merely for the sake of the theory and the better scientific foundation of a corresponding law school curriculum but also for the benefit of practice, for tackling the new tasks of practice with enhanced efficacy. Hence the subtitle of Part Two of the book: To the theoretical foundations and practice. If now the reader, together with the author, would ask what then the concrete justification for such a theory-and-practice book was, the author would save the time of the reader at this point. As far as it is able to

do so, the book itself should serve as a justification both in respect of content and substance. In fact the work is an experiment with a twofold aim. First, to see whether the theory here exposed is in fact capable of being truly comprehensive as regards comparative private international law and the law of economic relations; secondly, to test whether in the exposition of the theory the author could attain perfection. Indeed, a further maturing and unfolding of the theory form part of his endeavours.

FM