O. Kahn-Freund

GENERAL PROBLEMS OF PRIVATE INTERNATIONAL LAW

Sijthoff

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by

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PREFACE

This book reproduces with a few slight changes the General Course on Private International Law which I gave at the Hague Academy of International Law in 1974. The manuscript of the Course was completed in the autumn of 1974, and I have not attempted to take account of any changes in legislation which have occurred since that time, nor of any decisions reported or any literature published since then. It may however perhaps be appropriate for me to say that nothing has come to my notice which would have caused me to change the views expressed in this book in any material respect.

I should like to take this opportunity of thanking the Academy and its Secretary-General, Professor René Dupuy, for the permission to reprint my Course in this form.

O. Kahn-Freund

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CHAPTER I

INTRODUCTION

I. The Nature of this Course

This is a general course on Private International Law, and it is appropriate that it should begin by introducing itself, that is by explaining what it is or hopes to be, and, equally important, what it is not and cannot be.

The book is primarily addressed to students, and some of them may be intrigued by the relation of our subject to Public International Law. About this more will be said in subsequent Chapters, but it must be emphasised that these two disciplines have a very different character. Public international law is a system of rules which are intended to apply everywhere. It is international in its scope of application, and its source is international. It is intended to be one and the same body of rules wherever applied and wherever taught. There is no such thing as an English, a French or an Italian international law: there cannot be any such thing: it would be a contradiction in terms. Precisely the opposite is true of private international law. Private international law is everywhere a branch of, or a legal discipline within, a system of municipal law. As we shall see there is no "international" private international law: it is English, or French or German or Italian, or Californian, Ontario or New South Wales private international law. Hence a general course in this subject cannot be a substitute for a textbook. It cannot be an exposition of a system of principles because there are as many such systems as there are systems of law. No doubt these systems have much in common, and it is this "common core" [1] which must be emphasised in a course such as this. It is however very tempting and very easy to overestimate both the magnitude and the significance of this body of generally recognised rules, and—more important—it is dangerous to ascribe international validity or even relevance to doctrines which owe their origin to a particular national context.

This general course is therefore of necessity an exercise is comparative law. Comparative law has, as a legal discipline, two characteristics which this book will inevitably share. The first is that the best way of presenting it is to focus it on problems rather than on principles,

on questions rather than on answers. And this is particularly true of our subject because that "common core" which I have mentioned, that truly "international" element of this so-called private international law, consists of ubiquitous and recurrent problems much more than of a body of secured general principles. The second characteristic of comparative law is that whoever teaches or cultivates it does so against the background of a particular legal system—whether he is conscious of it or not, whether he likes the idea or rejects it, he cannot help thinking in terms of the legal system with which he is most familiar and in which he lives, which to him is the standard, that with which one compares rather than that which one compares, in a sense his legal domicil—of origin or of choice—*unde cum profectus est, peregrinari videtur: quo si rediit, peregrinari jam destitit.*[2] This will be very obvious in this Course.

Not a textbook, then, but not a monograph either. I cannot here, as one does in a work on such a special topic, analyse in depth and in detail any one of the many fascinating questions to which the simultaneous existence of systems of law and of courts has given and is giving rise. Such of the questions as I shall discuss will serve merely as paradigmata, and in this I shall have to be selective. The literature on the subject is gigantic. No living man or woman can have mastered it. There are monographs and articles in abundance, and from time to time I shall refer to some of them when they are germane to the matter under discussion, but it is not my purpose to delve into the depths of any of the innumerable doctrinal controversies, methodological and otherwise, which beset the conflict of laws.

This, then, is a course on general problems, not on general principles or general rules. A large number of important works on general principles have been written in the past.[3] They were mainly—not exclusively—concerned with the method of selecting the rule or rules to be applied to decision of a given case. This is indeed one of the general problems of our subject. It is however only one of several.

As everybody knows, problems of what we call private international law, or—in the language more common in the English speaking countries—of the conflict of laws, are created by the elementary fact that at the same time and in a given geographical area (which may be the Globe or a single country) there are in force a number of systems of law and that in a given situation someone must choose the system or systems from which to take the rule or rules of decision. This—the choice of

law—is the first of the problems of private international law, but it is only one of three. There are many systems of law, but there are also many systems of courts—and the second central problem is how to choose between them, that is to determine who will make the decision. But beside these problems of choice of rules and choice of courts there is a third: to an increasing extent the choice of law problem is circumvented: many countries agree to incorporate in their legal systems substantive rules to govern cases linked with more than one country, and in a given situation it will have to be decided whether one of these national substantive rules of international origin and content applies to the case.

Let me illustrate this: suppose an accident happened in a city of the Netherlands: a car belonging to and driven by a citizen of the United Kingdom domiciled in London runs over a French citizen domiciled in Paris. Both are temporary visitors to the Netherlands. They—or their insurers—cannot agree on whether anything (and how much) has to be paid by the Englishman to the Frenchman to compensate him for the personal injuries resulting from the accident. The Frenchman's lawyers must now decide in which country an action for damages can and should be brought, and then by what law the judge will determine the Englishman's liability. The lawyers may consider these two matters in the reverse order, and they may try to choose the court in the light of what they know about the choice of law the judge is likely to make. But, in whichever order they may appear, these problems of choice of law and choice of court cannot be separated in practice. They are different problems and must be treated as such, they are "separate but equal", and they cannot be viewed in isolation from each other.

Assume now however that our accident had happened not in a Dutch city, but at a Dutch airport: a French passenger on his way to Germany slips on the steps of a British aircraft and is injured: his and the airline's and the airport authority's advisers will have to decide whether his right to damages is governed by the terms of those international conventions which seek to create a uniform code of liability for accidents happening in the course of international transport by air. Those terms can only apply if they are incorporated in the relevant national legal system, but the possibility that they may be so incorporated raises a third problem of private international law of rapidly growing importance.[4]

We can see that the first two problems: what law will be applied? and: who will decide? must arise in most cases connected with more

than one legal system, and that the third problem: is there a special rule for international situations? will arise in many. These three problems exist side by side. Yet, looking at private international law as a whole and asking: what is the most promising method of coping with this co-existence of many laws and many courts?, one can place the emphasis on any one of these problems, on the choice of law, on the choice of court, or on the making of international substantive rules. One can try to formulate a network of rules neatly allocating each type of legal issue to a legal system and seek to get universal agreement on this so that the courts of all countries apply the same law to the same case and it does not matter what court handles it. One can also try to formulate a network of rules on jurisdiction clearly allocating each case to the courts of one and only one country and then stipulate that the court applies its own law, so that again it is clear how the case will be decided. One can thirdly try to formulate codes of rules for situations involving more than one country: international sales and other contracts, transfers of property, etc.—a method which can always have a limited application only, but which in so far as it applies restricts (it does not obviate) the need for choice of law rules. But neither of the first two methods can of course ever be applied in practice so as to exclude the other, and private international law will always be a mixture of choice of law and of choice of jurisdiction rules. Still, it does matter whether a given legislature, court or legal scholar tends in one or the other direction, that is whether they tend to achieve harmony by international agreement on what law applies or on what court decides. This is important *de lege ferenda*, but not exclusively. Our subject is so problematical, it leaves so much to be determined by judges and academic writers that preference for one of the available methods influences the way questions arising *de lege lata* are answered: thus it is clear that for reasons we shall discuss many problems of international family law are in the common law world solved through an attempt to allocate jurisdiction whilst in corresponding situations civil law countries seek to submit different issues to different legal systems.[5] A universal system of clear and unambiguous choice of law rules is a utopia, and so is a universal system of clear and unambiguous rules of jurisdiction. But here, as so often, the unattainable ideal may help to determine the direction in which practical action moves.

The principles which lay down from which law rules of decision should be taken, who should make the decision, and whether there are special rules of decision for conflicts situations, do not exist in a

vacuum. They must be derived from some binding authoritative source or sources. To find out what these sources are, will be one of my main concerns, and especially the question whether in any sense international law can be such a source, how in "composite" units of law making, i.e., federations such as the United States, and multilegal unitary States such as the United Kingdom, the creation of conflicts rules is organised, and what role legislation, case law, and doctrinal writing are playing in the making of such rules.

We shall however discover that both the origin and the content of these conflicts rules depend very much on the context in which they are to be applied. I shall therefore devote much space and attention to these contextual problems, and distinguish between international and various kinds of internal contexts, and see how far such conflicts situations are linked with various spheres of life, how far they are linked with court procedures, and how the nature of those procedures impinges upon their solution.

These matters: the sources available for the solution of conflicts problems, and the geographical and political, the social and the legal contexts in which they arise will occupy the larger part of this course. We must however also have a look at the choice of law process itself and consider the method used in determining the nature of the issue involved, in finding the link between that issue and a given legal system, and in applying a rule of decision taken from that system.

Accordingly, this course will, apart from the Introduction and an Epilogue, consist of three Parts: one on Sources, one on Contexts, and one on Methods.

II. Choice of Law Methods: a Preview

In the first place, however, we must get a pre-view of the methods available for the solution of conflicts problems, and for this purpose return to the hypothetical accident in the Netherlands involving a Frenchman and an Englishman. This situation is linked with three countries, with two through the nationality and the domicil of those involved, with one through the place where the accident happened and where a delict or tort has or may have been committed. Several links, then, and anyone who has to find the rule which governs liability must choose from these several available links the one that is relevant. He may have to cope with several links at the same time: the question whether the Englishman was at fault may perhaps be governed by

Dutch law, but, if the Frenchman has died, it may be for French law to decide whether his heir or his estate can recover damages from the Englishman, and if the Englishman has died, it may be for English law to decide whether his estate is liable to indemnify the Frenchman or his estate.[6] Let us right at the beginning get rid of the notion that one "case" is necessarily governed by "one law"—a notion which has bedevilled the discussion all too frequently. The choice of law process is intended to answer the question: from which legal system are we deriving the rule which will decide a legal issue? This concept of the "legal issue" is basic. In Europe it was above all Lewald in his masterly *Règles générales des conflits de lois*[7] who emphasised the significance of the "*question de droit*" in this connection. And, partly perhaps as a result of the very clear stand taken in this matter by the American Law Institute's *Second Restatement on Conflict of Laws* (1971),[8] this appears to be now the prevailing attitude in the United States as well. Any number of issues may arise in one case, and each may be governed by a rule taken from a different law.

But how does one decide which of any number of possible links is the one that is relevant? There would be no conflict unless at least one issue arising in the case showed features, or, as we usually say, "factors", connecting it with more than one legal system, or, to change the simile, several points of contact, *points de rattachement, Anknüpfungspunkte.* Thus the selection among many possible connecting factors or points of contact of the one that matters is the essence of that part of private international law which deals with the "choice of law". This is the dilemma. It may confront a judge, an administrator, and a lawyer advising a client. How can one solve it?

At first sight the dilemma involved in every choice of law looks much like that of a traveller at a crossroads. He sees two or more signposts pointing in different directions. In our case one signpost says: "nationality and domicil of the victim—France", the other says: "nationality and domicil of the alleged perpetrator of the act, the 'tortfeasor'—England", the third says: "place of the alleged delict—Netherlands". Which signpost is he to follow, which road to take? Yet there is a great, a decisive difference between the traveller and the lawyer. The traveller knows his destination, the lawyer does not. He does not know whether he "wants" to travel to France, to England or to the Netherlands to find the rule or rules of decision, all he knows is that he must follow a certain signpost wherever it may lead him. In saying that he does not know his destination, I am entering one of the controversies of our

subject. From the earliest days of medieval Italian learning[9] to the most modern American writings on our subject[10] there have been those who argued that the lawyer does know his destination. He does not, it is said, "blindly" follow a sign (such as "domicil", "*locus delicti*") wherever it may lead him. He looks for the sign that will lead him to the result he regards as just, to the substantive rule of which he approves. *Debet judicare secundum quod melius ei visum fuerit* said Master Aldricus at the end of the 12th century, and those adhering to what has been termed the "result-selecting method"[11] teach much the same thing in the United States today. Which law—they ask—is the one that "best accords with present-day ideas of justice and convenience"?[12] The problem—said Professor Cavers 40 years ago[13]—is "what should be the proper result in a case of this sort?", not "what rule is the proper one to select a jurisdiction whose law should govern it?" It is true that he never intended to be the "intellectual heir of Aldricus",[14] yet in his important book published eleven years ago he still insists that "the process of making a just choice between two laws requires that one take into account the respective results worked by the laws which one chooses" albeit in the light of general principles of preferences as between the policies and standards of the various laws in question whose selection—it is true—depends partly on the nature and intensity of the link between those laws and the case. Who can doubt that in their choice of law decisions judges and administrators are consciously or unconsciously influenced by what they know about the content of the laws from which the choice is to be made, having, like a weak-minded reader of a detective story, glanced at the last page which shows the *dénouement* before having patiently followed the mental processes that led there? And I should willingly follow Master Aldricus, Professor Cavers and Judge Learned Hand[15] in making a theory out of this practice, if only I knew what was *melius*, "proper", "satisfactory", "convenient" (to whom?), "preferable", "just". But, since neither faith nor reason has revealed this to me, and as I am afraid of my own and of other people's, especially judges', inarticulated prejudices, I prefer a clash between theory and practice, and even the reproach of hypocrisy, to the elevation of Aristotle's *epieikeia* from an exception to a rule, that is to a capitulation of the rule making to the decision making power.[16] And so I still say that our traveller at the crossroads does not know his destination and in that sense he is indeed, as Cavers said, "blindfolded".[17]

Still, only in that sense. We are now thinking of the judge or the

administrator, not of the advocate or adviser who is looking for the result most favourable to his client. The judge or administrator has—to continue the simile—been instructed not indeed to reach a certain point, but to follow signposts bearing inscriptions such as "domicil", "nationality", "place of the delict", "site of the property", etc. Which signposts he should follow depends on the nature of his journey, for instance whether his quest is for a rule to govern the distribution of a person's movable estate, or his capacity to marry, or the form of a marriage, or the validity of a contract, or a transfer of property, or delictual liability, etc. In the case of my hypothetical accident his quest may be for a rule governing "standard of delictual liability" to find out whether the Englishman is liable to the Frenchman or whether the French pedestrian contributed to the mishap in a relevant way by his own fault. But he may have to find a rule for "succession to and administration of a movable estate" to find out whether after the Englishman's death the Frenchman can make a claim against his estate. So the judge or administrator must be clear about two quite different things: the nature of his quest, that is the kind of issue to which a legal rule has to be applied, and the nature of the connecting factor that is relevant in pointing to that rule. Perhaps—to change the simile [18]—we can think of a sign pointing to a destination without mentioning it: in a concert hall the blue arrows point to the seats of those who participate in the concert, and the green arrows to the seats of the audience. A man entering the hall does not know yet where the choir sits and where the audience sits, but there are two things which he must know: does he want to sing or to listen? and what is the difference between blue and green? Or, in less metaphorical language: he must know the nature, the character of the issue—is it the validity of a contract or of a transfer of property, is it a question of succession to property or an issue concerning the effect of marriage on property?—and he must understand the relevant links between the issue and a given system of law, he must know the difference between blue and green, if he is colour-blind he cannot see that there is a difference between, say, domicil, and residence, and nationality, and he cannot perform this operation. Sometimes indeed the signs are not at all clear, and a "connecting factor" such as "domicil" has to be interpreted and—which is worse—is differently interpreted in different legal systems.

So the first step in the choice of law process is to find the category to which the issue belongs, to characterise or classify it—it was only at the end of the 19th century that two great scholars, one French,

Bartin,[19] the other German, Franz Kahn,[20] "discovered" almost simultaneously and independently from each other that this was one of the fundamental problems of private international law. Bartin was stimulated in this by a *cause célèbre* pending at that time[21]—one of several examples to show how practice has constantly influenced theory in our subject.[22] Once it is clear to what class or category the issue belongs, the judge takes the second step: he finds out what connecting factor is relevant to that category, for example whether for the category of issues bearing the label: substantial (as distinguished from formal) validity of a marriage, things like age of marriage, consanguinity and affinity, etc., the relevant connecting factor is the place of celebration or the domicil or the nationality of either spouse, or the place where they intend to establish their matrimonial domicil. And in the course of this second stage he must make up his mind as to what he chooses to mean, e.g., by "domicil", that is interpret the connecting factor which is a very different thing from classifying the issue.[23] And then, when he knows both to what category the issue belongs and what, for issues of that category, is the relevant connecting factor, he can set out on his journey and apply the rule to which he has thus been referred, and this is the third and last stage of the choice of law process.[24]

III. The Great Dilemma: Internal Consistency versus International Harmony

Superficially this looks fairly clear—a simple and straightforward scheme of things, a beautifully laid out system of roads and signposts. Yet there lurks in the background a fundamental difficulty. The judge wants to find out what law he has to apply: for this purpose he must classify the issue, find the relevant connecting factor, interpret it, and then apply the law to which he is thus referred. Well and good. But what law is he applying in performing these operations? What law establishes the categories of issues, and tells the judge for example whether the need for parental consent is a matter affecting the form of the marriage or the capacity to marry, what law defines for him the meaning of words such as "domicil", "place of delict", or "situation of things", what law tells him whether the nationality or the domicil of the prospective spouse or the place of the intended celebration is relevant to find the law to be applied? What law furnishes the rules of private international law?

Obviously this is a fundamental problem of our discipline. Not only

is it fundamental, but, in an peculiar sense, it is also dangerous. It does not require much reflection to see that the question I have just posed may be the first step of an infinite series of questions leading into a logical impasse. What law supplies the rules for the choice of law? And what law supplies the rules which determine the law that supplies these rules? And so on. This is the menace of the infinite series. As soon as we move out of the four corners of a given legal system and the question what law applies turns up in our range of vision, this menace has to be confronted. It does not bother courts, administrators, or practising lawyers very much, but for the student it is necessary to see this problem in order to grasp the elementary proposition that in private international law it is above all necessary to face the question what is the source of the choice of law norm, and then to see how much depends on the context in which the question is put.

The link between the menace of the infinite series and the question of sources is easy to see: the series must be cut at one point. The "buck" cannot be passed from one logical step to the next. Somewhere, to use President Truman's immortal phrase, there must be a point "where the buck stops". The answer to that question: "where does the buck stop?" is the answer to the question of the source of the choice of law norm. We shall see [25] that there is (or was) a school of thought which argued that in a case such as that of our motor accident, it is not for Dutch or English or French law to decide the conflict or contest between Dutch, English and French law. Surely—one has said—in this contest there must be an impartial arbiter, and what is more, there can be only one solution to this question of choice, and therefore only one source from which the solution is taken, and that is international law. The alluring feature of what we call "universalism" in private international law is that it purports to provide a single answer to a single problem, in whatever context it arises. It ensures harmony internationally and nationally: wherever the question is put, in any court anywhere or outside any court, everywhere it receives the same answer. Just like Truman's Presidential desk at the White House, international law is for this "universalist" theory the place where one can say: "this is where the buck stops". Alluring, but, as we shall see, utopian, and totally impracticable. International law cannot be the source of the conflicts norm because it has no sufficient supply of conflicts rules, and, moreover, the uniform application and enforcement of rules of international law is a "consummation devoutly to be wished", and, alas, no more.

There is now almost general agreement that the infinite series must