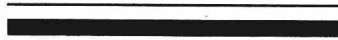


THE "CONFLICTS" PROCESS

Jurisdiction and Choice
in Private International Law

by
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1975

OCEANA PUBLICATIONS, INC.

Dobbs Ferry, New York

THE BRITISH INSTITUTE OF INTERNATIONAL
AND COMPARATIVE LAW

London, England

Library of Congress Cataloging in Publication Data

Jackson, David C

The "conflicts" process

Jurisdiction and Choice in Private International Law

Includes index.

1. Conflict of laws. I. Title.

Law 340.9 75-33647

ISBN 0-379-00382-1

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Manufactured in the United States of America

PREFACE

This book is a search for a framework. It is concerned with the creation of a pattern for the rules relating to issues involving foreign elements. Hence the quotation marks around "conflicts" in the title: for the boundary of the area under investigation is not indicated by the presence of "conflict" between domestic rules. Rather, possible conflict is one aspect of a process which provides criteria for selection of domestic jurisdictions and rules.

The problem of the foreign element is the problem of contact. A dispute with such an element is no longer wholly domestic in nature; and it follows that appropriate rules are needed. And until there are not only adjudicating bodies common to all but dispositive rules common to all the need will continue.

The traditional approach (at least at common law) has been to start with domestic concepts. But the purposes of these rules have little or nothing to do with the concepts on which they are based. The result is concentration not on the nature of the problem of selection of jurisdiction or governing rule in relation to a particular issue, but on reference rules for domestic groupings. One major contention of this book is that we have got the approach back to front. We should be trying to relate a framework of rules with the problems of selection firmly in mind, and founding the consequent generalities accordingly. Conventions may rid us of some conflicts between selective rules by specifying common contact points but the very hope of such agreement emphasises the need to approach the selection problem unbound by a domestic conceptual strait-jacket. And the need to interpret the generalities will always be with us.

The second and connected theme is the need to approach problems with a foreign element without first dividing them into questions of the power to adjudicate and the rule to govern the resolution of the dispute. They are interrelated, but the English approach has tended to assert and exercise power with little consideration of its consequences

on the rule which will be applied. And not sufficient attention has been paid to the need for substantial contact with the dispute for adjudication of it.

The third strand of the study is the role of policy. The English approach to disputes with a foreign element has a developed rigidity. It selects a governing rule by linking a legal grouping to a legal system usually by specified connecting factors. When an English court is unable to stand the result it overrules it in the name of "public policy" and applies English law. The variety and width of the roles of public policy render suspect - to say the least - the certainty of the basic approach. And it calls for its reappraisal in the hope that this may lead to the creation of a framework which may be accurately labelled "a process".

I am grateful to Professor Kenneth Simmonds for his continued helpful advice, and to my colleagues of the Faculties of Law at Monash University and the University of Southampton for their valued aid. My especial thanks are due to Mrs. Marian von Benko who continually (and amazingly) deciphers my handwriting and has had to contend with even more than my usual illegibility; and to the secretarial staff of the British Institute of International and Comparative Law who so speedily and efficiently produced the final copy.

To my wife I owe a debt of gratitude for not only helping with the typing of manuscript but for consistently and encouragingly bearing with the production of the book. That it has reached this stage is due in no small part to her.

SOUTHAMPTON April 1975

David Jackson

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