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International Litigation: Doctrine of Lex Fori Vs. Lex Loci

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ABSTRACT

Friedrich Carl von Savigny described 'international uniformity of results' as the foundational objective of international litigation. Savigny argued for realism in the private international to provide transnational law with the ability to respond to the evolving legal problems of the global world. Justice Story of the US Supreme Court stated the importance of uniformity in judgments in the seminal case of Martin v. Hunter's Lessee in 1816. The *principle of comity* allows for the consideration of foreign judgments within the US legal system. Lord Dicey appealed for the inclusion of private international law in the laws of England in his seminal paper of 1890. International litigation is referred to as the private international law and also as law of conflicts in the legal literature and legal lexicon. The legal doctrines of lex fori (choice of forum) and lex loci (choice of law) are intrinsically important in the debate for resolving international disputes for trade, commerce and tort. There is a customary fight over the jurisdiction issue (lex fori) in international litigation. It is so because if the issue of jurisdiction over the matter is resolved, the application of the choice of law is fairly simple. This paper examines the tensions between the two doctrines and their impact on the concepts underpinning the subject of international litigation.

1. Introduction

The *subject* of international litigation or private international law mainly covers three areas. It covers the international or inter-territorial *jurisdiction* of courts for civil or commercial litigation, the *choice of law* to be applied to the cases and finally the recognition and *enforceability of foreign case law* to the matters before the court.[1] Within the practitioners of international law, the litigation deemed international follows the course of the three main areas listed above.

Ulrich Huber, a Dutch jurist in the 19th century explained international litigation along the lines of "*De Conflictu Legum*" or "*On the Conflict of Laws*."[2] English legal system also follows the international litigation of civil, commercial or tort matters under the label of '*Conflict-of-Laws'*. [3] The European Union (EU) documents international litigation under the label of '*private international law*' for statutes, cases and academic legal materials.[4]

Hartley argues that the label '*international*' is misleading as the subject is as much concerned with *inter-State*[5] legal systems as it is concerned with *sub-state* legal systems.[6] Hartley is right as the subject also deals with, for example, the relations between the legal system of Scotland and England verses England and Germany. Similarly, in the United States (US), the subject deals with legal relations between the US and other countries including the various legal systems at the state-level within the US.

The US has established the doctrines of the *Full Faith* and *Credit Clause* within the US Constitution to give recognition to inter-state laws and judgments. In France, all nationality issues regarding aliens are also covered under the international private law or *droit international privé.* Under the French Law, the subject falls under two broad categories of Conflicts *de Lois* or 'conflict of laws' and *Conflits de Juridictions* or the jurisdictional conflicts.[7]

Civil or commercial litigation under the umbrella of 'international private law' or 'international litigation' potentially involves matters that have large monetary implications.[8] Legal scholars argue that international private law and international have one grand objective namely the '*international uniformity of result*'. [9] German legal scholar Friedrich Carl von Savigny described this as the key objective of international litigation that supersedes all other objectives.[10] Savigny argued that private international law was needed to give realism that would enable transnational laws to respond to the needs of the evolving global community.

This paper examines the international litigation under the prevailing core elements of the *lex fori* or legal forum (*jurisdiction*) and the *lex loci* or the choice of laws. Throughout this paper, the terms *conflict of laws*, *international private law* and *international litigation* will be used interchangeably.

2. Jurisdiction Vs Choice Of Law

Legal scholars have tried to portray international litigation to be more than just another branch of law. The label of 'international' does not add much to the actual legal practice. Some international conventions relating to the international litigation under the title of 'conflict of laws. The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 ("the Convention") is one of the most noteworthy international conventions for conflict of laws.[11] Article 1 of the 1968 Convention states, "*This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters*."[12] The convention went through a series of developments and is now part of the European Union's (EU) robust regime of international litigation that allows for the various EU member state courts to consider the judgments of EU Courts

[1] Trevor C. Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law* (Cambridge University Press, 2009), 49.

[2] Ulrich Huber, "De Conflictu Legum Diversarum in Diversis Imperiis," *Lorenzen's Selected Essays in the Conflict of Laws, op. cit*, no. 1 (1947): 162–180.

[3] Hague Academy of International Law and Academie de Droit International de la Haye, *International Litigation and the Quest for Reasonableness: General Course on Private International Law*, vol. 245 (Martinus Nijhoff Publishers, 1995).

[4] Geert Van Calster, *European Private International Law* (Bloomsbury Publishing, 2016).

[5] In this paper, State with a capital '*S*' refers to countries and state with lower case '*s*' refers to sub-units within a State.

[6] Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law*, 52.

[7] Georges René Delaume, "A Codification of French Private International Law," *Can. B. Rev.* 29 (1951): 721.

[8] Beth A. Simmons, "Money and the Law: Why Comply with the Public International Law of Money," *Yale J. Int'l L.* 25 (2000): 323.

[9] Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law*, 58.

[10] Joachim Ruckert, "Friedrich Carl von Savigny, the Legal Method, and the Modernity of Law," *Juridica Int'l* 11 (2006): 55.

[11] Silvio Pieri, "The 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters: The Evolution of the Text and the Case Law of the Court of Justice over the Last Four Years," *Common Market Law Review* 29, no. 3 (1992): 537–555.

[12] Brussels Convention, "Brussels Convention," last modified 1968, accessed March 25, 2020, https://curia.europa.eu/common/recdoc/convention/en/c-textes/brux.htm.

and the member state courts in their civil and commercial litigation.[13]

The question of jurisdiction or *lex fori* takes precedence over the question of *lex loci* in international litigation. This is not just a statement of fact rather it is a truism that has emerged as a legal realism which has been confirmed in the legal literature.[14] Hartley argues that the procedural differences in various legal jurisdictions such as the rules for discovery, evidential rules and the option to try cases as jury-trials or judge-only trials makes or breaks civil or commercial litigation. [15] It is for this reason that adversarial arguments during the initial phases of international litigation focus on *lex fori* and not *lex loci* since the choice of law does not preclude the adverse impacts of lex fori if not considered carefully by the lawyers.[16] Legal scholars and practitioners agree that deciding the choice of the law becomes a small step once the major procedural issues related to the forum or jurisdiction have been adequately addressed and decided between the parties to the conflict. Scholars describe this as the decision of '*proper law upon deciding the proper forum'*.[17]

3. Legal Realism of Lex Fori

Professor Albert A. Ehrenzweig (1906-1974) is one of the most respected legal scholars of the twentieth century who wrote extensively on the topic of international litigation. His work is considered amongst the most progressive and enlightening for those who practice international civil and commercial litigation. Professor Ehrenzweig was a Berkley professor emeritus of law. His work has been amply cited in this paper. Professor Ehrenzweig's professional rivalry with Professor Edwin W. Briggs of Montana Law is legendary.

Both professors wrote a series of articles about Savigny's theory on lex fori in the UCLA Law Review 1964.18 Both eminent scholars argued about the opposing 'institutional approach' to Savigny's lex fori vested rights doctrine. Professor Ehrenzweig argued that Savigny held lex fori as the 'fountainhead of conflict of laws' and Professor Briggs argued that Savigny considered lex fori in the context of 'universal customary law' to be applied uniformly for international litigation of civil and commercial cases. While both scholars argued about the interpretation of lex fori by Savigny, it must be noted that the argument was over the 'form' and not the 'substance' of what Savigny considered to be the importance of lex fori in transnational litigation.

To be more precise, Savigny's theory gave way to his further work on the lex fori doctrine that described lex fori as the realism of the 'seat of the legal relation' in any transnational civil or commercial litigation. Savigny considered the possibility of giving primacy to a 'transnational legal order' over the municipal assumption of applying local legislation to any case that had foreign elements attached to it. This is a repudiation to the municipal law of the forum and its assumptive application of municipal law in all cases brought before it. Savigny distinguished the lex fori and lex loci through his realism of considering the jurisdictional element as the key to decide the choice of law.

Jurisdiction or lex fori remains one of the key issues in the US legal system. Justice Joseph Story (1779-1845) of US Supreme Court wrote the seminal judgment in the case of Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).19 Justice Story wrote,

"the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. the laws, if the treaties and the constitution of the United States would be different, in different states... the public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed, that they could have escaped the enlightened convention which formed the Constitution"[20]

Justice Story held that the US Supreme Court could constitutionally review state court decisions that involved any federal law matters in the cases under the provisions of the Judiciary Act 1789 Section 25. The question of jurisdiction requires the US Supreme Court to exclusively recognise its Constitutional function of reconciling any conflicts that arise from the interpretations of the US federal laws when they come in conflict with the state law. Such distinctions of jurisdiction are maintained for the supremacy of the jurisdiction of the US federation if it is challenged under the authority of the state legislation.

Any legal theory that counters the prominence of lox fori over lex loci ignores the right of the litigant over the legal rules for litigation. In most legal systems, Legal realism is also

[13] Ksenija Vasiljeva, "1968 Brussels Convention and EU Council Regulation No 44/2001: Jurisdiction in Consumer Contracts Concluded Online," *European Law Journal* 10, no. 1 (2004): 123–142.

[14] Muckleroy McDonnold Jr, "Limitation of Actions--Conflict of Laws--Lex Fori or Lex Loci," *Tex. L. Rev.* 35 (1956): 95.

[15] Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law*, 58.

[16] Albert A. Ehrenzweig, "Lex Fori--Basic Rule in the Conflict of Laws," *Mich. L. Rev.* 58 (1959): 637.

[17] Albert A. Ehrenzweig, "A Proper Law in a Proper Forum: A Restatement of Lex Fori Approach," *Okla. L. Rev.* 18 (1965): 340.

[18] Edwin W. Briggs, "An Institutional Approach to Conflict of Laws: Law and Reason versus Professor Ehrenzweig," *UCLA L. Rev.* 12 (1964): 29.

[19] Frederick Schauer, "The Calculus of Distrust," *Virginia Law Review* (1991): 653–667.

[20] Leonard G. Ratner, "Congressional Power Over the Appellate Jurisdiction of the Supreme Court," *University of Pennsylvania Law Review* 109, no. 2 (1960): 157–202.

complementary to existing normative legal theories for adjudication that place the forum as the starting point to consider any litigation for civil or commercial matters. In international litigation, the question of international judicial jurisdiction is critically analysed based on the effect that it would have on the ultimate judgment of the case.

International litigation based on the doctrine of lex fori determines the jurisdiction question based on drawing clear distinctions between jurisdiction in personam and jurisdiction in rem. 21 The jurisdiction in personam is jurisdiction over the person and jurisdiction in rem is the jurisdiction over the property.

4. Lex Loci: Choice Of Law Problem

The lex loci doctrine of the choice of law is considered legal conceptualism with '*fuzzy alternatives*'.[22] Legal scholars consider the primacy of the doctrine of lex loci to be best suited for international arbitration as a central doctrine and not to judicial adjudication based upon the conflict of laws.[23] The reason afforded to for such distinction is because the procedural intricacies of differing legal forums are not a consideration in adjudication since the parties have already accepted the jurisdiction of a particular forum to adjudicate the matter.

To allow a '*foreign law'* in a municipal setting injures the axiomatic assumption in the legal theory of the supremacy of the domestic legislation stemming from the law-making ability of the local parliament. It is, for this reason, the doctrine of *lex loci delicti* or the *law of the place of the wrong* is questioned in contemporary legal literature. In the US legal system, foreign laws became recognized under the '*Principle of Comity*' in the 19th century.[24] US Supreme Court Justice Joseph Story is again attributed with the recognition of foreign sovereign law under the principle of comity in the US civil and commercial litigation under the conflict of laws.[25]

Professor Currie, the eminent US Tort Law professor had floated an alternative theory to counter the Principle of Comity under his theory of 'Government Legal Policy' doctrine which states that "*the court should first and always look to its own law to govern the case, even if foreign factors are involved*".[26] One has to be careful in considering Currie's theory as '*government legal policy*' is not the same as '*public legal policy*' which is a by-product of the Constitution while the former is an *executive action.*

Also, in civil or commercial international litigation, if the government legal interests clash with the individual legal interests, then the lex fori would immediately apply and lex loci would automatically follow the procedural actions of the forum chosen by the government. It is for this and other reasons that international litigation carefully considers the lex loci question to protect and safeguard the rights of the individuals in cases of civil and commercial litigation where the interests may clash with a government or large corporations that enjoy the protection and patronage of the government.

The law of tort or civil wrong rests on the doctrine of lex loci delicti or the place where the wrong was committed. It would then follow by analogy that wherever the last event occurs that is where the cause of action for the civil wrong should take place. The right to seek remedy for the wrong is created with all its legal dimensions under the sovereign laws. The situation becomes slightly 'fuzzier' as it was elucidated earlier when lex loci is applied to civil contracts.

Lex loci contractus states that wherever the final act that resulted in the contract being formed is the right legal jurisdiction that defines the promise as binding. It is also the place (*lex fori*) whose law (*lex loci*) creates the binding legal obligations giving rise to contractual duties and all other contract rights. *Lex Loci Contractus* also carries the added dimension of legal expectations on part of those who have obtained the legal right to be recognised under the doctrine of *locus standi. The choice-of-law* theory, therefore, requires that sovereign must uphold the expectations as one of the key policy objectives for lex loci doctrine within the legal system.[27]

The classic European choice-of-law theory rests on three elements of *connectivity*. The first is the *classification* of the situation, second is the *domicile* of the parties and the third is which *legal system* to be applied to the problem.[28] Hartley (2009) argues that any matters concerning an individual "*should be governed by the system of law most closely connected with the individual concerned*".[29] Such matters are usually classified under the category of the personal law. Any matters connected with property

[21] Robert C. Casad, "Shaffer v. Heitner: An End to Ambivalence in Jurisdiction Theory," *U. Kan. L. Rev.* 26 (1977): 61.

[22] Roy Goode, "The Role of the Lex Loci Arbitri in International Commercial Arbitration," *Arbitration International* 17, no. 1 (2014): 19–40.

[23] William W. Park, "The Lex Loci Arbitri and International Commercial Arbitration," *International & Comparative Law Quarterly* 32, no. 1 (1983): 21–52.

[24] William S. Dodge, "International Comity in American Law," *Colum. L. Rev.* 115 (2015): 2071.

[25] Kurt H. Nadelmann, "Joseph Story's Contribution to American Conflicts Law: A Comment," *The American Journal of Legal History* 5, no. 3 (1961): 230–253.

[26] Brainerd Currie, "Survival of Actions: Adjudication versus Automation in the Conflict of Laws," *Stanford Law Review* (1958): 205–252.

[27] David F. Cavers, "A Critique of the Choice-of-Law Problem," *Harvard Law Review* 47, no. 2 (1933): 173–208.

[28] Robert A. Leflar, "Conflicts Law: More on Choice-Influencing Considerations," *Calif. L. Rev.* 54 (1966): 1584.

[29] Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law*, 649.

should be "*governed by the law of the place where the property is situated*".[30] The doctrine of *lex situs* usually governs such matters in conflict of laws. Finally, any legal effects of transactions "should be governed by the law of the place where the transaction or event occurs."[31] The location of transaction in conflicts of law is covered under the doctrine of *lex loci actus*. The contemporary international litigation principles in western legal systems follows the classical theory of choice-of-law with minor differences between the common-law and civil-law jurisdictions.

Lord Dicey opposed the '*theoretical*' verses the '*positive*' method in conflicts of law.[32] Lord Dicey appealed for the inclusion of private international law in the laws of England in his seminal paper of 1890. Following Lord Dicey, Professor Cook and Professor Lorenzen advocated for the removal of fiction from the law that opposed the positivism which would allow "self-evident principles of right" to emerge in the conflict of laws.[33]

The idea that the law to be applied to conflicts that had 'foreign elements' but was based on the principles of the territory of law violated the norms of natural justice. However, the Courts have successfully used the '*public policy*' or '*ordre public*' to escape applying foreign law. Justice Herbert Goodrich famously wrote about rejecting foreign law on the grounds of public policy as,

"it is not that the foreign law does not seem so reasonable to the judge as his own good homemade precedent, but it must appear 'pernicious and detestable' or, to borrow Mr. Justice Cardozo's always effective language, 'violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[34]

Consensus has emerged in legal scholarship that the parties petitioning the Court to consider foreign law in cases do not violate public policy. Rather the legal scholarship views such requests as a petition asking the court to give legal effect to acts committed in foreign lands and under the laws prevailing in the land of action. If the court considers the petition to be congenial to the domestic law but still affronts public policy, the court is not abdicating in favour of the foreign law rather the court is finding a legal rule to accommodate the foreign law in the domestic system.

Professor Albert Ehrenzweig opposes the idea of applying foreign law in international litigation and advocates the application of forum law to decide cases with foreign elements.[35] Ehrenzweig (1961) argues that the application of forum law is the norm and the application of foreign law is an exception. Accordingly, "*foreign law should be applied only where there is a good reason for doing so*."

Case law suggests that courts find the idea of applying foreign law over the law of the forum in cases of contract as well as tort repugnant to the legal traditions involving foreign elements in cases before the US and English courts.[36] The argument rests on the idea that any foreign claim based on the petition to apply foreign law should not be enforced because it violates the principle of forum *lex fori*. Thus, the primacy of lex fori is a persuasive correction to counter the 'universalist' approaches to consider applying foreign laws over the law of the forum.

It seems the case law suggests that the conflict of laws rule seem to be dissolved if the foreign law is suggested to the court presents an outcome that may be repugnant to the public policy of the forum. The invocation of the rule of applying the choice-of-law is rare. The choice-of-law rule is mostly exercised by the courts when the results of applying foreign law do not run counter to local standards of justice and policy under the law of the forum.

5. Conclusions

The conflict of laws rests on the fundamental principles of lox fori and lex loci. The jurisdictional debate in international litigation arises from the varying procedural rules in legal jurisdictions that can drastically alter the outcome of the litigation. The jurisdictional issue becomes even more important if the governmental interests become stark in the matter. The choice influencing factors such as the classification of the matter, nature of the property and the location where the matter took place also impact the lex fori principle.

The inclusion of foreign law in matters with foreign elements is not an easy one to reconcile. The law of the forum has always created a force within legal reasoning of being the natural course of law in matters before the courts. Lex loci or choice-of-law also involves constitutional matters such as the government policy and public policy. The government policy involves the use of executive powers while the public policy concerns the legislative process or the court's interpretation of legislation that may or may not provide for the choice-of-law rules.

The simplification of judicial tasks also impacts the choice-of-law and choice-of-forum procedures adopted by the courts that may or may not be linked to where the matter originated. The lex fori and lex loci are matters that the courts decide based on legal

[30] Ibid., 650.

[31] Ibid., 651.

[32] Albert Venn Dicey, "On Private International Law as a Branch of the Law of England," *LQ Rev.* 6 (1890): 1.

[33] Megan Richardson, "Policy Versus Pragmatism-Some Economics of Conflict of Laws," *Comm. L. World Rev.* 31 (2002): 189.

[34] Herbert F. Goodrich, "Foreign Facts and Local Fancies," *Va. L. Rev.* 25 (1938): 26.

[35] Albert A. Ehrenzweig, "Choice of Law: Current Doctrine and True Rules," *Calif. L. Rev.* 49 (1961): 240.

[36] Gregory S. Alexander, "Application and Avoidance of Foreign Law in the Law of Conflicts," *Nw. UL Rev.* 70 (1975): 602.

choice-influencing considerations rather than some international legal formula which arises from conventions or legal agreements. These choice-influencing considerations are not a mechanical examination of pseudo-rules rather they are based on legislation, case law and legal literature arising from centuries of persuasive case law.

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