A. The Notion of Private International Law

1. The principles and rules of private international law (PIL) determine the applicability of a certain law or certain rules of law in situations involving a choice between the laws of different countries. In this context, the term international does not refer to the internationality of the source of law but to the internationality of the cases covered. As to the civil law distinction between private law and public law, the prevailing viewpoint is that PIL is a part of private law: PIL rules do not constitute competences of national legal systems in the area of private law, which would be a legal effect typical for public law. In international cases, the rules of substantive private law would be incomplete without PIL rules. Together, they determine legal answers to private law questions so that PIL rules are understood best if considered as a part of private law.

2. PIL itself does not decide cases. It provides for rules on the applicability of those laws which eventually decide a case. As a consequence, PIL, while still being a part of private law, can also be characterized as a meta-law which, speaking figuratively, is located above the various substantive private laws and chooses among those connected to a case. Thus, PIL rules are rules for conflicts of laws in international cases. PIL has to be distinguished from rules for conflicts other than international. Such other conflicts include rules for a) domestic conflicts (where a plurality of legal systems exist within a country, e.g. in the United States of America ["US"]), b) conflicts relating to time (between rules being in force at different times), and c) inter-personal conflicts (between rules applicable to different groups in a society, such as different religious family laws, e.g. in Israel or some Arab countries). Furthermore, PIL has to be distinguished clearly from other substantive, rules for cases involving a foreign element, such as specific national rules for aliens.

B. Sources

1. Private International Law and Public International Law

3. In the 17th century, Dutch scholars in particular, such as Hugo Grotius, Paul Voet, his son Johannes Voet, and Ulfrich Huber, argued that State sovereignty and public international law could be seen as the foundation of the application of laws in an international context. Later, this position was favoured by authors such as Ernst Zitelmann and Ernst Frankenstein. Today, however, it is widely recognized that it is impossible to deduce a complete set of PIL rules from principles of public international law such as sovereignty or comity. Furthermore, public international law and PIL are different in two essential aspects: whilst PIL addresses the individual private law rights of natural or legal persons, the subjects of public international law are sovereign States and international organizations; private individuals are addressed only under certain circumstances or as far as international protection of human rights is concerned (Subjects of International Law; see also Corporations in International Law; → Individual(s) in International Law). Moreover, public international law deals with legal limits to the conduct of sovereign States. By contrast, PIL does not focus on legal limits but tries to determine the law most suitable under the circumstances. As a consequence, public international law may provide for some outer limits for national legal systems if they impose their law on situations to which they have no link at all. For practical purposes, those outer limits rarely become relevant.

4. Some concepts derived from public international law did have or still have influence on PIL. In the 19th and early 20th centuries, PIL in the US was based on territorial concepts and principles of sovereignty and comity implemented by the "vested rights theory." Arguments of comity still have influence, especially in American PIL discussion. From a more general perspective, public international law and PIL are related to each other because both cover an international subject. As a consequence, the results of public international law may become directly relevant for PIL; a violation of public international law may, for example, be a reason not to recognize the right of eminent domain assumed by a State against foreign nationals (see Property, Right to, International Protection; however, such an influence eventually depends on the order public rules of the forum. Also, public international law is significant in the area of PIL as far as international conventions are a source of PIL rules (see also Sources of International Law). To some extent, there still are parts of PIL where reciprocity has some significance, especially for the recognition and execution of foreign judgments and arbitral awards (Recognition and Enforcement of Foreign Arbitral Awards; → Recognition and Enforcement of Foreign Judgments) but also in other areas of...
2. Sources in General

5 A significant problem in PIL is the broad variety of relevant sources, including numerous international → treaties. If a case is covered by a plurality of instruments, this constitutes a conflict among conflict rules which can be resolved by “ranking conflicts” rules in national PIL or in international instruments (see also → Treaties, Conflicts between).

(a) National Laws

6 Due to the limited role of public international law, PIL rules are a part of national laws (see also → International Law and Domestic [Municipal] Law). Even if international conventions or other supra-national sources apply, the imperative behind these sources is eventually rooted in national law. Based on this starting point, each forum having jurisdiction (→ Jurisdiction of States), applies its own PIL rules; these PIL rules determine the applicable substantive law.

(b) International Treaties

7 International → unification and harmonization of laws is a significant aspect of PIL since international harmony promotes effects such as the protection of existing private rights if an individual becomes subject to the laws of another State, and the equality and co-ordination of different legal systems. In PIL, this includes bilateral as well as multilateral treaties. As far as such treaties are self-executing, which is typically the case in PIL, it is a question of national law whether a treaty is directly applicable (→ Treaties, Direct Applicability). As to their content and effect, PIL distinguishes treaties providing for uniform PIL rules (or uniform—not to be mixed with substantive uniform law) from those applicable only to cases involving conflicts between the laws of the signing States. As far as a PIL treaty constitutes for uniform, its rules, if directly applicable, constitute an integral part of this legal system’s PIL rules. In many cases, multilateral treaties in the area of PIL are proposed by international institutions or organizations such as the → Hague Conference on Private International Law, the → International Commission on Civil Status (ICCS) the → United Nations Commission on International Trade Law (UNCITRAL), and → UNIDROIT.

(c) Regional Co-operation, eg the European Community

8 With respect to the Member States of the → European (Economic) Community, the Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and the Treaty of the European Union (‘ECT’), has introduced provisions concerning the ‘European area of freedom, security and justice’. According to Arts 65 and 68 European Community Treaty (‘ECT’), the EC has or assumes competence to enact instruments for the harmonization of PIL, having enacted various regulations in the field of international procedural law in recent years. Before the Treaty of Amsterdam came into force, the Member States had entered into the Convention on the Law Applicable to Contractual Obligations of Rome in 1980 as a part of their efforts to co-ordinate their PIL rules (see Art. 203 ECT). In the near future, further EC instruments will be enacted or will enter into force, relating to contracts (Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations [Rome II], to extra-contractual obligations (Council Regulation [EC] 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations [Rome III]), and—in the long run—also family and succession law. Furthermore, there is discussion as to how far the fundamental freedoms of the ECT influence PIL. According to the case law of the European Court of Justice (→ European Union, Court of Justice and General Court), two aspects have to be distinguished. First, if PIL refers to a national law, the application of which results in an infringement of fundamental freedoms, this national law is not applied as far as is necessary to avoid such an infringement (eg Case C-362/98 Garino-BM v Confédération du Commerce Luxembourgeois para. 19). This line of case-law, however, does not interfere with PIL rules; it only limits the effect of their application. By contrast, in cases relating to PIL rules for companies, the ECJ has ruled that a PIL rule providing for the application of the law of the seat of central administration of a company constitutes a violation of the freedom of establishment because, under this freedom, Member States are bound to recognize the existence of a company under the laws of the statutory seat (Case C-206/00 (Oversehing BV v Nordic Construction Company A/S management GmbH [NCC] para. 82). Looking at existing EC private law from a more general perspective, the current status is characterized by a primary responsibility of the Member States and sectoral legislation by the EC in particular areas such as consumer law, labour law, insurance law, company law, and unfair commercial practices. Several instruments enacted in these areas either also encompass sectoral PIL provisions or have to be construed so as to provide for a certain mandatory territorial scope of application which takes preference over contractual choice of law clauses (Case C-381/98 Ingmar GB Ltd v Eaton Leasercraft Inc.).

(d) Conflicts Law or Harmonization of Substance

9 International cases are to some extent not dealt with by PIL rules referring to a certain national law but by international uniform substantive law. The most important of these for international business transactions, in particular for the international sale of goods, is the United Nations Convention on Contracts for the International Sale of Goods (CISG); → Uniform Sales Law. Such conventions are related to PIL in so far as there is need for rules on their applicability (eg Art. 1 CISG).

(e) Private Sources of Law

10 In this respect, one has to distinguish private sources of PIL from private sources of uniform substantive law. The former are particularly relevant for arbitration tribunals (see also → Arbitration), where choice of law raises questions different from the ones before State courts in so far as arbitration tribunals cannot refer to a lex fori as a source of PIL rules. Consequently and also because of the important role of party autonomy in arbitration, the prevailing viewpoint is that, in arbitration, parties are free not only to choose the applicable law but also the applicable PIL rules (eg Art. 28 (1) sentence 2 Model Law on International Commercial Arbitration of UNCITRAL), eg by reference to the rules of a certain arbitration institution. Most institutions have, therefore, included in their rules a choice of law provision (eg Art. 17 Arbitration Rules of the → International Chamber of Commerce (ICC)). Furthermore, in some legal systems, it is submitted that, in arbitration, the tribunal does not have to apply a certain choice of law regime but may directly apply a certain law (voie directe), which concept seems doubtful since, even in such cases, a conflict of laws is resolved by a choice. Whereas PIL traditionally refers to the law of a certain State, there is discussion, especially in contract law, as to how far a reference to private sources or instruments of substantive law is possible. Such private sources include instruments such as the → UNIDROIT Principles of International Commercial Contracts (→ Commercial Contracts, UNIDROIT Principles) or the Principles of European Contract Law prepared by the Commission on European Contract Law (PECL); moreover, international arbitration tribunals have applied the → lex mercatoria as an autonomous law of international
commerce, thereby shaping an alternative to the traditional choice of law mechanism.

3. Specific Questions of International or Regional Private International Law Sources

PIL treaties, generally, are instruments to solve conflicts of laws and to co-ordinate the application of different substantive private law systems. For this purpose, they have to refer to legal concepts or terms known from national private, commercial, or procedural law such as domicile, contract, damages, movables, marriage, or judgment. Theoretically, such terms can be construed as representing an independent or autonomous international concept or as a reference to the applicable law—lex causae—or the forum law—lex fori. Whereas a so-called autonomous interpretation of such terms serves an internationally harmonized understanding of the relevant provisions, it may also raise considerable problems since, in many cases, it may be difficult to find a sufficiently reliable and internationally accepted basis for such an independent interpretation (see also → Interpretation in International Law). Furthermore, in some cases, the wording or purpose of a provision may require a reference to national law. For example, Art. 12 Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants refers to national laws to define the term ‘minor’. In general, however, the goal of harmonization pursued by such treaties constitutes a strong argument in favour of an autonomous interpretation, in the context of Council Regulation (EC) 4/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ([Brussels I Regulation]; respectively the former Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention)) as the core European PIL instrument, the ECJ has ruled that ‘according to settled case-law, the concepts used in the Brussels Convention...must be interpreted independently, by reference principally to the scheme and purpose of the Convention, in order to ensure that it is uniformly applied in all the Contracting States’ (Case C-454/01 Johann Grauer v Bay Wa AG para. 31). This constitutes a convincing guideline for other international instruments too. With regard to legal terms in such instruments, an independent and autonomous interpretation is preferable unless the purpose of a term requires a reference to national laws.

12 As to the method of independent interpretation, general rules apply. Regard has to be given to the wording—or the different wordings in the relevant languages—and the context of a provision, its legislative history and its purpose. As to the context, other international instruments must be included. Comparative arguments play an important role too (see also → Comparative Law, Functions and Methods).

The ECJ has sometimes referred to an interpretation ‘by way of a systematization of solutions which, as to their principle, have already been established in most of the states concerned’ (Case C-217/76 Hendestokken v Bien v Mines de Potasse d’Alsace para. 23). The principle of a harmonized independent interpretation can be implemented best if there is an institution with the proper authority for interpretation like the ECJ for European instruments. In other cases, an independent interpretation faces the problem that there is no international court system that guarantees identical results. Consequently, it is desirable that national courts have regard to case-law and legal scholarship in other Member States.

C. Theories of Private International Law

1. Private International Law in the 19th and Early 20th Centuries

Basic concepts of PIL are still, to a large extent, influenced by the work of three PIL scholars of the 19th century, Joseph Story, Pasquale Stanislao Mancini, and Friedrich-Carl von Savigny. Story’s work was based on principles developed by Ulric Huber who had tried to base choice-of-law rules on the law of nations. Story and his followers (Albert Venn Dicey, Joseph Henry Beale) argued that States have to respect private rights that have emerged in the territory of another State (‘vested rights theory’). The vested rights theory resulted in a strict formal and territorial concept of PIL, which was followed in the US First Restatement of Conflicts of Laws (‘First Restatement’). Mancini looked at the law as a cultural phenomenon and saw a main task of law in preserving the sovereignty of the States and the freedom of men. Therefore, everybody should be judged by the laws he or she is familiar with—which, especially for questions of family law and succession law, is the law of citizenship. Savigny was sceptical about PIL concepts based on an international ius gentium (law of nations). Instead, PIL should follow the idea that modern private law is based on the principle of legal equality of all persons regardless of their citizenship (see also → Equality of individuals). Seen from the perspective of the parties and their legal relationship, Savigny argued, all legal systems are equal; and also in the interest of growing international trade, it is therefore advisable to follow the principle to and regard a State’s own connection and foreign laws as equal on a reciprocal basis. The attractiveness of this analysis can also be seen as a consequence of its effect on international harmony: if all States apply this concept, every legal relationship is governed by the same substantive laws regardless of the State of adjudication. This leads to Savigny’s main conflict of laws principle: ‘For every legal relationship that legal territory should be searched to which this legal relationship, according to its particular nature, belongs or by which it is governed (where it has its seat)’ (Savigny 29).

Today, these ideas still function as a foundation of modern PIL principles such as the recognition of the lexica loxia of the contract. By looking at PIL problems from the parties’ perspective, Savigny could focus on the interests of the parties involved instead of focusing on regulatory State interests, which made his concept a liberal one, in the European sense, adequate to co-ordinate private laws in a time of liberalism.

2. Interests and Policy in Private International Law

In the 20th century, after World War II, interest analysis became increasingly important for PIL. In the US, this development resulted in the so-called choice-of-law revolution which put an end to the regime of the First Restatement and the vested rights theory. From an international perspective, discussions focus on three contrary aspects of interests: State or governmental interests versus private or parties’ interests; substantive versus conflicts interests; flexibility versus predictability. State interests call for the implementation of a State’s political decisions, especially its regulatory policies, and may also include the protection of its own citizens. In general, they relate to certain substantive policies and tend to favor an application of the lex fori. Party interests include substantive as well as specific conflict interests. As to conflict interests, one could distinguish party interests, transaction-related interests, and order-related interests. Parties are normally interested in an application of the laws they are used to, especially if their personal status is applied; they may also be interested in making a contractual choice of the applicable law. Another important party-related interest is the protection of vested rights; yet, this interest must not be confused with the vested rights theory contained in the First Restatement. This theory argued that, once a right has come into existence within the boundaries of a State and under this State’s law, it has to be recognized by other States and their laws. It is a well-known development that this approach was abandoned because its mechanical method was not open to an adequate consideration of the interests which are at stake. The logical defect of the vested rights theory had already been pointed out by Savigny, who argued against this theory: “This principle leads to a mere circle. For we can only know which rights are vested when we know before under which local law we have to consider the performed acquisition” (Savigny 150).
not imply a statement in favour of the mechanical and circular approach of the vested rights theory. However, it is one of the most important objectives of the law to protect legitimate expectations. PIL, consequently, has to recognize that a party may, for example, have the legitimate expectation that his or her legal rights, for instance property, acquired under the laws of State A, is still this party’s property during a stay in State B. Action- or transaction-related interests are served by rules which allow the performance of transactions easily and safely. For example, the parties have an interest in being governed by rules which are easily accessible. This is, for example, the basis of the old rule focus recti actum, which states that the formalities of a transaction are fulfilled if the requirements of the law of the State where the transaction was closed are met. Order-related interests require establishing a predictable order, which avoids contradictions. This, of course, is an important goal in every field of law. Yet, in an international context, there is, due to the unavoidable fact that every country has its own legal system and pursues its own policies, a particular likelihood that the goal is not achieved. Consequently, one if not the most important goal of PIL is to avoid international disharmony of solutions and decisions. In particular, so-called ‘limping legal relationships’, for instance, a divorce which is effective in one State but not in another, may result in serious problems. Many discussions in PIL address the question of how far these conflict interests prevail over substantive interests, particularly regular policies of a certain State. Another important issue is the tension between flexibility on the one hand and predictability on the other. Whereas, for example, European doctrine and American doctrine are comparable in so far as the former endorses the principle of the ‘closest connection’ and the latter, as far as the US Second Restatement of Conflicts of Laws is concerned, follows the principle of the ‘most significant relationship’, there is an important difference as to the tension between flexibility and predictability. The former is more important for the American approach to weighing of factors in each single case whereas the latter is given more weight in Europe, where ‘hard and fast rules’ find more support.

15 The governmental interest approach, as presented by its most important advocate, Brainerd Currie, can also be seen as a consequence of his position as a ‘legal realist’ (→ Legal Realism School), arguing that law is an ‘instrument of social control’ and that States actually have a political interest in the outcome of private lawsuits. The classic answer in the tradition of Savigny to this rather State-oriented regulatory approach is that, particularly in the core areas of private law (contract, wrongs, property, family, succession), the rights of the parties do, to a large extent, not depend on legislative decisions. A contract is a contract, even if the applicable law is unclear. People consider their property still to be their property even if they have crossed a State border so that a different law may apply. A marriage remains the same marriage and a family remains the same family, even if they move from one State to another. Seen from this viewpoint, a legal relationship can exist regardless of a certain applicable law. The applicable law does not constitute this legal relationship; it only determines its details, which therefore are different, to some extent, in different legal systems. Consequently, conflict problems should be looked at from the perspective of the legal relationship (Fragestellung vom Fall her) as opposed to a look from the perspective of a certain legal rule (Fragestellung vom Gesetz her). That does not exclude that private law legislation may, in certain cases cover areas of basic political interest. However, a political perspective on PIL should be strictly limited to cases where such a political decision actually exists, which is the explanation for phenomena such as ‘internationally mandatory law’, ‘Entfronnung’ or ‘lois d’application immédiate’, and ordre public.

D. The Technique of Private International Law—Specific Issues

1. Unilateral and Multilateral (‘Total’ or ‘Universal’) Private International Law Rules

16 Technically, international harmony and a complete avoidance of limping legal relationships would be, of course, achieved by world-wide uniform PIL rules. Although it is clear that such perfect harmony is unlikely to be achieved, the underlying idea finds some support in civil law thinking. ‘We always have to ask whether a rule would be suitable for an adoption into that joint law of all nations’ (Savigny 115). Such so-called categorical imperative of PIL implies that legal systems of all States are of equal value and deserve the same appreciation. Thus, it promotes international co-operation and is attractive also for those influenced by the policy goals deriving from international commerce. In order to implement these requirements and to avoid limping legal relationships, choice-of-law rules generally have to be symmetrical, i.e. they have to give the same scope of application to laws of every country instead of following a one-sided preference for a State’s own law. To implement this principle of symmetry, it is necessary to use multilateral, total, or universal rules, such as ‘Rights in immovable property are determined by the law of the situs’, as opposed to unilateral, non-universal, PIL rules which follow the pattern ‘our law applies if...’.

2. Characterization

17 Technically, most PIL rules operate by stating that, for a certain area of law or a certain connecting factor, or a plurality of factors, refer to a certain law, the rules of which then decide the case. Consequently, it is necessary in PIL to decide first to which area of law a legal question of a case belongs. This operation is called qualification or characterization. In this respect, the central issue is whether the characterization has to be made according to the lex fori or the lex causae or on a more comprehensive basis. Political considerations would perfectly reflect the circumstance that PIL rules potentially have to do with substantive laws from all legal systems. However, seen from the perspective of an ordinary court, this is an impossible task so that most legal systems refer to the lex fori, with regard, however, to the special needs of PIL. In the context of international treaties or other supranational rules, eg European regulations, the general considerations relevant for their interpretation apply (cf paras 11–12 above) in the context of characterization.

3. Connecting Factors

18 Connecting factors, used in PIL to determine the applicable law, include party-related factors such as → nationality, domicile, (permanent) residence, the statutory seat, the seat of the central administration, or the principal place of business of a company; furthermore action- or transaction-related factors such as the place of performance of a contract, the place of its conclusion, or the place of the wrongs or the situs of movable or immovable asset. In cases of unfair competition or anti-cartel law, reference is also made to certain national or regional markets (see also → Antitrust or Competition Law, International). Another very important factor is the choice of the parties, especially in international contract law. Letting the parties’ choice decide the applicable law may, at first glance, seem paradoxical in so far as, usually, the parties are considered to be subject to the law. A choice by the parties turns this relation upside-down, which clearly goes beyond mere freedom of contract since a choice of the applicable law, if valid, has the effect that, unless the doctrine of ordre public of the forum applies, the parties may derogate from the mandatory provisions of the otherwise applicable law. However, especially in contract law, there is a significant practical need for allowing a contractual choice because uncertainty about the applicable law is particularly detrimental in contract cases.

4. Renvoi

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5. Preliminary Questions

20 Some legal rights depend on the existence of a certain preliminary relationship. A succession may depend on the validity of a marriage or of a divorce or on another family relationship. If the succession is governed by a foreign law, the results which would be achieved under this foreign law can only be mirrored if this foreign law’s PIL is applied to the preliminary question. Whereas this solution serves the needs of international harmony, especially in the context of international conventions, it may cause internal disharmony because it results in an application of different PIL rules, depending on whether an issue is raised as a ‘main’ question or as a preliminary question. Thus, many legal systems prefer an application of their own PIL rules to preliminary questions. Practice is different as to nationality which normally will be determined pursuant to the laws of the State of which a person is considered to be a national.

6. Ordre Public

21 The reference to foreign legal systems without certainty as to all their contents has been described as a ‘leap into the dark’ (Rapaport 199).

All legal systems recognize that there is a need for a safeguard against unacceptable provisions of a foreign law, such as the doctrine of ordre public (public policy exception). Furthermore, ordre public is a means to balance substantive interests of the forum against conflicts interests typically favoured by PIL rules. However, all application of this doctrine has to bear in mind that it has been developed as an exception and that it may seriously interfere with the goal of international harmony of decisions. On the level of application, one has to distinguish: ordre public in choice of law, barring an application of foreign legal rules, as opposed to ordre public barring recognition of foreign judgments or arbitral awards. Moreover, ordre public is used in a negative function as a shield against foreign law; in some legal systems, ordre public is also used in its positive function as a sword to enforce laws of the forum. The latter, however, is today often achieved by other means, eg unilateral PIL rules providing for a broad scope of application of a certain substantive rule or a body of rules of the law of the forum. Whereas principles of general contract or property law rarely give rise to ordre public questions, there are three main substantive areas where ordre public plays an important role today: as a shield against excessive or arbitrary damages; as a means to protect regulatory policies of the forum; and as a reaction to unbridgeable cultural differences in family or succession law.

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