

Part I Introduction, 1 Definition, Nature and Scope of Private International Law

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1. Introduction

Private international law is that part of English law which comes into operation whenever the court is faced with a claim that contains a foreign element. It is only when this element is present that private international law has a function to perform. It has three main objects.

First, to prescribe the conditions under which the court is competent to entertain such a claim.

Secondly, to determine for each class of case the particular municipal system of law by reference to which the rights of the parties must be ascertained.

Thirdly, to specify the circumstances in which (a) a foreign judgment can be recognised as decisive of the question in dispute; and (b) the right vested in the judgment creditor by a foreign judgment can be enforced by action in England.

The *raison d'être* of private international law is the existence in the world of a number of separate municipal systems of law—a number of separate legal units—that differ greatly from each other in the rules by which they regulate the various legal relations arising in daily life. Courts in one country must frequently take account of some rule of law that exists in another. A sovereign is supreme within his own territory and, according to the universal maxim of jurisprudence, he has exclusive jurisdiction over everybody and everything within that territory and over every transaction that is effected there. He can, if he chooses, refuse to consider any law but his own. Although the adoption of this policy of indifference might have been common enough in other ages, it is impracticable in the modern civilised world. Consequently, nations have long found that they cannot, by sheltering behind the principle of territorial sovereignty, afford to disregard foreign rules of law merely because they happen to be different from their own internal system of law. Moreover, as will be shown later, it is no derogation of sovereignty to take account of foreign law.

The recognition of a foreign law in a case containing a foreign element may be necessary for at least two reasons. In the first place, the invariable application of the law of the forum, ie the local law of the place where the court is situated, would often lead to gross injustice. Suppose that a person engaged in English litigation is required to prove that she is the lawful widow (p. 4) of a man who has just died, the marriage having taken place abroad many years ago. The marriage ceremony, though regular according to the law of the place where it was performed, did not perhaps satisfy the formal requirements of English law, but nevertheless to apply the English Marriage Act 1949 to such a union, and thereby to deny that the couple were man and wife, would be nothing but a travesty of justice.

Secondly, if the court is to carry out in a rational manner the policy to which it is now committed—that of entertaining actions in respect of foreign claims—it must, in the nature of things, take account of the relevant foreign law or laws. A claimant,¹ for instance, seeks damages for breach of a contract that was both made and to be performed in France. Under the existing practice the court is prepared to create and to enforce in his favour, if he substantiates his case, an English right corresponding as nearly as possible to that which he claims. However, neither the nature nor the extent of the relief to which he is rightly entitled nor, indeed, whether he is entitled to any relief can be determined if the law of France is disregarded. This is because to consider English law alone might reverse the legal obligations of the parties as fixed by the law to which their transaction, both in fact and by intention, was originally subjected. A promise, for instance, made by an Englishman in Italy and to be performed there, if valid and enforceable by Italian law, would not be held void by an English court merely because it was unsupported by consideration.²

In justifying this reference to a foreign law, English judges and textbook writers have frequently used³ the term *comity of nations*, “a phrase which is grating to the ear, when it proceeds from a court of justice”.⁴ Although the term has been often used, analysis of it reveals that it has been employed in a meaningless or misleading way. The word itself is incompatible with the judicial function, for comity is a matter for sovereigns, not for judges required to decide a case according to the rights of the parties.⁵ Again, if the word is given its normal meaning of courtesy it is scarcely consistent with the readiness of English courts to apply enemy law in time of war. Moreover, if courtesy formed the basis of private international law a judge might feel compelled to ignore the law of Utopia on proof that Utopian courts apply no law but their own, since comity implies a bilateral, not a unilateral, relationship. If, on the other hand, comity means that no foreign law is applicable in England except with the permission of the sovereign, it is nothing more than a truism. The fact is, of course, that the application of a foreign law implies no act of courtesy, no sacrifice of sovereignty. It merely derives from a desire to do justice.

Private international law, then, is that part of law which comes into play when the issue before the court affects some fact, event or transaction that is so closely connected with a foreign system of law as to necessitate recourse to that system. It has, accordingly, been described as meaning “the rules voluntarily chosen by a given State for the decision of cases which have a foreign complexion”.⁶ The legal systems of the world consist of a variety of territorial systems, each dealing with the same phenomena of life—birth, death, marriage, divorce, bankruptcy, contracts, wills and so on—but in most cases dealing with them differently. The moment that a case is seen to be affected by a foreign element, the court must look beyond its own internal

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(p. 5) law, lest the relevant rule of the internal system to which the case most appropriately belongs should happen to be in conflict with that of the forum. The forms in which this foreign element may appear are numerous. One of the parties may be foreign by nationality or domicile; a businessman may be declared bankrupt in England, having numerous creditors abroad; the action may concern property situated abroad or a disposition made abroad of property situated in England; if the action is on a bill of exchange, the foreign element may consist in the fact that the drawing or acceptance or endorsement was made abroad; a contract may have been made in one country to be performed in another; two persons may resort to the courts of a foreign country where the means of contracting or of dissolving a marriage are more convenient than in the country of their domicile. It is the existence of such foreign elements as these that has caused the courts to frame a number of different *rules for the choice of law* which demonstrate the most appropriate legal system to govern the issue that has arisen.

2. Space and Time

(a) Space

It is frequently stressed that the function of private international law is to indicate the area over which a rule of law extends—that it “deals primarily with the application of laws in space”.⁷ The essence of this is that a rule of substantive law, eg the English rule that every simple contract must be supported by consideration, is generally expressed in universal terms and seems to have no dimension in space, for according to its wording it applies to all contracts wherever made. But its dimension in space, ie its sphere of authority, is the very thing that is fixed by private international law, because a sovereign is free to provide, if he chooses, that the area over which a rule of substantive law, whether domestic or foreign, is to prevail shall be wider than the territorial jurisdiction in which it originated. If, for instance, an English court decides that the goods situated in England belonging to a man who died intestate and domiciled in France shall be distributed according to the provisions of the Code Napoléon, what it decides in effect is

that the rule of the French internal law relating to intestacy is, in the case of persons domiciled in France, to be given effect outside the territorial limits of the French law-maker, provided of course that French law so permits. In the words of Savigny:

It is this diversity of positive laws which makes it necessary to mark off for each, in sharp outline, the area of its authority, to fix the limits of different positive laws in respect to one another.⁸

This method of expressing the function of the subject does not mean that the sphere of application of each rule of law is, or can be, determined once and for all for every situation to which it may be relevant.⁹ The area over which any given rule of law extends will vary with the particular circumstances in which its operation is under consideration. Consequently, the English rules governing contractual capacity will apply to certain transactions effected by domiciled Englishmen abroad, but not to others.

(b) Time

There are certain circumstances in which the factor of time as well as that of space may require consideration.¹⁰ In the dimension of space, for instance, the rights of a husband and

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(p. 6) wife to each other's property are usually governed, in the absence of a marriage settlement, by the law of the domicile. But does this rule of selection refer to domicile at the time of the marriage or to domicile as it may change from time to time?¹¹ Again, whether a will has been effectively revoked by the execution of a later will or by its destruction is determinable by the law of the testator's domicile, but if his domicile does not remain constant this selective rule will produce no decision until it has been decided whether the reference is to the law of the domicile at the time of the execution, or of the act of destruction, or at the time of the testator's death.¹²

Another type of case in which the factor of time is relevant arises where, subsequently to the transaction in issue, there has been a change in the foreign law selected to govern the rights of the parties. Here, it is essential to ascertain whether the English court must apply the foreign law as it stood at the time of the transaction or as it now exists after the change.¹³ Generally, courts prefer the latter solution.¹⁴

A variety of situations in which the factor of time is pertinent will be considered at later stages in this book.

3. Scope of Private International Law

Private international law is not a separate branch of law in the same sense as, say, the law of contract or of tort. It is all-pervading.

It starts up unexpectedly in any court and in the midst of any process. It may be sprung like a mine in a plain common law action, in an administrative proceeding in equity, or in a divorce case, or a bankruptcy case, in a shipping case or a matter of criminal procedure. . . . The most trivial action of debt, the most complex case of equitable claims, may be suddenly interrupted by the appearance of a knot to be untied only by Private International Law.¹⁵

Nevertheless, private international law is a separate and distinct unit in the English legal system just as much as the law of tort or of contract, but it possesses this unity, not because it deals with one particular topic, but because it is always concerned with one or more of three questions, namely:

- (a) Jurisdiction of the English court.
- (b) Recognition and enforcement of foreign judgments.
- (c) The choice of law.

We must be prepared to consider almost every branch of private law, but only in connection with these three matters.

(a) Jurisdiction

The basic rule at common law is that the English court has no jurisdiction to entertain an action *in personam* unless the defendant has been personally served with a claim form in England or Wales. This rule, which cannot be satisfied while the defendant is abroad, applies,

(p. 7) of course, whether the case has a foreign complexion or not, but there are three reasons which require the question of jurisdiction to be separately treated in a book on private international law. First, there are certain circumstances in which the court is empowered by statute to assume jurisdiction over absent defendants, a power which naturally is of greater significance in foreign than in domestic cases.¹⁶ Secondly, there are certain types of action, such as a petition for divorce, where the mere presence of the defendant in the country does not render the court jurisdictionally competent.¹⁷ Thirdly, there is a separate regime of jurisdictional rules in the case of a defendant domiciled (in a specially defined sense) in a Member State of the European Union.¹⁸

(b) Recognition

Where there has been litigation abroad, but the defendant has most of his assets in England, it will be important to ascertain whether English law will recognise or permit the enforcement of the foreign judgment. Provided that the foreign court had jurisdiction to adjudicate on the case, according to English private international law, the English court will generally recognise the foreign judgment as if one of its own and it can be enforced accordingly.¹⁹ Again, our membership of the European Union has led to the introduction of important specific rules for the recognition of judgments from courts of the Member States.²⁰

(c) Choice of law

If the English court decides that it possesses jurisdiction, then a further question, as to the choice of law, must be considered; ie which system of law, English or foreign, must govern the case?²¹ The action before the English court, for instance, may concern a contract made or a tort committed abroad or the validity of a will made by a person who died domiciled abroad. In each case that part of English law which consists of private international law directs what legal system shall apply to the case, ie, to use a convenient expression, what system of internal law shall constitute the applicable law. English private international law, for instance, requires that the movable property of a British subject who dies intestate domiciled in Italy shall be distributed according to Italian law. These rules for the choice of law, then, indicate the particular legal system by reference to which a solution of the dispute must be reached. This does not necessarily mean that only one legal system is applicable, for different aspects of a case may be governed by different laws, as is the case with marriage where formal and essential validity are governed by different laws.²²

The function of private international law is complete when it has chosen the appropriate system of law. Its rules do not furnish a direct solution of the dispute, and it has been said that this department of law resembles the inquiry office at a railway station where a passenger may learn the platform at which his train starts. If, for instance, the defence to an action for breach of contract made in France is that the formalities required by French law have not been observed, private international law ordains that the formal validity of the contract shall be determined by French law. But it says no more. The relevant French law must then be proved by a witness expert in the subject.

(p. 8) It is generally said that the judge at the forum “applies” or “enforces” the chosen law, or alternatively that the case is “governed” by the foreign law. These expressions are convenient to describe loosely what happens, but they are not accurate. Neither is it strictly accurate to say that the judge enforces not the foreign law, but a right acquired under the foreign law.²³ The only law applied by the judge is the law of the forum, the only rights enforced by him are those created by the law of the forum. But owing to the foreign element in the case, the foreign law is a fact that must be taken into consideration, and what the judge attempts to do is to create and to enforce a right as nearly as possible similar to that which would have been created by the foreign court had it been seised of a similar case which was purely domestic in character.²⁴

4. Meaning of “Foreign Law”

For the purposes of private international law the expression “foreign system of law” means a distinctive legal system prevailing in a territory other than that in which the court functions. It therefore includes, not merely the law existing in a state under a foreign political sovereignty, but also the law prevailing in a subdivision of the political state of which the forum is part. Thus, for the purpose of private international law and so far as English courts are concerned, the law of Scotland, of the Channel Islands, of Northern Ireland, or of one of the member countries of the Commonwealth or European Union is just as much a foreign law as the law of Japan or Brazil.

5. International Variety of Private International Law Rules

Private international law is not the same in all countries. There is no one system that can claim universal recognition, though there has been a significant movement in recent years towards the harmonisation of private international law rules between groups of countries. This book is concerned solely with the English rules, ie with the rules that guide an English court whenever it is seised of a case that contains some foreign element. A writer on public international law may perhaps claim with some justification that the doctrines which he propounds are entitled to universal recognition. Thus, in theory at any rate, a German and a French jurist should agree as to what constitutes an effective blockade. But the writer on private international law can make no such claim. This branch of law as found, for instance, in Japan shows many striking contrasts with its English counterpart, and though the English and American rules show considerable similarity they are fundamentally different on a number of points. The many questions relating to the personal status of a party depend in England on the law of his domicile, but in France, Italy, Spain and most other Continental European countries on the law of his nationality. Again, the principles applied by various legal systems to divorce jurisdiction may so conflict that the same two persons are deemed married in one jurisdiction but unmarried in another. On the other hand, though Scottish internal law differs substantially from that of England, the principles of private international law are so similar in both countries that an English decision is usually, though not invariably, followed in Scotland and vice versa.²⁵

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(p. 9) 6. Avoiding Conflicts

There are two possible ways in which this lack of unanimity among the various systems of private international law may be ameliorated.²⁶

(a) Unification of internal laws

The first is to secure by international conventions the unification of the *internal* laws of the various countries on as many legal topics as possible. When attention is paid to the fundamental and basic differences in principle that distinguish one legal system from another, especially in the common law systems as contrasted with their civil law counterparts, it is obvious that this form of unification holds out no great prospect of success. Nevertheless, a certain amount of progress has been made in the few departments of law where this unity is imperative and possible.

An important example of unification is the Warsaw Convention of 1929 as amended at The Hague, 1955, and supplemented by the Guadalajara Convention, 1961,²⁷ which makes the international carriage of persons or goods by aircraft for reward subject to uniform rules as regards both jurisdiction and the law to be applied. It also provides that any agreement by the parties purporting to alter the rules on these matters shall be null and void. The Convention has been made binding in England by the Carriage by Air Act 1961. Further examples of the unification of internal laws are the Carriage of Goods by Sea Act 1924,²⁸ the Carriage of Goods by Road Act 1965, the Carriage of Passengers by Road Act 1974, the International Transport Conventions Act 1983 and the Merchant Shipping Act 1995, all of which give effect to conventions made at international conferences. Mention may also be made of the Berne Convention of 1886, since amended several times, by which an international union for the protection of the rights of authors over their literary and artistic works was formed. The Council of the League of Nations entrusted to the Institute for the Unification of Private Laws (UNIDROIT), established by the Italian Government in Rome, the task of indicating the lines along which further unification might be attained.²⁹ An important result of its labours, in conjunction with those of the Hague Conference,³⁰ was the conclusion at The Hague in 1964 of a convention which establishes a uniform set of rules on international sales of goods and also on the formation of contracts for such sales. These conventions were accepted by the United Kingdom and incorporated in the Uniform Laws on International Sales Act 1967³¹ which, when its provisions apply, excludes the rules of private international law.³² There is now a successor to the 1964 Convention, the United Nations Convention on Contracts for the International Sale of Goods of 1980,³³ prepared under the auspices of another body

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(p. 10) concerned with the unification of law, the United Nations Committee on International Trade Law (UNCITRAL). The United Kingdom is not a party to the 1980 Convention. On a smaller scale, the

Scandinavian countries,³⁴ and a number of Latin-American countries,³⁵ have adopted conventions unifying various areas of their laws.

(b) Unification of private international law

The second method by which the inconvenience that results from conflicting national rules may be diminished is to unify the rules of private international law, so as to ensure that a case containing a foreign element results in the same decision irrespective of the country of its trial.³⁶ Several attempts have been made in the Hague Conference on Private International Law³⁷ to reduce the number of topics on which the rules for choice of law in different countries conflict, thus indicating the desirability of having a code of private international law common to the civilised world. Prior to the seventh session in 1951, the sessions were confined to the Continental states of Europe, for, owing to the fundamental differences between the common law and the civil law which forms the basis of most European systems, there seemed little prospect of agreement being reached between the two groups. The British delegates, however, attended the seventh and subsequent sessions, no longer as mere observers but as full members of the conference³⁸ and they have since been joined by delegations from other common law jurisdictions, including Australia, Canada and the USA.³⁹

A step of great significance taken in 1951 was the drafting of a charter designed to place the Hague Conference on a lasting footing by the establishment of a permanent bureau. This charter has been accepted by many countries, including the United Kingdom, and the Bureau, consisting now of a Secretary-General, a Deputy Secretary-General, three First Secretaries and a small team of Legal Officers belonging to different countries, was established at The Hague. Its mission is to be a forum for the Member States for the development and implementation of common rules of private international law in order to co-ordinate the relationships between different private law systems in international situations and to promote international judicial and administrative co-operation in the fields of protection of the family and children, civil procedure and commercial law. Its chief functions are to examine and prepare proposals for the unification of private international law and to keep in touch with the Council of Europe and with governmental and non-governmental organisations, such as the Commonwealth Secretariat and the International Law Association.⁴⁰ The Bureau works under the general direction of the Standing Government Commission of the Netherlands, which was established by Royal Decree in 1897, with the object of promoting the codification of private international law. Fairly recent English statutes relating to private international law problems which owe their existence, at least in part, to acceptance by the United Kingdom of the Hague Conventions,⁴¹ include the Wills Act 1963,⁴² the

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(p. 11) Adoption Act 1968,⁴³ the Evidence (Proceedings in Other Jurisdictions) Act 1975,⁴⁴ the Child Abduction and Custody Act 1985,⁴⁵ Part II of the Family Law Act 1986⁴⁶ and the Recognition of Trusts Act 1987.⁴⁷

In addition to the conventions mentioned above, many similar arrangements have been made between individual countries, as for example the bilateral conventions on civil procedure concluded by the United Kingdom with a large number of foreign states. An example of a limited multilateral convention is that concluded in 1969 between the Benelux states—Belgium, the Netherlands and Luxembourg—which unified the rules of private international law on the more important matters, such as capacity and status, succession to property on death and the essential validity of contracts.⁴⁸

(i) Europeanisation of private international law

A modern feature of private international law is the Europeanisation of the subject,⁴⁹ by which is meant the assimilation of Member States' private international law rules, and the creation of a European "area of freedom, security and justice". The legal basis for this development is the Treaty of Amsterdam,⁵⁰ Articles 61 to 67, in terms of which the subject of judicial co-operation in civil matters became a matter of European Union law rather than one merely of inter-governmental co-operation. By virtue of Article 65, measures in the field of judicial co-operation in civil matters having cross-border implications may be taken *in so far as necessary for the proper functioning of the internal market*, and shall include improving and simplifying the recognition and enforcement of decisions in civil and commercial cases; promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction; and eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States. There followed, in 1998, the Vienna Action Plan⁵¹ of the European Council and Commission on how best to implement the Amsterdam provisions, and subsequently, in 1999, there was convened in Tampere,

Finland, an Extraordinary European Council Meeting, which produced a programme of work for the period 1999–2004, devoted to the development of the European judicial area. The results of the five-year Tampere programme were presented by the European Commission in June 2004, and in November that year, a new programme, termed the “Hague Programme”,⁵² was adopted by the European Council, with a view to strengthening and developing the EU Justice and Home Affairs legislative portfolio over the period 2005–09. Then followed the “Stockholm Programme” in

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(p. 12) December 2009, which covered the period 2010–14,⁵³ and which was replaced in June 2014 by the European Council’s strategic guidelines in the area of freedom, security and justice.⁵⁴

Title IV (“Area of Freedom, Security and Justice”) of the Treaty of Lisbon, amending the Treaty on European Union and the Treaty establishing the European Community,⁵⁵ replaces the pre-existing provision on visas, asylum, immigration and other policies related to free movement of persons. Article 65 in Chapter 3 of Title IV of the Lisbon Treaty concerns judicial co-operation in civil matters, and provides that:

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

The wording of the new Article 65(2) is noteworthy:

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, *particularly when necessary for the proper functioning of the internal market*,⁵⁶ aimed at ensuring:
 - (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
 - (b) the cross-border service of judicial and extrajudicial documents;
 - (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
 - (d) cooperation in the taking of evidence;
 - (e) effective access to justice;
 - (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
 - (g) the development of alternative methods of dispute settlement;
 - (h) support for the training of the judiciary and judicial staff.

Accordingly, the European Union has proved to be, and looks set to continue to be, a major force for the creation of uniform law within the Community and for the unification of private international law among EU Member States.⁵⁷ European harmonisation efforts have generated, for example and of note, in the area of civil and commercial jurisdiction, the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters⁵⁸ (almost entirely replaced by Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial

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(p. 13) matters and the Recast Brussels I Regulation⁵⁹),⁶⁰ and in choice of law, the 1980 Rome Convention on contractual obligations⁶¹ (now the Rome I Regulation),⁶² implemented in the United Kingdom by means of the Contracts (Applicable Law) Act 1990 and the Rome II Regulation.⁶³ There now exist many EU directives, regulations and proposed regulations containing private international law measures, concerned not only with the allocation of jurisdiction and enforcement of judgments, but also with choice of law and matters of procedure. These will be identified and examined in context throughout the book.

For the European Union, there is an important, and sometimes difficult, balance to strike between securing regional harmonisation of laws, and participating in projects which seek to bring about global harmonisation of laws.⁶⁴ By virtue of membership of the European Union, Member States have lost the

power to act autonomously in matters concerning judicial co-operation in civil matters which fall within European Union competence. In 2006, the European Union decided to accede to the Hague Conference on Private International Law, by means of declaration of acceptance of the Statute of the Hague Conference.⁶⁵ The Accession of the Community to the Hague Conference took place on 3 April 2007.⁶⁶ The admission of the European Union to the Hague Conference is in addition to the individual membership of the Conference of the various European Union Member States.⁶⁷

(ii) Impact of European Convention on Human Rights on private international law⁶⁸

The Human Rights Act 1998 incorporates into the law of the United Kingdom the European Convention on Human Rights (ECHR). Human rights concerns were aired in private international law cases in the United Kingdom long before the passing of the 1998 Act,⁶⁹ but since its entry into force instances of this phenomenon have increased dramatically.

The rights incorporated are referred to under the Act as “Convention rights”. In terms of section 6(1) of the 1998 Act, it is unlawful for a public authority, which includes a court

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(p. 14) or tribunal,⁷⁰ to act in a way which is incompatible with a Convention right. A court or tribunal determining a question which has arisen in connection with a Convention right must “take into account”⁷¹ any judgment, decision, declaration or advisory opinion of the European Court of Human Rights (ECtHR), whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.⁷² Moreover, in so far as it is possible to do so, primary legislation and subordinate legislation, whenever enacted,⁷³ must be read and given effect in a way which is compatible with the Convention rights.⁷⁴ If a court⁷⁵ is satisfied that a provision is incompatible with a Convention right, it may make a declaration of that incompatibility.⁷⁶

In the context of private international law, discussion of the ECHR has most commonly focused upon the effect of Article 6, which provides the right to a fair trial.⁷⁷ Article 6 has been considered not only in the context of rules of jurisdiction,⁷⁸ but also in relation to recognition and enforcement of foreign judgments.⁷⁹ Decisions of the ECtHR have made clear the point that denial of access to national courts may amount to a breach of Article 6,⁸⁰ but it is equally clear that the right of access to a court is not absolute, and may be subject to restrictions, provided that these pursue a legitimate aim and are proportionate.⁸¹

With regard to other provisions of the Convention, United Kingdom courts have been required to consider, in a private international law context, the implications of Article 8

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(p. 15) (right to respect for private and family life),⁸² Article 10 (freedom of expression);⁸³ Article 12 (right to marry);⁸⁴ Article 14 (prohibition of discrimination);⁸⁵ and Article 1 of the First Protocol (protection of property).⁸⁶

More detailed examination of particular Convention rights in their private international law context will be included in subsequent chapters, as appropriate.

7. The Name of the Subject

The issue of the name or title of the subject may seem to be of little importance, but needs to be addressed, largely because there is no name which commands universal approval. The expression “Private International Law”, coined by Story in 1834,⁸⁷ was adopted by the earlier English authors, such as Westlake and Foote, and is used in most civil law countries. The chief criticism directed against its use is its tendency to confuse private international law with the law of nations or public international law, as it is usually called. There are obvious differences between the two. The latter primarily governs the relations between sovereign states and it may perhaps be regarded as the common law of mankind in an early state of development;⁸⁸ the former is designed to regulate disputes of a private nature, notwithstanding that one of the parties may be a sovereign state.⁸⁹ There is, at any rate in theory, one common system of public international law, consisting of the “customary and treaty rules which are considered legally binding by States in their intercourse with each other”,⁹⁰ but, as we have seen, there are as many systems of private international law as there are systems of municipal law. Moreover, as often as not a question of private international law arises between two persons of the same nationality, as, for instance, where the issue is the validity of a divorce between two English persons in a foreign country.

(p. 16) It would, of course, be a fallacy to regard public and private international law as totally unrelated. Some principles of law, such as requirements of natural justice, are common to both; some rules of private international law, as for example the traditional common law doctrine of the “proper law” of a contract, have been adopted by a court in the settlement of a dispute between sovereign states; equally, some rules of public international law are applied by a municipal court when hearing a case containing a foreign element.⁹¹

An equally common title to describe the subject, and one generally used in the USA, is “The Conflict of Laws”.⁹² This is innocuous if it is taken as referring to a difference between the internal laws of two countries on the same matter. When, for instance, a question arises regarding whether the assignment in France of a debt due from a person resident in England ought to be governed by English or by French internal law, it may be said that these two legal systems are in conflict with each other in the sense that they can each put forward claims to govern the validity of the assignment. But the title is misleading if it is used to suggest that two systems of law are struggling to govern a case. If an English court decides that the assignment must be governed by French law, it does not do so because English law has been worsted in a conflict with the law of France, but because it is held by the law of England, albeit another part of the law of England, ie private international law, that in the particular circumstances it is expedient to refer to French law. In fact, the very purpose of private international law is to avoid conflicts of law. The one case where a genuine conflict arises is where two territorial systems, differing in themselves, both seek to regulate the same matter, as, for example, where the bequest of a Greek citizen dying domiciled in England is governed by the law of his domicile according to the English doctrine, but by the national law according to the Greek view.

The fact is that no title can be found that is accurate and comprehensive,⁹³ and the two titles “Private International Law” and “The Conflict of Laws” are so well known to, and understood by, lawyers that no possible harm can ensue from the adoption of either of them. It might be argued that the latter title is preferable, because it is a little unrealistic to speak in terms of international law if the facts of the case are concerned with England and some other part of the British Isles. However, the former is the title most widely used throughout the world and, significantly for this country, it is the description used in the European Union and most other international bodies of which the United Kingdom is a member.

Footnotes:

¹ Following the reforms to civil procedure introduced in 1999, the term “claimant” is now used in place of “plaintiff”. It needs to be borne in mind that the latter term was used in earlier English decisions and is still used in other common law jurisdictions.

² *Re Bonacina* [1912] 2 Ch 394; and see now the Contracts (Applicable Law) Act 1990.

³ Eg *Amin Rasheed Shipping Corpn v Kuwait Insurance Co* [1984] AC 50 at 65; *Spiliada Maritime Corpn v Cansulex Ltd* [1987] AC 460 at 477; *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871 at 895; and *Arab Monetary Fund v Hashim (No 3)* [1991] 2 AC 114 at 136.

⁴ De Nova (1964) 8 Am JLH 136, 141, citing the early American author, Livermore.

⁵ Nadelmann, *Conflict of Laws: International and Interstate*, p 8; for further discussion see Wolff, pp 14–15; Yntema (1966) 65 Mich LR 1; Khan-Freund (1974) III Hague Recueil 147, 164.

⁶ Baty, *Polarized Law*, p 148.

⁷ Beale, p 1; see especially, Unger (1957) 43, Grotius Society 87, 94 et seq.

⁸ *Private International Law*, Guthrie’s translation, p 6.

⁹ Cook, *Logical and Legal Bases of Conflict of Laws*, p 7.

¹⁰ On this topic, see F A Mann (1954) 31 BYBIL 317; Grodecki (1959) 35 BYBIL 58; Spiro (1960) 9 ICLQ 357; Kahn-Freund (1974) III Hague Recueil 147, 441–6; Fassberg (1990) 38 ICLQ 956; Grodecki, 3 *International Encyclopedia of Comparative Law*, Chapter 8; Dicey, Morris and Collins, pp 63–76; Morris, paras 20-034–20-045.

¹¹ See *infra*, pp 1367 and 1368.

¹² See *infra*, pp 1348–50.

¹³ See for instance, *infra*, pp 897–8.

¹⁴ *Re Chesterman’s Trusts* [1923] 2 Ch 466 at 478.

¹⁵ Frederic Harrison, *Jurisprudence and the Conflict of Laws*, pp 101–2.

¹⁶ *Infra*, p 334.

¹⁷ *Infra*, p 954 et seq.

¹⁸ See *infra*, Chapter 11.

¹⁹ *Infra*, p 525 et seq.

²⁰ *Infra*, p 608 et seq.

²¹ For the view that this question is becoming less significant in comparison with jurisdictional issues, see Briggs (1989) 9 OJLS 251, 252–7; Fawcett [1991] Current Legal Problems 39.

²² *Infra*, p 893 et seq.

²³ *Re Askew* [1930] 2 Ch 259 at 267.

²⁴ *Infra*, pp 23–4, and see Lorenzen (1920) 20 Col LR 247, 259.

²⁵ By virtue of the Scotland Act 1998, Scottish civil law (being a reference to the general principles of private law, including private international law—s 126(4)(a)) falls within the legislative competence of the Scottish Parliament. However, the private international law aspects of reserved matters (s 29(3)) are reserved to the Westminster Parliament. See Crawford and Carruthers, para 2-04.

²⁶ For an excellent account of the various methods of seeking unanimity, and an assessment of their success, see David, 2 *International Encyclopedia of Comparative Law*, Chapter 5.

²⁷ This was made part of the law of the United Kingdom by the Carriage by Air (Supplementary Provisions) Act 1962. The Warsaw Convention was modernised by the Montreal Convention for the Unification of Certain Rules relating to International Carriage by Air 1999.

²⁸ The Hague Rules which are contained in the Act were amended by a Brussels Protocol of 1968 which is embodied in the Carriage of Goods by Sea Act 1971, which came into force in 1977.

²⁹ See David, *op cit*, pp 133–41.

³⁰ *Infra*, pp 10–11.

³¹ As amended by the Sale and Supply of Goods Act 1994, Sch 2 and the Consumer Rights Act 2015 (Consequential Amendments Order) 2015/1726.

³² Graveson, Cohn and Graveson, *Uniform Laws on International Sales Act 1967*.

³³ See Honnold, *Uniform Law for International Sales Act under the 1980 United Nations Convention* (3rd edn, 1999).

³⁴ David, *op cit*, pp 181–8.

³⁵ *Ibid*, pp 148–50; and see Parra-Aranguren (1979) III Hague Recueil 55; Maekelt (1982) IV Hague Recueil 193; Juenger (1994) 42 AJCL 381.

³⁶ Vitta (1969) I Hague Recueil 111–232; van Loon, in *Forty Years On: The Evolution of Postwar Private International Law in Europe* (1990), pp 101–22; Pfund (1994) V Hague Recueil 9.

³⁷ See generally <<http://www.hcch.net>> accessed 14 April 2017.

³⁸ Van Hoogstraten (1963) 12 ICLQ 148.

³⁹ Nadelmann (1965) 30 Law & Contemporary Problems 291; Pfund (1985) 19 Int Lawyer 505; Reese (1985) 19 Int Lawyer 881; McClean in Borrás (ed), *E Pluribus Unum* (1996), p 205.

⁴⁰ On the work of the Hague Conference generally, see Nadelmann (1972) 20 AJCL 323; David, *op cit*, pp 141–8; Droz (1980) III Hague Recueil 123; Overbeck (1992) Hague Recueil 9; Boggiano, *ibid*, 99; McClean, *ibid*, 267; TMC Asser Institute, *The Influence of the Hague Conference on Private International Law* (1993); (1994) 57 Law & Contemporary Problems, No 3.

⁴¹ See North, *Essays in Private International Law* (1993), pp 225–6.

⁴² *Infra*, pp 1341–51.

⁴³ See now Adoption and Children Act 2002, *infra*, p 1156 et seq.

⁴⁴ *Infra*, pp 83–4.

⁴⁵ *Infra*, p 1134 et seq.

⁴⁶ *Infra*, p 1005 et seq.

⁴⁷ *Infra*, pp 1382–3.

- ⁴⁸ For discussion of the activities of the seven Inter-American Specialised Conferences on Private International Law, see http://www.oas.org/en/sla/dil/private_international_law.asp accessed 14 April 2017. Also Parra-Aranguren, in *Conflicts and Harmonisation* (1990) 155–75; and see Burman (1995) 28 Vand J of Transnational L 367; Parra-Aranguren in Borrás (ed), *E Pluribus Unum* (1996), p 299.
- ⁴⁹ See generally Crawford and Carruthers (2005) 3 Jur Rev 251.
- ⁵⁰ Signed in 1997 and in force on 1 May 1999.
- ⁵¹ OJ 1999 C 19.
- ⁵² The Hague Programme: Strengthening Freedom, Security and Justice in the European Union (OJ 2003 C 53/1) and the Council and Commission Action Plan Implementing the Hague Programme on Strengthening Freedom, Security and Justice in the European Union (OJ 2005 C 198/1). See European Council 4/5 November 2004, Presidency Conclusions (Press Release, Brussels, December 8, 2004, 14292/1/04 REV1 CONCL3), and Communication from the Commission to the Council and the European Parliament: Report on the Implementation of the Hague Programme for 2006 (COM (2007) 373 final).
- ⁵³ Adopted by the European Council on 2 December 2009, The Stockholm Programme—An open and secure Europe serving and protecting the citizens, OJ 2010 C 115/1, see <https://ec.europa.eu/anti-trafficking/eu-policy/stockholm-programme-open-and-secure-europe-serving-and-protecting-citizens-o_en> accessed 14 April 2017.
- ⁵⁴ See <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2079%202014%20INIT#page=2>> accessed 14 April 2017. A mid-term review is planned for 2017.
- ⁵⁵ Signed in Lisbon on 13 December 2007 and entered into force 1 December 2009.
- ⁵⁶ Emphasis added. This requirement is less stringent than that which applies under Art 65 of the Treaty of Amsterdam.
- ⁵⁷ *Harmonisation of Private International Law by the EEC* (ed Lipstein); Fletcher, *Conflict of Laws and European Community Law* (1982); Lasok and Stone, *Conflict of Laws in the European Community* (1987); North, in *Forty Years On: The Evolution of Postwar Private International Law in Europe* (1990), pp 29–48; Duintjer Tebbens, *ibid*, pp 49–69; Stone, *EU Private International Law Harmonisation of Laws* (2006).
- ⁵⁸ Implemented in the UK by means of the Civil Jurisdiction and Judgments Act 1982. See *infra*, Chapter 10.
- ⁵⁹ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351/1.
- ⁶⁰ See, *infra*, Chapter 11.
- ⁶¹ OJ 1980 L 266; North, *Contract Conflicts* (1982). See *infra*, Chapter 19.
- ⁶² Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6.
- ⁶³ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.
- ⁶⁴ See H van Loon and A Schulz, ‘The European Community and the Hague Conference on Private International Law’ in B Martenczuk and S van Thiel (eds), *Justice, Liberty, Security: New Challenges for the External Relations of the European Union* (Institute for European Studies of the Free University of Brussels, 2007).
- ⁶⁵ Council Decision (EC) 2006/719 of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law OJ 2006 L 297/1. Membership of the Conference is open to Regional Economic Integration Organisations to which the member states thereof have transferred competence over matters of private international law (Art 3 of the amended version (1 January 2007) of the Statute of the Hague Conference).
- ⁶⁶ See Schulz (2007) 56 ICLQ 939.
- ⁶⁷ On the distribution of competences between the Regional Economic Integration Organisation and its Member States, see Schulz (2007) 56 ICLQ 939, 945.
- ⁶⁸ See, generally, J J Fawcett, M Ní Shuilleabháin and S Shah, *Human Rights and Private International Law*, (2016); Fawcett (2007) 56 ICLQ 1; and Bell in Bottomley and Kinley (eds), *Commercial Law and Human Rights*, 115.

⁶⁹ Eg *J v C* [1970] AC 668, HL; *Oppenheimer v Cattermole* [1976] AC 249, 278 (per Lord Cross), 283 (per Lord Salmon), HL; *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368, 428 (per Lord Templeman); *The Playa Larga* [1983] 2 Lloyd's Rep 171, 190, CA; *Settebello Ltd v Banco Toto and Acores* [1985] 1 WLR 1050, 1056, CA.

⁷⁰ S 6(3).

⁷¹ Though not necessarily follow.

⁷² S 2(1).

⁷³ S 3(2)(a).

⁷⁴ S 3(1).

⁷⁵ Meaning, for this purpose, the House of Lords; the Judicial Committee of the Privy Council; the Courts-Martial Appeal Court; in England and Wales or Northern Ireland, the High Court or the Court of Appeal; and in Scotland, the High Court of Justiciary sitting otherwise than as a trial court, or the Court of Session (s 4(5)).

⁷⁶ S 4(2).

⁷⁷ For full analysis of the impact of Art 6 on private international law rules, see J J Fawcett, M Ní Shúilleabháin and S Shah, *Human Rights and Private International Law*, (2016), Chapters 3–8.

⁷⁸ In relation to jurisdiction in civil and commercial matters, see, eg, *OT Africa Line Ltd v Hijazy (The Kribi)* [2001] 1 Lloyd's Rep 76. The UK judicial response to arguments based on Art 6 sometimes has been fairly dismissive, eg *Lubbe v Cape plc* [2000] 1 WLR 1545; *Dow Jones & Co Inc v Yousef Abdul Latif Jameel* [2005] QB 946; and *AG of Zambia v Meer Care and Desai (A firm)* [2005] EWHC 2102 (Ch). See, in detail, *infra*, p 628. In relation to jurisdiction in matrimonial matters, see, eg, *Mark v Mark* [2005] UKHL 42 (*infra*, Chapter 22).

⁷⁹ Eg *Joint Stock Co 'Aeroflot—Russian Airlines' v Berezovsky and another* [2014] EWCA Civ 20; *Merchant International Co Ltd v Natsionalna Aktsionerna Kompaniya Naftogaz Ukrayiny* [2012] EWCA Civ 196; *Ahuja v Politika Navine/Magazini Doo* [2015] EWHC 3380 (QB); *Sutton LBC v K* [2016] EWHC 1375 (Fam); *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883; *Maronier v Larmer* [2002] EWCA Civ 774, [2003] QB 620; *SA Marie Brizzard et Roger International v William Grant & Sons Ltd (No 2)* 2002 SLT 1365; *Al-Bassam v Al-Bassam* [2004] EWCA Civ 857; *Government of the United States of America v Montgomery (No 2)* [2004] UKHL 37, [2004] 3 WLR 2241; and *Orams v Apostolides* [2006] EWHC 2226 (QB). As regards the operation of public policy as a defence to recognition and enforcement, see *Krombach v Bamberski* [2001] QB 709; further, *infra*, pp 626–32. In relation to matrimonial matters, see, eg, *Emin v Yeldag* [2002] 1 FLR 956 (concerning the grant of ancillary relief dependent upon recognition by the English court of a divorce obtained in the Turkish Republic of Northern Cyprus, a country not recognised by the British Government).

⁸⁰ Eg *Airey v Ireland*, Judgment of 9 October 1979, Series A, No 32; (1979) 2 EHRR 305; *Golder v UK*, Judgment of 21 February 1975, Series A, No 18; (1975) 1 EHRR 524; and *Osman v United Kingdom*, Judgment of 28 October 1998; (2000) 29 EHRR 245.

⁸¹ *Ashingdane v United Kingdom*, Judgment of 28 May 1985, Series A, No 93, para 57; (1985) 7 EHRR 528; *Steel and Morris v United Kingdom*, Judgment of 15 Feb 2005, para 62.

⁸² Eg *Weller v Associated Newspapers Ltd* [2015] EWCA Civ 1176; *T v K and others* [2016] EWHC 2963 (Fam); *Re A* [2015] EWFC 25; *R (on the application of Williams) v France* [2012] EWHC 2128 (Admin); *J v C* [1970] AC 668, HL; *Re I (Minors)* 23 April 1999 unreported, CA; *Re J (A Child) (Return to Foreign Jurisdiction: Convention Rights)* [2005] UKHL 40, [2005] 3 WLR 14; *S v B (Abduction: Human Rights)* [2005] 2 FLR 878; and *Re C (A Child) (Abduction: Residence and Contact)* [2006] 2 FLR 277. See J J Fawcett, M Ní Shúilleabháin and S Shah, *Human Rights and Private International Law*, (2016), Chapter 13.

⁸³ Eg *Weller v Associated Newspapers Ltd* [2015] EWCA Civ 1176; *Skrine & Co v Euromoney Publications plc* [2002] EMLR 15; and *Prudential Assurance Co Ltd v Prudential Insurance Co of America (No 2)* [2003] EWCA Civ 1154, [2004] ETMR 29. See J J Fawcett, M Ní Shúilleabháin and S Shah, *Human Rights and Private International Law*, (2016), Chapter 10.

⁸⁴ Eg *Wilkinson v Kitzinger and Ors* [2006] EWHC 2022 (Fam), in which the petitioner, an English domiciliary, sought a declaration as to her marital status in terms of the Family Law Act 1986, s 55, failing which, a declaration of incompatibility, under s 4 of the 1998 Act, in relation to s 11(c) of the Matrimonial Causes Act 1973, which specifies that a marriage shall be void on the ground that parties are not respectively male and female. Dismissing the petition, the court concluded that neither Art 8 nor Art 12 of the ECHR guaranteed the petitioner the right to have her foreign same sex marriage recognised as having

the status of a marriage in English law. See J J Fawcett, M Ní Shúilleabháin and S Shah, *Human Rights and Private International Law*, (2016), Chapter 11.

⁸⁵ Eg *Re J (A Child) (Return to Foreign Jurisdiction: Convention Rights)* [2005] UKHL 40, [2005] 3 WLR 14. See J J Fawcett, M Ní Shúilleabháin and S Shah, *Human Rights and Private International Law*, (2016), Chapter 9.

⁸⁶ Eg *Shanshal v Al-Kishtaini* [2001] EWCA Civ 264 at [50]–[62], [2001] 2 All ER (Comm) 601; *Kuwait Airways Corp v Iraqi Airways Co* [2002] 2 AC 883; and *Orams v Apostolides* [2006] EWHC 2226 (QB), [36]. See Carruthers, paras 8.71–8.76 and J J Fawcett, M Ní Shúilleabháin and S Shah, *Human Rights and Private International Law*, (2016), Chapter 15.

⁸⁷ *Commentaries on the Conflict of Laws* (1st edn), S 9.

⁸⁸ Jenks, *The Common Law of Mankind*; Jessup, *Transnational Law*.

⁸⁹ See, eg, *Re Maldonado's Estate* [1954] P 223; *infra*, pp 49–50.

⁹⁰ Oppenheim, *International Law* (1967) 8th edn, Vol I, pp 4–5.

⁹¹ Eg the doctrine of sovereign immunity, *infra*, p 491 et seq. The interaction of public and private international law has been fully canvassed by Wortley (1954) I Hague Recueil 245; Hambro (1962) I Hague Recueil 1–68. See also Vallindas (1959) 8 ICLQ 620–4; Lipstein (1972) I Hague Recueil 104, 167–94; Kahn-Freund (1974) III Hague Recueil 147, 165–96; Lowenfeld (1979) II Hague Recueil 311; Mann, *Foreign Affairs in English Courts* (1986) and A Mills, *The Confluence of Public and Private International Law* (2009). See, for the interesting interface between private international law and public international law, *Kuwait Airways Corp v Iraqi Airways Co* [2002] 2 AC 883, and comment thereon in Carruthers and Crawford (2003) 52 ICLQ 761.

⁹² For criticism of this title in the USA, see Maiea (1993) 56 Albany LR 753, 754.

⁹³ Other terms which have been used to describe the subject are “International Private Law”, “Intermunicipal Law”, “Comity”, and the “Extra-territorial Recognition of Rights”.