LAWS404: Public and Private International Law

Private International law in Australia by R.Mortensen, R.Garnett ans M.Keyes

Week 1: Introduction to Private International Law

Chapter 1: Scope, Development and Purpose

Themes of private international law

- Private international law (PIL) is the body of principles, rules and, at times, policies and approaches that indicate how a foreign element in a legal problem or dispute should be dealt with.
- Through migration, trade and communications, legal relationships increasingly cross state and national borders, giving rise to cross-border or multi-state cases when a dispute occurs.
- For example, a case in NSW might relate to an event that occurred in Singapore. The action in NSW might be paralleled by an action in Singapore, or be pre-empted by a judgement made there.
- In addressing multi-state cases, the law in common law and civil law countries has traditionally classified them as giving rise to one or more of three different issues:
  - Jurisdiction: whether the local court had the power to hear and determine the case, or whether the contacts the case has with another state/country limits or restrains the court's power to decide the case;
  - Recognition and enforcement of foreign judgements: whether the judgement in one state or country can be recognised or enforced in the other state or country;
  - Choice of law: whether the court will decide the case in accordance with the law of the forum (lex fori), or in accordance with the law of other state or country.
- PIL is also referred to as conflicts of laws, mainly in the US, but it does not describe PIL adequately as it only suggests a choice of law issue.
- The term 'private international law' can also be misleading as this body of law becomes applicable when either an international or interstate elements arises in a case, and the term can be confused with 'public international law'.
- The outcome of PIL can still turn on public international law concepts such as international personality, basic human rights and obligations not to discriminative against foreign nationals.
- Public international law comprises customary international law, treaties, conventions and legalisation passed by international agencies such as the UN.
- Public international law's effectiveness lies only in countries voluntarily complying with its rules, and it cannot be enforced directly unless implemented through legislation passed by a competent parliament.
- Public international law aims to regulate relations between nation states that have international personality, or relations between the national governments and their citizens.
- Public international law is universal in the sense that the rules are the same regardless of where in the world they are considered.
- Private international law regulates legal relations between private persons and corporations.
- Private international law is not universal because conflicts law differs from country to country and state to state.
- In PIL, member countries of the Commonwealth are treated as foreign to each other.
- In cases which do not involve federal or national law, ember states, territories, provinces or countries of a federal or composite nation are, in a sense, foreign to each other.
- *Chaff and Hay Acquisition Committee v JA Hemphill and Sons Pty Ltd* (1947) 74 CLR 375, 396: 'for the purposes of PIL, SA is a foreign country in the courts of NSW'.
- The UK comprises three private law areas: England and Wales, Scotland, and Northern Ireland, and for conflicts law purposes there regard each other as different countries.
- Private law areas are usually in the power of the state, territory or province, some areas are the subject of federal or national concern **e.g** *the Australian Federal Parliament has the power to make laws on insurance, property, marriage, incorporation, negotiable instruments etc.*

- The relevant private law area in the above situations (i.e insurance) is Australian as a whole.
- Three concerns of conflicts:
  - Whether the forum court has jurisdiction?
  - Whether lex fori or some foreign law is applied?
  - ***

Historical development

Ancient approaches

- Anything like PIL did not emerge until the 12th century.
- The ancient approach to multi-state cases was a substantive law approach.
- In this approach special courts decided multi-state cases in accordance with a separate body of laws.
- This was because the fundamental premise of ancient law systems was the idea of personal law; the law by which a person lived depended on his citizenship, and not on where the person lived or conducted business **e.g** *The 'ius civile' or civil law of Rome was only available to Roman citizens*
- In 242 BC, a special office of peregrine praetor was created to deal with any dispute in Rome involving a foreigner.
- The peregrine praetors developed a distinct body of law called the 'ius gentium' or the law of nations based on an amalgam of Roman and foreign legal institutions.
- The distinction between the civil law and 'ius gentium' eventually collapsed by the gradual reception of 'ius gentium' into the urban praetor's jurisdiction, and the result was some harmonisation of the law applied in local disputes and those involving a foreigner.
- The Edict of Caracella in 212 AD extended Roman citizenship to all inhabitants of the Empire, and so universalised the application of the civil law within the Empire's limits.

Scholarly development

- The revival of the teaching and study of Roman law in Italian universities in the 12th century, under the influence of feudalism, helped the emergence of PIL.
- Italian states developed 'statuta' or municipal laws to regulate local activities, which differed between cities.
- The scholars explained how to deal with conflicts of statuta in cases between residents of different cities and became known as 'statutists', and conceived the modern approaches of choice of law.
- The probable founder of conflicts law, Aldricus, suggested that a judge dealing with statuta should apply the better or more useful law – this is a multi-lateral approach.
- A multi-lateral approach involves the evaluation of relevant but competing laws or legal systems, and he selection of one or the other.
- Most statutists took a unilateral approach, in which the court determined the proper territorial operation of the statutum and gave it effect, generally classifying the rules as either real, personal or mixed.
- The French Scholar Charles du Moulin held that the traditional classification of rules as real or personal did not apply to questions of rights which depend on the will of the parties.
- In this case the intention of the parties determined their legal rights and obligations, an assumption which underlies the idea of party autonomy in English law and the 'proper law of the contract' choice of law rule.
- The reformation and rise of nationalism in the 16th century decentralised political power in northern Europe, and municipal laws began to displace the supranational Roman and canon laws.
- Jean Bodin's 'Six Books of the Commonwealth' legitimised the new political order by the idea of national sovereignty in which a sovereign was regarded as unlimited within the territory he governed in power, function and duration.
- Ulric Huber (EU) integrated the idea more thoroughly in 'On the Conflict of Laws', which marks the first real departure from statutist theory. Huber's theory was based on three assumptions:

- Territorial sovereignty: the laws of each state will have force within the limits of that government and bind all subjects to it, but not beyond;
- Comity: the local sovereign might give effect to a foreign sovereign's laws in his own realm because of convenience and consent of nations, not because the foreign sovereign's laws had any right to be applied in the local sovereign's country;
- The theory of vested rights: foreign laws cannot have direct force in the local sovereign's realm, but the local sovereign recognises rights valid in the foreign country in the interests of commerce and international usage.

- Justice Joseph Story (US) in his 'Commentary on the Conflict of Laws' tried to integrate the 506 common law decisions in mutli-state cases. Story thought that courts should give effect to the comity of nations by presuming that, in the absence of local laws which specifically directed how foreign laws were to be treated, the government was prepared to recognise foreign laws unless they were repugnant to public policy or local interests.
- Albert Venn Dicey's (UK) 'Conflict of Laws' finally established PIL as a department of English municipal law: 'The Courts of England never in strictness enforce foreign law; when they are said to do so, then enforce not foreign laws, but rights acquired under foreign laws'.
- Joseph Beale (US):
  - A sovereign or state only had legislative power over transactions or events that occurred within its borders;
  - A legal relationship would 'vest' on the last event that could, by the law of the country where it occurred, create that relationship or right;
  - As a result, a tort could only be recognised by the law of the place where the events occurred, a person would secure a right to compensation;
  - The governing law for a multi-state tort was the law of the place where the tort occurred.
- 19th century, Savigny's 'Treatise on the Conflict of Laws': Began with territorial sovereignty, accepted the idea of comity, but rejected the doctrine of vested rights. This was an attempt to state a PIL of universal application, and centred on the idea that it was possible to identify the 'seat' or territorial location of every legal relation by reference to factors like the place where the transaction occurred.
- 20th century, Brainerd Currie (US): theory of interest analysis began with the assumption that the primary duty of the court was to its own sovereign. So, if asked in a multi-state case to apply the law of a different country or state, the court in the forum first had to determine whether the legislative policies of its own sovereign would be advanced by application of its own forum law, if so, then the law of the forum had to be applied, if not, a relevant foreign law could be applied.

<u>Judicial development in England</u>

- England was slowed than European countries to develop a PIL.
- There were several elements of the English legal system that obviated the need for conflicts of law:
  - Centralised administration of justice – the application of one body of law common to all of England;
  - The common law courts had jurisdictional rules that precluded the hearing of multi-state cases until the 17th century;
  - The Court of Chancery claimed the right to adjudge claims involving property outside of England, but only when it had personal jurisdiction over defendant by reasons of their presence in England;
  - The several courts that did assume jurisdiction in multi-state cases applied international laws, and therefore encountered no conflicting English and foreign laws.
- The first choice of law rules were adopted by English courts in the late 17th and 18th centuries.
- The landmark decision was *Robinson v Bland* (1760) 1 Wm Bl 234, 256: The plaintiff Englishman lent Sir John Bland, another Englishman, a sum of 300 pound in Paris for gambling. Sir John lost this and other sums to the plaintiff so have him a bill of exchange payable in England. After Sir John's death, the plaintiff bough actions claiming, inter alia, repayment of the 300 pound loan by Sir John's administrator. Evidence proved that, IN France, money lost gambling between two gentlemen could be recovered as a 'debt of honour' before the Marshals of France. The Court held that the plaintiff could recover the loan:

- Denison and Wilmot JJ thought English law should apply as the plaintiff sued in an English court.
- Lord Mansfield ruled that a contract is generally governed by the law of the place where it was made unless the parties had intended it to be governed by some other law, and concluded that, in this case, if there had been a conflict of laws, the loan would be governed by English law.
- Note that in this case the law in France and England was basically the same so there was no conflict of laws.

Objectives

- PIL serves a number of sometimes competing purposes, including:
  - The need to promote uniformity or predictability of legal, social, or economic consequences;
  - The expectations or intentions of the parties;
  - The validation of legal transactions or relationships;
  - Respect for the interests of other countries and states;
  - International and interstate co-operation;
  - Justice of the result in a particular case.
- The objectives can be reduced to general themes: consistency, particular justice and international interstate comity.

<u>Consistency</u>

- Ensuring consistency in multi-state cases is one aspect of the basic principle of the rule of law that like cases be decided alike.
- Therefore, a reason why a court in the forum might apply the law of another country is to deliver an outcome similar to that which the other court would have delivered.
- The result is that individuals can predict the legal consequences of their actions even when they have contact with other countries and states, and it allows them to make appropriate plans for personal and business arrangements that cross borders.
- The goal of consistency also aims to minimise the legal significance of the plaintiff's choice of forum, and so discourages the practice of forum shopping.
- Forum shopping involves plaintiffs bringing an actions in one court primarily to obtain material benefits that they could not obtain had they sued in a more appropriate court.
- *Breavington v Godleman* (1988) 169 CLR 41: The plaintiff brought an action relating to a motor vehichle accident in the NT in the Supreme Court of Victoria because damages for economic loss were recoverable in Vic but not in the NT.
- *Sweedman v TAC* (2006) 226 CLR 362: HCA applied the law of Victoria for an accident hat took place in NSW.
- Forum shopping can be a useful means of avoiding and marginalising unjust laws; can choose country whose laws are not unjust.
- Consistency is effectively unattainable.
- A more realistic objective is a general body of principles that provides some reasonable regularity in multi-state litigation.
- *Neilson v Overseas Project Corp of Victoria Ltd* (2005) 223 CLR 331: HCA applied WA limitation period to a case involving a tort in China, and elevated the goal of consistency in international litigation over and above all other goals of PIL.
- In *Neilson* the Court claimed to be adopting the same outcome it was believed that China would deliver, however there was great uncertainties about what a Chinese court would actually decide, showing that consistency does not always give a predictable or certain result.

<u>Particular justice</u>

- The fact that a case heard in the forum has contacts with another country or state might indicate to the judge that application of the other country's or state's law will produce a more just outcome than application of the forum's law.