

Harmonisation of Private International Law – Is It Possible *At All*?

Poomintr Sooksripaisarnkit*

School of Law, City University of Hong Kong, Hong Kong, China

Abstract

Unlike its public international law counterpart, private international law traditionally lies on domestic rules of each jurisdiction. Recently, some trends can be seen both on the regional level and the global level to harmonise private international law rules. What exactly have these attempts achieve? This editorial article seeks to explore and outline attempts on both regional and global levels in harmonising private international law rules. It argues that, like how public international law rules were formulated, a process of harmonisation of private international law requires a consensus among global community. To reach such a consensus, extensive discourses are necessary in order to glean rules which are commonly adopted.

Keywords: Private international law; Brussels regulation; Rome I and Rome II regulations; The Hague conference on private international law

Introduction

Private International Law (or commonly known in some jurisdictions as ‘conflict of laws’) is a branch of law which is said to have a long historical root [1]. The origin of modern ideas on conflict of laws may be traced back to Italian jurists after the Dark Ages. ‘The Italian city-states in which Roman law was taught was independent entities, each having its own judiciary and its own local laws’ [2]. Hence, when a citizen of a city state came to be in contact with a citizen of the other city-state, questions of conflict of laws were inevitable. Despite such a long tradition, private international law has its own unique characteristic. Unlike public international law where there exists a uniform understanding among international community, private international law does vary among nations. ‘There is no one system that can claim universal recognition...’ [3]. Just one example would suffice for the purpose. In common law jurisdictions, a prevailing ‘connecting factor’ [4] which links an individual with a nation has been a ‘domicile’ of such person, in civil law jurisdictions however the prevailing connecting factor is a ‘nationality’ [5]. Such unique characteristics no doubt lead to different methodologies which in turn cause uncertainty. Suppose Mr. Chan, a Hong Kong labour, was employed via an agency company in Hong Kong, to work for a Liberian company for a building project in Singapore. There, in Singapore, he drove a car and hit upon Mr. Huang, a People’s Republic of China (PRC) citizen, causing severe injuries on Mr. Huang. Soon after the accident, Mr. Chan returned to Hong Kong. Mr. Huang, after a long repatriation in a hospital in his hometown, decided to come and sue Mr. Chan before the Court of First Instance in Hong Kong. To determine Mr. Huang’s entitlement to sue, the judge of the Court of First Instance will inevitably have to resort to a traditional ‘double actionability’ rule which has been recognised since the case of *Phillips v Eyre* [6] which in turn was re-affirmed by the House of Lords in *Chaplin v Boys* [7] and was adopted into Hong Kong by the Court of Appeal in *The Adhiguna Meranti* [8]. The essence of the rule is, as propounded by Willes J., for a tort committed overseas to be actionable ‘...the wrong must be of such a character that it would have been actionable if committed in [the place of forum]...the act must not have been justifiable by the law of the place where it was done’ [9]. The law of the forum, in this sense, Hong Kong, is taken to be a governing law while the relevant laws of Singapore, i.e. the law of the place, has only sub-ordinated role as a checking point to ensure a civil wrong for such act exists at the place [10]. If, however, one would tweak this factual scenario further. Instead of Mr. Chan returned to Hong Kong soon

after the incident, Mr. Chan travelled to the PRC to set up his business there opening a chance for Mr. Huang to sue Mr. Chan before the court in the PRC. The court in the PRC will necessarily resort to relevant statute to determine the applicable law in this context [11]. According to the statute of the PRC, for such a scenario, the court in the PRC will apply relevant laws of Singapore where the tort was committed [12]. Hence, much depends on where a suit is brought. But, as maintained by Fawcett and Carruthers, ‘there has been a significant movement in recent years towards the harmonisation of private international law rules between groups of countries’ [13]. This editorial article aims to argue that the process of harmonisation has been rather slow and any harmonisation on the regional level is limited by geographical scope. It will suggest that, in accordance with the debut of the *Journal of Civil and Legal Sciences*, any harmonisation of private international law rules can only be achieved by discourses among lawyers and practitioners of different jurisdictions with extensive comparative exercise. An idea of free access journal such as this no doubt facilitates such discourses. To do so, the article will start by exploring developments of harmonisation process among ‘groups of countries’. It will look into attempts at both regional and global levels and discuss why any such attempts have never met with complete success. Finally, the author will explain why he thinks an ‘open access’ such as in the form of the *Journal of Civil and Legal Sciences* can form such a significant part to accelerate the harmonisation process.

Harmonisation: Regional Level

Examples of such harmonisation which immediately came to mind are attempts on the European level. The European Community, which formerly known as the European Union, had passed through series of developments. On 25 March 1957, the ‘Treaty Establishing the European Economic Community’ (EEC Treaty) was signed effective from 1 January 1958 [14]. On 7 February 1992, the ‘Treaty on European Union’ (EU Treaty) was signed effective from 1 November 1993 [15]. It is now established in Article 67(4) of the ‘Treaty on the Functioning of

*Corresponding author: Poomintr Sooksripaisarnkit, LLB (Thammasat), LL.M. (International Commercial Law), PhD (Leicester), Assistant Professor, School of Law, City University of Hong Kong, Hong Kong, China, E-mail: psooksri@cityu.edu.hk

Received April 32, 2012; Accepted May 03, 2012; Published May 07, 2012

Citation: Sooksripaisarnkit P (2012) Harmonisation of Private International Law – Is It Possible *At All*? J Civil Legal Sci 1:e103. doi: [10.4172/GFJL.1000e103](https://doi.org/10.4172/GFJL.1000e103)

Copyright: © 2012 Sooksripaisarnkit P. This is an open-access article distributed under the terms of the Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited.

the European Union', a successor of the EEC Treaty, 'The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extra judicial decisions in civil matters'. Similarly, in the Article 81(1) and (2) (c) of the same Treaty:

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.
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 aimed at ensuring:
 - (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction...

With such common spirit, countries within the European Union have now agreed for the 'Brussels Regulation' [16] regulating their conflict of laws problems among members on jurisdiction and enforcement of judgment matters. They have also agreed for what came to be informally dubbed the 'Brussels II Regulation' relating to jurisdiction and recognition of judgments in matrimonial matters [17]. Within the context of choice of law, there have been the 'Rome I' [18] and 'Rome II' [19] Regulations regulating among citizens of their Member States applicable law for contractual and non-contractual relationships. Under these Regulations, for cross-boundary cases involving private citizens of Member States, each Member State does not need to resort to its own conflict of laws rules, especially among other things different connecting factors. These Regulations provide presumed rules applicable among Member States. To maintain such consistency among Member States, the European Court of Justice also refused recognition of *classic* doctrines of *forum non conveniens* [20] and anti-suit injunction [21] - hence depriving Member States' courts with their usual wide discretion to determine jurisdictional questions.

In addition to these Regulations directly relevant to private international law, some legal instruments may leave one under illusion that the European Union has addressed more specific issues of private international law. An example of which is the 'Directive on Electronic Commerce' [22]. However, as North points out, the language of Article 1(4) of the said Directive is clear [23]. According to Article 1(4), '[t]his Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of courts'. Hence, the Directive made no fruitful addition to private international law.

As briefly reviewed above, whilst there have been some developments on private international law within the European Union, such developments are limited by geographical scope. Its application does not have wider impact. Academically, a comparative study of private international law rules in each jurisdiction to the rules of the European Union is no doubt inevitable; such study within a narrow context of an ivory tower does not yield great practical impacts. Such comparative studies and academic discourses have to be brought to the attention of the wider public, especially policy makers or legislators whose voices can lead to actions. An interesting question which has to be asked at this stage is whether various instruments relevant to private international law as adopted on the European level can serve as 'models' for the basis of creating similar international legal instruments on a wider scale - for example perhaps a complete 'private international law' code for international community?

Harmonisation: Global Level

Looking at attempts to harmonise private international law rules on a larger scale, one would have in mind the work of the 'Hague Conference on Private International Law' [24]. It was established following the initiative of the Dutch government and its first conference was held on 12 September 1893 [25]. Currently, it consists of 72 members drawn from countries across the globe [26]. But, as warned in its website, one has to carefully distinguish between the Member States to the Hague Conference on Private International Law and the Member States who became the State Parties to relevant international conventions spearheaded by the Hague Conference on Private International Law! The primary objective of this organisation is to promote 'progressive unification of the rules of private international law' [27]. However, like any multilateral treaties or agreements created by any international organisations, the success of each international convention drafted under the auspice of the Hague Conference on Private International Law depends on a number of State Parties ratifying such convention. For example, the 'Convention of 30 June 2005 on Choice of Court Agreements' has been adopted only by Mexico so far [28]. The Hague Conference on Private International Law still works on crucial aspects of private international law such as the choice of law in international contracts and aspects of electronic commerce.

Aside from the Hague Conference on Private International Law, some organisations such as the International Institute for the Unification of Private Law (UNIDROIT) and the United Nations Convention on International Trade Law (UNCITRAL) also touched upon aspects of private international law [29]. Examples of the products of the UNIDROIT include the 'Convention Relating to A Uniform Law on the International Sales of Goods 1964' and 'Convention Providing A Uniform Law on the Form of an International Will 1973'. Nevertheless, judged from a number of the State Parties, these conventions are not well-received to say at least. One contribution of the UNIDROIT which cannot be ignored is, of course, the creation of the 'Principles of International Commercial Contracts, 1994'. But, the Principles have no binding legal effect. They can only be used if parties to international commercial contracts stipulate them as a choice of law in their contracts. Hence, the principles do not effectively replace existing private international law rules of each jurisdiction. For the UNCITRAL, its success in the realm of private international law which immediately came to mind would be the 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958' (commonly known as the 'New York Convention') which has been adopted by many jurisdictions and has influenced local statutes on arbitration of many other jurisdictions. Likewise, the 'United Nations Convention on Contracts for the International Sales of Goods 1980' has also met with quite a success from responses received among international community. With the UNCITRAL's effort, the 'United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea' (known as the 'Rotterdam Rules') was adopted by the General Assembly at the end of 2008 and as of the time of writing this editorial article Spain has already ratified this Convention. The Rotterdam Rules will come into force within a year after the ratification by the twentieth nation [30]. Of note with the Rotterdam Rules are specific provisions in Chapter 14 dealing with jurisdiction and Chapter 15 dealing with arbitration. But, there are specific provisions allowing the Member States to 'opt out' from Chapters 14 and 15, hence undermining a prospect of harmonisation [31].

One would see that a problem of harmonising private international law rules on a global level is the lack of real success. Relevant international conventions are either narrow in scope limited to particular

topics or else they are not well-received. Contemporaneous issues such as private international law in electronic commerce or other activities over the internet have not been addressed by international community. Debates on these are limited within the concerned international organisations or else within the ivory towers.

Towards Harmonisation: Widening International Dialogues

As mentioned, private international law is unlike its public international law counterpart. Public international law originated from commonly accepted 'norms' or 'traditions' within the international community. On the other hand, the term 'private international law' is a misnomer. It is still domestically focused. Hence, academic discourses within each jurisdiction focused on internal legal problems. The author thinks that for a successful harmonisation of private international law there is a need to search for common norms or methodologies which are widely accepted among international community. This should not be a work of the Hague Conference on Private International Law whose members do not even represent the half of the countries in the world. Likewise, this task should not be delegated to any one international organisation in particular. Such finding of common norms or traditions can only be achieved through extensive comparative analysis and academic discourses. The idea of 'open access' as pioneered by the *Journal of Civil and Legal Sciences* no doubt facilitates such dialogues. With rapid turn-around time, scholars from different jurisdictions will gain access to the most cutting-edge academic discourses within the field. Policy makers and legislators can gain easy access to information available on-line, without having to search for printed journals which may only be available in large academic library. Therefore, the approach taken by the *Journal of Civil and Legal Sciences* is no doubt something to be applauded. It is doubtlessly a suitable forum for continuing debates on harmonisation of private international law.

References

- Juenger FK (2005) Choice of Law and Multistate Justice. Transnational Publishers.
- Juenger (2005). 11.
- Fawcett J, Carruthers JM (2008) Cheshire, North & Fawcett Private International Law. Oxford University Press.
- The term 'connecting factor' is explained as '...facts which tend to connect a transaction or occurrence with a particular law or jurisdiction...Connecting factors are taken into consideration and weighed by courts and arbitrators, in determining the proper law...to apply to decide the case or dispute'. William Tetley, QC., 'Glossary of Conflict of Laws'.
- McClellan D, Beevers K (2009) The Conflict of Laws. Sweet & Maxwell.
- Phillips v Eyre* (1870) L.R. 6 Q.B. 1.
- Chaplin v Boys* [1971] A.C. 356.
- The Owners of Cargo lately laden on board the Ship or Vessel "AdhigunaMeranti" v The Owners of the Ships or Vessels "AdhigunaHarapan" and Others*[1987] HKLR 904.
- Phillips v Eyre* (1870) L.R. 6 Q.B. 1: 28-29.
- The Adhiguna Meranti* [1987] HKLR 904, 914.
- Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (Adopted at the 17th session of the Standing Committee of the 11th National People's Congress, 20 October 2010). English translation is translated by Professor LU Song of China Foreign Affairs.
- Article 44: 'Tortious Liability is governed by the law of the place of tortious act. Where the parties have common habitual residence, the law of their common habitual residence shall be applied. Where the parties have chosen by agreement an applicable law after the tortious act occurs, the agreement shall be followed'.
- Fawcett, Carruthers (2008).
- The European Economic Community (EEC) was renamed the 'European Community' by the Treaty on European Union. With the effect of a 'Treaty of Lisbon' (signed on 13 December 2007 and came into effect on 1 December 2009), the name of the 'Treaty Establishing the European Economic Community' has since been changed to a 'Treaty on the Functioning of the European Community'. TC Hartley (2010) The Foundations of European Union Law. (7thedn) Oxford University Press: 3-11. See also Official Website of the European Union, 'Treaties' <http://eur-lex.europa.eu/en/treaties/index.htm> accessed on 20 April 2012.
- Hartley TC (2010) The Foundations of European Union Law. Oxford University Press.
- Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Prior to the coming into force of the Brussels Regulation, the European Union adopted the 'Brussels / Lugano Convention', which formally known as 'Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed in Lugano on 30 October 2007' which in turn replaced the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988 and the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.
- Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000.
- Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.
- 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.
- Owusu v Jackson* Case C-281/02; [2005] 1 Lloyd's Rep. 452.
- Turner v Grovit* Case C-159/02; [2004] 1 Lloyd's Rep. 216; *Allianz Spa and Another v West Tankers Inc. (The "Front Comor")* Case C-185/07; [2009] 1 Lloyd's Rep. 413.
- Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.
- North P (2001) Private International Law: Change or Decay? Int'l & Comp. L.Q. 50: 477-503.
- The Hague Conference on Private International Law.
- Lipstein K (1993) One Hundred Years of Hague Conference on Private International Law. Int'l & Comp. L.Q. 42: 553-653.
- The Hague Conference on Private International Law, 'HCCH Members'.
- Lipstein, (1993). 559.
- The Hague Conference on Private International Law, 'Status Table: Convention of 30 June 2005 on Choice of Court Agreements'.
- North (2001). 493-495.
- Article 94 of the Rotterdam Rules.
- See Articles 74 and 78 of the Rotterdam Rules.

Submit your next manuscript and get advantages of OMICS Group submissions

Unique features:

- User friendly/feasible website-translation of your paper to 50 world's leading languages
- Audio Version of published paper
- Digital articles to share and explore

Special features:

- 200 Open Access Journals
- 15,000 editorial team
- 21 days rapid review process
- Quality and quick editorial, review and publication processing
- Indexing at PubMed (partial), Scopus, DOAJ, EBSCO, Index Copernicus and Google Scholar etc
- Sharing Option: Social Networking Enabled
- Authors, Reviewers and Editors rewarded with online Scientific Credits
- Better discount for your subsequent articles

Submit your manuscript at: www.omicsonline.org/submission