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Abstract

Applicable Law, Interests in Protection and Freedom between North and South

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The topic "Applicable Law, Interest in Protection and Freedom between North and South" addresses issues which at first glance do not have very much in common. The relationship between the northern and the southern part of the world is more or less a synonym for the global difference and tension between developed and underdeveloped countries, between rich and poor countries. The aim and challenge is to remove or at least reduce the economic, social and political inequality and imbalance between these groups of countries. The selection of the applicable law on the other hand, the field of private international law, is concerned with the choice between different laws which have a significant connection with a given case. It is not the aim of private international law to outbalance different levels of poverty between states. Nonetheless it deserves questioning whether private international law disposes of tools which can be activated to assist that goal. In this regard the paper discusses the various areas of private international law, looks for examples and draws the following conclusions:

1. It is evident that on a global scale tremendous differences in public wealth exist between different countries. A reasonable balance of the global distribution of wealth is one of the most difficult challenges for a just global order. However, the slogan of the North-South conflict does not fully reflect the conflict of interests between poor and rich countries.
2. Despite the increasing globalisation also of the law and despite a reduction of the sheer number of territories with differing law through regional integration movements all over the globe private international law will remain to be of importance and will retain its function to provide rules to solve conflicts of differing law. But those rules should be increasingly inspired by, an should take into account, the idea of a just global order.
3. Private international law is able to take care of the interests of private persons or states who are directly or indirectly involved in a given conflict. However, these are specifically private international law interests which this branch of law can protect. Their peculiarity is the interest in the application of that law which in the perspective of the parties, of involved third persons or of the involved state(s) is most closely connected with the case at hand. However, the traditional instruments and methods of private international law which are still to be supported despite the American "conflicts revolution" allow only to a very limited extent to influence the material outcome of a specific case. Justice in private international law is mainly administered and achieved by finding and applying that system of law that is from the viewpoint of the interests involved the just and rightly applica-

ble system of law. Only in exceptional cases – with the instrument of internationally mandatory rules ("lois de police") and the *ordre public* – it is possible to correct the material solution reached by the applicable law.

4. One could, however, imagine a general conflicts rule that always the law of the party of the poorer country should apply – according to the model of the protection of the weaker party in international contract law. But such a rule would not achieve the intended goal of stronger protection of parties from poorer countries because the law of these countries is thus far not known for being generally more favourable to parties from those countries than is the law in rich(er) countries. The imagined rule has therefore to be rejected.

5. But nonetheless in few single areas of private international law a better protection of the interests of poor countries can be imagined and achieved.
   a) It appears not only possible but necessary that these countries participate to a greater extent than at present in the preparation of private international law conventions or other international regulations in this field.
   b) In international contract law the principle of an almost unrestricted freedom of choice of law may be questioned. This principle can enable parties of rich countries to bring to bearing their own law due to their superior economic power, their better information and greater routine in international business. Nevertheless it is not advised to restrict the freedom of choice of law further than at present already provided for by the specific protection for consumers, employees and insured. There is no convincing justification to assume that a party generally deserves better protection because this party is seated in a poor country. Many firms of rich countries have subsidiaries in poor countries. They could – and certainly would – also invoke this kind of protection. Moreover, the notion "poor country" is too vague for practical purposes.
   c) The conflicts rules on international tort law, international property, competition, industrial property and nationalisation law do not appear to particularly discriminate parties from poor countries or those countries themselves. However, it has to be cared that the specific protection of employees is not undermined which is granted by international employment contract law.
   d) Another area where specific interests of poor countries can be recognised is the field of internationally mandatory rules where for instance such countries provide for rules against the export of certain goods (cultural goods, protected species etc.). The idea to outbalance the different levels of wealth between countries can and should be taken into account when answering the question whether and when a mandatory rule should be respected. Also in the interpretation and application of uncertain terms of the applicable material law this idea could and should be taken into account.

e) The *ordre public* enables only to reject foreign law which otherwise would apply. But it has to be cared that the rich countries do not reject just those provisions of poor countries which can add to decrease a little the imbalance of wealth between the different countries.

In sum, private international law can help little in outbalancing the tremendous differences of wealth which exist between the nations. But this little it should do.