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Summary

Schools of thought in private international law

by Prof. Dr. Christiane Wendehorst, LL.M. (Cambridge), Wien

1. Identifying 'schools of thought' in Private International Law is not an easy task. One of the reasons for this is that Private International Law has, over recent centuries, become much more of a national matter, so that the most striking differences are usually viewed through the lens of comparative law or legal history, and not so much perceived as trends within one and the same scientific community. It might, therefore, be more promising to search for overarching paradigmatic perspectives that up to now have come in and out of play at various times and places.

2. Famous paradigm shifts in the history of Private International Law would be the shift from the principle of personality to that of territoriality, from the statute theory to the doctrine of the natural seat of a legal relation, or from universalism to autonomism. Furthermore, we can distinguish unilateral versus multilateral systems, rights-based versus law-based approaches, and views that see conflict of laws embedded in a procedural setting versus views that regard conflict of laws as a separate issue. Similarly, conflict of laws can be seen as being essentially about the interests of states or about the interests of private individuals, and if the latter, some put the focus on interests reflected specifically by conflict of laws, while others concentrate on interests protected by substantive law.

3. What might be perceived as different 'schools of thought' within conflict of laws can usually be traced back to one out of three paradigmatic perspectives. These perspectives might be termed the choice-of-law paradigm, the scope-of-application paradigm, and the paradigm of recognition. According to the choice-of-law paradigm, Private International Law is about allocating to each legal issue a particular legal system or particular rules by which the issue is governed. The scope-of-application paradigm, however, is built on the assumption that substantive rules carry within them a particular personal and/or territorial scope which is either explicit or implied, either for a particular rule or in general terms. The function of Private International Law is to balance the claims of different substantive rules to be applied in a particular case. And the paradigm of recognition takes as its starting point the idea that, by way of private or public acts, links are created between a legal system on the one hand and the legal relations between individuals on the other, which means that a certain legal relation came about 'under' a particular law and must, as such, be recognised by foreign courts. Private International Law, from this point of view, is about the conditions required for recognition.

4. Modern Private International Law is clearly dominated by the choice-of-law paradigm. However, the scope-of-application paradigm is still required to explain the rules on the scope of application of international or European uniform law, the enforcement of 'overriding mandatory rules' within the meaning of Article 9 Rome I and similar rules, and some restrictions on the choice of the applicable law by the parties. Finally, the paradigm of recognition is scarcely present at all: certain features that imply elements of 'recognition' can usually be analysed as being really about the connecting fac-

tor or about a split reference, by virtue of which the creation of a right is governed by a different legal system than its enforcement. It is still unclear whether, and if so to what extent, the fundamental freedoms enshrined in the TFEU may require real recognition of legal relations within the meaning of the paradigm of recognition. In any case, such recognition is very problematic and difficult to integrate into a system of Private International Law which is, in general, based upon the choice-of-law paradigm.

5. In future, Private International Law in Europe is likely to emerge as much more a matter of coexistence of the three paradigms than has for centuries been the case. This is illustrated by the Proposal for a Regulation of the European Parliament and the Council on a Common European Sales Law (COM(2011) 635 final) submitted in October 2011. In a manner that presents something of a challenge, the Proposal combines the application of traditional choice-of-law rules according to the Rome I regulation, the rules on the scope of application of the Common Sales Law to be found in its Articles 4 to 9, further choice-of-law rules for matters not addressed in the Common Sales Law, and issues of recognition in the context of retention-of-title. It is to be expected that the choice-of-law paradigm, the scope-of-application paradigm, and the paradigm of recognition will, in future, no longer stand for fundamentally different approaches to Private International Law, but rather for elements of it applied complementarily.