International Private Law

Introduction

* that part of law which come into operation whenever the court is faced with a issue that contains a **foreign element**,
* in the world, there is **a number of separate national legislations** that differ greatly from each other in the rules by which they regulate the various legal relations arising in daily life (birth, death, marriage, divorce, bankruptcy, contracts, wills etc.),
* „principle of territorial sovereignty“, but it is no derogation of sovereignty to take account of foreign law,
* recognition of foreign law is necessary because invariable application of the law of the forum would often lead to gross injustice,

→ number of different **rules for the choice of law**

Introduction

* The courts do not always apply their own country's law - the ***lex fori*** - but they sometimes apply the law of another country with which the dispute has a close connection.
* **Example:** German-Italian couple who were married in Portugal now live in France and want to divorce, so they seize the French courts. In theory, there are four sets of law that might have an interest to be applied – the **French**, the **Portuguese**, the **Italian** and the **German** - and consequently these laws can be regarded as being in "*conflict*" as to which of them should apply.

Definition

Set of rules determining which law shall govern **civil, commercial, family, labour and other comparable relations with an international (foreign) element** and which regulate the legal status of aliens, as well as the procedure before judicial authorities in the regulation of such relations and the decision-making in respect of such relations, and help thereby to facilitate international co-operation in these matters.

Scope

* Separate and distinct unit in the Slovak legal system,
* Civil law theory,
* International public law theory,
* Covers three legal areas:
  1. **The choice of law,**
  2. **Jurisdiction of the Slovak courts,**
  3. **Recognition and enforcement of foreign judgments.**

Choice of law

* the court must decided which system of law – the Slovak of foreign must govern the issue/case,
* then the rules of international private law apply – **rules for the choice of law,**
* **these rules do not furnish a direct solution** of the case but only stipulate which national legislation is applicable for the case,

Jurisdiction

* rules whether the court is empowered by law to solve the case,
* we recognize:
  * General jurisdiction,
  * Alternative jurisdiction,
  * Exclusive jurisdiction,
  * Prorogation of jurisdiction.

Recognition

* **“I won my court case but I still haven't been paid.”**
* The litigation has been before court of one country but another court has to **recognize or permit the enforcement** of foreign judgment,
* Europeanization of private international law – EU regulations

Foreign element

* **Subject – citizenship, domicile, habitual residence**
* **Object – immovable property**
* **Legal fact – birth, death, place of damage**
* **Connectivity with principal relation – art. 13 –** *„Prescription of rights relating to obligation shall be governed by law applicable to the obligation itself.“*

Sources of law

* **National legislation**
* **International law**
  * Multilateral treaties
  * Bilateral treaties
* **EU law** – regulations, international treaties with third countries concluded on behalf of the EU

National legislation

* Constitution of the Slovak Republic – basic principles of the national legislation
* The Act No. 97/1963 Collection of Laws on Private International Law and Rules of International Procedure
* The Act No 244/2002 on arbitration procedure
* Commercial Code
* Labour Code
* Act on Family

International Law

* Multilateral treaties
  * UN Conventions
  * Council of Europe Conventions
  * Hague Conference on International Private Law Conventions
  * Others
* Bilateral treaties
  * on judicial cooperation in civil and commercial matters

UN Conventions

* Convention on **the Recovery Abroad of Maintenance** (New York, 20 June 1956)
* Convention on **the Recognition and Enforcement of Foreign Arbitral Awards** (New York, 10 June 1958)
* European Convention **on International Commercial Arbitration** (Geneva, 21 April 1961)
* Convention **on Contracts for the International Sale of Goods** (Vienna, 11 April 1980)
* Convention **on the Limitation Period in the International Sale of Goods**, as amended by the Protocol of 11 April 1980 (New York, 14 June 1974)

Hague Conference of International Private Law

* the world organization for international cooperation in civil and commercial matters
* global inter-governmental organisation
* statutory mission of the Conference is to work for the "progressive unification" of private international law rules
* this involves finding internationally-agreed approaches to issues such as:
  * jurisdiction of the courts,
  * applicable law,
  * the recognition and enforcement of judgments in a wide range of areas, from commercial law and banking law to international civil procedure and from child protection to matters of marriage and personal status.

Hague Conference of International Private Law

* The Conference held its first meeting in 1893, on the initiative of T.M.C. Asser (Nobel Peace Prize 1911),
* it became a permanent inter-governmental organisation in 1955, upon entry into force of its Statute,
* Between 1893 and 1904, the Conference adopted 7 international Conventions, which have all been subsequently replaced by more modern instruments.
* Between 1951 and 2008, the Conference adopted **38** international Conventions, the practical operation of many of which is regularly reviewed by Special Commissions (even when they are not ratified, the Conventions have an influence upon legal systems, in both Member and non-Member States).
* Conventions also form a source of inspiration for efforts to unify private international law at the regional level, for example within the Organisation of American States or the European Union.

Hague Conference of International Private Law

* The most widely ratified Conventions deal with:
  * The abolition of legalisation (Apostille)
  * Service of process
  * Taking of evidence abroad
  * Access to justice
  * International child abduction
  * Intercountry adoption
  * Conflicts of laws relating to the form of testamentary dispositions
  * Maintenance obligations
  * Recognition of divorces

Hague Conference of International Private Law

* **The most recent** Conventions are
  * the *Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary* (2006),
  * the *Convention on Choice of Court Agreements* (2005),
  * the *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance* together with the *Protocol on the Law Applicable to Maintenance Obligations* (2007).

Hague Conference of International Private Law

* The Conference website, www.hcch.net, presents
  * general information concerning the Hague Conference,
  * detailed and updated information on the Hague Conventions
    * texts of the Conventions,
    * full status reports,
    * bibliographies,
    * information regarding the authorities designated under the Conventions on judicial and administrative co-operation,
    * explanatory reports, etc.

Hague Conference of International Private Law

* Convention of 1 March 1954 on civil procedure
* Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters
* Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations
* Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations
* Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

Hague Conference of International Private Law

* Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
* Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption
* Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents

Council of Europe

* European Convention on Information on Foreign Law (London, 7 June 1968)
* European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (Strasbourg, 20 May 1980)

EU Law

* plan for a European law-enforcement area became a Union objective with **the Maastricht Treaty** in 1993, but
  * Brussels Convention of 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters
  * Rome Convention of 1980 on the law applicable to contractual obligations.
    Hague Conference on Private International Law
  * Council of Europe

had already existed.

EU Law

* In 1999, **the Amsterdam Treaty** brought judicial cooperation in civil matters into the Community framework.
* This made it possible both to use the Community method here **and** to adopt instruments in the form of Community legislation (regulations, directives and decisions).

EU law

* Council Regulation (EC) No **44/2001** of 22 December 2000 **on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters**, sometimes known as „the Brussels I Regulation" provides the answers to two vital questions that arise in the event of a dispute between two people living in different States:
  1. which courts have jurisdiction, and
  2. what rules apply to decide whether a judgment given in a Member State will be recognised.

A number of modifications have been made to this Regulation which came into force on 1 st. March 2002 and **replaces the Brussels Convention of 1968.**

EU law

* 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 (Brussel II bis),
* The Council Regulation **1393/2007** of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (**service of documents**)
* Regulation (EC) No **1206/2001** of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters improves, simplifies and expedites cooperation between courts as regards evidence.

EU law

* The Council Regulation 593/2008 of 17 June 2008 on the law applicable to **contractual** obligations (Rome I)
* The Council Regulation 864/2007 of 11 July 2007 on the law applicable to **non-contractual** obligations (Rome II)
* The Council Regulation 861/2007 of 11 July 2007 establishing a **European Small Claims Procedure**
* The Council Regulation 1896/2006 of 12 December 2006 creating a **European order for payment procedure**
* The Council Regulation 805/2004 creating a **European enforcement order for uncontested claims**

Conflict of Law Rules

* **Function**
  - to choose applicable law in issues/cases containing foreign element by using „connecting factors“
  - Special rules not regulating issue concerned as such

* **Structure** – extent and connection
* **Types** – unilateral and bilateral

Connecting Factors

- *lex loci contractus*: the law of the place where the contract was made;
- *lex loci solutionis*: the law of the place where the contract is to be
- performed;
- *lex loci celebrationis*: the law of the place where the marriage was
- celebrated;
- *lex loci delicti*: the law of the place where the tort was committed;
- *lex domicilii*: the law of the place where a person is domiciled;
- *lex patriae*: the law of the nationality;
- *lex situs*: the law of the place where the property is situated;
- *lex fori*: the law of the forum, that is, the internal law of the court in which a case is tried.

Proof of foreign law

* the European Convention on Information on Foreign Law (London, 7.VI.1968)
* the Additional Protocol to the European Convention on Information on Foreign Law (Strasbourg, 15.III.1978)

Proof of foreign law

* information on law and procedure in civil and commercial fields as well as on judicial organisation
* in order to carry out the provisions of the Convention each Contracting Party shall set up or appoint a single body “receiving agency”
* the object of the reply shall be to give information in an objective and impartial manner on the law of the requested State to the judicial authority from which the request emanated
* the reply shall contain, as appropriate, relevant legal texts and relevant judicial decisions. It shall be accompanied, to the extent deemed necessary for the proper information of the requesting authority, by any additional documents, such as extracts from doctrinal works and travaux préparatoires
* it may also be accompanied by explanatory commentaries.

Proof of foreign law

1. **a question of „fact“**
   - it is **for the parties** to prove the content of foreign law; **judges are not permitted to investigate the content of foreign law themselves**
   - in the event of conflict between the evidence submitted by the parties, the judge may assess the credibility of the experts and is permitted to consider the primary evidence (e.g. foreign statutes and cases), especially where they are written in English and apply concepts that are familiar to an English judge
   - the content of foreign law is normally proved by expert evidence. It is not enough to put the text of a foreign statute, case or text of authority before the court. Expert evidence as to foreign law may be given by anyone “suitably qualified to do so on account of his knowledge or experience,” irrespective of whether he is entitled to act as a legal practitioner in the relevant jurisdiction.

Proof of foreign law

- it is usual for experts to be either academics or practitioners in the jurisdiction in question/by properly qualified witnesses (practical experience is suffiecient qualification)
- Example: An experienced police officer from Quebec was able to prove the road traffic law of that Province before an Ontrio court.
- if the content of foreign law has been determined in an earlier English case, this case may be cited as evidence of the content of foreign law, and the content of foreign law will be presumed to be the same as determined in that case unless proved otherwise.

Proof of foreign law

- role of the court: power to control expert evidence for the purpose of reducing costs and delay; no party may call an expert or put in evidence an expert´s report without the court´s permission
- expert evidence is to be give in a written report unless the court directs otherwise
- **the burden of proof is on the party relying on the foreign law**
- if foreign law is not proved satisfactorily, the general rule is that **English law will be applied**. However, in cases where there is no reason to think that the foreign law in any way resembles English law (e.g. a tax statute from another European jurisdiction), the suit may be dismissed.

Proof of foreign law

2. **a law**
   * court has to ascertain the content of foreign law
   * court must take all action required for the proof of foreign law
   * if a court is unfamiliar with the content of foreign law, it may seek information from the Ministry of Justice in this respect
   * the Ministry of Justice also provides courts with statements in cases where doubts arise in discussions of private-law relations with an international element.

Proof of foreign law

France

* Traditionally, it was the responsibility of the party requesting application of a foreign law to establish its content, and more particularly to demonstrate how application of French law would not lead to an equivalent result.
* Following a relatively recent precedent (1998), it is now accepted that the judge must research the content of the foreign law when he himself declares it applicable - this is obligatory when the case concerns unavailable laws.
* Proof of the foreign law's content can be provided via the means set out in the new Code of Civil Procedure (expert opinion, parties appearing in court, request for evidence from a third party, etc.).
* It is also standard practice to have recourse to the ***certificat de coutume***. This is a document drawn up in French either by a foreign State's consulate or embassy in France or by a foreign or French lawyer specialising in the area of law concerned.

Proof of foreign law

Spain

* the content and validity of foreign law must be proved and the court can use any means that it considers necessary for checking this
* as regards the parties, the proof of foreign law is subject to the general rules on the burden of proof in civil action.
* foreign law can be proved by any legally accepted means of proof

Proof of foreign law

Netherland

* the court must officially establish the content of the foreign law. Parties are often invited to express an opinion on the foreign law and usually comply with this request. This does not alter the fact that the court itself continues to be responsible for that which it accepts as the content of the foreign law.
* the court is free to choose the manner in which it obtains information. It may follow the channel prescribed in the European Convention on Information on Foreign Law (London, 7 June 1968), it may carry out its own research based on literature, it may outsource this research to an expert from the country in question or to a research institute such as the T.M.C. Asser Instituut or the International Juridical Institute [*Internationaal Juridisch Instituut*].
* if the content of the foreign law cannot be established to a sufficient extent, a variety of solutions shall be used, such as the application of a system that is related to the law that is in fact applicable, the application of internationally accepted principles or of Dutch law.

Difference between substance and procedure

* distinction between **right and remedy**
* **the substantive rights of the parties to an action may be governed by a foreign law, but all matters appertaining to procedure are governed excluýsively by the law of the forum**

Next topic

* Renvoi