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Predictability and Flexibility in Private International Law: Allies or Enemies?

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Abstract

The chapter discusses the relationship between predictability and flexibility as the values currently expected for private international law standards. While predictability has been perceived for a long time, flexibility has been gaining momentum in the US since the 1930s and in Europe in the second half of the last century. At present, however, the demand for flexibility in the standards of private international law is expressed in all modern codifications. Therefore, the chapter also outlines the institutes through which flexible elements intended to enable to take into account individual aspects of a particular case can be incorporated to traditional predictable blind conflict-law-rules methodology.

Keywords

Predictability; Flexibility; Private International Law; Value; Legal Certainty; Stability; Individual Case; Adaptation; Contradiction; American Revolution; European Evolution; Balance; Accumulation of Connecting Factors; Flexible Connecting Factors; Escape Clauses; Status Preference; Validity Preference; Position of Person Preference; Cascade; Cumulation; Double-Actionability.

1 Predictability and flexibility – values of private international law?

What is understood under predictability and flexibility in private international law? How do these notions manifest themselves and what values do they represent in the conflict-of-law approach to determining the applicable law? What is their mutual relationship? Is it suitable or more suitable to accentuate

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any of these values or should they apply in parallel? And is parallel application of these values actually possible? These are only a few of numerous questions that might be faced by the legislature when creating legal norms, by a judge when hearing a dispute with an international element or an academician when deliberating over the conflict-of-law approach to determining the applicable law.

Predictability is a value that is quite typically associated with legal norms. It represents the possibility for a legal entity to devise ideas about its future conduct, while taking into account the objective legal conditions under which such conduct will (or should) take place.[1] However, it cannot be stated that the very existence of a legal norm ensures sufficient predictability – the frequency and manner of changes to the legislation also play an important role in this regard. Predictability can also be perceived as transparency of the law and legal norms in view of their application.[2] Predictability is therefore a necessary prerequisite of legal certainty, i.e. a situation where similar situations are decided in the same way, and where the law is thus not applied arbitrarily. Both values are interconnected especially in the sphere of application, where a person who relies on the valid (applicable) law should not be disappointed in his/her expectations.[3] The principle of legal certainty and predictability means *de facto* that the law inclines towards stability, and anyone who relies on it should not be caught off guard by some surprising and unexpected turn of events.

The requirement that a legal norm ensure legal certainty and predictability is inherent to the law in general. Therefore, this requirement cannot be denied even to private international law and its conflict-of-law component. Both these notions are commonly used in professional publications dedicated to private international law. No further explanation is needed in this regard.[4] It is clear that the academia considers these values so automatic that it does not consider it necessary to substantiate why conflict-of-law rules should

1 Judgment of the Constitutional Court of 12 December 2013, Case III. ÚS 3221/11.
2 Wolff, L-C. Flexible Choice-of-Law Rules: Panacea or Oxymoron? *Journal of Private International Law*. 2014, Vol. 10, No. 3, pp. 431–459.
3 Judgment of the Constitutional Court of 12 December 2013, Case III. ÚS 3221/11.
4 See for example Pfeiffer, M. Legal Certainty and Predictability in International Succession Law. *Journal of Private International Law*. 2016, Vol. 12, No. 3, pp. 566–586.

ensure predictable solutions and legal certainty for parties to private-law relationships with an international element.[5] These notions are also commonly used in the recitals of European Union regulations on private international law, which like to denote legal certainty as their general objective[6] or basic element.[7] They are also referred to in explanatory memoranda of new general civil codices[8] and codes of private international law.[9]

Flexibility is perceived as an ability to adapt to the circumstances of the given case. It is therefore often understood as a precondition for ensuring justice in an individual case, although *Wolff* already considers this statement a *cliché*.[10] However, it remains a fact that this interconnection of flexibility and individual justice can be found in the works of many authors.[11] The requirement for flexibility in decision-making is based on the idea that a judge should be interested in finding a fair solution to the legal question presented to him/her. A judge cannot decide without regard to individual justice only

5 See Rozehnalová, N. *Instituty českého mezinárodního práva soukromého.* Praha: Wolters Kluwer ČR, 2016, p. 26; Pauknerová, M. Prostor pro uvážení v českém mezinárodním právu. *Právník*. 2016, Vol. 155, No. 1, p. 14; Symeonides, C. S. Rome II and Tort Conflicts: A Missed Opportunity. *The American Journal of Comparative Law*. 2008, Vol. 56, No. 1, p. 179.

6 Recital 16 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I Regulation").

7 Recital 14 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 ("Rome II Regulation").

8 The Explanatory report to the Act No. 89/2012 Coll., Civil Code (Czech Republic) speaks on legal certainty as the unwritten principle (p. 26), or, as the case may be, of the overall objective pursued by both private and public law (p. 30). See The Explanatory report to the Act No. 89/2012 Coll., Civil Code (Czech Republic), p. 26, 30 [online; cit. 7. 1. 2020]. Available in Czech language at: http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-NOZ-konsolidovana-verze.pdf

9 The Explanatory report to the Act No. 91/2012 Coll., on Private International law (Czech Republic) [online]. p. 43 [cit. 7. 1. 2020]. Available in Czech language at: http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-k-ZMPS.pdf

10 Wolff, L-C. Flexible Choice-of-Law Rules: Panacea or Oxymoron? *Journal of Private International Law*. 2014, Vol. 10, No. 3, p. 441.

11 Explicit reference is made by Rozehnalová, see Rozehnalová, N. *Instituty českého mezinárodního práva soukromého.* Praha: Wolters Kluwer ČR, 2016, p. 27. As well as Pfeiffer, see Pfeiffer, M. Legal Certainty and Predictability in International Succession Law. *Journal of Private International Law*. 2016, Vol. 12, No. 3, p. 567. It can be deduced in Symeonides, C. S. Codification and Flexibility in Private International Law. In: Brown, K. K., Snyder, V. D. (eds.). *General Reports of the XVIIIth Congress of the International Academy of Comparative Law*. Dordrecht: Springer. 2011, p. 14 or in Pauknerová, M. Prostor pro uvážení v českém mezinárodním právu. *Právník*. 2016, Vol. 155, No. 1, p. 14.

because he/she is required to rule on a relationship with an international element,[12] i.e. the idea of individual justice cannot be abandoned due to the presence of an international element.

However, throughout the historical development of private international law, the position of flexibility was not as strong as that of predictability. Considerations regarding flexibility did not appear until the 1930s in the United States and until after WWII in Europe. Moreover, the actual perception of the significance of flexibility represents a struggle between the civil-law approach, i.e. the traditional continental manner of determining the applicable law, and American concepts. Indeed, there is no single prevalent doctrine in the United States; to the contrary, several different concepts have been introduced by various authors. By stating that the perception of predictability and flexibility represents a struggle between civil-law (continental) and American private international law, I do not mean minor disagreements among several academicians regarding marginal aspects of conflict-of-law rules, but rather a battle regarding the very concept of private international law settings in terms of determining the law applicable to a private-law matter involving an international element.

2 Extreme positions of predictability and flexibility

If the relationship between predictability and flexibility can be perceived through the prism of a collision between European and American approaches, how can these positions be characterised? The European approach is considered traditional and is associated with *Friedrich Carl von Savigny*. The development of conflict-of-law rules can naturally be traced further to the past, but *Savigny's* approach, which differed from the concepts prevalent to that date, later dominated continental Europe and is currently considered the basis for conflict-of-law considerations in civil law.

12 Symeonides, C. S. Material Justice and Conflicts Justice in Choice of Law. In: Borchers, P., Zekoll, J. (eds.). *International Conflict of Laws For the Third Millennium: Essays in Honor of Friedrich K. Juenger*. Leiden/Boston: Brill, Nijhoff, Transnational Publishers. 2001, p. 128.

Savigny approached various legislations as mutually equal – his concept was based on formal equality and thus also interchangeability of legal systems.[13] He therefore rejected the priority of *legis fori* vis-à-vis foreign laws[14] because this would not allow for an equal approach towards the state's own citizens and to foreigners. At the same time, he followed from the idea that the laws of each jurisdiction as well as each legal relationship were localised in space – he denoted this as the "local seat" of the legal relationship. His allocation technique adopted a neutral stance towards the contents of the laws[15] and did not perceive any hierarchical relationships among them. *Rozehnalová* refers fittingly to a horizontal conflict in this regard.[16] *Savigny's* theory has its geographical basis (is jurisdiction-oriented). It assumes that if a legal question is correctly localised in space and is thus connected to the territory of a certain state, the law used in this territory can be applied to the given question. The European concept is based on the premise that the law of an appropriate state is (automatically) an appropriate law, where this appropriateness (of both the state and the law) is approached in geographic terms.[17] And this is without regard to the contents of the law. *Pauknerová* denotes this as emotional neutrality of the conflict-of-law method.[18] The connection of a certain legal question to a certain state territory is governed by conflict-of-law rules. A legal norm is what is oriented towards ensuring conflict-of-law justice. Conflict-of-law justice is not identical with material justice, as its objective is (merely) a geographically fair, predictable connection of a certain legal question to the territory of a certain state and thus also its law. A conflict-of-law rule chooses, among laws of sovereign states, the law which is generated by the state to which the legal question is connected, where this connection is perceived purely

13 Schäfer, K. A-S. *Application of Mandatory Rules in the Private International Law of Contracts.* Frankfurt am Main: Peter Lang, 2010, p. 23.

14 Kegel, G. Fundamental Approaches. In: Kurt, L. (ed.). *International Encyclopedia of Comparative Law.* Vol. 3. Tübingen: J. C. Mohr, 1986, pp. 6–7.

15 Schäfer, K. A-S. *Application of Mandatory Rules in the Private International Law of Contracts.* Frankfurt am Main: Peter Lang, 2010, p. 23.

16 Rozehnalová, N. *Instituty českého mezinárodního práva soukromého.* Praha: Wolters Kluwer ČR, 2016, p. 166.

17 Symeonides, C. S. Exception Clauses in American Conflicts Law. *The American Journal of Comparative Law.* 1994, Vol. 42, No. 2, p. 815.

18 Ibid.

territorially in terms of its suitability – justice. The resulting solution is not *a priori* better for one or the other party to a specific dispute. This solution connects, based on a certain criterion (connecting factor), a legal question to a certain law, according to which the contents of the given legal question will be regulated in the sense of the rights and obligations of the parties involved. The conflict-of-law solution does not favour either of the parties involved in terms of substantive law – the connecting factor used is chosen and formulated in such a way that it is neutral in its result. It does not prefer any specific party to a specific legal relationship in view of the contents of the specific legal regulation. As an example, we can mention connecting factors in conflict-of-law rules such as: the law applicable to the seller's place of residence, in the case of a purchase contract; or the law applicable to the person performing a certain act, as regards the capacity to engage in legal conduct; or the law applicable to the place of unlawful conduct, in the case of constructive obligations.

However, according to *Symeonides*, such an approach results in the fact that private international law does not (and does not even want to, cannot) try and achieve the good and justice in an individual case.[19] In another work of his, he makes the same considerations as he explains the difference between conflict-of-law justice and material justice,[20] where private international law and the solution it provides are not about a good or a bad result.[21] *Kučera* also considered the conflict-of-law approach, in its traditional *Savigny's* concept, to be a manner of maintaining legal certainty. *Kučera's* concept is a pure example of the European approach. In his understanding, the conflict-of-law method does not discriminate among various laws and considers them equal. Conflict-of-law rules are employed to make a choice between the relevant laws, as they aim at determining fairly the applicable

19 Symeonides, C. S. Material Justice and Conflicts Justice in Choice of Law. In: Borchers, P., Zekoll, J. (eds.). *International Conflict of Laws For the Third Millennium: Essays in Honor of Friedrich K. Juenger*. Leiden/Boston: Brill, Nijhoff, Transnational Publishers. 2001, pp. 126–127.

20 Similarly, Kegel distinguishes between justice in substantive law, that is material justice, and justice in private international law, that is conflicts justice. See Kegel, G. Fundamental Approaches. In: Kurt, L. (ed.). *International Encyclopedia of Comparative Law*. Vol. 3. Tübingen: J. C. Mohr, 1986, p. 15.

21 Symeonides, C. S. Result-Selectivism in Private International Law. *Roman Private International Law & Comparative Private Law Review*. 2008, p. 2.

law based this conflict-of-law approach, since they cannot cover various perceptions of substantive justice in individual jurisdictions. *Kučera* also does not ask the question of whether or not conflict-of-law rules should show interest in substantive justice. He curtly states that this is not possible in view of the nature of the matter. Therefore, conflict-of-law rules are not interested in the contents of the applicable law.[22]

On the other hand, American approaches perceive those aspects which are considered positive by the continental doctrine of private international law as negative. While *Symeonides* acknowledges the need for predictability in the European concept, he goes on to criticise it by noting that this need renders any such system rigid. He claims, and documents this by a reference to American case-law, that no democratic system can mechanise the methods of decision-making because, should it do so, the application sphere (judges) will begin ignoring this system.[23] Only such norms are then applied which enable to avoid the rigid rules, whereby the entire system becomes unstable and solutions unpredictable.[24] By this mechanical nature, he means the aforesaid automatic connection between an appropriate state and an appropriate law.

The mechanic character of decision-making, giving up on seeking individual justice as a result of blind (regardless of contents) selection among the relevant laws, is the basic argument why several theories arose in the United States in the 1930s which have strictly distinguished themselves from the traditional European conflict-of-law method. In spite of certain differences, some of which will be mentioned in the text below, some identical elements can be identified in this respect. These include limited scope, realism and academic character.[25] They are limited in the sense that while European private international law deals with international conflicts, American law focused more at the time on addressing conflicts among states

22 Kučera, Z., Pauknerová, M., Růžička, K. et al. *Mezinárodní právo soukromé.* Plzeň-Brno: Aleš Čeněk-Doplněk, 2015, p. 23 et seq.

23 Symeonides, C. S. Rome II and Tort Conflicts: A Missed Opportunity. *The American Journal of Comparative Law.* 2008, Vol. 56, No. 1, p. 180.

24 Symeonides, C. S. Exception Clauses in American Conflicts Law. *The American Journal of Comparative Law.* 1994, Vol. 42, No. 2, p. 815.

25 Kegel, G. Fundamental Approaches. In: Kurt, L. (ed.). *International Encyclopedia of Comparative Law.* Vol. 3. Tübingen: J. C. Mohr, 1986, pp. 29–72.

within a single federation.[26] International conflicts were much less frequent and, moreover, the interest in resolving them gradually disappeared in view of the problems associated with the interstate conflicts. This is why constitutional law played a more important role compared to Europe and the differences between the laws of the individual states of the federation were relatively minor. The obsolescence of legislation in certain states could thus be more reflected both in the requirement for application of the law which is better and provides a better (more modern) solution to the given problem, and in the willingness to experiment with the creation of new rules.

Realism[27] is a manifestation of the belief that law should be sought in real life and existing legal relationships, rather than abstractly in professional books. This phenomenon was reflected not only in private international law, but was also typical of the contemporary approach to the law as such.[28] It is characterised by interconnection of law with economics and social sciences and by an attempt to reveal rational reasons for judicial procedures. This results in an inclination towards *ad hoc* solutions to individual cases based on consideration of the interests concerned.

The academic nature merely complements the above. The individual approaches are formulated by theorists active in the academia. As *Kegel* fittingly notes, the approaches were developed in lecture rooms and not in court halls.[29] This is why, in his opinion, these approaches, on the one hand, almost recklessly rely on time-consuming processes of examination and comparison of the relevant laws, and on the other hand, place small emphasis (unlike European approaches) on legal certainty and predictability.

Moreover, all American innovators mostly neglected the general part of private international law with concepts such as qualification and *renvoi*, as they perceived them as instruments of courts to manipulate decision-making. They share a common strong interest in interpretation of substantive norms.

26 Vischer, F. General Course on Private International Law. In: *Recueil des cours 1992*. Vol. 232. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993, p. 49.

27 In more detail see Vischer, F. General Course on Private International Law. In: *Recueil des cours 1992*. Vol. 232. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993, pp. 45–48.

28 Kučera also speaks about "realists", see Kučera, Z., Pauknerová, M., Růžička, K. et al. *Mezinárodní právo soukromé*. Plzeň-Brno: Aleš Čeněk-Doplněk, 2015, p. 86.

29 Kegel, G. Fundamental Approaches. In: Kurt, L. (ed.). *International Encyclopedia of Comparative Law*. Vol. 3. Tübingen: J. C. Mohr, 1986, p. 65.

They believe that, by means of interpretation as such, or in combination with evaluation of further circumstances, it is possible to find an answer to the question of whether the given norm requires its application to certain facts. They sought an answer to the question of the scope of a legal norm through interpretation regardless of whether or not the facts of the case involved an international element. If a "norm" wants to be applied, this is also true in relationships with an international element. They infer from the above that if resolution of relationships with an international element in the sense of a choice of the relevant substantive norms depends on interpretation of those substantive norms, the choice can only be made *ad hoc*, exceptionally in conjunction with a narrowly profiled conflict-of-law rule, but not with a broadly formulated conflict-of-law rule, which covers extensive categories of substantive norms. Rejection of both generally constructed conflict-of-law rules and[30] the general part of private international law influences the entire character of the process of determining the applicable law. From this, they infer, in combination with *ad hoc* interpretation, that the result cannot be predicted in advance due to the absence of general mechanisms. It is only possible to set the boundaries for the process of seeking the applicable law – it is not feasible to use an exact map, but only to provide certain guidance that is to be followed.

Individual approaches were formulated by *Currie, Ehrenzweig, Cavers, Leflar, von Mehren* and *Trautman* and, last but not least, by *Weintraub*. The order used in the above list also reflects the intensity with which the relevant authors distinguished their approach from the neutral conflict-of-law approach, where *Currie* represented the most significant deviation; on the other hand, *Weintraub* and his ideas might be considered least distant from the traditional European concept.[31] Only some of the relevant authors have been chosen to illustrate the basic differences between the European approach and American concepts.

30 However, Ehrenzweig refused to be considered as the creators of the chaos caused by the vague evaluation of various interests, while rejecting certain and historically well-established conflict-of-law rules by the vague evaluation of various interests – viz Ehrenzweig, A. A. A Counter: Revolution in Conflicts Law? From Beale to Cavers. *Harvard Law Review*. 1966, Vol. 80, No. 2, p. 380.

31 Kegel, G. Fundamental Approaches. In: Kurt, L. (ed.). *International Encyclopedia of Comparative Law*. Vol. 3. Tübingen: J. C. Mohr, 1986, p. 58.

Currie, who is denoted as a revolutionary by *Symeonides,*[32] stated that the problem did not lie in bad rules, but rather in the existence of legal norms as such.[33] His approach is based on an analysis of the state's interests in application of its norms (government interest analysis),[34] where interpretation of the individual substantive rules is used to identify, within these rules, the interests of the state that issued the given norm in terms of when and how intensively the state insists on the application of the rule. Including the interest of the state in resolving a private-law relationship with an international element – indeed, he refused to distinguish between national and cross-border relationships.[35] A shortcoming of *Currie's* teaching lies in the fact that he does not distinguish between private and public law, or rather focuses only on interests of the state,[36] while neglecting individual interests[37] – as if everything that takes place within a certain state was conditional on the state's interest. Therefore, when dealing with a private-law issue with an international element, he does not perceive justice as a matter of individuals and, along with that, of society as a whole, or justice in the sense of correctly functioning legislation, but rather as an expression of the state's interest in application of general, broad groups of substantive norms. Given that only the state can express an interest, the need for application of a substantive rule can be assessed separately without the need to apply a conflict-of-law rule. He believes that the state's interest has to be attributed to substantive rules and, by examining the structure of a given norm and

32 Symeonides, C. S. Exception Clauses in American Conflicts Law. *The American Journal of Comparative Law*. 1994, Vol. 42, No. 2, p. 816.

33 Currie, B. Selected Essays on the Conflict of Laws. Chapter Four [online]. *Notes on Methods and Objectives in the Conflict of Laws*. Published in 1963, pp. 180–183 [cit. 7. 12. 2019]. https://heinonline.org/HOL/Page?public=true&handle=hein.beal/secl0001&div=8&start_page=177&collection=beal&set_as_cursor=2&men_tab=srchresults

34 He considers this to be a crucial factor in the choice of applicable law – viz Leflar, A. R. Conflicts Law: More on Choice-Influencing Considerations. *California Law Review*. 1966, Vol. 54, No. 4, p. 1585.

35 Symeonides, C. S. *The American Choice-of-Law Revolution: Past, Present and Future Account*. Leiden: Martinus Nijhoff Publishers, 2006, p. 14.

36 Similarly Kegel, G. Fundamental Approaches. In: Kurt, L. (ed.). *International Encyclopedia of Comparative Law*. Vol. 3. Tübingen: J. C. Mohr, 1986, p. 31 or Vischer, F. General Course on Private International Law. In: *Recueil des cours 1992*. Vol. 232. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993, p. 55.

37 Symeonides, C. S. *The American Choice-of-Law Revolution: Past, Present and Future Account*. Leiden: Martinus Nijhoff Publishers, 2006, p. 1852.

by interpreting it,[38] it then has to be identified whether the state has any interest in application of the given norm to a private-law issue with an international element, and if so, what that interest is.[39]

Leflar set five criteria for the choice of applicable law. He believes that these should be realistic reasons why the judge proceeds – chooses a law – in the way he/she does, or help the judge to modify his/her procedure. The individual criteria should be balanced, but he admits that some of them may prevail in certain situations. These criteria include predictability of the result, compliance with the interstate and international order, simplicity of the court procedure, promotion of the interests of the forum and selection of the "better law". Just like other authors, *Leflar* considers that a judge does not have the right to choose blindly. *Symeonides* considers *Leflar* to be one of the first American advocates of the concept of material justice.[40] As a matter of fact, *Leflar* claimed that judges do not choose the law blindly anyway, although they will not explicitly admit this.[41] Even though the choice of applicable law by the court might appear as a choice between legal systems (European view), according to *Leflar*, judges in fact make a choice among individual substantive norms. A drawback of *Leflar's* concept of better law lies in the fact that he does not explain how to determine the laws among which the better one should be chosen. He provides no guidance as to how to determine the laws that will subsequently be compared.

The considerations of *von Mehren* and *Trauman* are perhaps the closest to the European concept. The first step in their approach designated as functional (functional analysis) is identification the relevant laws.[42] These are both actually and potentially affected laws, which manifest a connection to the relevant facts through persons, place of conduct, arrangement of private legal matters or arrangement of community issues. The next step is to determine how each of the relevant jurisdictions would deal with the given question,

38 Juenger, K. F. General Course on Private International Law (1983). In: *Recueil des cours 1985*. Vol. 193. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1986, p. 215.

39 Symeonides, C. S. *The American Choice-of-Law Revolution: Past, Present and Future Account*. Leiden: Martinus Nijhoff Publishers, 2006, p. 15.

40 Ibid., p. 25.

41 Kegel, G. Fundamental Approaches. In: Kurt, L. (ed.). *International Encyclopedia of Comparative Law*. Vol. 3. Tübingen: J. C. Mohr, 1986, p. 47.

42 Ibid., p. 50.

i.e. whether through its own law, a foreign law or norms of its law which, however, have been specially created for relationships with an international element. If the legal solutions offered differ (there is a true conflict), the "predominantly affected" norm can most often be applied. Such a norm is a norm of the state that exercises ultimate, effective control over the legal question to be resolved[43] – there again is an apparent marked connection between the substantive and procedural solutions.

The option of respecting the individual aspects of a specific case can undoubtedly be perceived as an advantage common to the American approaches. However, this leads to the above-mentioned choice of applicable law without any fixed rules, i.e. *ad hoc* decision-making. Decision-making thus becomes unpredictable and the parties to the legal relationship lose legal certainty. All approaches significantly increase the influence of courts, which, in real life, tend to apply *legis fori*. The situation in the United States is fittingly described by *de Boer*. He considers the above-mentioned approaches to be a criticism of blind determination of applicable law. According to him, this was reflected in the following decades of experiments, which resulted in a confusing mix of traditional conflict-of-law rules combined with lines of thought aimed to determine the applicable law.[44]

3 Relationship between predictability and flexibility

It follows from the above that a legal norm that provides for a predictable solution is rigid at least to a certain extent and does not allow for considering all the aspects of potentially existing legal relationships. In contrast, an approach that is highly flexible and allows for such considerations does not ensure sufficient predictability and legal certainty. The relationship between the two values is thus contradictory. As a matter of fact, this was already perceived by Aristotle, according to whom any pre-defined rule, even if formulated with utmost care, diligence and wisdom, could lead, precisely because of its generality, to results that are at variance with the objectives

43 Ibid.

44 Boer, M. T. de. The Purpose of Uniform Choice-of-Law Rules. *Netherlands International Law Review*. 2009, Vol. 56, No. 3, p. 297.

to which the rule should have led.[45] A number of other authors also mention the contradictory nature of the two values.[46] However, it is also clear that an ideal state of affairs would exist if a legal norm provided sufficient legal certainty and, at the same time, was able to ensure individual justice. *René David* stated similarly that "there is and will always be in all countries, a contradiction between two requirements of justice: the law must be certain and predictable on one hand, it must be flexible and adaptable.[47]

Legal "export" from the United States to Europe also brought the debate in Europe to a state where authors ask whether conflict-of-law rules should be simple and provide a predictable solution, or whether they should also take into account the result that will be provided by the applicable law.[48] Others speak, in connection with modern European conflict-of-law rules, about emphasised flexible approach and importance attached to achieving individual justice,[49] or about an inclination towards reflecting substantive law and the results that it provides when dealing with a specific legal question.[50] Simply put – today's Europe no longer asks, with regard to flexibility, where or not this aspect is relevant, but rather to what degree and how the traditional European model should be enabled to consider the individual aspects of a specific case.

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45 Nicomachean Ethics.

46 Symeonides, C. S. Codification and Flexibility in Private International Law. In: Brown, K. K., Snyder, V. D. (eds.). *General Reports of the XVIIIth Congress of the International Academy of Comparative Law*. Dordrecht: Springer. 2011, p. 14; Hay, P. Flexibility versus Predictability and Uniformity in Choice of Law. Reflections on Current European and United States Conflicts Law. In: *Recueil des cours 1991*. Vol. 226. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1992, p. 304; Wolff, L-C. Flexible Choice-of-Law Rules: Panacea or Oxymoron? *Journal of Private International Law*. 2014, Vol. 10, No. 3, pp. 432–435.

47 David, R. English Law and French Law. In: Symeonides, C. S. Exception Clauses in American Conflicts Law. *The American Journal of Comparative Law*. 1994, Vol. 42, No. 2, p. 814.

48 Weintraub, J. R. The Choice-of-Law Rules of the European Community Regulation on the Law Applicable to Non-Contractual Obligations: Simple and Predictable, Consequences-Based, or Neither? *Texas International Law Journal*. 2008, Vol. 43, p. 402.

49 Rozehnalová, N. *Instituty českého mezinárodního práva soukromého*. Praha: Wolters Kluwer ČR, 2016, p. 27.

50 Forsyth, Ch. The Eclipse of Private International Law Principle? The Judicial Process, Interpretation and the Dominance of Legislation in the Modern Era. *Journal of Private International Law*. 2005, Vol. 1, No. 1, p. 100.

4 Balancing mechanisms

It follows from the above that approaches absolutely accentuating predictability, on the one hand, or flexibility, on the other hand, are no longer considered entirely suitable. The need for sufficient predictability and legal certainty is perceived along with the requirement for a suitable degree of flexibility to achieve individual justice. What mechanisms can be used to balance these values? It cannot be said that there exists some kind of consensus "half way" between the European and American approaches. They influence each other, while it is borne in mind that the two approaches can have their benefits and drawbacks. However, Europe has not abandoned its concept of determining the applicable law through a conflict-of-law rule. It has not resolved to push conflict-of-law rules aside and start using alternative, "soft" approaches. Therefore, the following text must also be perceived from this point of view. I still consider conflict-of-law rules a basis for choosing the applicable law. As every legal norm (if properly formulated), it specifies a rule for making a choice. And even though the existence of a legal norm itself is not a sufficient guarantee of predictability and legal certainty (see above), this is nevertheless a condition *sine qua non*. Rejection of legal norms leads to decision-making *ad hoc*, which I consider unacceptable from the viewpoint of continental private international law. It is clear at the same time, however, that an excessively general rule of conduct cannot be capable of respecting the individual aspects of all situations that may occur. This is all the more true in the case of conflict-of-law rules if the rules, or their scope, are formulated in more general terms (contract; constructive obligation; rights *in rem* to real properties and movable assets). However, there also exist certain legislative techniques that enable to avoid excessively mechanical approach and inability to respond to differences in real life, also with regard to conflict-of-law rules.

These include:

- a combination of the basic connecting factor, firmly and objectively formulated, with special connecting factors;
- accumulation of connecting factors;
- flexible connecting factors;
- escape clauses.

The first two variants have in common that they enable to take into account several aspects of the relevant facts, but still with regard to generally (more broadly) specified groups of facts. In contrast, the third and fourth variants represent an even higher degree of flexibility as they allow to take into consideration the individual aspects of the specific situation. A combination of general and special connecting factors forms the foundation of the entire Rome II Regulation, which supplements the basic connecting factor of legis loci damni infecti with special rules for product liability, unfair competition, distortion of competition, damage to the environment, infringement of intellectual property rights, industrial action, unjust enrichment, negotiorum gestio and culpa in contrahendo. It also envisages a separate rule for a defamation (this question is excluded from the substantive scope of Rome II Regulation).

Accumulation of connecting factors can take several forms. A higher degree of flexibility will be ensured by the use of alternative connecting factors or putting them in order based on the cascade rule. On the other hand, a higher degree of rigidity will be provided by accumulation of connecting factors – the British *double-actionability rule*, according to which conduct can be considered unlawful only if it can be classified as an offence under both the law of the place of such conduct and the British law, can serve as an example. Alternation of connecting factors is used in cases where a certain objective or entity is to be preferred:

- preference of validity of a legal act (Art. 11 para. 2 of Rome I Regulation; a contract is considered formally valid if it meets the conditions of at least one of the legal systems – *lex causae* of a contract, place where each of the parties was present at the time of conclusion of the contract, or the place of habitual residence of each of the parties);
- preference of a certain status, such as adoption or divorce;
- preference of the position of a certain person (Art. 7 of Rome II Regulation – The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Art. 4 para. 1, unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred).

A cascade structure of connecting factors is a situation where a certain basic conflict-of-law rule has been formulated, covering most situations or at least situations which occur most frequently. Further stages then apply to facts which are defined more narrowly, while at the same time, progress to the next stage is based on non-fulfilment of the conditions set down in the previous stage. An example can again be found in Rome II Regulation, specifically in its Art. 5, where the application of the law in individual stages is conditional on placing the given product on the market in the given country. If this condition is not met, one proceeds to the next stage of the cascade:

the law applicable to a non-contractual obligation arising out of damage caused by a product shall be:

a) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that,
b) the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that,
c) the law of the country in which the damage occurred, if the product was marketed in that country.

However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c).

A flexible connecting factor goes even further in terms of flexibility. It is not formulated in precise terms in relation to the facts to which it is connected, but rather permits considerations regarding the contents. Therefore, in its application, it enables to take account of the individual aspects of the specific facts of the case, whereby it provides a margin of discretion to the decision-making body (a contract is governed by the law whose application corresponds to a reasonable arrangement of the given relationship).

An escape clause is a mechanism ensuring the greatest degree of flexibility. This is a specific concept of private international law that allows for derogation from a general (basic, generally applicable) conflict-of-law rule, which ultimately enables the relevant court to take into account the specific characteristics of the case in view of which the application of the general conflict-of-law

rule appears to be inappropriate.[51] It represents a concept that is used in special situations which are subject to the statutory conflict-of-law rules, but the latter prove to be inappropriate in view of the specific and exceptional nature of the facts *in concreto*.[52] According to another definition, an escape clause enables the application of a conflict-of-law rule leading to a different law, instead of a conflict-of-law rule which is otherwise objectively laid down by the statutory law.[53] Potentially, it can also be perceived as an instrument modifying the result of application of a conflict-of-law rule, where in the given case, the close connection envisaged by the conflict-of-law rule exists only to a very limited extent, while there exists a much closer connection to another law.[54] Although specific deviations may exist in individual laws, application of an escape clause is subject to two conditions – a clearly weak connection of the facts to the envisaged law, and a much closer connection to another law, where the latter may be applied as a result of the escape clause. General escape clauses, which enable avoidance of all conflict-of-law rules of the given law, are comprised in Swiss, Belgian, Dutch and Czech laws (Belgian and Dutch provisions do not allow for the use of an escape clause in the case of conflict-of-law rules aimed at protecting or benefiting a certain entity); special escape clauses can be found in Rome I Regulation and Rome II Regulation.

5 What is the current state of affairs?

European conflict-of-law rules are still based on the primary requirement of predictability and legal certainty. Nonetheless, due to the influence of the American doctrine, as well as social and economic development, flexibility and the requirement for a certain degree of individualisation of decision-making have begun to be perceived as fundamental and worthy of respect in formulating

51 Pauknerová, M. Escape Clauses and Legal Certainty in Private International Law. In: Bonomi, A., Romano, G. P. (eds.). *Yearbook of Private International Law 2016/2017*. Vol. XVIII. Köln: Verlag Dr. Otto Schmidt; Lausanne: Swiss Institute of Comparative Law, 2017, p. 65.

52 Pauknerová, M. § 24. In: Pauknerová, M., Rozehnalová, N., Zavadilová, M. et al. *Zákon o mezinárodním právu soukromém. Komentář*. Praha: Wolters Kluwer ČR, 2013, p. 175.

53 Rozehnalová, N. *Instituty českého mezinárodního práva soukromého*. Praha: Wolters Kluwer ČR, 2016, p. 40.

54 Boele-Woelki, K., Van Iterson, D. The Dutch Private International Law Codification: Principles, Objectives and Opportunities. *Electronic Journal of Comparative Law*. 2010, Vol. 14.3, p. 10.

modern conflict-of-law rules. The mechanisms presented above represent the possibility of introducing individual justice into a truly mechanical manner of choosing the applicable law. However, it must be borne in mind that these are still mechanisms which are primarily based on a geographic criterion and do not simultaneously allow to reflect substantive law in a conflict-of-law choice (subject to preference of a certain status with regard to alternative connecting factors). It is therefore necessary to continue distinguishing between an objective consisting in achieving individual justice, while simultaneously insisting on conflict-of-law justice, and an objective of achieving material justice.

Material justice means reflecting the impact of the chosen substantive law on the relevant facts. Private international law is also capable of dealing with this aspect. However, other concepts of private international law serve this purpose, such as materialisation of the conflict-of-law solution or reservation of public policy, possibly while taking into account mandatory provisions. At the same time, however, a significant difference can be seen between the manner of achieving individual justice and individual material justice. While mechanisms bringing flexibility into conflict-of-law decision-making are used to achieve individual justice, material justice is attained in the opposite way. Materialisation of a conflict-of-law solution leads to limitation of conflict-of-law decision-making where a certain law either cannot be applied, or it can be applied but its application is limited by protective mechanisms originating in some other law (see, e.g., the provisions on a choice of law in consumer contracts or individual employment contracts in Rome I Regulation).

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