HccH
HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ
1893|2003

MILESTONES ON THE ROAD OF PRIVATE INTERNATIONAL LAW DEVELOPMENTS

Prof. Ferenc Mádl, University of Budapest

Delivered on the occasion of the Celebration of the 110th Anniversary of the Hague Conference on Private International Law, on 31 October 2003 in The Hague, Netherlands.

Mr President, Mr Minister of Foreign Affairs, Mr Secretary General, Excellencies, Ladies and Gentlemen:

First of all I would like to extend my sincere thanks for having been invited to this celebration; I also would like to extend my gratitude to the Secretary General, and to all of those who have organised this commemoration of the 110th anniversary of the Hague Conference, to have thought of my country, Hungary, and of a Hungarian to take the floor.
The Hungarians settled in Hungary 1100 years ago. Ever since they have participated in the construction and shaping of European legal culture and European history in general.

After forty years of communist rule, Hungary has developed a new structure of political democracy and of liberty, as well as a modern legal system based on the rule of law. Also, a great deal of efforts have been made in respect of the moral values of the European heritage, and with a view to building a social market economy in order to join the European family and become a member of the European Union. I think it was on the basis of such considerations that a Hungarian was asked to speak here today.

First, a personal word. It is a hardly deserved privilege to be invited to address this jubilee conference. I think the real consideration behind this was that Hungary has been for 1100 years part of European legal culture, and took part as from 1893 in the First Session of the Hague Conference on Private International Law. Hungary has also joined a few Hague Conventions, and should be able to stimulate more activities also by its own efforts in this family of 62 Member States, striving for – as Article 1 of the Statute claims – "the progressive unification of the rules of private international law". Having now the privilege and the duty to co-celebrate with you the 110 years, I decided to choose a way of celebration fairly commonly resorted to at such memorial events.

On this basis I thought I would visit with you those main milestones along which the road of legal thinking moved through human history when substantive or conflicts law treatment was required to regulate international relationships, cases with foreign element. This road may also shed some light, we may assume, on the present requirements concerning the Hague Conference programs.

First of all, I would stress that we all know that Roman Law – Greek and Roman political and legal genius – has been the very foundation and framework of European legal development. Both Greece and Rome had developed domestic and international commercial activities, supported by equally developed and sophisticated laws and rules in all or in most public and civil law matters. They, of course, covered also relationships and cases with foreign elements.

The question may be asked: Do we see in that distant legal world a milestone of what we are talking about? A milestone around which legal thinking generated comparative substantive or conflict of laws ideas and rules to serve the respective needs of Greek and Roman antiquity?

The answer is “yes” and “no”.

The “yes” answer is very strong. Both Greece and Rome developed and constantly improved domestic substantive law instruments and forensic practice. These laws and practice were applied also with respect to cases with a foreign element. The “ius peregrini” also was substantive Roman law. These propositions are well evidenced by the works of, e.g., Aristotle and Plato, and the vast body of laws and regulations represented by the Roman Corpus Iuris Civilis. As to the substantive law structures, the mutual learning and influencing process – as a result, the harmonizing effect – was very strong.

At the time of setting up the Twelve Tables, the Roman people – as D. 1. 2. 2. 4. of the Digests recall - realised that their law was working with vague ideas and that there was a need for clear legislation. So, to put an end to this state of affairs, it was decided that there be appointed a commission of ten men by whom were to be studied the laws of the Greek city states and by whom their own city was to be endowed with laws. It was from this exercise that the laws of the Twelve Tables got their name.

Many other things have had long lasting influence from Greek legal culture on Roman law development. Lex Rhodia is a well-known example. The notions of Aequitas, Ius Gentium and Ius Naturale were also part of such transplantation processes. The most far-reaching Greek, and later Christian impact on Roman Law, were the principles-based and system building approach as against the case law method of the classical Roman Law. This resulted, as Ihering, the famous German lawyer, pointed out in the big Iustinian codification efforts, and the Corpus Iuris Civilis.

The Corpus Iuris Civilis gave Roman Law the chance to survive first as text-book and then as an identifiable real legal instrument for general civil law practice, a sort of lex mercatoria, practically all over Europe, either by formal reception or by informal penetration into the national legal systems.

The “no” answer is also fairly strong. At the time of the first big milestone mentioned, a conflicts law structure did not evolve. Substantive law took care of the need for harmony when it came the treatment of cases involving foreign elements. This approach prevailed also in the regional or national laws of the later Middle Age centuries; e.g. in the Leges Barbarorum of the middle of the first millennium or in the Laws of the Hungarian kings at the beginning of the second millennium.

There are very rare exceptions to this. For example, Professor Vrellis of Greece reported a case, called Aegineticus, in which the author (Isocrates, 436 – 338 B. C.) observed a conflict between three legal sysems, and speculated about the choice which of them should rationally apply. Many are of the view that this, together with one or two other sporadic cases, remained isolated conflicts law phenomena throughout the whole of antiquity.

The next milestone on the road of how legal thinking might react to legal relationships with a foreign element, was to be met in the 13th century A.D. Legal history claims that at this intersection a big change occured: Accursius (1185 – 1263) in his Glossa Ordinaria added glossas to the Codex Iustinianus, viz. to the introductory lines “Cunctos populos” (C. 1. 1. 1.). In these he submitted the proposition that the litigants’ legal disputes with a foreign element should be resolved most reasonably according to their own respective legal system. He assumed the equivalence of the legal systems and responded to the conflict brought about by the international trade and personal relations, with conflict of laws technics.

Many say that this was a real “big bang” in the process of European legal thinking. Other glossators followed by the statutists developed this approach into generalized notions, theories and comprehensive conflicts law systems. This soon found general acceptance and extension through legal writing, legislation and legal practice in most countries. Later on this way of thinking, regulation and practice has been working fairly generally for centuries: national and regional substantive laws – more or less based on Roman Law – were applied both the internal and international relationship; To the extent that a conflict arose as to which substantive national law should apply, the conflicts law of the respective forum country was expected to provide the solution.

The next new phenomenon in the morphology of legal thinking and regulation, which affected also international legal relationships, was the emergence of comparative law. While the cementing force of Roman Law started to subside, nation states and national codification and codes became predominant.

After the weakening of Roman Law which had fostered unity, disintegration occurred with national laws and regulations becoming the rule. At this point – around a new milestone on the road of legal development – the interests of international trade, transport, capital and money transactions, among others, gave rise to a new approach: namely to optimise the relevant national laws by learning from the laws of other countries, i.e. by comparative law. Of course a harmonizing effect went hand in hand with these efforts. The Twelve Tables effect, referred to above, came to the fore.

As is well-known, comparative law became a very instrumental and intensively developed discipline from the middle of the 19th century on (as an example, the French Société de Législation Compareé was founded 1869 with the epigraph lex multiplex – ius unum) to the world-wide undertaking of the International Encyclopedia of Comparative Law of the recent decades.

The next milestone is very close to that just described. They really merge into each other. Comparative law searches for and identifies the common elements and values of the different legal systems and serves thereby directly or indirectly the unification of law.

Soon after efforts at unification emerged around the end of the 19th century (the Bern Union Convention of 1886 on copy-right protection became a very important first initiative), they soon expanded to many substantive law areas, and this has been going on ever since. The wide range of international substantive law unification treaties and arrangements is evidence of this development. The substantive law unification arrangements include also non-legislative instruments (like the 1990, 2000 INCOTERMS or the 1994 UNIDROIT Principles of International Commercial Contracts).

This new milestone marked also the beginning of the unification developments in the sphere of private international law and related areas.

They complemented the general harmonization and unification efforts concerning issues where international relationships called for more thoroughly harmonized treatment.

The great beginning, and still the most outstanding initiative to this end, was the birth of the child of our private international law family: the First Session in 1893 of the Hague Conference. Others – like the Latin-American Bustamante Code (1928), the EU Convention of 1980 on the Law Applicable to Contractual Obligations –followed later.

Before addressing a few words of appreciation for the Hague Conference’s accomplishments, I think I should briefly point to the last of the milestones constituting the main forms of legal thinking concerning the treatment of international legal relationships in private and commercial law spheres.

This particular new phenomenon became expressed by the forms and body of laws of – as it is referred to – the European Community Private Law, the “Gemeinschaftsprivatrecht” as the German wording goes. This, as we know, is an increasingly expanding instrumentality of the EU integration process.

EU directives, regulations, conventions – like the just mentioned Conflicts Law Treaty on Contracts, the EU Contract Law Principles, or the initiatives to develop a European Civil Code, are part of this development.

I thought it appropriate to submit an address to the Hague Conference jubilee pointing out its achievements which reflect the highest qualities of human legal thinking. Now at the end of my presentation I would limit myself to a few statements only. Given the fact of the 62 Member States and the 35 conventions – with all the scholarly, theoretical and lawmaking efforts and achievements behind these, with the vast amount of knowledge also of the present audience – I must be modest in saying a few concluding words.

The 35 conventions cover many classical conflicts law fields. They also cover areas of civil procedure as well as jurisdiction, substantive civil and family law matters. Nevertheless I agree with those who claim that there are still areas which should come under the Hague Conference legislation; for example electronic commerce, recovery of maintenance claims, civil liability for environmental damage, unfair competition, etc. More efficiency is expected in the ratification and actual operation of the conventions. More ratifications and accessions would contribute substantially to the values of uniform law for all. To this end, special conferences and other means, for example database services will be instrumental.

Apart from other countries with a less active record of ratification, quite a few European nations with EU aspirations should catch up with the Hague Conference unification family, although a few have been active already. Let me conclude with an example in the hope that it will be promising. Hungary – although founding Member State of the Hague Conference – adheres to only 4 conventions.

Nevertheless there is a described program along which substantial growth can be made (see Ferenc Mádl: Ius Commune Europaea – Lex mercatoria. “Unification of Law, the Hague Conventions and Hungary”; in “Mélanges ou l’honneur d’ Alfred E. von Overbeck” Fribourg 1990 p. 287 – 319). I anticipate that this may happen.