Look back before you leap?  
- Fatefull tendencies of materialization and of parallelism in modern private international law theory

Michael G Martinek *

1 The old school

The warning “look back before you leap” alludes, of course, to the famous phrase about the private international lawyer’s “leap into the dark”. This phrase had been coined by Leo Raape¹ and was designed to describe the classical, traditional conflicts lawyer’s calamity, when he or she has meticulously determined the applicable law for a certain case or factual pattern and considers the job hereby done according to the rules of the game – however, instead of leaving the scene triumphantly, he or she is sometimes exposed to an embarrassing dissatisfaction and confronted with displeasing questions: “What have I done, after all? – How does the applicable substantive law finally decide upon the case? - What will the outcome of the case eventually be for the parties involved? – Have I not leapt into the dark? - Have I not opened an abysmal precipice?” It was the great Italian

* Professor Dr.iur. Dr.reg.publ. Dr.h.c.(Wuhan) Michael Martinek, M.C.J. (New York), holds the Chair of Civil Law, Commercial Law, International Private Law and Comparative Law at the University of Saarland, Saarbruecken (Germany), where he is also the director of the Institute of European Law. Professor Martinek is a frequent visiting research fellow to South Africa and Honorary Professor of Law at University of Johannesburg since 2006. This contribution is based on a paper he has presented upon invitation to the Faculty of Law of UNISA, Pretoria, on March 29, 2006. The author is much obliged particularly to his colleagues Eesa Fredericks, Jan Neels, Joopie Pretorius, Christa Roodt, Engela Schlemmer and Christian Schulze.

private international lawyer *Rudolfo De Nova*, who articulated, in the mid sixties\(^2\), the warning or motto "look before you leap", to encourage his Continental-European colleagues to more willingness and preparedness to allow substantive legal considerations to influence the decision regarding the applicable law. He meant, of course: look forward, not: look back.

To fully comprehend the “horror of darkness” which the conflicts lawyers of the old school have to face it might be useful to recapitulate the most important theoretical notions and doctrinal categories of classical conflicts law. Private international law embodies the rules which determine when the private law of the *forum*, i.e. the *lex fori*, respectively which foreign private law, i.e. the substantive private law of another legal system, is applicable; the actual substantive content of the law to be applied is neither discussed nor considered. According to the classical doctrinal thought of Continental-European countries in the wake of *Joseph Story* and *Friedrich Carl von Savigny* “the matter rests there” – as *Gerhard Kegel* expressed it in his introduction to private international law in the International Encyclopedia of Comparative Law.\(^3\)

The consequences of the “matter resting there” are manifold and reveal the ambiguities and deficiencies of the old school. Already the very name “private international law” can be questioned and even ridiculed – and that is what many students encounter in the first hour of our university courses in private international law (PIL). A somewhat polemic start is the professor’s question, if PIL is *law* at all – and not sheer politics being mainly based on unconcealed policy considerations. Of more serious concern is the by far not fully consented issue, whether PIL is actually *private* law or not perhaps public law by its very nature, since it is at first sight beyond the scope of private law - defined as the rules regulating the relationships between equal citizens or enterprises, respectively between private natural or juridical persons - to deal with the subjection of cases and persons to a particular national (domestic or foreign) law. It seems to be more a matter of public law,

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defined as the rules regulating the relationship between the individual and the state, to
determine the applicable local or foreign private law.

The response of the old school is, however, that PIL were indeed private law in that it
serves to do justice between individuals. Following the classical approach, not only the
substantive private law serves to do justice between equal citizens or enterprizes as private
natural oder juridical persons, but also PIL which determines the application of the
appropriate, the “right” and “just” substantive private law for the sake of private
individuals and their interests – in the words of Ulpian: “ad utilitatem singulorum”.

Even if one agrees with PIL being private law by its very nature, procedural
international law, dealing with jurisdiction as well as with recognition and enforcement of
judgements, albeit in private law matters, certainly is not; it concerns, like all procedural
law, the relationship between individuals and the state. The old school of classical conflicts
law treats international procedural law as something strictly different from PIL: “Conflits
de lois” on the one hand, “conflits de juridictions” on the other hand for the French
juristes de droit international privé, “Internationales Privatrecht” and “Internationales
Prozessrecht” in German speaking countries are sharply separated by a borderline. Unlike
common law jurisdictions, civil law countries, in their systematization of private
international law, do not include, traditionally, international procedural issues in matters of
private law into their subject, neither questions of determining the capable forum, which
have to be answered by the rules of jurisdiction, nor issues of recognition and enforcement
of foreign judgements, which belong to the domain of general civil procedure law.

It is also widely consented that private international law is not international law in a
material sense, apart from the conflicts rules stemming from multilateral conventions,
bilateral treaties or supranational regulations, e.g. those issued by the European Union
legislative bodies. Apart from directly applicable, self-executing conflicts rules of
international origin, PIL is national law: only its object is international, not its source -
which is perfectly domestic and national. An international dimension comes into play,
however, since PIL pursues the ideal of international decision harmony, i.e. a conformity
of judgements in conflict cases independent of the forum state. In this spirit many of the
unilateral conflict rules of a country’s PIL, shaped to determine and declare the
applicability of its substantive law in cases of foreign elements, were extended, by
doctrinal and judicial promotion, to universal conflict rules which could also declare a
foreign law applicable. This development illustrates that the old Savignyan school’s
*national* approach is internationally orientated as well in that it strives for an equal, evenly
matched, undiscriminatory application of foreign law and allows for the development of a
system which is, at least theoretically, internationally consistent and based on the equality
of all legal orders. Let me recall the resolution of Siena of the Institute of International
Law (Institut de Droit International) which had, in 1952, promulgated the following
general maxime:

> “The provisions of PIL should apply general criteria which are capable of an
internationalisation in that they could be embodied in international conventions to
prevent different solutions of a particular case in different countries.”

The most important corollary of the old school’s view in our context (in the look-back-
before-you-leap-context) is that PIL, in determining only which country’s (national) law is
to apply in a certain “international” case, is not *substantive* or not *material* law. PIL does
not decide a case on the merits, but is confined to the determination and declaration which
national private law is to govern a case and hereby contains the substantive rules for the
decision. In theory, the (national) PIL does not care about the material outcome of the
decision, but leaves the scene before the outcome has been formulated according to the
rules of the legal system decreed by the PIL. That is what has been referred to by the
phrase about the “leap into to dark”. The classical private international lawyer “leaps into
the dark” in that he or she accepts the substantive outcome of a decision independently
from its content and notwithstanding a content more or less inconform with the content of
his or her own private law or of any other hypothetical national private laws which he or
she found eventually inapplicable. PIL is administering justice by selecting “justly” the
applicable law. Justice of PIL means justice of the selection process and of the selection
decision and has nothing to do with a possibly and hopefully just content of the concrete
substantive decision of the case by the selected law. One may say “justice according to
private international law prevails over justice according to substantive law”.

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Of course, PIL appears hereby as a kind of a meta- or preceding law, as a “super-law”, positioned on a higher platform, from where it looks down to all the substantive laws floating around down there in the different nations. Private international law is in so far a “law above all laws” in that it decides upon the application of domestic or foreign private law. Private international law is, in essence, only “referring law” (Verweisungsrecht), not “deciding law” (Entscheidungsrecht)\(^5\) - it lacks the capability to finally resolve disputes.

### 2 Intrusions of substantive law into conflicts law

#### 2.1 Foreign and domestic substantive law

Well, the old school of traditional conflicts law has lost territory in the course of the previous decades and was compelled to compromise in many respects. Notwithstanding the sharp theoretical distinction being upheld between PIL rules and substantive law rules, more and more intrusions of substantive law into conflicts law had to be noticed. This is, what Rudolf Do Nova with his phrase “look before you leap” referred to.

Let us inspect the many loopholes for these intrusions each of which has been expanded more and more in most countries’ conflicts laws over the years.\(^6\) We are talking here - and this is noteworthy beforehand - first and foremost about the intrusion of a particular country’s substantive law into the same country’s PIL. We are not talking here about the generally taking into account of different substantive laws of different countries in the context of characterization, qualification, adjustment, approximation or premininary question. Comparative considerations with regard to the different substantive laws concerned in the choice of law process come of course frequently into play, since comparative law is today an indispensable working tool for the private international lawyer. After all, an appropriate comprehension and classification of both foreign legal institutions and the notions of a foreign legal system can hardly be achieved in the absence

\(^5\) See Dölle, Gegenwärtige Aufgaben der deutschen Wissenschaft vom IPR, in: Gegenwartswissenschaft des IPR (5th supplement to Deutsche Richterzeitung), 1948, p. 3.

of a reliable knowledge of foreign law and comparative legal methods. In so far an “intrusion” of substantive law into PIL is as legitimate as it is welcome and, indeed, indispensable – our concern here, however, is by far more serious: the intrusion of a particular country’s substantive law into its own PIL, thus effecting a more or less insidious materialization or substantivation of its PIL and leading to a growing parallelism between a country’s substantive and private international law. This is the crucial and questionable point which explains our heading: Look back – to your own substantive law - before you leap?

2. 2 The ordre public-“reservation”

As you have of course expected, the ordre public reservation must be mentioned here at the first place. The ordre public or public policy reservation can - in its negative content - repulse and avoid the application of foreign law violating a country’s public policy, or - in its positive content - force the application of particularly important domestic law which is considered indispensible for a country’s identity.⁷ Admittedly, the positive effect of ordre public, according to which it can serve as a bridgehead for the direct influence of domestic substantive law into PIL, is highly disputed. By contrast, the negative effect of ordre public is fully acknowledged and alway has been, even among the most orthodox supporters of the old Savignyan school. Ordre public is in so far a device to exclude foreign law which is totally unacceptable and unbearable. Hereby PIL makes an exception from its conflict rules for the sake of the value judgements of its substantive legal order. The jurisdiction-selecting rules are being set aside in favour of the applicable domestic substantive law. This materializes where fundamental differences between legal orders exist like in the field of family law, e.g. with regard to the obligation to pay maintenance to illegitimate or extra-marital children, where some countries erect enormous impediments for the determination

of the paternity and others do not. The invocation of the ordre public reservation here has become a militant means in the “clash of civilizations” (Huntington).  

Apart from the general ordre public reservation the so-called special ordre public clauses in the different PIL systems aim as well at an absolute effect of the domestic substantial law. When, e.g., for a marriage concluded in a particular country only the domestic form of the civil marriage is permitted - hereby deviating from the generally admitted choices between the form of the lex causae and the form of the lex loci -, then also foreigners concluding a marriage in this country shall be subjected to the domestic substantive law linked to its obligatory civil marriage.

As long as the invocation of the ordre public clause is confined to rare exceptions, the old school’s doctrinal basis remains unquestioned. The public policy reservation serves only as a means to prevent “the worst” and to mitigate the deficiencies of the “leap into the dark” and to calm down the uneasiness of the private international lawyers. As soon as the invocation of ordre public becomes unfettered, it opens the gate for tsunami-like devastations to PIL.

2.3 The constitutional prerequisites

For the old school the effect of a country’s fundamental constitutional rights upon its rules of PIL was non-existent. For the traditional approach regarding PIL as jurisdiction-selecting rules without a material content the choice of connecting factors was treated as primarily a technical matter.  The public policy reservation was the only exception and


allowed for constitutional deliberations only under exceptional circumstances. Today, the public policy reservation does not need to be activated in order to push through the value judgements of a country’s constitutional order. Being the “supreme law of the land”, the constitution gains prevalence *eo ipso* over all national law including the country’s conflict rules and is supreme also to a country’s private international law: conflict rules and their application have to be in accordance with the constitution. Not only the application of *foreign* law has to be in accordance with the human rights and fundamental freedoms of the constitution, but also the conflict rules of the *lex fori*. In fact, the awareness is omnipresent today that a national PIL requires a constitutional foundation in the sense that it must not only be free of any contradictions to, but in full conformity with this country’s constitution.

In many European countries this became pertinent in the sphere of international family law, where increasingly considerations of substantive law entered into the discussion.
The constitutional provisions contained in the charter of human rights and fundamental freedoms, like equality of gender and protection of family, or freedom to conclude a marriage, demanded adherence in the field of PIL and prevented, in particular, paternalistic, sexually biased conflict rules and even, in some countries, lead to the annulation of certain statutory provisions. In most modern PIL codifications at least in the post-industrial civilisations of the Western hemisphere the conflict rules relating to international family law are today in full accordance with the pertinent constitutional provisions on non-discrimination and gender equality. It must no be overlooked that these developments favoured manifest and manifold tendencies towards the integration of value considerations into PIL. It is no longer the determination of the geographically better law alone that governs PIL unreservedly and independently from substantive value judgements. This development toward a constitutional undercoat for the conflict of laws rules led to it being said that: “private international law has lost its innocence.”

2.4 The rules of direct application

2.4.1 General idea and background

A broad avenue for the intrusion of substantive law into conflicts law are the lois d’application immédiate, the rules of immediate or direct application which supplement the body of ordinary conflicts law rules. I am talking here about the mandatory intervention norms of civil law.

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Modern PIL has globally experienced the emergence and growing significance of an independent field of conflict of laws which follows its own rules, namely the area of international economic law in the sense of regulating law pertaining to both public and private law.\(^{15}\) Here the doctrine of *lois d’application immédiate* governs. In fact, for many years we had been observing a “splitting” or a “duality” in private international law: On the one hand there was the traditional, “purely” private field of law (like family law or the law of succession) and on the other hand we respected the fields of economic regulation through private law (*e.g.* the law of competition in the sense of unfair trade practices, or the law of concurrence in the sense of antitrust law for cartels and for vertical restrictions to trade), the latter forming a “second pillar”\(^{16}\) of conflict of laws.\(^{17}\)

The problem as such had already been discerned by *Savigny* who recognized an inevitable sphere of exceptions, which he described as „law of strictly positive, imperative nature“ ("von streng positivver, zwingender Natur").\(^{18}\) According to *Savigny* the general conflict rules should not be applied with respect to statutes „which bear a political, police-related or economic character“ ("die einen politischen, einen polizeilichen oder einen volkswirtschaftlichen Charakter an sich tragen"). These „mandatory intervention norms“\(^{19}\) are being employed by the state to regulate private relationships in the public common interest pursuing socio-economic tasks, hereby restricting the individual freedom of private persons.\(^{20}\) Clearly, these intervention norms have to be applied in any event, when


\(^{16}\) *Cf.* *Martinek*, Das internationale Kartellprivatrecht, 1987, p. 59.


\(^{19}\) *Karl Neumeyer*, Internationales Verwaltungsrecht Vol. 1, 1936, p. 228 and 243; *Neuhaus*, Die Grundbegriffe des Internationalen Privatrechts, 1st ed. 1962, p. 58 and 2nd ed. 1976, p. 33 (§ 4 II), who, in contrast to *Neumeyer*, emphasises that the concept of „Eingriffsnormen“ (intervention norms) is not confined to the field of public administrative law.

they belong to the national legal order which forms the *lex causae* for the private legal relationship in question. In case of intervention norms of the *forum state* the application can be justified - at least in “urgent” cases - by (“positive”) *ordre public*. The crucial point is reached, however, where an intervention norm of a *third state* demands application while this third state is neither the *forum state* nor the *lex causae state*.

The idea of a law of immediate application as such was never totally foreign to the private international law. This can easily be exemplified by the treatment of nationality of the form of legal transactions (*locus regit formam*). However, it has gained a new feature, namely the importance of the law of immediate application for the ever widening field of socio-economically regulating law intervening in private relationships. These intervention norms were first identified with regard to the law of foreign currencies\(^\text{21}\) and thereafter with regard to the law of cartels and restrictive trade practices. A prerequisite for the “immediate application” is, of course, that the norm itself demands application independently of the applicable substantive law and that the intervening state has a respectable interest in the application. This approach can lead to the division of the same contractual relationship into two sections, one for the purely private matters and the other for the socio-economic functions of the contract. The recognition of intervention norms was originally restricted to those of the *forum state*, but in time it was increasingly extended to those of third states, albeit hesitantly and not unanimously. The *lois*

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"d'application immédiate"\textsuperscript{22}, norms which demand for a direct and extraterritorial application independently of the customary conflict rules, belong to the substantive law and are supposed to expressly or impliedly contain a unilateral conflict rule. The Rome Convention of June 19, 1980 between the European member states regarding the harmonization of the applicable law for contractual obligations provides in art. 7 sec. 1 for the possibility of giving effect “to the mandatory rules of the law of another country”, hereby providing for the application of the intervention norms of the forum state, the \textit{lex causae} state as well as those of a third state.

\subsection*{2.4.2 Expanding areas of \textit{lois d’application immédiate}}

The area of „mixed“ private-public law with „social“ or „economic“ norms which serve both public and private interests, does not force a departure from the modern private international law with its flexible conflict rules, as long as the interventionist character of the norms in question do not prevail. There are many parts of private law, particularly the family law and the law of succession, which are relatively free from public political interference and which belong to a field of law unsuspected to being influenced by socio-economic deliberations.\textsuperscript{23} It can be noticed, however, that the field of classical PIL is shrinking, whereas the area of \textit{lois d’application immédiate} is expanding. After all, the seemingly “pure” realms of private law like family law or the law of succession are also influenced, if not governed, by public policy considerations: making divorces more difficult or more easy has a direct impact on the economically important number and size of private households and on the job market of a country; the distribution of a wealthy estate among fewer or more heirs of a deceased rich entrepreneur influences the number and the strenght of players in the market, can destroy or uphold market power, and so on. If


\textsuperscript{23} Heini, Der Entwurf eines Bundesgesetzes über das Internationale Privat- und Zivilprozessrecht (IPR-Gesetz), in: Schweizerische Juristenzeitung Vol. 74 (1978), pp. 249, 256, who, in footnote 29, speaks of the „field unsuspected of interventions by social policy“ („sozialpolitisch unverdächtiger Bereich“).
signs are not deceiving we observe a growing readiness and willingness among private international lawyers to detect and to honour \textit{lois d'application immédiate}. 

This type of norm was not as pertinent some decades ago: According to the classical liberal PIL, the citizens of the civilian society bore the responsibility for the economy and they could avail themselves of the private law as an instrument for their autonomous and decentralized planning and acting. By contrast, the modern state in a mixed economy tends to instrumentalize the institutions of the private law for its regulating purposes, for instance to secure a workable competition, to shelter the national currency, to protect consumers and workers, or to exert export control, to push through price regulations or to guarantee workers’ co-determination. In modern states the “pure” public law of the governing state and the “pure” private law of the acting citizens denote only models and extremes, whereas the bulk of the existing norms is located in between. Despite many disputes regarding this type of law it constitutes today the predominant challenge of private international law.\textsuperscript{24}

The dangers of an undue extension of the \textit{lois d'application immédiate} are obvious, since there are relatively few fields in private law without an interventionistic background, be it the protection of the weaker party or simply the maintenance of peace.\textsuperscript{25} The decision regarding the consideration and recognition of the \textit{règles d'application immédiate} turns the classical approach of private international law upside down, in that it allocates factual patterns to legal norms instead of the other way round. Moreover, this decision is, in itself,
often a political one. The private international lawyer cannot escape this problem by simply referring to it as a problem of public international law. This merely raises the further problem of characterization of the systematical categories of “private” or “public” law and is highly unsatisfactory, as the distinction between private and public law is itself highly questionable and unclear.

It is still an unresolved issue, whether the unilateral conflict rules which are inherent in the interventional law can be extended to universal conflict rules for the intervention norms of immediate application. In the interest of conformity of decisions independent of the state of jurisdiction, a system of universal rules of conflicts of intervention norms is, undoubtedly, highly desirable. Nevertheless, the international discussion is far removed from this goal. It is the so-called comity, the principle of friendliness among civilized peoples and nations, the old notion of comitas gentium, which is decisive regarding the mutual application of intervention norms, particularly in the field of international competition law. The problem is that states, when enacting intervention norms, still employ fairly different political strategies and concepts based on different convictions. Undoubtedly the underlying issue here is the sovereignty of national states. The globalisation and the deregulation movement only partly mitigate this problem. Conventions only provide for help among relatively homogeneous states. Beyond conventions, it is open whether comity has the potential to ever evolve into a sound basis for the architecture of a system of universal conflict rules for intervention norms.

2.5 The materialization of general doctrinal concepts


Substantive law also intrudes more or less openly into the so-called general part of PIL in that problems such as characterization or qualification, preliminary question, approximation or adjustment and teleological interpretation or reduction, very often heavily rely on arguments of domestic substantive law.\textsuperscript{29} In the eyes of many private international lawyers the deficiencies of the “leap into the dark” can be mitigated by the refined general instruments of PIL and by a closer look where to leap. The comparative view as such is perfectly in order, but it is often enough domestically biased; the conflict lawyers wear, when looking, national glasses. They look \textit{back} before they leap.

The characterization or qualification of a pre-marital engagement is normally influenced by the question whether the \textit{lex fori} treats an engagement as a contractual agreement between fiancé and fiancée or not and which consequences it links to it; in some countries the breach of an engagement is considered a delict, in others an unjust enrichment issue (\textit{condictio ob causa data causa not secuta} or \textit{condictio ob rem}). A claim for damages or restitution because of a breach of an engagement can, consequently, be governed by the \textit{lex causae} or the \textit{lex loci delicti commissi} according to a country’s PIL. It is widely consented today that the problem of characterization or qualification, i.e. the comprehension and classification of both foreign legal institutions and the notions of a foreign legal system, are to be resolved first and foremost in the light of the conceptual categories of the forum state, even if assisted by the knowledge of foreign law and comparative legal methods. The same is true with regard to the problems of approximation, harmonisation or conformity of judgements.\textsuperscript{30} The judge decides as an exponent of the \textit{lex fori} employing the doctrinal categories and the means of thought of his familiar legal system. When the qualification leads him to two contradictory substantive norms, he may well tend to favorize the domestic norm in his rule selection and in his assessing and balancing of interests. The substantive domestic law can also easily steer a preliminary question into a more familiar direction. The preliminary question of a child’s descent in a claim for maintenance costs will more likely be answered autonomously according to the


law of the *lex fori*, when the concurring foreign law would produce an unwelcome result. It is not too difficult for the conflict lawyers to conceal their true considerations and their preference for the domestic solution behind a formal reasoning about autonomous or immanent interpretation or about internal or international harmony of judgements. They look back before they leap - and they leap short.

2.6 The creation of new conflicts of law rules

2.6.1 General development

Another loophole for substantive law sneaking into PIL is the creation of new conflicts of law rules and the refinement or concretization of existing ones which is more or less influenced by interests of substantive law when narrowing down the lacunae. The classical PIL of the old school was governed by a limited numbers of principles and relatively strict rules which left room for innovations and refinements. In an evolutionary way during the last decades of PIL development the original severity of its forms has been mitigated; the previous strictness of its structures has been moderated; the former rigidity of its rules has been loosened; the old crampedness of the principles has been broken. The conflict rules on the applicable law and the connecting factors like domicile, habitual residence, nationality, *locus contractus*, *locus rei sitae*, *locus delicti commissi*, to name but a few, have become decidedly more diverse and flexible than before. The considerations, which justify and legitimate the determination of the applicable law, have become by far more complex than before. There is no doubt that this development has been guided to a remarkable degree, if not in the first place, by notions of the pertinent domestic substantive law. It is, in essence, the substantive law which sponsors the loosening of the rigidity of the principle *locus regit actum* by the *favor negotii* or *favor validitatis* in the international law of legal transactions in order to uphold the validity of a certain contract. Likewise in the law of torts or delict the *favor laesi*, or in child custody cases the *favor legitimationis* or *favor infantis* is often enough influenced by the substantive law of the *lex fori* to achieve the privilege of certain persons and thus to pursue certain substantive objectives in accordance with the national legislator.
2.6.2 The law of delicts as example

The most prominent example is perhaps the international law of delicts, where a differentiated modification of the connecting factors has been introduced to determine the applicable law. The traditional and exclusive connection of all delictual questions to the *locus delicti commissi* has long since been abolished. There have been many efforts in the last decades to shape preferable connecting factors which honour the circumstances of a delict or the interest in the protection of the infringed legal positions. Also in this context the arguments and methods, the values and notions have been, to a great extent, been lended by domestic substantive law.

It has been recognized that different types of delicts, as for instance road accidents, product liability, delicts in family relationships, delicts in competition cases, had to be dealt with differently. As a result the traditional concept of *lex loci delicti commissi* nowadays only serves as a subsidiary category, in cases where no closer relationship of the factual pattern with a certain legal system can be established. Such a closer relationship can be formed by the common personal statute, the connection of a delict to a contractual obligation or to a family relationship, as well as by a later choice of law by the parties. The driving force behind the increasing diversity and flexibility, refinement and sophistication was not so much a special autonomous justice of PIL, but the system of the values and notions of domestic substantive law. Substantive tasks are undoubtedly being pursued, *e.g.*, when a PIL-legislator establishes a scale of connecting factors regarding the

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obligation to pay maintenance and providing that the law of the habitual residence, the law of the common personal statute and finally the *lex fori* applies (with a reservation for debtors domiciled in the country of the PIL-legislator).

2.6.3 Scales of connecting factors

The international law of the right to the use of a name, the international law of the act of marrying, of the effects of a marriage, of divorce, the law of child custody and maintenance, particularly the international law of contract and the international company law have seen an increasing refinement and diversification of their respective connecting factors. The private international law theorists requested for increasing amounts of special connecting factors to better suit the individual cases. So-called scales of connecting factors have been compiled along with sophisticated exception clauses, elaborate evasion clauses and intricate escape clauses. Even with regard to the international law of property the principle of *lex rei sitae* has been supplemented by special rules relating to means of transport; imported goods or goods passing through a country (*res in transitu*) respectively.

In addition it can be noted that with the change of substantive law also conflicts law can change. Take for example the law of unfair competition which was formerly considered a special delict law of merchants and subdued under the rules of international delict law with its alternative connectiong factors of the place of commission and of effect. Today unfair competition law is interpreted in most countries as a mainly constituting a kind of consumer protection law so that the law of the place where the consumer is domiciled governs the applicable law – an extremely pro-plaintiff rule for the sake of consumer protection. Again: the choice of law considerations and rules are designed to further the policy underlying the substantive filed os law to which they pertain. Instead of the old idea of a special justice of PIL now the notion prevails that the law of a country should be a coherent and harmonious whole. The furtherance of relevant substantive policies is accepted as an important objective of choice of law.

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The idea of a relatively simple and concise private international law system has fully collapsed. Quite obviously the certainty and foreseeability of the determination of the applicable law has suffered, and so has the traditional ideal of an international harmony of decisions in the sense of a conformity of decisions irrespective of jurisdiction. Scales of connecting factors and alternative applications may serve well as political instruments, but they hardly promote the idea of conformity of decisions. In summary, the modern PIL of many countries has carefully accepted the tendency of the incorporation of substantive legal considerations. PIL is recognized as also constituting “a reflecting image of substantive legal value judgements of its time” (“auch Spiegelbild sachrechtlicher Wertungen seiner Zeit”).

3 The new school

The idea of the old school that PIL could be equipped with a substantive justification and legitimation of its own has been thrown overboard. The notion that there were specific common interests or interests of the parties, which could be considered characteristic to the tasks of PIL and which could be taken into account when construing conflict rules, did obviously not suffice to endow PIL with a justice of its own. The explicit assumption of a specific conflicts justice distinct from the substantive law justice could not gain enough support.

According to the new school, PIL appears by no means any more as a neutral law of application of law (“Rechtsanwendungsrecht”) seeking and determining the applicable law for the private persons involved in a private legal relationship, hereby consciously taking into account that the determination ends in a “leap into the dark”. In fact, the times when the determination of the applicable law led to a risky “leap into the dark” are over. Conflict lawyers today look very carefully indeed before they leap – they look preferably at their


own domestic substantive law and they leap preferably into their own domestic substantive law. They look back - and they do not leap!

Particularly, continental European PIL-theorists agree today that the conflict rules must be regarded as value judgements based on a balancing of interests. The influence and effect not only of fundamental constitutional rights, but of the entire value system of a country’s national system for the development, interpretation and application of its conflict rules is enormous. At the beginning the private international lawyers had a bad conscience and suffered from compunction when they, as an exception and never as a rule, let substantive law considerations intrude the conflict. Today, a materialization and a parallelism has taken place which means that a country’s PIL is more and more understood as an integral part of its substantive legal system and thus reflects and indeed repeats its value system. The issue of what the ethical background and the substantial objectives of a country’s private international law are, lie on the table.37 A country’s PIL is no longer, if it ever was, a super-law, but just another branch of its substantive law.

The vicinity to a neo-statutism is cleary at hand. When the theory of statutes originated, in the late 12th century, the glossator Magister Aldricus answered the question of the applicable law with the simple characterization: “which seems to be the mightier and more useful” - “quae potior et utilior videtur”.38

4 The only hope

I had called, in the subtitle of this paper, the tendencies of materialization and of parallelism “fateful”. They are fateful, since they point at the regrettable fate of PIL as a self-contradictory subject matter, the expectations in which could, as we know now, not be


fulfilled. It is not feasable to square the circle, particularly not the vitious circle of PIL. Despite the theoretical fascination and intellectual appeal of the ideals and principles of PIL, the deficiencies and imperfections are endless, simply because the PIL of different states with their conflict rules deviate due to differing connecting factors. In short: reality does not fit. The fundamental dilemma of PIL is unresolved and unresolvable: How can one cope with international cases by employing the imperfect means of the national law which, eventually, always reflect the national legal notions? The axiom of equality of legal orders is connected with the fiction of their homogeneity, whereas, in reality, deeply rooted cultural and political peculiarities govern.

What can one hope for? What should we strive for? Firstly, of course, the augmentation of "lois uniformes" among the states and their unions or associations is highly desirable. Where uniform law governs, a law of conflict of laws is not needed because of the lack of conflicts. We know, however, that the call for uniform law can only lead to limited successes. Secondly, the harmonization of conflict rules by multilateral conventions should be considered the prevalent task. Surely, also international understandings regarding a harmonization of the national laws of conflict of laws will remain fragmentary. All efforts should be made, however, to harmonize the national PIL of as many countries in as many respects as possible and to come to a neater and neater network of truly international rules of conflict of laws. This is all we can hope for. For the rest, PIL law will remain what it presently is and always was: Private International Law is in reality Public National Policy.