

12-1-2000

COMMENTARY: Territorialism, National Parochialism, Universalism and Party Autonomy: How Does One Square the Choice-of-Law Circle?

Amos Shapira

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

Recommended Citation

Amos Shapira, *COMMENTARY: Territorialism, National Parochialism, Universalism and Party Autonomy: How Does One Square the Choice-of-Law Circle?*, 26 *Brook. J. Int'l L.* 199 (2000).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol26/iss1/10>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

TERRITORIALISM, NATIONAL PAROCHIALISM, UNIVERSALISM AND PARTY AUTONOMY: HOW DOES ONE SQUARE THE CHOICE-OF-LAW CIRCLE?

*A Comment by Amos Shapira**

Choice-of-law theorists are characteristically prone to assigning a host of frequently incompatible policy goals to be furthered through the workings of choice-of-law prescriptions. Yet inflated expectations regarding the potential accomplishments of the choice-of-law machinery are doomed to frustration: the choice-of-law process, even in its most sophisticated version, just cannot faithfully and effectively serve too many, often irreconcilable, masters simultaneously. One should therefore refrain from overstating choice-of-law methodological desiderata. An overloaded choice-of-law apparatus just cannot carry the burden and deliver the goods.

Still, a fair, rational and functional choice-of-law method ought to be responsive—to a carefully measured, proportionately shaped extent—to the following five policy objectives:

1. Ease of judicial administration;
2. Uniformity and predictability of the result of litigation;
3. Vindication of parties' expectations and fair notice as to the applicable law;
4. Advancement of the substantive law concerns of the implicated legal orders through the elucidation and evaluation of the underlying concrete policies of the various legal standards involved; and,
5. Interstate and international harmony.

* Visiting Professor of Law, Brooklyn Law School.

I. EASE OF JUDICIAL ADMINISTRATION

An appropriate choice-of-law methodology should avoid confronting the forum of litigation with insurmountable practical difficulties in its routine implementation. The need to economize on judicial time and effort is all the more pressing where courts' dockets are crowded in general and choice-of-law litigation is not a rarity. Surely, the virtues of a simple, convenient and efficient adjudicatory apparatus for the handling of choice-of-law controversies are self-evident. No one can deny that litigants, lawyers and judges are bound to benefit from an easily workable, smoothly operational choice-of-law machinery.

Specific and simple choice-of-law rules forged *ex ante* by the legislature are conducive to judicial economy. By the same token, open-ended and complex choice-of-law standards, that can only be invoked through *ad hoc* exercise of broad and essentially unguided judicial discretion, will hardly serve the need for ease of judicial administration. Yet the borderline between guiding clarity and mechanical rigidity is often frustratingly blurred. To be sure, judges are likely to welcome brightline, hard-and-fast legislative directives that are designed to facilitate the task of judicial decision-making. But at the same time they are prone also to shun overly mechanical and rigid statutory formulas and to seek ingenious escape devices in order to avoid an unfair or unsound, and therefore unacceptable, result otherwise dictated by the ostensibly governing black-letter rule. The truth of the matter is that sometimes simplicity in judicial administration is incompatible with the complexity inherent in a certain branch of the law. A modality proposed for the regulation of a given problem-area is bound—if it purports to be rational, principled and directive—to reflect the intrinsic complications of that same problem-area. An attempt to create ease of administration in a legal field which is not endowed with the virtue of simplicity is doomed to breed confusion and frustration. It is always better, in the final analysis, to face up to the problem in its true dimensions and with its unconcealed complexities while striving to maximize realistically the ease of judicial administration.

II. UNIFORMITY AND PREDICTABILITY OF THE RESULT OF LITIGATION

The traditionally asserted overriding policy objective of the choice-of-law process has been uniformity and predictability of the result of litigation irrespective of the location of the forum. Uniformity of result is expected to promote international harmony and cooperation in socioeconomic matters and to foster predictability as to the governing law, thus facilitating private legal ordering, ensuring stability and eliminating forum shopping. It is also designed to guarantee equal treatment and impartiality in choice-of-law adjudication. It goes without saying that all these are values worthy of promotion in any legal discipline. Yet, a substantial measure of uniform judicial decision-making in choice-of-law matters across national boundaries requires a uniform choice-of-law instrumentality common to all legal systems—an ideal that is still largely unrealized. Also, judges' propensity to resort to side-stepping techniques in order to escape unacceptable results otherwise dictated by mechanical—even if uniform—choice-of-law rules is bound to undermine decisional uniformity and predictability.

Looking around, we must realize that practitioners learn how to function in the legal sphere without absolute certainty, resorting to educated guesses and conducting their affairs with some doubt at the edges. This is so in a host of wholly domestic legal settings and *a fortiori* in the real world of transnational choice of law. Realistically viewed, the need for uniformity of result is not equally pressing in each and every choice-of-law problem area. As a corollary, the prospects of the actual realization of this policy goal range over a wide spectrum from reasonably promising to virtually non-existent. Universal uniformity of result is truly not required in many instances or is overshadowed by other policy goals of the choice-of-law process. Conversely, there are situations where—due to political, socioeconomic, humanistic or technological constraints—a uniform pattern of decision-making across national frontiers is clearly indicated. Where the need to secure accommodation of concrete transnational concerns—such as the facilitation of multinational commercial activity—is acutely felt and widely shared, similar choice-of-law standards are prone to emerge, either through independent legal evolution in the various national communities or by concerted international or regional efforts in the

form of multilateral conventions. Such choice-of-law standards usually point to the application of the rule of decision of that one of the involved legal systems which displays a paramount interest in controlling the matter at hand. Thus, for instance, the home community of a person is preeminently concerned with his or her marital status. Similarly, the situs country has a predominant interest in safeguarding its system of registration and ascertainment of title to local land.

A fair degree of uniformity of result, where it really presents a compelling necessity of international life, can best be secured through multinational collaboration with a view to the mutual adoption of uniform choice-of-law standards. To be uniformly adoptable and operative, such standards must be simple, "shortcut" choice-of-law directives, much in the traditional system-pointing mold. Adherents of some of the modern approaches who recoil from the very notion of system-selecting rules must realize that uniformity of result in distinctive problem areas is not a cost-free objective. Its promotion as a peculiar transnational concern inhering in the multijurisdictional context must be paid for at the expense of other choice-of-law policy goals.

III. VINDICATION OF PARTIES' EXPECTATIONS AND FAIR NOTICE AS TO THE APPLICABLE LAW

Situations involving foreign elements present a fundamental jurisprudential dilemma: the reasonableness and fairness of judging human conduct by foreign legal standards. The concept of legal fairness postulates the existence of an appropriate connection between the parties to the controversy at hand and the legal norms in the light of which their rights and obligations are to be assessed. This notion of an appropriate connection between parties and the law governing them is frequently depicted in terms of vindication of justified expectations as to the applicable law.

The protection of the justified expectations of parties to legal relationships is a much-acclaimed goal in all branches of law, including private international law. It would clearly be unfair to charge a person with liability under the laws of country A, for conduct undertaken by him or her with reasonable reliance on the different laws of country B. It would likewise be unjust suddenly to saddle one's transactions with a prohibi-

tory or regulatory law, the applicability of which could not have been foreseen at the relevant time. Thus the "vindication of justified expectations" desideratum weighs very heavily in choice-of-law literature. It imparts life to some cardinal choice-of-law principles, such as the "party autonomy" rule enabling the parties to a transnational contract to choose for themselves the governing law. It also lends support to the idea of allowing the litigants in a transnational tort case to agree, after the dispute has arisen, on the applicable law (without prejudice to the rights of third parties).

Nonetheless, one should be cautious not to overstate the significance of subjective foreseeability and reliance in cases entailing foreign elements. After all, to be deserving of legal protection, alleged party expectations must first be actually existing and susceptible of realistic ascertainment. To attribute concrete expectations to litigants where such expectations have never really existed, or are incapable of verification, is to obfuscate legal reasoning. Indeed, the hypothesis that parties to legal relationships invariably form specific expectations as to the legal norms that will govern their interactions is highly questionable in many instances, especially in contexts fraught with foreign factors.

It may well make sense to reason in terms of concrete expectations regarding the applicable law in the domain of privately ordered, preplanned activity, such as in the field of transnational commercial transactions. In many cases falling within this category, the parties indeed are prone to be mindful of the juridical implications of their planned activity and to fashion their business policy upon an informed consideration of relevant legal standards, local and foreign. Thus, for instance, a manufacturer whose commercial engagements cut across national boundaries is likely to foresee contingencies of involvement with foreign laws (pertaining, say, to products liability) and to account for them when determining prices or acquiring insurance coverage. It would, therefore, only be fair to vindicate as fully as possible (barring countervailing policy and fairness considerations such as consumer protection) the conduct-influencing expectations formed by parties with regard to the legal regulation of their transnational activities.

The situation is utterly different, however, concerning a wide range of human interactions that ordinarily are devoid of any meaningful prior legal ordering. These are not readily

amenable to judicial elaboration in terms of subjective expectations as to the applicable rule of decision. Where people usually interact with little or no awareness of the possible legal ramifications of their action, the "upholding of the parties' expectations" desideratum may be nothing but an empty slogan. Thus a host of ordinary personal injury tort cases are simply not amenable to judicial reasoning based upon the concept of subjective party expectations. The very notion of crystallized choice-of-law expectations is incongruous in a context of social interaction where the participants are not disposed to fashion their conduct upon a prior consideration of potentially applicable laws.

The notion of a required appropriate connection between parties and applicable laws in cases entailing foreign elements has thus far been addressed in terms of vindication of subjective choice-of-law expectations whenever they actually exist. Yet the fundamental principle of fairness embodied in this notion transcends the goal of upholding parties' concrete choice-of-law expectations. This principle conveys the basic idea that it is a threshold requirement of fairness in the choice-of-law process that a sufficiently significant relationship exists between a party and the legal regime by which his or her situation is to be judged. This is an objective criterion that is not necessarily related to any actual or presumed subjective expectations as to the governing law. Under this criterion, the fairness of judging conduct by foreign legal prescriptions is ultimately dependent on whether it would be reasonable to charge the party concerned with prior notice regarding the potential foreign law connotations of the occurrence at bar. If the party can reasonably be charged with fair notice as to the possible transnational ramifications of the affair at hand then one may conclude that an appropriate connection does exist between that party and the foreign law which is to be applied. Fair notice means that the party in question could have reasonably perceived at the relevant time a possible contact with, or potential impact upon, persons, property, institutions or events that might fall within the prescriptive domain of a given legal system. Hence, a litigant who actually was, or reasonably could have been, mindful of possible involvement with matters potentially subject to the legal management of a foreign country may not complain of lack of sufficient connection between himself or herself and the normative order upheld by

that country. By the same token, a choice-of-law methodology that aspires to promote the idea of objective fair notice ought to refrain from designating as applicable a system of law that clearly has no appropriate relationship with a party to the litigation.

IV. ADVANCEMENT OF THE SUBSTANTIVE LAW CONCERNS OF THE IMPLICATED LEGAL ORDERS THROUGH THE ELUCIDATION AND EVALUATION OF THE UNDERLYING CONCRETE POLICIES OF THE VARIOUS LEGAL STANDARDS INVOLVED

The traditional approach builds on system-pointing choice-of-law rules that purport to designate the governing *lex causae* (whether domestic or foreign) in cases involving foreign elements. A conventional system-pointing choice-of-law rule comprises two structural components: a category of type-situations (e.g., tort claims) linked to connecting factor (namely, a spatial contact between a person, a relationship or an event and a given country, e.g., the place of the tort). Once the matter at bar is characterized as falling within a given category of type-situations, the connecting factor attached to that category will lead the forum to the designated governing legal system, be it the *lex fori* or the law of a foreign country. Thus, conventional choice-of-law rules are in essence system-selecting. They are intended to furnish a reference to a country, the law of which would ultimately provide the controlling rule of decision. And such reference is supposed to be effected in deliberate disregard of the content of the specific rule of decision (local or foreign) finally to be applied and in an acknowledged indifference as to the merits of the concrete resulting outcome of the dispute. Such multilateral directives are designed to furnish impartiality, reciprocity, certainty, uniformity and ease of application to the choice-of-law process. Critics of the traditional system, however, have persistently challenged its actual ability to deliver these promised goods. In particular, they have pointed to the public policy barrier and to the notion of substantive rules of direct ("immediate") or mandatory application as escape devices, or longstop techniques, that in fact infuse a seemingly multilateralistic system-pointing apparatus with unabashed unilateralistic, often parochial, choice-influencing considerations.

In sharp contrast to the traditional system-pointing paradigm, current rule-selecting methods seek the maximization of the substantive law concerns of the socio-legal systems entangled in a choice-of-law situation. Rather than relying on stereotyped connecting factors, rule-selecting approaches call for a functional analysis of the specific substantive legal rules potentially involved as the very core of the choice-of-law process. The distinguishing mark of this school of thought lies in its fundamental assumption that all standards of law are designed to further some distinct social concerns, randomly defined as "public policies," "governmental interests," "socioeconomic goals" and the like. The application of these standards in concrete situations, both purely local and those involving foreign ingredients, must therefore entail a systematic probe into their supporting purposes to determine their contemplated scope of personal and territorial coverage. In this view, the appropriate reach of all legal standards, domestic and foreign, can only be delineated through an examination and evaluation of their particular underlying rationale. Choosing the governing law solely on the basis of stereotyped spatial connecting-factors, and in deliberate ignorance of the tenor and purpose of the potentially applicable laws, is therefore an irrational exercise in futility. The choice-of-law process must be based on a functional analysis of the social objectives underlying the substantive rules, local and foreign, implicated in the dispute at bar.

It goes without saying that rule-selecting methods, like the American "governmental interests" approach, are not conducive to judicial ease of application. And the *ad hoc* exercise of broad, potentially freewheeling, judicial discretion that is mandated by such methods is hardly compatible with the goals of uniformity and predictability of result. Moreover, "governmental interests" enthusiasts are predisposed to impute to virtually every legal norm some underlying concrete socioeconomic or political purpose. The intellectual premise of such a process may become rather shaky as one encounters legal rules with supporting policy goals that are unascertainable, obscure, tenuous, cumulative, or even contradictory. In the absence of reliable information as to the intended policy function of the legal norm in question, the process may readily degenerate into speculative postulation, or even an outright fabrication, of putative underlying policies, merely on the ground of their assumed plausibility. To ascribe hypothetical purposes to con-

crete legal rules, particularly foreign ones, on the basis of mere conjecture is a judicial enterprise of dubious validity and utility.

Still, the advancement of the substantive law concerns of the legal orders implicated in a choice-of-law situation is a worthy policy objective in appropriate instances. Thus certain normative arrangements—pertaining, for example, to matters of social welfare, economic regulation, fiscal stability and market institutions—are sometimes likely to be adversely affected unless the particular substantive law supporting them is applied. Substantial and readily discernible socioeconomic benefits or detriments may well count in the choice of the applicable law. Indeed, it hardly makes sense to designate as applicable a legal system whose relevant rule of decision is manifestly “uninterested” functionally in controlling the matter at hand or, conversely, to exclude the applicability of a legal system whose relevant rule of decision is evidently “interested,” given its underlying objective, to govern the situation at bar. A choice-of-law methodology that repeatedly and haphazardly produces such unsound results cannot be accepted as rational. To be sound and functional it should be responsive, in proper cases, to a measured consideration of the intrinsic particular policies animating the substantive laws that are candidates for application.

V. INTERSTATE AND INTERNATIONAL HARMONY

It goes without saying that with transnational commerce, much depends on transnational cooperation in the shaping of choice-of-law standards. This may require national restraint and moderation in the pursuit of parochial policy-goals and an attitude conducive to mutual cooperation and compromise.

* * *

To generalize, and simplify, there are several principal methodological approaches to the choice of the applicable law:

1. Hard-and-fast choice-of-law rules that build on rigid, pointed connecting factors (*territorial*—e.g., the place of the tort, the place of making or performing a contract, or *personal*—e.g., the place of habitual residence of the parties or a party to a transaction).

2. "Soft," open-ended, flexible choice-of-law directives, such as the American Restatement of Conflict of Laws formula of "the most significant relationship,"¹ or the English private international law concept of the "proper law" of the contract.
3. "Party Autonomy," that is, empowering the parties to a legal transaction or relationship to select for themselves the governing law.
4. A choice-of-law process that shies away from specific, black letter choice indicators, such as the American "governmental interests" rather complex method of analysis.

Of course, legal systems may, and often do, opt for a combination of some or all of these (or similar) choice-of-law methodologies.

To again generalize and simplify—European legal systems have displayed a traditional preference for statutory, hard-and-fast jurisdiction-selecting rules rather than for nebulous choice-of-law standards, let alone for no-rule policy analytical frames that are saturated with ad hoc judicial discretion. In the field of international intellectual property transactions personal links (such as the habitual residence of the licensee or the consumer) are likely—so it seems—to be preferred over territorial connecting factors (such as the contract's place of making or performance). In Europe one may also, I believe, notice a traditional championing of the "party autonomy" principle (that endorses contractual choice of the applicable law by the parties themselves), moderated by a concern for the fair treatment of consumer and other weak populations.

Professor Patchel points out the diverse attitudes of different jurisdictions to intellectual property rights and the manifest importance of intellectual property to all jurisdictions. She emphasizes the territorial dimension of the "product" involved in international intellectual property transactions. This would seem to militate in favor of a territorialist choice-of-law approach. At the same time, she predicts that national courts will be prone to ascribe much significance, in this field, to the pub-

1. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) cmt. c (revised 1988).

lic policy exception and to the concept of mandatory, "immediately applicable" rules. Invoking such conceptual tools is, of course, conducive to a frequent resort to the *lex fori*, namely, national courts will be likely to tend to apply their own national law. Such an attitude is clearly incompatible with the principle of party-sponsored choice of law ("party autonomy"). And it is hardly supportive of systemic concern for transnational harmony, respect and cooperation. How, then, can one square the circle and tie together all these relevant—yet often contending—ingredients of territorialism, national parochialism, universalism and party autonomy and blend them into a coherent, well-balanced choice-of-law system for international intellectual property transactions? I am afraid that much more work must still be done in this respect.

