

CONFLICT RESOLUTION SYSTEMS RULES IN INTERNATIONAL PRIVATE LAWS

NORMAS DE SISTEMAS DE RESOLUCIÓN DE CONFLICTOS EN LEYES PRIVADAS INTERNACIONALES



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RESUMEN

El objetivo de este artículo es determinar las reglas de los sistemas de resolución de conflictos en las leyes internacionales de privacidad. Esta es una investigación cualitativa realizada por el método de análisis de contenido. Los resultados mostraron que la promoción de la completa libertad de enjuiciamiento al describir problemas legales y establecer un sistema lógico no restringe la ejecución de la sentencia y no pone en peligro la imparcialidad de los fiscales en la ejecución de la sentencia. Esto no puede hacerse a menos que se respeten las organizaciones legales extranjeras y sus reglas de gobierno.

Palabras clave: reglas de sistemas de resolución de conflictos, leyes privadas, leyes internacionales.

ABSTRACT

This article aim is determining the rules of conflict resolution systems in international privacy laws. This is a qualitative research conducted by the content analysis method. Results showed that the promotion of complete freedom of prosecution in describing legal issues and establish a logical system does not restrict executing judgment and does not endanger the impartiality of prosecutors in performing judgment. This cannot be done unless by respecting foreign legal organizations and their governing rules.

Key words: conflict resolution systems rules, private laws, international laws.

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INTRODUCTION

This article aim is determining the rules of conflict resolution systems in international privacy laws. The international rules and regulations are established generally and independently and relationships among legal concepts including properties, deeds and contractual or non-contractual commitments are set without considering exceptions. Gaining accurate knowledge about a disputed issue by judges depends on their accurate description, since it can lead to correctly identifying the governing rule. Afterwards the position of legal problems and topics are clarified, and the law judgment is issued on the external issue.

International descriptions are like underlying stones laying the foundation of a legal building (Van Calster, 2016). When setting them, great accuracy is needed. The last pillar of this building brings about results (entering categories of communication and executing the governing law) which becomes a reference for the people's rights being justified or unjustified. Regarding the exact description, it can be stated that wrong legal description results in conflict resolution rule becoming void and abusing topics and concepts and making wrong decisions. It can probably bring about violation of verdicts (Dickinson, 2016).

Sometimes, we have to cite the analysis of foreign legal issues for gaining knowledge about a legal institution. Some descriptions are called secondary ones since they have no role in executing conflict resolution rules. Domestic judges sometimes use foreign descriptions in analyzing foreign issues. Therefore, in this study, all the above-mentioned issues are explained since the correct description improves the role of the legal procedure in executing legal rules.

LITERATURE REVIEW

When studying relationships among conflict resolution systems, each country resolves conflict among rules however it feels suitable. In other words, conflicts are resolved via certain systems selected in each country (Rammeloo, 2017). Of course, there are crucial similarities among the general ways of national systems of conflict resolution. However, these similarities do not stop differences in the solutions proposed by systems. Since personal international law and conflict of rules supervise international relationships, meaning that they adjust legal systems of countries, regarding the conflict of rules, the relationship among conflict resolution systems must be stated (Walters & Zeller, 2017).

Currently all legal systems are categorized of communication like people, properties, legal acts, contractual and non-contractual commitments, deeds, etc. Regarding these issues they are approximately similar. But when we go beyond these general problems and face with incidents, we can see differences among systems. Generally, differences among national conflict resolution systems are noticeable regarding two aspects (Mashayekhi, 2017):

1 -The aspect of content of the communication category.

2 -The aspect of conflict resolution rules resulting in some negative conflict, meaning that each country's conflict resolution rule refers the incident to another country (reference or transfer) which is a completely separate issue.

Difference, regarding the content of categories of communication, means that in the private international legal systems of countries, there are differences in topics of categories of communication. The answer to an issue could be different in different countries. For example, the heritage rights are considered under the category of personal status in some countries like Iran, Italy or Germany, while in some other countries like France they are considered under the category of immovable inheritance (Almasi, 2014).

It means that when a problem is stated to a judge, first, he must identify that the problem belongs to what category of communication. For example, whether movable inheritance is under the category of properties, or disability, guardianship and divorce are under the category of personal status or not?

After describing a legal relationship and categorizing it under a category of communication, e.g. personal status or properties, for the above-mentioned example, the 7th article or the 966th article of the civil law is executed regarding properties (Mashayekhi, 2017).

"Therefore, description is in fact categorizing a case under a category of communication, though in USA law, the term description is used" (Torremans & Fawcett, 2017, p. 44). in the British law, categorizing a lawsuit case is used instead of description.

MATERIALS AND METHODS

This is a qualitative research conducted by content analysis method. In the first stage the theme was selected, and the outline was drawn. In the second phase, the most important books and articles on the conflict of private law in international law were selected and a bibliography on the subject under investigation was compiled. In the third stage, a brief overview of the topic and the results of the first research was carried out, and in the fourth stage, an in-depth and comprehensive critique study was conducted. Finally, the existing conflicts were identified, and the final text was written.

RESULTS

DESCRIPTION BASED ON WHICH LAW MUST BE DONE?

For describing a relationship or a legal regulation, the cause law or foreign law must be referred to. The cause law is the governing one on a case by which the problem is stated. It means that in cases that a foreign relationship is established because of a foreigner law, it must be defined based on that law. For executing the

cause law, it is both congruent with the nature of the relationship and in agreement with the international credit and identification of achieved rights.

Description of an international legal relationship via the laws of the nation of the judge is like combination of vocabulary of a language with grammar of another. On the contrary, many domestic and international jurists especially the Roman-Germanic ones, consider the trial venue law qualified for legal descriptions (Almasi, 2015).

The rules of resolution of conflicts are ratified in the civil law of each country by domestic jurists; therefore, domestic courts are the best institution for discussing regulations including solving ambiguities, executing laws and identifying evidence and the best reference for a legal relationship and categorizing it under a category of communication.

On the other hand, describing by trial venue law by domestic courts is both favorable for the judge and also in accordance with national governing. It is favorable for the judge because the regulation of trial venue law is in his hands and closer to his legal understanding. Therefore, its execution is also simpler and there is no need for proving by foreign experts. Also, it is favorable for parties to the suit because they can find out how a legal regulation or act is described and categorized. Supporters of description based on the trial venue law have stated a problem which is called the begging the question problem. They state that if we refer to a cause law:

Foreign law to describe a legal relationship, it means that we suppose a problem that we should solve, already solved. Because the foreign rule qualification is clear when we know that a relationship is under the category of personal status. In our presupposition, this relationship is still in the stage of description and there is no time to refer to a foreign law since we must first describe the relationship to clarify the qualification of a foreign law (Almasi, 2014, p. 81-82).

THE NECESSITY OF INTERFERENCE OF A FOREIGN LAW IN DESCRIPTIONS AND LIMITATIONS OF TRIAL VENUE LAW

Most of contemporary scholars have considered the description of cause law despite its reasons and explanations and argue that the law qualified for describing a legal relationship must be the sovereign law of the court in which the case is stated. But in spite of the regulation based on trial venue law this reality cannot be ignored that the case has a foreign factor linking it to foreign law and that law is qualified for the lawsuit.

As a result, recognition of cases and analysis and determination of its legal circumstance cannot be done ignoring that law when that law is not present in the trial venue court. As a result, two stages are clarified in legal scientific theories and explanation of this issue and consideration of both abovementioned necessities, the necessity of executing the rule when describing a case and the necessity of

considering a foreign law which deals with the described case: the first one is analyzing a case and identifying its legal features which can be done by foreigner laws if necessary, and adjusting it with the conflict resolution rule, or in other words finding judgment about determining a qualified law regarding a regulation about which only domestic law must be obeyed. The reason is that many scholars and jurists of conflict of rules have recognized the necessity of intervene of foreign law in description and considered some restrictions for trial venue rule in describing cases:

A) The first limitation for qualification of the trial venue law is the role of a foreigner law in description process. The reason of intervene of a foreign law is that executing the national conflict resolution regulation on foreign legal organizations is not possible unless we consider features that the desired organization have based on the foreign law. It means that the judge of the trial venue law encounters legal organizations existing in each foreign country but non-existent in the country where the lawsuit is. In such cases, instead of stating that a case is not describable, first it must be analyzed based on a foreign rule and describe it based on the trial venue law.

For example, the organization of trust rights is a significant legal constitution in England. According to it, based on legal restrictions like lack of legal capacity of the person who is called trust, he cannot transfer a property to another person. Therefore, he transfers some of his property to another person called trustee and the trustee commits to yearly or monthly give benefits to a third person out of the property he owns. If the trustee does not obey his commitment and the third-party files a lawsuit against him, the judge of the trial venue court cannot decide regarding the issue unless he knows the legal nature of trust institution whether he is under the category of sale, trust or endowment. The reason is that each of them has different results. In brief he believes that:

Each legal system is not completely generalizable except in some determined solutions about issues. In all countries people marry, own some property trade goods and services and pass away. Therefore, the rule regarding inheritance and marriage in each country is not except a possible solution to problems. If institutions like polygamy or contractual transfer of inheritance can be found in foreign law and not in domestic law, they can be considered regulations of their own legal system. This does not mean ignoring the domain of regulations in domestic rights (Nasiri, 2017, p. 87).

It must be noted that such differences occur between private international and domestic rights and this shows that private international rights are independent from domestic rights. Concepts like description or transfer is different in private international and domestic rights and they render various interpretation. Consequently, legal relationships in different systems are the subject of various orders and results. Never can we reach a relatively favorable result via description based on the trial venue law (Saljugh, 2018).

B) The second limitation and exception on the trial venue law is in cases where it is necessary to accept descriptions of the cause law in order to execute an Iranian law. For example, we know that determination of personal status of foreign citizens in Iran is according to the law of nationality of those foreigners. The determination of governing law regarding the personal status depends on what citizenship a foreigner person has. Now on which law do we want to know the description of a foreign citizenship depends. It is clear that only the foreigner law (cause law) is qualified in this case. Because foreign citizenship is the same one the foreigner achieves based on the foreign law and the Iran law is not qualified here.

C) In explaining this exception which is the most important one regarding the qualification of the trial venue law, we state that because description comes before conflict resolution rule, only the descriptions follow the trial venue law that are necessary for the conflict resolution law (main descriptions). "But regarding descriptions not necessary for conflict resolution law (secondary descriptions) the cause law must be referred to" (Almasi, 2016, p. 85-86). In other words, whenever there is an issue of choosing a conflict resolution law, the description of the case is based on the trial venue law. Therefore, if that is not the purpose, there is no reason to obey description based on the trial venue law for demonstrating differences between main and secondary descriptions. Regarding whether a property is movable or immovable, which rule should we take into consideration?

We state that because being movable or immovable has no role in executing the conflict resolution rule and the trial venue rule is qualified to deal with it, the description is secondary and the rule of the occurrence of case must be executed. Even if this rule contradicts with the trial venue rule, this solution is always taken in Iran. But in France, regarding inheritance, the description of properties affects the execution of conflict resolution rule and as a result and the trial venue law is obeyed. The reason is that the qualified law articles based on the movability or immovability of properties are different. In French law the movable inheritance obeys the rule of the last residence of the deceased and the immovable one obeys the rule of occurrence (Nasiri, 2017).

DISCUSSION

In the French law, an official deed must be written for identification of biological children. Definition of an official deed is a description itself. But since it has no interference in executing the conflict resolution, it is a secondary description. Generally, it can be said that in all situations relative to deeds, definitions and descriptions are secondary and they must be according to the rule of the location of formulation of deed, even if it is a foreign rule. the reason is that the descriptions are not necessary for executing the conflict resolution rule. On the contrary, when there is a question of description of a right as objective or personal, since it affects the conflict rule resolution, it obeys the trial venue rule. Whether it is objective or personal, the rules governing it are different. The objective rights are dealt with based on the rule of the occurrence location of properties (immovable or movable) while personal rule is based on the rule of location of agreements or the one of residence of the debtor.

Generally legal acts are executed in cases whose bigger ones are comprised by legal rules and whose smaller ones are comprised by intellectual events. The verdict of court is the result of combinations of these two preliminary steps.

But, the determination of the law governing a disagreement is the responsibility of courts and no prosecutor can restrain executing a law because of the silence of the claimer and flaws in his reasons. In fact, the issue whose proof is the responsibility of the claimer is the circumstances of executing law or in other words the small preparation of deduction which is the basis for judgment at the its final analysis. It is supposed that prosecutors know about it. Generally, claimers try to clarify the law explaining their own rights and suggest his favorable analysis and sometimes discussions about the domain of execution of law takes much time.

CONCLUSION

Regarding international legal events, the issue has a different face. In cases which courts must execute foreign law based on Iranian conflict resolution, it cannot be expected that Iranian prosecutors know completely about the legal systems of all countries. Therefore, there is no choice but parties of a suit assisting them and proving the existence of a foreign law and convention and legal procedure and beliefs of knowledgeable people regarding them. Although, theoretically, in this case prosecutors are the people responsible for execution of a foreigner law and they must gain enough knowledge about foreign rules, the scientific problems of this investigations of not knowing foreign rules have made many jurists consider the existence of foreign law under the category of intellectual issues.

This explanation is logical regarding the possibility of counseling with parties to a suit and using their evidence, but it can never impede prosecutors to directly investigate issues and make them so restricted to the reasons of parties like it is accepted in other cases. It is in this stage that the vital role of description and its instruments becomes clear for prosecutors. It is clear that their success paves the way for execution of suitable conflict resolution law. The law on which courts emphasized on their effective qualification based on their natural governing nature and do not accept any wrong description by prosecutors which are against the legal effects of domestic legal organizations, based on their procedures, and try to violate them.

Of course, we must forget about the belief and the promotion of complete freedom of prosecution in describing legal issues and establish a logical system which does not restrict executing judgment (regarding the foreign nature of problems) and does not endanger the impartiality of prosecutors in performing judgment. This cannot be done unless via respecting foreign legal organizations and their governing rules and wise prosecutors' mental attempting to establish congruity between foreign legal establishments and recognized concepts of domestic law.

REFERENCES

- Almasi, A. (2014). **Conflict of Rules in Private International Laws**, University center Publication. Iran.
- Almasi, A. (2015). **Explicit and Implicit Conflict Among Conflict Resolution Systems**, The Kanoon-e Vokala Journal, No.148, 149. Iran.
- Almasi, A. (2016). **Private International Laws**, 3rd edition, Tehran: Mizan Publication, Iran.
- Dickinson, A. (2016). **Back to the future: the UK's EU exit and the conflict of laws**. Journal of Private International Law, 12(2), 195-210.
- Mashayekhi, M. (2017). **The book of Transfer in international Laws**, Aryan Publication. Iran.
- Nasiri, M. (2017). **The international trade Laws in Iran legal system**, Amirkabir Publication. Iran.
- Rammeloo, S. (2017). **'From Rome to Rome'—Cross-border employment contract. European Private International Law: Intertemporal law and foreign overriding mandatory laws: Case C-135/15 Greek Republic v. Grigorios Nikiforidis**, EU: C: 2016: 774. Maastricht journal of European and comparative law, 24(2), 298-322.
- Saljugh, M. (2018). **Private international Laws**, Vol.2, 3rd Edition, Tehran: Mizan Publication. Iran.
- Torremans, P., & Fawcett, J. (2017). **Cheshire, North & Fawcett: Private International Law**. Oxford University Press (OUP).
- Van Calster, G. (2016). **Your laws or mine? On a European Ius Commune for Third Party interests in private international law**. In 28e journée de droit international privé, Date: 2016/05/27-2016/05/27, Location: Lausanne (pp. 145-157). Schultess; Zurich.
- Walters, R., & Zeller, B. (2017). **A Comparative Study of Australia and Slovenia's Private International Laws and the Application of Citizenship and Residence**. Liverpool Law Review, 38(3), 325-338.