



Conceptual Landmarks regarding the Principle of Legal Certainty from the Perspective of European Private International Law

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Abstract: The general principles of European law are those unwritten rules of the European Union, originated from the Court of Justice's interpretation of treaties and other European legislation. An essential element of European private international law and a crucial component of the EU's legal framework is the idea of legal certainty. The concept in question pertains to the imperative of guaranteeing the stability and predictability of legal interactions across borders, particularly regarding ascertaining the relevant legal framework in cases involving extraneous elements. The principle of legal certainty requires that parties involved in a law dispute must have clear and foreseeable knowledge of the law, which governs their legal relationship between them. This means that the judges must ensure that the law is applied in alike circumstances to all the people. To set the determining criterion of the applicable law in a case with relation to an extraneousness issue, it is also important to define the connecting or linking factors between different legal systems involved. These criteria can be diversified, i.e., nationality of the parties, their domicile, the place of the legal fact did happen, or the law chosen by the parties. Withstanding the legal certainty principle meant that the rights of the parties were to be respected and protected in line with the standards of Europe and the international community. The measures may include providing for justice and fair trial, respecting the right to a fair trial and protecting rights of the minority communities and other vulnerable groups. This article examines the complex relationship between the laws of different Member States or between European Union law and national law, with legal certainty requiring a sufficient degree of predictability and safeguards against arbitrariness within the legal system.

Keywords: legal certainty; European Union law; international law; European Court of Justice

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1. Introduction, Background and Objectives

Legal certainty is a concept that has long been sought after by legal scholars and jurists alike. It is often cited as the goal of any legal system. Despite its importance, legal certainty does not have a single definition and its implications in various subfields of law are not yet fully understood. This is particularly true in the case of private international law where any conflict as to when the law should be certain, or which law should be certain, is encompassed by the vague and complex notion of "choice of law". Moreover, legal certainty is often said to be in direct conflict with justice. When general ideas are formed as to what is fair and just, this creates a degree of certainty by which individuals try to mold their actions. Any change in the law which contracts these notions creates injustice according to the law as it stood formerly. Thus, agreeable changes brought about by legal uncertainty are generally seen to be a good thing while unfavorable changes are seen to be unjust. The English view was historically synonymous with the rule of law and Sir William Blackstone famously wrote that "it is better that right be done though the rule of law be upset". However, it is difficult to accept the notion of unjustness as a benefit and this is particularly true for judges whose main goal is to deliver justice. For these reasons legislation promoting legal certainty is often seen to directly conflict with the aims of justice. Any discussion of legal certainty must also consider the laws' practical implementation. Favorable changes to the law are often made through judicial decision upon a specific case. Precedent in common law systems is an important source of law, and it allows for the more gradual and natural evolution of legal rules. It can be seen to be a part of the laws' certainty at that time as the decision is binding and it provides guidance for future cases. However, it is arguable that any change made by judicial decision does not amount to true legal uncertainty as the rule can be changed back by a later decision. The act of uncertainty is most associated with legislative changes, and it is here where the effects upon private international law are most prevalent. (Svantesson, 2021) (Lehmann, 2020).

The role of legal certainty in European Union law can be seen very clear because it is a relatively younger law in comparison with the laws of Member States. When EU Member States and other States which have some kind of relationship with the EU accept become the Member of EU, they must sacrifice a part of national sovereignty to the EU regarding certain policy areas and in return they get the benefits to creating a wealth of laws which creates a complex legal structure. This may raise a question on which of these laws that should be enforced to certain cases and legal certainty is a key for this question. The development of law through the case law method by the European Court of Justice also giving an important reason why legal certainty should be maintained. Development of law through decisions of the ECJ means that at the certain case area there should be a final and clear decision on which law should be referred. Failure to provide legal certainty here is contradictory with article 19(1)

TEU which states “The Court of Justice shall ensure that in the interpretation and application of the Treaties the law is observed.” and will bring an uneasiness to the community of EU law actors.

The purpose of this essay is to explore the extent to which judicial protection of legitimate expectations can be reconciled with the principle of legal certainty in the context of European private international law. To accomplish this, it will first be necessary to explain the principle of legal certainty and the circumstances under which expectations are protected.

2. Overview of Legal Certainty

Legal certainty denotes the requirement that, for the purposes of attaining justice, those subject to the law should be able to regulate their conduct (which may include bringing a claim or a defense in litigation) by it. It requires that legal rules be framed in such a way as to enable the citizen to regulate his conduct. It also requires that the law provide the citizen with adequate protection against arbitrary state action, that is, action taken without the authority of law. The principle of legal certainty seeks to secure the expectations of the individual, a higher priority in an ever-changing society. It is a term with no widely accepted definition that varies between jurisdictions and situations. However, the consensus is that it is an integral principle to the functioning of justice within society and business.

Legal certainty is seen as a paramount requirement for ensuring justice in national legal systems. This is since legal certainty allows for those subjects to the law to be able to regulate their conduct and secure their expectations. It also provides security for individuals against arbitrary state action. These are essential aspects to attaining justice and maintaining a fair society. In modern societies, legal rules govern various forms of cross-border activity. As such, there is an increasing chance of a collision between differing national legal systems. The use of conflict of laws rules to resolve such collisions means that the rules themselves determine which national laws will apply to a particular issue. This again regulates conduct by providing an answer as to what law is to be followed and secures the expectations of those subject to the law. It is at this juncture that legal certainty moves from being a principle directed at ensuring justice in national legal systems to a fundamental concept that requires address in considering the rules of conflict of laws and, more broadly, in Private International Law.

3. Principles of Legal Certainty in European Private International Law

In general, the doctrine of legal certainty requires a clear and relatively conclusive legal basis. However, in the legal system of Civil Law states, mere clarity and conclusiveness of the legal basis is not enough to fulfill legal certainty in softer regulation of substantive law compared to the Common Law. This is because, in contrast to the Common Law legal system with its judge-made law, the Civil Law system values its legal basis in statutes and has a more determinable legal policy. These cases have then evolved into the softer regulation of law on European private international law, while some member states still hold the doctrine of legal certainty as their general principles of law. However, the differences in each member state, their legal culture, and the conception of law and justice become major factors in any different interpretation of those terms of legal certainty.

In the legal field, principles of legal certainty will assist in determining various practices, especially in relation to cases involving private international law. These principles were emphasized in European Union law, as well as in numerous cases in the European Court of Justice. It has been concluded that legal certainty requires a certain legal basis for any decision that affects individual rights, whether in European Union law or national law. This shows the importance of legal certainty in decision-making and its relevance to the purpose of law itself, which is to avoid vagueness and arbitrariness. The general principles of legal certainty in the European legal system, based on national law, are like the past of the Common Law legal system, but there are significant differences with the legal system in some member states.

Seeing that, there are sundry a treat of elucidations of legal certainty I should explain the sum of concepts that we could sight from the Principle of Legal Certainty which is comprised in Article 6 (1) ECHR and Principle concerning the Rule of law. This passage is concerned with a variety of provisions or substantive law, that are relating similar cases with different types of legal transaction.

4. Conceptual Landmarks

The labels of 'conceptual landmarks' or 'principal elements' would appear to be references to norms or general ideas about individualization which provide some guidance to specific solutions, but they are less than fully articulated rules. Considering the volume, diversity and complexity of the material to be addressed by Europe's PIL system, it is difficult for much of the law to rise above the level of general principles. This is a point which has been well understood by the European Court of Justice, which has frequently based its judgments on what it has called 'principles' or 'general considerations' rather than specific rules. It is not always easy

to distinguish these principles from rules. A principle is a norm that will dictate a particular result, or range of results, in a variety of specific fact situations. Principles are usually expressed at a high level of generality, encompassing a wide range of potential fact situations. But sometimes the ECJ has been dealing with ad hoc rules, drawing inspiration not from any general notion of what is just in private international law, but from the specific features of a Community system for a given area of substantive law. A good example of this can be found in the early judgments on product liability, where the ECJ relied heavily on the fact that a special regime of strict liability had been created by directives.

Finally, EU Regulations that have direct effect within Member States represent the clearest instance of providing legal norms for market participants to follow. Moving on, the Single European Act and the Treaty of European Union have laid the groundwork for unified legal rules and goals within the context of a single market. EU instruments of law are essentially a method of selling legal certainty to market participants. In considering the Four Freedoms, for example, nothing can be clearer than a business may wish to avail itself of legal practices that make the comparative advantage more certain. This is a broad goal that touches on the various aspects of public and private international law, but the net result of greater legal certainty should be highlighted when considering individual pieces of legislation. As such, the evaluation of legislation and case law may have set out to examine the maximum effectiveness of a given rule, but it often provides legal academia with a guide on the best use of a particular choice of law rule in each situation. The method is often to restate existing rules in a manner that is more certain, with the net result often being that judicial rule shopping exercises become unfruitful due to a lack of diverse interpretation of differing national statutes. (Pistor, 2020).

The relevant legislation and regulations have been referred to in the preceding sections, yet they represent a key point of reference in understanding the need for legal certainty in European private international law. The 1958 Rome Convention must be mentioned first, because it represents the first major private international law instrument that was formulated within Europe. The preamble of the Convention demonstrates how the drafters deemed legal certainty to be so fundamental to the goals of the Convention that it was viewed as an axiom, while Article 26, which states "A judgment given in a Contracting State shall be recognized and enforced in the other Contracting States," provides a tangible contribution to enhancing legal certainty within European private international law. Further to this, a closer examination of the case law that developed around the Convention, particularly that of the ECJ by virtue of its interpretation and application of the Convention, will yield a wealth of material concerning legal certainty.

Contributions from legal scholars have also been very important in shaping the development and understanding of the principle of legal certainty in European private international law, and particularly its relationship with flexibility. For the most part, scholars have made their contribution in reaction to the case law and legislation.

5. Challenges and Criticisms

Perhaps the most significant and interesting challenges to the increasing importance of legal certainty as the leading principle in European PIL are those that come from other principles governing individual areas of law. It is argued that the simplistic maxim that parties should be able to foresee which law will be applied to their contract is at odds with the aims of party autonomy and the best interests of the child. The logical conclusion of the Rome II test for the closest connection seems to indicate that despite parties' wishes, there can often be a different law that applies to a situation that has less connection to the parties or the contract.

This has been a long-standing criticism against the revolution in European Private International Law, and arguably its legitimacy. This claim is harder to disprove in comparison to the other criticisms that will be examined due to the abstract nature of the principle of legal certainty and the fact that it's a governance principle rather than a rule. However, the most recent attempt to create a new legislative instrument for the regulation of consumer sales (which is assumed to be the Rome I regulation) and the decision to exclude it from the scope of the instrument has given renewed vigor to this criticism. There is now a necessity for clearer definitions of what the internal market requires in terms of governing law provisions for intra-EU contracts and how this is to be balanced with the general desirability of leaving party autonomy as untouched as possible.

In attempting to translate a complex system of rules aimed at regulating judicial jurisdiction into the black letter of the law, European private international law has always aimed to provide certainty in its outcomes. This certainty was for a long time considered of a solely legal form: the certainty that the correct substantive law would be applied to a given factual situation. It is generally accepted that within the European Union, member states' traditional methods of applying these rules, whether through referring them to the appropriate forum non convenient or through their own domestic choice of law rules, has led to forum shopping, a situation where the claimant is able to choose the forum providing the most favorable substantive law to his claim. The recent reformations in European private international law, such as the introduction of the EEX Regulation and Rome Convention, have been attempts to plug gaps and close doors to prevent forum shopping and, as a result, increase certainty in predicting what law will be applied

to a case. However, these attempts have been met with concerns that closure of such doors will limit access to justice for claimants. This point is acutely observed in relation to the general principle in European private international law that lays down the jurisdiction of member states' courts enshrined in EEX Regulation Article 2. This principle, though it may provide a certain set of rules as to where international cases should be litigated, is often turned on its head by specific jurisdiction rules derogating the general principle provided for by other EEX articles and forum non convenient decisions based on applying the doctrine to the most appropriate choice of law rules. As a result, while the claimant may know where his case will be tried, he may not be certain as to whether it can be effectively adjudicated at the chosen forum. Ultimately, it is a clear implementation of the EU rule that will provide certainty as to the correct means of transferring these cases to the most appropriate forum.

6. Future Perspectives

The starting point adopts the findings of the reference to the fact that certain areas of law have improved, i.e. Rome I and in particular Rome II. No doubt improvements, albeit with teething problems, but dogmatic that an attempt to look for improvements with the Common Frame of Reference will render more problems than it solves. One landmark in the expedition of the CFRE is its contractual part which was drafted into a political resolution by the European Parliament. This part is to be presented with a set of draft regulations. It is opined that they should be an exercise in law and an example here will render yet another better regulation for European law. However, the plethora of international instruments in the area will render inevitable conflicts between the conflict rules in various different areas. An example which will only require the resolution process to write even more conflict rules between conflict rules!

According to the profound changes undergone in the conceptual landmarks, the principle of legal certainty has witnessed, the future points at further complexity. This is since the only means to make a complex area of law work better is to make it even more complex. This inevitability is because the attempted reforms will be to an already complex area of law. It follows that the reforms will be complex to breathe life into an area which has seen the lives of many aborted attempts at unification.

Abolishing the distinction between “civil” and “commercial” matters would increase legal certainty. It is generally thought that the exclusion of consumer and employment contracts from the Regulation has not achieved its intended aim of leaving the national rules as the default set of choice of law rules. Instead, it has left a patchwork of European and national rules which businesses and individuals have

found hard to understand and predict. The European Parliament's rapporteur on Rome I has suggested extending the scope of the Regulation to cover all contractual obligations for the choice of law rules, whilst leaving rules concerning the validity of contracts and third-party effects to the national law.

The growing importance of conflicts' issues in such fields as environmental law or human rights law suggests that proponents of unification may wish to push their agendas into areas where conflicts specialists might prefer more options and creative methods of harmonization. An increase in the global mobility of persons has implications for choice of law and jurisdiction rules, and for the status of foreign judgments and orders, in many areas of law. All of these are issues which existing conflicts theories and methods can realistically address, and the future development of conflicts law in response to these global issues may be influenced by the extent to which conflicts scholars and practitioners are able to market their expertise in competition with specialists in various fields of substantive law. (Brunet-Jailly, 2022).

Bibliography

Brunet-Jailly, E. (2022). Cross-border cooperation: a global overview. *Alternatives*. [\[sagepub.com\]](https://sagepub.com).

Lehmann, M. (2020). Regulation, global governance and private international law: squaring the triangle. *Journal of Private International Law*. [\[https://www.tandfonline.com/doi/abs/10.1080/17441048.2020.1744255\]](https://www.tandfonline.com/doi/abs/10.1080/17441048.2020.1744255).

Pistor, K. (2020). *The value of law. Theory and Society*. [\[https://link.springer.com/article/10.1007/s11186-020-09388-z\]](https://link.springer.com/article/10.1007/s11186-020-09388-z).

Rome I Regulation [\[https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008R0593\]](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008R0593).

Rome II Regulation [\[https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32007R0864\]](https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32007R0864).

Svantesson, D.J.B. (2021). Private international law and the internet. *Private International Law and the Internet*. [\[https://www.torrossa.com/gs/resourceProxy?an=5393053&publisher=FZR504\]](https://www.torrossa.com/gs/resourceProxy?an=5393053&publisher=FZR504).