A COMPARATIVE STUDY OF THE LAW GOVERNING CIVIL RESPONSIBILITIES IN BRITISH AND FRENCH PRIVATE INTERNATIONAL LAWS

UN ESTUDIO COMPARATIVO DE LA LEY QUE RIGE LAS RESPONSABILIDADES CIVILES EN LAS LEYES PRIVADAS INTERNACIONALES BRITÁNICAS Y FRANCESAS

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Abstract: *Nowadays the relationships between different countries and their citizens have expanded to the extent that currently it is not possible for any nation to stay surrounded by the walls of its land. By taking a look at the elements of international relationships, transportation of individuals from one country to another and, international commerce it can be concluded that there are countless international issues that could be faced. One of these issues is the issue of the law governing out-of contract responsibilities in case of a conflict between the laws. In these cases, there are no universal regulations and the basics of out-of contract civil responsibilities differ from one country to another. On this basis the issue is to determine the governing law in case of occurrence of a conflict regarding out-of contract responsibilities; in addition the issue is raised from disagreements between the domestic laws of different countries. This is because the verdict depends upon the governing law. Determining the law governing the civil responsibility has been one of the cases of conflict of laws in laws of Britain and other countries as well.*
Keywords: *location of incident, place of residence of the summoned, civil responsibility, conflict of laws*

Abstracto: *Hoy en día las relaciones entre diferentes países y sus ciudadanos se han expandido en la medida en que actualmente no es posible que ninguna nación permanezca rodeada por los muros de su tierra. Al observar los elementos de las relaciones internacionales, el transporte de personas de un país a otro y el comercio internacional, se puede concluir que existen innumerables problemas internacionales que podrían enfrentar. Uno de estos problemas es el tema de la ley que rige las responsabilidades fuera del contrato en caso de conflicto entre las leyes. En estos casos, no existen normas universales y los fundamentos de las responsabilidades civiles fuera del contrato difieren de un país a otro. Sobre esta base, la cuestión es determinar la ley aplicable en caso de que se produzca un conflicto en relación con las responsabilidades fuera del contrato; además, el problema surge de los desacuerdos entre las leyes nacionales de diferentes países. Esto se debe a que el veredicto depende de la ley que rige. La determinación de la ley que rige la responsabilidad civil ha sido uno de los casos de conflicto de leyes en las leyes de Gran Bretaña y otros países también.*
Palabras clave: *ubicación del incidente, lugar de residencia del convocado, responsabilidad civil, conflicto de leyes*

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Introduction

The issue of the law governing civil responsibility is usually found in the laws of the United States of America and most American researchers are focusing on this issue. British judgmental procedure receives a few criticisms; however Australian and Canadian laws are criticized more. Some may say that they do not bother themselves with proving the laws related to foreign laws. It may be because British laws have fewer variations of civil responsibility laws. Some of the several views that have been proposed regarding determination of the law governing civil responsibilities will be discussed in the following.

The theory of the prescribed court law

In 1849 this theory was proposed by some of old German lawyers including Savigny and Waecther aimed at solvation of conflicts of laws in the context of compulsory liability. They considered this issue subject to the law of the court (Bourel, 1961, 20).

In British laws, whenever a damaging act was done, the British law was enforced even if neither of the sides of the conflict had no relation with British laws. For the first time this regulation was employed in a conflict. The summoned was of a Czechoslovakian nationality and a British citizenship and was charged for sending insulting documents to the Czechoslovakian president who also was a citizen of Britain. The plaintiff claimed that the summoned had shown an improper behavior. The British court determined that the British law was the governing law since the damaging act was done in the country of Britain. The main reason behind this theory is that a damaging act in out-of contract responsibility is highly similar to crimes in criminal responsibility. Therefore not unlike criminal cases in which enforcement of the laws of the place of the court is an agreed upon fact by every country and there is no doubt regarding inapplicability of foreign criminal codes in another country , out-of contract civil responsibility has similar conditions too (Collier, 2001, 221).

It seems that out-of contract issues and claims must always be judged under the governance of the laws of the state of the judge. Regulations related to out-of contract responsibility have a magisterial attribute in a way that the judge is never able to enforce the laws of the foreign country in these contexts; especially when the prescribed laws of the court are inconsistent with the laws of the place of occurrence of the damaging act (Wolf, 1945, p215).

Problems with the theory of the prescribed court law

The purpose of pursuing civil responsibility is compensation of damages and in this regard, the purpose of compensation is to return the plaintiff to its status prior to occurrence of the damages. This does not essentially imply that the incident or the damaging act is a criminal act, rather it implies that the incident has caused damages that are in need of compensation since there are no damages that are supposed to be left uncompensated. This is while in the context of criminal laws, the main focus is on crime and criminal faults. In contrast to civil responsibility, criminal actions are discretely determined and counted in criminal laws. As a result, in the context of civil responsibility one cannot use the criterions of criminal laws for determination of the governing law.

As a critical issue regarding enforcement of the prescribed laws of the court it can be referred to citation to public order. By referring to the regulations of solvation of conflicts between countries regarding civil responsibility it can be seen that in many countries including Britain it is legal to enforce the laws of foreign countries and this shows that the related regulations are not among the regulations related to public order.

The theory of enforcement of laws of location of occurrence of the damaging act

This theory is the traditional doctrine for conflict of laws in determination of the law governing out-of contract responsibility and it has been accepted by many countries as the solution for conflict of laws in civil responsibility.

According to the dominant idea held by majority of lawyers and jurists and the judicial procedures of many countries, in terms of faults that cause others damages, the theory of local law is introduced. This theory can be expressed in two forms. In the first form, by local law it is referred

to the laws of the location of occurrence of the damaging act disregard of the place of damage. On the other hand, some believe that the basis should be the location of realization of the damage. In case of conflict of laws, the law of the location of realization of the damage is considered as the governing and privileged law. However it is in case where the location of the occurrence of the damaging act and the location of realization of the damage are in multiple countries (Bourel, 1961, 15).

For instance, if a person of nationality of "A" who is also a citizen of the country of "A" has caused damage to a plaintiff in the country of "B" in a driving accident, the person is only obliged to compensate the imposed damage if the laws of the country of "B" as the location of occurrence of the damage find him responsible for the damages. In addition, the amount and extent of his responsibility is also determined by the laws of the aforementioned country (Almasi, 2004: 62-63). For a long time the country of Britain used a combination of the theory of the prescribed court law and the law of location of occurrence of the damaging act. However, nowadays according to the paragraph 1 of the article 11 of the private international law issued in 1995, the law of location of occurrence of the damaging act is used by British courts. This principle has also been accepted in the convention relation to traffic incidents issued in May 4th of 1971.

Reasons held by proponents of enforcement of the law of the location of occurrence of the damaging act in case of conflict of laws

One of the reasons is the political or social goal which can direct us towards the principle of territoriality of laws and regulations. In this view, every person is obliged to obey the laws of the place he/she is located in. Also the government is also privileged to regulate its own laws for maintaining public order and to prohibit individuals from interfering with the aforementioned order. It is natural to believe that the laws of the location in which the damaging act has occurred and interfered with its public order is the only law that can both determine the legal proceedings and resultant legal obligations, and oblige the person causing the damage to compensate it. On this basis, since even in the most normal conditions the damaging act somehow interrupts the public order of the location of occurrence, it is expected to have the matter judged under the governance of the laws of the location of occurrence so that efforts are made to maintain the values and priorities of the immediate society. The purpose of these types of regulations is to obligate the owners of vehicles towards being highly careful so that the vehicles are not taken control by improper, uncommitted and, unauthorized drivers (Morris, 1968: 258).

Whenever a damaging act that has caused a person certain damage occurs in the territory of a country by a foreign element, the damaged person is legally allowed to make a complaint and ask for compensation of the imposed damages. In this case, not only in the local country of the plaintiff, but also the summoned can be brought to the court in any other country. The only condition here is that the public order of the recent country is not in any conflict with this action. In other words, according to the theory of acquired rights, the rights relating to civil responsibility are also equal to the person's properties and since the damaging act has taken place in the territory of that certain country, the laws of that country would govern the civil responsibility. In such cases, the territorial principle and acquired rights are added to each other and whenever this situation is raised, the imposed damages must be compensated according to the laws of the same country.

Every different country's civil responsibility law proposes several various solutions for compensation of damages in case of various damaging acts and those who undertake socially dangerous activities must be able to forecast and predict the legal effects of their works. In other words, every person should be given the right to control his/her activities according to the laws of the country in which he/she undertakes his/her activities. In this case there would be no responsibility for the person.

Problems with the theory of the law of location of occurrence of the damaging act

In the domain of civil responsibility problems may occur that are related to several countries. Or in some cases the act may not be any country at all. In these situations enforcing the

aforementioned theory would give rise to certain problems.

In case of the first situation. The laws of each of the countries are preferred over the laws of other countries. This is known as the absolute preference.

On the other hand this difference itself and having different legal systems would result in different solutions.

By taking a look at the upper content a third situation can be supposed too. Imagine a case in which fire and spread of particles in country "A" have caused damages to the crops of the country "B"; in this situation the upper theory in conflicted and it cannot be decided whether to enforce the laws of the location of occurrence of the damaging act or the laws of the location of realization of the damages.

The Integrated theory

In order to prevent the undesirable consequences and to adjust the theory of the prescribed court law, lawyers and jurists have proposed an integrated theory combining the law of the location of occurrence of the damaging act and the law of the location of realization of the damages. Primarily this theory was accepted in British judicial procedure and after that, it found its way to the laws of other countries as well.

In Britain, this rule is known as the rule of "similitude". The following regulations have been stated regarding selection of the governing law:

First of all, whenever a damaging act is done in the territory of Britain, the British law is the only law that governs the situation. Second, when a damaging act is done outside the territory of Britain but according to this law, the doer is responsible for compensation. For the first time this regulation was introduced in the case of Phillips vs. Eyre. This regulation has two basic conditions: when the damaging act has taken place outside Britain but according to the law of location of occurrence of the act the doer is sentenced as responsible for compensation of the damages but according to the British laws it is not judicially pursuable, the plaintiff would not be given any right to ask for compensation from the doer (Collier, 2001, 222). In other words, the action of the summoned must be characterized in a way that if it was occurred in Britain, it would have resulted in requirement for compensation of the damage by the inflictor. The second is that the action of the summoned must not be considered as a legally authorized action in the laws of the location of occurrence of the act. These conditions are known as the conditions for judicial pursuit in French Laws. In addition in 1971 this principle was interpreted by the court of appeal in the case of Chaplin vs. Boys. The first regulations resulting from this decision were made by the board of royal counselors in 1868 regarding the case of Holly. In this case, a Norwegian ship collided with a British ship in Belgian waters. The owner of the Norwegian ship filed a complaint against the owner of the British ship in British Courts. The cause of the collision was human error by the captain of the British ship. In this claim, the damaging act had taken place in Belgian waters and according to Belgian laws the owner of the British ship was responsible for this fault. However according to British laws in British courts, this action does not bring any responsibilities for the owner of the ship and since here the one of the two conditions have not been realized, the owner of the British ship faced no responsibilities (Collier, 2001, 222).

According to this content, in order to sentence the summoned who has committed a damaging act outside the territory of Britain, the action of the summoned must be considered as illegal in both of the courts of Britain and the location of occurrence of the action. Therefore whenever the summoned can refer to one of these reasons and frees him/herself from the responsibilities, the court cannot sentence the summoned to compensation of damages.

Problems with the integrated theory

This theory has proponents in many countries and is put in effect in those countries as well. However some jurists and lawyers have made certain criticisms to this theory:

Especially in the sense of the British regulation of "similitude", this theory is based on a distinct interpretation of public order. On this basis the territory limits the enforcement of the law of location of occurrence of act. This is because in this case the law of location of occurrence of the

damaging act is only referred to in order to determine whether the act of the summoned in that location was legal or illegal according to the laws of that location. But ultimately it is the prescribed law of the court that determines the destination of the claim along with the quality and extent of compensation of damages.

This theory is somehow in favor of the summoned because he/she can refer to the prescribed law of the court and use this as an advantage. This is while there is no justified reason to grant the summoned such an advantage. In the view of some lawyers, this theory is like a sword against the plaintiff and a shield in favor of the summoned. Because both the prescribed court law and the law of the location of occurrence of the damaging act must consider the doer responsible and if the doer can prove that according to one of the laws he/she has not committed any illegal actions, there would be no responsibility for him/her; even if his/her act was considered as illegal according to one of the laws. On this basis since this theory is in favor of the summoned and this is against judicial justice.

Conclusion

Determining the governing law in claims regarding out-of contract responsibilities is one of the most complicated instances of conflict of laws and has resulted in various doctrines in judicial procedures. The reason lies in the lack of agreement regarding the effective communicating factor in legal facts. This causes difficulty in finding a clear and firm support for analysis of conflict of laws in this domain. In terms of conflict of laws and unlike the out-of contract responsibility, the center point of the legal relationship of interest would be easily distinguishable. As a result setting regulations regarding solvation of conflicts would not be challenged in any significant way. For example, regarding the status and personality, his/her residence, nationality and habitat can be considered as the most important communicational factors for determination of the governing law. Also in terms of properties, most countries have considered the location of the property as the effective communicational factor. In the domain of out-of contract civil responsibility, due to the variability of legal facts, there is no single legal support available. The most ancient theory in thie regard is the theory of legibility of the prescribed court law. The proponents of this theory consider civil responsibility in close relationship with criminal responsibility and the prescribed public order and therefore they believe that the law governing the claims in the context of out-of contract civil responsibility is the prescribed court law. Among other theories in this regard it can be referred to the integrated theory that combines the law of location of occurrence of the damaging act and the prescribed court law. This theory has certain problems since it requires the plaintiff to make the summoned responsible for compensation according to two laws and this is in contrast to judicial justice. In most countries, the theory of the local law has been selected as the solution for solvation of such conflicts. This is because among the communicational factors, the factors of damaging act and damage are shared in all legal facts.

However the most modern theory in this regard is the theory of appropriate law. Also this theory is criticized because of unpredictability of privileged laws and probability of unfairness of the judge. In France there was also another theory formed named as the closeness principle. This theory has also been subjected to several criticisms in cases happened in different countries.

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Recebido em 1 de fevereiro de 2018.
Aceito em 16 de fevereiro de 2018.