Back to the Future of Conflict of Laws: Enhancing interface through mutual trust

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BACK TO THE FUTURE OF CONFLICT OF LAWS:
Enhancing interface through mutual trust

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OUTLINE

• Criticism of conventional conflict of laws debate
• Emphasis on actors and relations among actors
• Mutual trust and interface:
  • Interaction between development of mutual trust and establishment of interface between governments, agencies and professionals
  • Mechanisms to promote developing mutual trust
• Implications of mutual trust to conflict of laws
CRITICISM OF THE CONVENTIONAL CONFLICT OF LAWS DEBATE (1)

- Conventional terminology: place of act / effects, territoriality, domicile, residence, comity, etc.

- These notions symbolize citizens’ “deemed” trust in local agencies and societal structures

- Territorial connecting factors became less appropriate due to the development of global communications network
CRITICISM OF THE CONVENTIONAL CONFLICT OF LAWS DEBATE (2)

- Limited efficiency of conventional tools of conflict of laws:
  - Recognition and enforcement of foreign judgments between Japan and PRC have been consistently denied due to lack of reciprocity
  - Party autonomy has been a source of divergent regulation (cf. Rome I and Rome II)
  - Arbitration has been effective only in B2B situations (not B2C or mass claims)
CRITICISM OF THE CONVENTIONAL CONFLICT OF LAWS DEBATE (3)

• “there is nothing new left in our area that has not been proposed already”
  (F. Juenger, Choice of Law and Multistate Justice (2005))

• How to return to the original situation: from symbolic (or, “deemed”) trust to actual trust?
  • NB: we are not seeking to propose a uniform law approach
  • we fully respect conflict of laws approach
IRRELEVANCE OF GEOGRAPHICAL LOCATION

- Traditionally, certain territorial connecting factors could be considered as a signal of trust in the institutions of a particular place.
- E.g., transaction between different parties made in state α; conferral of jurisdiction to the courts and applying the law of that state is a signal of trust.
- In the era of global telecommunication, such territorial factors lose their signaling function:
  - the place of certain acts and location of the parties can be hardly identified;
  - most communication occurs via a third party (intermediary such as telecom service provider or cloud computing service provider).
TRADITIONAL WAYS OF INTERFACE AND MUTUAL TRUST

• Interface - points of interaction (sending signals, exchanging the information) among different levels of a system

• Lower level actor is the principal of an actor on a higher level, and higher level actor often becomes its agent

• Vertical authority-based relations represent deemed trust among the actors
Traditionally, lower level actors hardly had any horizontal interface (e.g., Japanese consumers and Californian consumers)

Higher level actors often had horizontal interface (e.g., inter-governmental communication). However, it was not necessarily supported by personal communication and relationship
How to establish mutual trust and interface on a horizontal level among actors belonging to different systems?
BUILDING MUTUAL TRUST AND INTERFACE

• Repetitive interaction over time in a particular field of knowledge leads to the established of actual mutual trust

• The establishment of mutual trust:
  • Is more likely among actors on the same horizontal level (peers)
  • Facilitates exchange of information and other values
  • Contributes to the building of mutual expectations of certain behavior

• Such cooperation could be noticed among professionals
BUILDING MUTUAL TRUST AND INTERFACE:
An example of patent offices (1)

- Since 1983, three major patent offices (JPO, EPO, USPTO) engaged into a Trilateral Offices partnership which facilitates cooperation and harmonization of procedures
  
  - Patent Prosecution Highway (PPH) started in 2006 and aims to streamline international patent prosecution and deal with backlog
  
  - PPH-PCT Program: fast-track patent examination using the search results of the Office of First Filing
  
  - Patenting procedures and application forms have been been to a large degree harmonized by multilateral agreements among the patent offices
BUILDING MUTUAL TRUST AND INTERFACE:
An example of patent offices (2)

In the context of Trilateral Cooperation, trust between one applicant and certain patent office, could further lead to the establishment of trust in other patent offices.
IMPLICATIONS to conflict of laws: Enhancing mutual trust and interface

- Enhancing mutual trust could contribute to multiple layers of interface:
  
  - Allocation of jurisdiction and coordination of multi-state proceedings could be streamlined if agencies and courts cooperate (e.g., insolvency proceedings, int’l family law disputes)
  
  - Applicable law problems could be mitigated if greater trust is developed among professionals (attorneys, courts); e.g., proof of the content of foreign law
  
  - Recognition of judgments could be also facilitated if courts of the recognizing state deem themselves as agents of the litigating parties and their attorneys
THANK YOU!

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