

Reflections on the purpose and function of private international law

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INTRODUCTION

It is generally understood that the purpose of private international law is to regulate the relations of international legal transactions. To achieve this, private international law should use a set of rules whose principal aim consists of arbitrating a regime which is specifically designed for these relations, distinct from that which the *lex fori* establishes for internal legal transactions, notwithstanding the fact that, from the perspective of some areas of legal doctrine, the aforementioned set of rules may give rise to a method of legal regulation that is different from the conflictual mechanism.

This form of interpreting private international law through the functions of its rules leads, in my opinion, to conclusions which are difficult to accept, as they lead to a narrow and residual concept of the purpose and functioning of the discipline. In the following sections I offer a respectful and modest reflection on the bases of a discipline whose crucial problems are seemingly always under debate.

1. Private international law as the regulator of external legal transactions

Within the doctrine it is taken as established that the regulation of relations of international legal transactions is the purpose of private international law, understanding that these relations, unlike those of domestic law, come into contact with other legal codes in one or more ways. The aspects of these relations which are not related to the *lex fori* are, from the perspective of the domestic legal order, known as *foreign aspects*, which may be relevant to one or more of the subjects of a legal transaction (nationality, address or habitual residence) or to acts from which the transaction arises (location in which it was established or executed). Therefore, the foreign aspect is what differentiates a particular legal relationship from another legal relationship which is purely internal.

In order to achieve its aims, private international law enjoys a system of rules which, logically, have the common characteristic of their extranational nature. These rules are differentiated from one another according to their functioning or operating mechanisms:

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the conflictual rules aim to resolve which legal system should be applied to a particular case, either through reaching a decision over whether a particular legal code should be applied to the dispute in question (unilateral conflictual rule) or, in a more extensive manner, indicating the appropriate foreign legal framework to be applied in the case that the *lex fori* does not have the authority to process the dispute in question (bilateral conflictual rule). In all cases, these rules establish an indirect regulation of the dispute in question, as they are limited to establishing which state's legal code is the most appropriate through which to find a material solution for it. Other rules, on the other hand, provide a direct and substantive resolution to the dispute (material rules of private international law), as work by Francescakis¹ indicates, due to their objectives and binding nature. These other rules overlook the extranational nature of the dispute and resolve it directly and immediately, as if it were a domestic matter (immediate application rules).

As can thus be observed, this approach to the purpose of private international law and the various rules which it has available is based on the distinction between relations and situations concerning external legal transactions and internal legal transactions. Whilst domestic legal relations can, at least in theory, be easily delimited, the same cannot be said for extranational transactions, as although the foreign aspect is the surest way in which we can define these relations,² not all of them form part of external legal transactions which are subject to private international law. The question of which relations require treatment under private international law has had various interpretations within the doctrine. Maury's³ position is well known, for whom when just one of the elements of the relation is foreign — one of the subjects, due to their nationality or residence, the location of the dispute or the place in which the legal relation was established — then we are in an extranational relation and private international law is the appropriate regime to regulate this. This interpretation may, however, be interpreted in two ways. Professor Angulo Rodríguez understands that Maury pointed to the possibility that a single foreign element, of whatever type, would serve to condition the entire relation or underlying situation as foreign⁴ or simply to understand that the presence of any foreign element within a legal relationship as being sufficient cause to convert it into a foreign legal transaction, which would thus be more debatable.⁵

By making the presence or otherwise of any foreign element of a legal transaction a distinguishing feature of private international law, with the aim of assigning private international law as the appropriate regime for regulating a legal transaction that has been designated as extranational, in my opinion leads to outcomes whose logic and coherence are questionable. The reasoning behind my position is that the aforementioned distinguishing feature leads to a vision of private international law which reduces it to

¹ Francescakis, P. (1958), *La théorie du renvoi et les conflits de systèmes en droit international privé*, Paris, p. 11

² Rigaux, F. (1963), *Droit public privé dans l'ordre juridique internationale*, Mélanges Jean Dabin, volume I. Paris, p. 263

³ *Règles générales des conflits de lois*, Academic Course Material International Law The Hague, 1963-III (volume 57), p. 375

⁴ Angulo Rodríguez, M. (1970), 'Objeto, contenido y pluralidad normativa en derecho internacional privado,' *R.E.D.I.* (vol. XXIII), p. 749

⁵ Sopena Monsalve, A. (1981), *Formalismo y finalismo en el Derecho internacional privado (una propuesta metodológica)*, PhD Thesis, University of Granada (unpublished), p. 181

the rules of bilateral conflicts, and even then only in the case that these rules point to the application of foreign law.

If extranational legal relations, which are the object of private international law, are to be characterised by the presence of at least one foreign element, then the element in question should be legally relevant from the perspective of *lex fori*. This notwithstanding, the legal relevance of the element must depend on the conflictual rule considering it as being a necessary condition of its operation. If for example a dispute involves Spain deciding on the inheritance of a Spanish national resident in Italy with assets in Italy, the residence and location of the assets -foreign elements for *lex fori*- are relevant for the Spanish conflictual rule, as set out in article 9.8 of Spain's Civil Code, which only takes into account the nationality of the testator at the time of death, regardless of the nature of their assets and where they are located. Likewise, following the same logic, if it were an Italian national who resided in Spain with assets in Spanish territory that had died, then Spanish conflictual rule would justify that the Italian legal system handle the succession. In the first case, the application of Spanish law can be argued as a case of a domestic transaction, despite the foreign elements that are objectively present and which could link the case to Italian law from the perspective of the Italian legal system, even though these elements are irrelevant for the Spanish conflictual rule and are consequently not implemented. However, this line of argument leads us to conclude that the conflictual rule only functions as a rule of private international law when it mandates the application of foreign law and when the relations of domestic transactions are subject to *lex fori* without this being due to a rule but rather because it is naturally understood to be the case. This notwithstanding, it could be argued that the application of Spanish law to the example above is determined by the conflict rule of article 9.8 of the Civil Code, just as it is for the case of the deceased Italian living in Spain, whose inheritance would be processed by the Italian legal system. But in such a case, for the application of Spanish law it would make no difference whether the deceased Spaniard's residence and assets were located in Spain or Italy. That is, we observe no difference between a legal relation in which there are overlaps between two or more legal systems and a legal relation that is totally internal. Therefore, if the conflictual rule is what determines *lex fori* through connection – the Spanish nationality of the deceased in the example – without any other elements being considered relevant (residence and whether assets are located within or outside Spain), it becomes obvious that the triptych of 'legally relevant foreign element – extranational legal transaction – subject to private international law' on which, it is argued, the discipline should be based, is no longer valid.

It could be argued, however, that the conflictual rule is not the only rule within private international law which deals with extranational relations, as the material rule of private international law also carries out this function. This material rule takes into account the foreign element in a way that allows for a legal response that may be different from that which exists for purely domestic matters.

If this argument is valid, the problem would still be rooted at the level of the conflictual system, which is, of course, at the centre of the discipline. Nevertheless, I believe that the explanation that is traditionally offered on the nature of material rules needs to be revised.

It is a widely held belief that each set of material rules is subordinate to, or depends on, a prior implementation of a conflictual rule. The Civil Code of Commerce of Czechoslovakia, for example, is made up of material rules applicable to international contracts whose application depends on the conflictual rule of its Article 3. According to this article, the Civil Code is only applicable when the Czech legislation is in accordance with its own private international law or when this legislative arena has been chosen by the parties of a legal transaction. Similarly, the same can be said for Article 992 of the Civil Code of the Netherlands, which prohibits the Dutch from executing an holographic testament abroad, even though this is valid within the Netherlands because, as Fragistas notes,⁶ there is a unilateral conflictual rule which submits authentic testaments to the legal domain of the country in which they were executed and holographic testaments to the material law of the Netherlands.

There are, however, other material rules whose application would be independent of the prior implementation of a conflictual rule. Examples of such rules, originating in jurisprudence and applicable to international contracts, can be seen in the rule which recognises the validity of the gold-value clause for international payments (which is prohibited in domestic contracts), or the rule which declares as valid the compromissory clause in international contracts or its autonomy with regard to the legal transaction to which it refers, whether included within this or stipulated separately. This notwithstanding, a deeper analysis of this issue calls into question the idea that these types of material rules have an immediate and direct application, that is, independently of the implementation of a conflictual rule. In fact, from the detailed study of this theme by Professor Miaja de la Muela it can be clearly seen that the application of the aforementioned material rules is actually conditioned by a special conflictual rule which dismisses the foreign law, which an 'ordinary' conflictual rule could lead to, and which implicitly delimits internal private relations from international ones.⁷

Applying one or more substantive norms to a relation, whether domestic or extranational, is only necessary when another rule provides for this; otherwise the application would be unsupported. For this reason the application of material rules in private international law is necessarily subordinate to the implementation of a conflictual rule, the purpose of which is to delimit the field of application of material rules. This conflictual rule may act for an entire set of material rules or be included within each particular material rule; in this latter case we are dealing with a specific conflictual rule to which a substantive solution has been incorporated. These rules, which are material yet which include an individual solution, are what Professor De Nova considers to be carriers of the boundaries of their own sphere of action. That is, they are 'self-limited rules'.⁸ By definition these rules are always unilateral and, therefore, will inevitably lead to the application of the law of which they form a part.

⁶ See Von Overbeck, A. E., (1962), *Les règles de Droit international privé matériel*. Nederlands Tij. Int. Recht (De conflicto legum). Dedicated to Kollewijn and Offerhaus, p. 363

⁷ Miaja de la Muela, A. (1974), 'De la territorialidad de las leyes a l nueva técnica del Derecho Internacional privado', *Cuadernos de la Catedra*. J. B. Scott. Valladolid. p. 64

⁸ De Nova, R. (1959) 'I conflitti di leggi e le norme con apposita delimitazione della sfera de efficacia'. *Diritto internazionale*, p. 13 and ss; (1960) 'Conflits de lois et normes fixant leur propre domaine d'application'. *Mélanges Maury*, vol. I Paris; and (1967) 'I conflitti di leggi e le norme sostanziali fonziamente limitate', *Rivista d. i. Privato e Processuale*, p. 699 and ss.

The logical conclusion of all the above is that the rules of private international law are those indicated by the applicable law, *whatever the relation or situation that is being resolved*. Otherwise we must accept that there can only be private international law when foreign law is applied to the relation or situation, that only bilateral rules belong to private international law, and even then only in cases where they mandate that foreign law is the appropriate domain.

2. Private international law as a regulator of legal transactions

The following observations are based on the real and evident existence of some of the premises of private international law which allow us to analyse its rules just as they are set out, that is, to consider them as structural elements of this field of law.

Private international law has certain premises which are conspicuously visible and thus require no demonstration: the world is parcelled up into sovereign states, each with its own specific legal system; and recognition, from any of these legal systems, of the relevance and pertinence of other legal systems, is guided by the same forces (if states simply ignored each other then private legal transactions could not develop beyond the most basic elements of state activity). In addition, it is the domestic legislator who, taking on functions of international legislator, governs their own system of private international law.⁹ Obviously, the legal systems of different states come into contact with each other every time citizens of different states establish a relation or transaction between them. As posited by Professor Rigaux, the international legal order offers private business an organised means through which to interact, without which the subjects of different states would have great difficulties in establishing legal relations. In all its forms, private international law involves reciprocal recognition by states of their respective legal frameworks. Importantly, this recognition is not based purely on the division of the world into states, but rather perceives a society of states who recognise each other's legal identity and which produces an international order within which individuals circulate and carry elements of their own domestic legal systems.¹⁰

Furthermore, from my perspective what is really definitive about this is not the idea of relations between individuals governed by different legal systems, but rather the existence of these systems and their principal characteristics.

Law, just as any other phenomenon, is formed through knowledge, and one of the methods through which this is achieved is via the establishment of systems that may be constituted either through criteria of the hierarchical ordering of its rules, or through the coming together of these rules, in accordance with relations between the contents of these rules, with the possibility that both these criteria can be applied independently from one another.¹¹ At the current phase of legislative development of law, we note that both modes are found within domestic legal systems. Based on

⁹ Miaja de la Muela, A. (1975), *El legislador interno en funciones de legislador internacional ante los conflictos de leyes*, Monographic course on the law of bases for the modification of the T. P. of the Spanish Civil Code. Colegio de Abogados de Valencia, p. 169 and ss.

¹⁰ Rigaux, F. (1968), *Droit International Privé*, Brussels, pp. 11-12

¹¹ Battifol, H. (1596), *Aspects philosophiques du Droit International privé*, Paris, p. 48, cit. 2

the unity and exclusivity of legal order, each legislator creates rules linked by content according to a hierarchical ordering process, with some depending on others until achieving a fundamental norm which is considered ideal in order to cover a legal order which is socially established.¹²

Two other essential factors need to be considered as part of this legal framework: the *general* character through which rules are formulated and their aim of *completeness* and *exclusivity*.

The logical consequence of the foregoing notes would be that the aim of all legal systems throughout the world is to be, in and of themselves, universal and applicable in all situations and relations that are considered susceptible to legal regulation. This is unlike ‘conflict of laws’, which would give rise to a generalised and permanent conflict between all legal systems. As reality shows us, this is in fact not the case, so we need to examine why various laws can be applicable to the same purpose, which necessarily leads us to define the field of application of different legal systems. As Wengler observes, no legislator aims to achieve that their laws be followed all over the world, by everyone and throughout time.¹³ If, in spite of everything, a particular relationship is subject to several laws from distinct legal orders, or to none, it is due to the fact that there is a delimitation of the sphere of application of these which, in certain cases may be imperfect or overlapping.

It is, therefore, vital that every legal system has rules which determine their own field of application. If the intention of a legislator is not (and cannot be) to give their laws a universal and exclusive application, then this must be formally established. The generality and exclusivity of a legal order must be delimited by other rules from its own regulation, namely *self-limiting rules*.¹⁴

In this line, Van Hecke considers two broad procedures of delimitation. One is ‘internal’ to the material rule in itself, which is fairly exceptional; and the other is ‘external’ to material rules – the latter is more usual and is typical within private international law, being articulated through ‘rules of connection.’¹⁵ Delimitation can function in line with distinct criteria, such as, for example, due to *reason of territory*; which requires a general delimitation in the style of Article 1 of Spain’s Civil Code (as formulated prior to 1974), which stated:

‘Laws are of compulsory adherence in the Spanish peninsula, adjacent islands, the Canary Islands and African territories subject to Spanish law...’

Similarly, it is also necessary to apply a delimitation in terms of special materials, *reason of territory or of people*, with a general scope. An example of the former can be seen in Article 8.1 of Spain’s Civil Code:

¹² Katicic, N. (1963-4), *Le Droit international privé, droit privé des relations extranationales*, Course at the Institut des Hautes Etudes Internationales (Université de Paris), p. 6

¹³ Wengler (1961), *The General Principles of Private International Law*, Academic Course Resource, D. I. The Hague III (vol. 104), p. 286

¹⁴ Katicic, N. *op. cit.*, p. 9

¹⁵ Van Hecke, G. (1969), *Principes et méthodes en Droit International privé*, Academic Course Resource, D. I. The Hague I (vol. 126), pp. 446-7

‘Criminal laws, police laws and laws relating to public safety are of compulsory adherence for anyone within Spanish territory...’

An example of the latter can be observed in Article 9.1 of Spain’s Civil Code:

‘Personal law corresponding to physical persons is that determined by nationality. This law governs capacity and marital status, the rights and duties of the family and inheritance due to death.’

All this shows that the powers of a legal order may extend beyond its territory, or be restricted to its territory, either due to reasons of territory or of persons.

Once the field of application of legal regulations has been delimited, the situation or relation under consideration becomes located within the rule whose ambit it is included within. However, it may be the case that a relation or situation contains a specific element which is enough to make it unique: one or more of its elements are foreign with relation to *lex fori*. In such cases we refer to a ‘conflict of laws’, and this may give rise to two extreme situations. Firstly, two laws belonging to two different legal systems have the same field of application, and both claim to be applied to the case (this is known as a ‘positive conflict’). Or, secondly, the opposite may occur wherein none of the possible laws include the relation or situation under consideration within their field of application due to their delimitations (this is a ‘negative conflict’). This notwithstanding, it is not correct here to talk about a ‘conflict’ of laws, as such a conflict does not exist for the judge interpreting the case. For the judge the issue revolves around determining which material law is applicable, which can be achieved through the correct application of the delimitation rule – conflictual rule – from their own legal order. As Wengler contends, what we observe here is the action of choosing between different laws that could be applied to the case being dealt with.¹⁶ If we were to approach this as a ‘conflict’, the ‘conflict’ would precede the ‘choice’, and the ‘choice’ would resolve the ‘conflict’.

Ultimately, and as Sperduti observes, we see that ‘conflicts of laws’ are caused by the rules of private international law, as these conflicts are no more than the result of the autonomy of different systems of private international law. Conflicts arise because one state’s system of delimitation defines a field of application which clashes with the laws of other states.¹⁷

The different rules of delimitation of legal orders are in part *unilateral* in nature. That is, through these rules the legislator determines the scope of application of a law which it has designated as appropriate for a certain relation which falls within the legislator’s own legal system.¹⁸ These rules will always designate as applicable the law of which they form part and whose scope of application they themselves delimit. In the case that the delimitation brought about by these rules excludes the relation or situation from the law which these rules belong to, the resultant problem remains unresolved. The

¹⁶ Wengler, W., *op. cit.*, p. 279

¹⁷ Sperduti, G. (1967), *Théorie du Droit International privé*, Academic Course Resource, D. I. The Hague III (vol. 122), p. 182

¹⁸ Gothot, P. (1971), ‘Le renouveau de la tendance unilatéraliste en Droit International privé’, *Rev. Critique D. I. Privé*, p. 1

unilateral rule of delimitation decides solely on the applicability or otherwise of the *lex fori*, without making any claims over the applicability of any law from beyond the *lex fori*.

From the perspective of the needs of a legal system to delimit laws, this situation would seem perfectly logical. However, from the perspective of international legal cooperation, it would seem less than satisfactory, as the world divided up into states, each with their own legal systems that somehow need to deal with the web of relations across borders of subjects of different states on a daily basis. Indeed, it seems rather illogical, as where there is a relation or situation which is distinguished by a foreign element, the unilateral delimitation rule can only provide a negative response, namely the application or otherwise of material law from the *lex fori* and, as Francescakis posits, ‘it refuses to internationalise events.’¹⁹ For this reason, it is necessary to have a rule which provides a ‘positive’ response in that it resolves the problem of selecting a law from *lex fori* or abroad that is appropriate for application in the situation or relation being dealt with. This is the multilateral rule, which, unlike its unilateral counterpart, is a complete rule that gives a conclusive response to the question of ‘application of *lex fori* or application of a foreign law,’²⁰ covering all possible conflicts of this type.

We thus observe that different rules – unilateral and multilateral – respond to different needs. Unilateral rules deal with the necessary delimitation of the legal systems of which they form part. As is well known, this necessary and independent function came before the system of multilateral rules, which does not arise in its complete form until Savigny makes his renowned distinction. Being more complete, these multilateral rules have a unique function beyond that of unilateral rules. If, for example, a certain legislator determines that property located within the legislator’s territory should be subject to the law of that state, this can be prescribed by means of a unilateral rule. But, this same effect can be achieved through a broader formula, whereby it is determined that property be subject to the law of the country in which it is located. This second formula coincides with the first one in that it regulates or delimits the application of the law of which the rule belongs to, that is, *lex fori*. However, it goes further in that it also determines the regulation of other legal systems in cases where property is located abroad, which the first formula does not do. Thereby, the multilateral rule delimits not only one’s own legal order but rather extends to foreign legal orders as well. This is carried out from within *lex fori*, which underlines the importance of the function of the international legislator, which, in the current context of international legal cooperation, is necessarily carried out by the internal legislator.

In this line Barile wonders whether the function of the rules of private international law is to determine the sphere of application of domestic material norms, to designate a foreign law, or to do both simultaneously. The solution to this question largely depends on how the rule in question has been conceived. However, Barile argues that if we take into account the historical function of private international law, there is no doubt that that the duplicity of the formal function derives from the uniqueness of its substantial function. Barile notes that it is obvious that appeals to national or foreign law constitute

¹⁹ Francescakis, P. (1958), *La théorie de renvoi et les conflits de systèmes en Droit International privé*, Paris, p. 15

²⁰ Van Hecke, G., *op. cit.*, p. 448

the two means which have the purpose of achieving the single aim of uniformity of legal order.²¹

Aside from the issue of elucidating which materials are more easily susceptible to being regulated by a multilateral rule and which require, in the current context of private international law, a unilateral rule, it is clear that multilateral rules contain unilateral rules. That is to say, multilateral rules carry out the function of delimiting unilateral rules. In this sense both types of rule blend into one. This does not mean we should forget the importance of, and need for, unilateral rules, which can not currently be substituted, above all in delimiting certain matters which can not be regulated by anything other than the substantive law of *lex fori*. Nor should we overlook the fact that it is only through unilateral rules that multilateral rules have been developed, as is seen in Article 9 of Spain's Civil Code, both in terms of the drawing up of the norm prior to 1974 and the decision adopted by the legislator on how this norm should be established.

This notwithstanding, if unilateral rules are to be considered as implicitly included in each and every one of the material provisions of the legal order of which they form part in terms of how they indicate the sphere of application of these material provisions – even though, for obvious reasons related to legislative technique they are not reiterated in each of these, but rather are formulated in a general form – then multilateral rules, in cases in which they do not carry out the same function of indicating the sphere of application of domestic law, do not add anything to this. In fact, on the contrary, they determine that domestic law should be substituted for foreign law.

Ultimately, the rules of private international law contain *the mandates of the national legislator with respect to the application, in a given situation, of certain legal norms, be these from domestic or law or a foreign legal framework*. These rules, which, according to their formulation, either exclusively delimit the field of application of the domestic legal order or of both the domestic order and all other legal orders, are, due to this function, rules which determine the applicable law. This is because, from the perspective of the judge or authority which interprets a dispute, the relation or situation is situated in the sphere of one legal order or another.

The difference in function which has been assigned to the two types of rule – unilateral and multilateral – creates a problem of unprecedented importance and scope which strikes at the core of private international law. Once the material law of *lex fori* has been assigned to a particular case as a result of the delimitation implemented by the unilateral rule, it will be applied in complete form within the boundaries established by the said rule. However, in the event that foreign law was signalled as applicable through the implementation of the multilateral rule, there would automatically be a question over whether that foreign law could be applied outside of, and even in contradiction with, its own rules of delimitation. This is a problem of remitting a case to a foreign legal framework. Until this moment the notion of ‘conflict’ of laws could be defended in that it considered a situation or relation which was characterised by a foreign element and subject to a plurality of applicable laws due to their respective rules of delimitation.

²¹ Barile, G. (1965), *La fonction historique du Droit International privé*, Academic Course Resource, D. I. The Hague III (vol. 116), pp. 371-2

However, since the moment in which a law can be effectively applied without taking into account the provisions of that law regarding its own sphere of application, then we see a *choice* on which law is applicable on the part of the *lex fori*, meaning that from then on we can no longer speak of ‘conflict of laws’.²²

This question of remitting a case to a foreign legal framework – or the lack of regulation regarding this – is, possibly, the most crucial of the discipline, as it touches its very essence and, as is well known, has been used as the principal argument against the multilateral technique by proponents of the system of unilateral rules. If, as indeed occurs, the remitting of a case to foreign law is not universally applied, but rather, to the contrary, it is explicitly rejected within various legal systems or in particular cases, it becomes clear that the application of a foreign law, whose appropriateness has been signalled by the multilateral rule of *lex fori*, supposes the consideration of said law only in its material form, as the only law considered appropriate to regulate the situation or relation, independently of its own rules of delimitation. The designation of the law comes from a choice by *lex fori*, without it mediating, or being able to mediate, in any conflict.

If this is how things are, then from this perspective we need to draw out a series of consequences, some of which I will briefly highlight:

1. All relations and situations that are susceptible to legal regulation should be classified into two big groups: A) *National*, or internal. This refers to those which, whatever their characteristics, are located within the regulative ambit of *lex fori* due to their own rules of delimitation (conflictual rules). Within this group we find relations and situations whose elements are entirely ‘national’, that is, linked exclusively to the *lex fori*, as well as those which, despite possessing one or more foreign elements, become ‘naturalised’, as the foreign elements are not taken into account due to the criteria of the pertinent conflictual rule, and they thus fall into the ambit of regulation of *lex fori*. B) *Extranational*, which refers to those relations or situations which, due to the rules of the *lex fori* on the determination of applicable law and, taking into consideration the specific nature of their personal, real or formal elements, are located within the ambit of a foreign legal system.
2. The rules which delimit the sphere of application of legal frameworks distribute relations and situations that are susceptible to legal regulation amongst the different frameworks, meaning that they indicate the law which should provide the material solution to the case under consideration. These rules constitute private international law, which is thus configured as an authentic *law of law*, that is, as a system of legal rules which fits relations and situations between private individuals into one or another legal system, both from a procedural perspective – the legal authority of the *lex fori* and its recognition and execution of legal decisions – and from a legislative perspective – the applicable law. Therefore, and by way of an example, the Spanish legislator has, within the law 30/1981 of July 7, an additional provision which states:

The legal organs of Spain will be authorised to hear cases of separation, divorce or

²² Katicic, op. cit., pp. 22-3

annulment of marriage in the following cases:

1. When both spouses have Spanish nationality
2. When they are resident in Spain

It is thus evident that the conflictual rule number 1 above covers the international legal authority of Spain's legal organs, both in the case of a relation which is strictly internal (Spanish spouses, residents and living in Spain), as well as in a relation with an objective foreign element, such as foreign residence and nationality. In the same way, and to the same effect, the relation would also be internal if the spouses, regardless of their nationality, reside in Spain (conflictual rule number 2). If the Spanish judge hearing a case of this type does not approach the issue of legal authority, especially when the spouses are Spanish, maybe as they consider it to be superfluous, this does not affect the nature of the rule in question in any way. What is absolutely clear is that the authority of the Spanish judge to hear the case where the spouses are foreigners (even of different nationalities) but resident in Spain is justified legally and exclusively in rule number 2. This can also be seen in the applicable law: by virtue of Article 107 of Spain's Civil Code, separation or divorce is governed by

the national law common to the spouses at the time of the filing of the case; or, if there is no shared nationality, the law of the country of habitual residence of the couple and, if the spouses have their habitual residence in different states, by Spanish law, providing that the Spanish courts are authorised.

The sole basis for applying Spanish law is exactly the same – the conflictual rule of Article 107 of Spain's Civil Code – whether we are dealing with Spanish spouses, whether they reside in Spain or not, foreign spouses with their habitual residence in Spain, or spouses of different nationalities with habitual residences in different states (if the Spanish courts are authorised, which, it should be noted, is totally superfluous for the Spanish judge).

3. The assigned function which is carried out by the rules of private international law, as has been set out, provides a new approach, which is more realistic and technically correct in my opinion, to the problem that exists around the so-called 'methods or techniques of regulation', and to certain institutions of the discipline, especially concerning public order. Indeed, from the perspective put forward throughout this analysis, the problem will always be one of interpretation and localisation of the law which is really applicable, which assumes a prior interpretation and precise localisation of the delimitation rule – a rule of private international law – which includes the relation or situation under consideration. As these rules must be either unilateral or multilateral, in the case of the former there will obviously be an application of *lex fori*, either directly from its own unilateral rule if it is 'self-limited',²³ or from the material provisions whose scope is delimited by the rule²⁴; in the second case we see an application of either *lex*

²³ See the concept of De Nova (1960), 'Conflits de lois et normes fixant leur proper domaine d'application', *Mélanges Maury*, vol. I, Paris, pp. 377 and ss; and (1967) 'I conflitti di leggi e le norme sostanziali fonziamente limitate', *Rivista D. I. Privato e Processuale*, p. 699 and ss.

²⁴ For example, police, security and criminal laws

fori or foreign law, in accordance with the personal, real or formal elements of the relation or situation in terms of their connection to the rule.

All this means that, on the one hand, it is in no way necessary to classify the rules of private international law as *conflictual*, *material* and *of necessary application* since, as all these rules are delimiting, and carry out this function, material rules and rules of necessary application are ultimately unilateral rules, as they incorporate a direct solution to the case under consideration and indicate the essential application of certain material provisions from *lex fori*. On the other hand, the so-called ‘public order exception’ is an institution which, in accordance with all that has been put forward so far, should be eliminated, as it is a mechanism which firstly requires the implementation of a multilateral conflict rule which indicates the application of a foreign law and, secondly, requires the non-application of the aforementioned law due to its results being incompatible with the essential provisions of *lex fori*. The norm or principle which includes these provisions is directly and unconditionally applicable due to it being the norm which includes the case under consideration. If public order is constituted by certain, specific principles which give meaning, coherence and homogeneity to the legal order to which they pertain in a certain era and moment, this public order evidently embodies and constitutes a legal structure which, by definition, must be directly and unavoidably applied by the judge. This abstraction results from the fact that the public order in question is formulated, in a specific case, in a written rule or in one or more legal principles, as these are what make up the legal order in question. Ultimately, where a multilateral conflictual rule is applied correctly, the foreign law which it indicates as applicable can not in any case be rejected due to the public order ‘exception’. If an incompatibility between foreign *law* and *lex fori* were detected, this would be due to the incorrect localisation and interpretation of the law which is truly applicable, that is, that the multilateral rule were used in a case for which it was not formulated, rather than using a norm from *lex fori*, which is what should have been applied.

4. Finally, we can consider private international law as a set of rules which carry out the special function of signalling the sphere of application of diverse legal orders and, in consequence, of indicating the material law applicable to relations and situations established between private individuals that are susceptible to legal regulation. From the perspective of these relations and situations, we must consider the law as a whole entity in which the judge hearing the case will find, through the pertinent delimiting rule (conflictual rule) of the legal system governed by the national legislator, the material provisions applicable to the resolution of the dispute. This means that what the judge applies is, in all cases, *law*. Notwithstanding the nuances that can be reasonably established regarding the validity of the maxim *iura novit curia* when the indicated law is not from the judge’s national system – neither the judge nor the parts are obliged to know this beforehand, but they are obliged to gain knowledge subsequently – the unwavering scientific principle we observe is that the applicable law is always *law*, and nothing less.