CONFLICT AVOIDANCE IN EUROPEAN LAW*

HENRI BATIFFOL†

The emergence of techniques for avoiding conflicts between different judicial systems has special significance in Europe owing to the differentiation among the laws of various states occasioned and accentuated by the nineteenth-century movement towards codification. Roman law, naturally, was the common basis of those codifications, but it is well known that it was not their sole source of inspiration. Customary law (*le droit coutumier*), like that which developed in the north of France, played an important part throughout Europe, even in regions such as the south of France, where the influence of Roman law has been at its strongest. Moreover, with the growth of industrialization in the nineteenth century, divergencies among national economic and social structures have increased and have, thus, also contributed to the development of disparate legal elements. And the fact that the major codifications were spaced out over more than one century has had its effects as well. For example, the problems confronting the framers of the Napoleonic code in 1804 were not the same as those confronting the framers of the Swiss civil code in 1907. Finally, the common basis of Roman law no longer applies as such, in spite of the reality of its partial influence, to English or Scandinavian law; and in recent times, Soviet law and the laws of various countries in East Europe have been seen to develop other tendencies based upon an entirely new model. Therefore, a growing need has long been felt to find a remedy for this dislocation of what has been called the old European "common law."

The method which has suggested itself naturally is that of treaties of unification, whether consisting of agreements between two countries, neighbors by tradition as well as by geography, or of a convention aimed at bringing together the largest possible number of countries. Alternative methods have been less promising. Thus, the phenomenon of uniform laws, well known in the United States, does not appear to have played in Europe more than an indirect role. The existence of foreign influences has, however, been recognized. For instance, a legislator may take inspiration from the laws or codes of another country, even transcribing, if necessary, the exact text of certain provisions. Thus, the Napoleonic code and certain of the German codes have inspired alike legislators in Europe, South America, and even the Near and Far East of Asia. Thus, in 1926, Turkey was seen to adopt the Swiss civil code. But this borrowing has not resulted in any real integration of the laws concerned, nor has this propagation of similar provisions ever amounted to the promulgation of uniform laws for the countries involved. In practice, the only way

* Translated from the French by Charles Winter, Esq., Barrister-at-Law.

† Professor of Private International Law, University of Paris.

in which uniformity of laws has been achieved in Europe has been by means of treaties.

It must, however, be noted in passing that since the commencement of the twentieth century, serious efforts have been made to spread the knowledge of foreign laws. University chairs have been created, institutes have been founded, and reviews have sprung up for this purpose.[1] These efforts have paved the way for legislative consideration of foreign solutions to legal problems, either for the purpose of benefiting from the experience of other countries or for the purpose of endeavoring to assimilate two different bodies of law. Thus, the most recent of the continental civil codes, namely the Greek code of 1940, was based on a serious comparative study of foreign law. In this connection, attention must also be drawn to the valuable publication of the judicial decisions arising out of the Geneva conventions relating to negotiable instruments,[2] whose object is to help judges, when called upon to interpret any of the conventions, to conform their decisions with those already given in foreign countries. The dissemination of comparative information can, thus, exert a direct and beneficial influence on the judicial elaboration of law. Of course, the judges in a codification country are bound by the general rules in force in that country, but for some eighty years past, they have solved problems to which the old laws, especially in France, gave no answer; and they have solved them with practically no consideration whatever of foreign law. But there are signs of evolution in this respect that cannot fail to be stimulated by the dissemination of information concerning foreign law.[3]

Unification by treaty can be effected in two ways: first, by means of internal law—*e.g.*, a treaty unifying commercial law in relation to bills of exchange, promissory notes, and checks; and secondly, by means of rules governing the resolution of conflicts of laws. Modern states, whether in Europe or in the United States, have their own systems of laws, and failing unification of these systems, unification of the rules applied in resolving conflicts among them is already an appreciable advance. For the purposes of this article, it will be convenient to examine in succession, first, the former sort of treaties, then the latter. Thereafter, attention will be turned to a relatively recent conflict-avoidance development (not of a diplomatic nature) that seeks to avoid the submission of certain contracts to any determined law, the will of the parties rather being the legal standard, whatever forum may be called upon to resolve their differences, thus averting the possibility of a conflict of laws.

[1] It is sufficient to mention here the *Zeitschrift für Ausländisches Und Internationales Privatrecht*, founded by Rabel in 1927, the journal of the Institute of the same name; the *Annuario di Diritto Comparato* and the other specialized studies of the Instituto di Studi Legislativi (Galgano); the *International and Comparative Law Quarterly;* and the *Revue Internationale de Droit Comparé.* These publications testify to the resurgence of the interest evoked by comparative studies.

[2] ERNST VON CAEMMERER, INTERNATIONALE RECHTSPRECHUNG ZUM GENFER EINHEITLICHEN WECHSEL- UND SCHECKRECHT (1954).

[3] See, *e.g.*, the recent judgment of the Court of Appeal of Paris in Charr v. Hazim Ulusahim, Oct. 21, 1955, relying on its isolated character in comparative law to avoid a solution theretofore admitted in France.

The dislocation of the European "common law" by the codification movement of the nineteenth century has not prevented the conclusion of important treaties which unify many fields of internal law. These treaties are well known, but they will be mentioned here briefly, if only to prove that such unification, contrary to the opinion of many pessimists, is not a mere dream. The ease with which such unification may be achieved, incidentally, seems largely to depend on the problems sought to be solved. Thus, the law relating to business affairs has been easier to deal with than family law, where national or religious traditions and the social structure play a more important part.

The first fields in which unification was effected were those concerned with industrial property[4] and literary and artistic property.[5] No doubt, the facility of imitating an invention discovered in one country in another country or of translating the work of an author of one country in another country rendered international measures of protection in these areas more urgent. Later, unification was extended to the fields of international railway transport[6] and maritime law. The results in this latter field, in particular, have been especially rewarding. Since the celebrated rules of the International Law Association of 1890 relating to general average, the use of which, by progressive expansion, has finally resulted in the creation of a real international common law on the subject, many treaties have been framed under the aegis of the conference set up at Brussels by the International Maritime Committee.[7] Finally, in turn, unification came to the field of aerial navigation.[8]

The League of Nations was also a positive force in this area, having stimulated the conclusion of conventions on private arbitration in 1923, the execution of arbitral awards in 1927, interior navigation in 1930, and, in particular, negotiable instruments in 1931, the result of which has been to unify particularly complex laws in a large number of countries. The negotiators, not having achieved complete unification, were, nevertheless, wise enough to maintain their agreement upon the points settled and to conclude another convention unifying the rules applied in resolving conflicts of law in those matters where differences still existed in the application of internal law. This exemplifies the duality of means in which unification can be secured.

The study of future possible unifications of internal law by treaty is under consideration at Rome by the International Institute for the Unification of Private Law, whose important work on the contract of sale is well known, and whose year-book gives details of all the proposals for unification which are under consideration.[9]

The general unification, by means of conventions, of the rules for the resolution of conflicts of law was a preoccupation of Mancini immediately after the Italian codifica-

[4] Union of Paris, 1883, revised in London in 1934.

[5] Union of Berne, 1886, revised in Brussels in 1948.

[6] The Berne Convention of 1890.

[7] *E.g.*, conventions on collisions and aid to vessels in distress, 1910; the responsibilities of shipowners and bills of lading, 1924; and rights against and hypothecation of ships, 1926.

[8] Union of Warsaw, 1926, revised in Rome in 1933.

[9] 3 L'UNIFICATION DU DROIT; APERCU GÉNÉRAL DES TRAVAUX POUR L'UNIFICATION DU DROIT PRIVÉ (PROJETS ET CONVENTIONS) 1947-1952 (1954).

tion of 1865. His views on the dislocation of European "common law" stemmed from a contemplation of the dislocation of the different systems of conflict of laws. His proposal, made as early as 1867, for an international conference, postponed by reason of the Franco-Prussian war of 1870, spurred the unsuccessful attempts of the Italian government (1874-1881) in this regard. His goal was realized, however, owing to the initiative of the Dutch Government, in 1893, and the spacing out of the above dates demonstrates the continuity of his ideas. Everyone is familiar with the astonishing success and subsequent disappointment of the Hague conventions. They had been successful in unifying the conflict rules over a wide range of subjects, such as marriage, guardianship, and succession, in a large number of countries; but this success is now seen to have been more apparent than real. The signatory countries were exclusively those that already had admitted the test of national law and had accepted the general extension of that test; divergencies of interpretation were followed by denunciation; and the first world war finally put an end to the application of the conventions between many countries which had become enemies.[10] Nevertheless, it would be presumptuous to regard the Hague conventions as obsolete, as they still bind a considerable number of countries.[11] Further, the spirit animating the seventh session, held in 1951, seems to augur well for the future. The proposals are less ambitious, and they concentrate on more precise subjects that are particularly useful in the business world, such as the law relating to the sale of movables and the recognition of the personality of foreign corporations.[12]

The relative obsolescence of the earlier Hague conventions had aroused considerable scepticism, especially after the first world war, as to the future fate of treaties of this nature. Accordingly, it is somewhat remarkable that less reticence appears to be shown on this subject after the second world war. This difference in outlook can doubtless be explained by the growing conviction that the way must be opened towards easier international relations. Other developments in the interim also seem to reflect this point of view—principally the emergence of regional unifications. The first to arise was that known as the Nordic Union. Between 1931 and 1934, five conventions were concluded between Denmark, Norway, Sweden, Finland, and Iceland concerning marriage, adoption, guardianship, alimony, judicial competence and the execution of judgments, bankruptcy, and succession. Unfortunately, information is lacking as to the judicial application of these conventions, as it would be interesting to know how far it has been possible to maintain unity of interpretation in spite of the absence of a supreme common jurisdiction. This lack of judicial decisions, however, is perhaps an indication that these conventions have operated

[10] See ALBERT DE LAPRADELLE AND J. P. NIBOYET, REPERTOIRE DE DROIT INTERNATIONAL (1929-31); PAUL DE LAPRADELLE, CONFERENCE DE DROIT INTERNATIONAL PRIVÉ DE LA HAYE (No. 162 n.d.).

[11] See the schedule published in 43 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 893 (France 1954).

[12] On the works of the seventh session, see Morandière, in 41 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 5 (France 1952); and Offerhaus, in 79 JOURNAL DU DROIT INTERNATIONAL 1070 (France 1952). See also Graveson, *Hague Conference on Private International Law*, 2 INT'L & COMP. L. Q. 605 (1953).

without difficulty. Indeed, the common juridical traditions enjoyed by the signatory countries would probably go far to explain the harmonious results achieved. Nevertheless, it must be stressed that, while the Atlantic countries (Denmark, Norway, and Iceland) apply the law of domicile in matters of personal law, the Baltic countries (Sweden and Finland), being more sensitive to continental influences, apply the national law in such matters. By means of the conventions, an interesting compromise between the two positions has been evolved.

Attention must also be drawn to the Benelux proposal for conventions unifying the rules governing conflicts of laws in Belgium, Holland, and Luxembourg.[13] This proposal, at present under consideration by the parliaments of the countries concerned, is largely attributable to the learning and efforts of the late and greatly missed Dutch jurist, Meijers. It must be pointed out that while the conflicts solutions of Belgium and Luxembourg are frequently the same as those of France, Dutch law, on the other hand, although based upon a nineteenth-century codification inspired by the Napoleonic code, has, in many respects, developed its system of the conflict of laws along lines more closely approaching those of the German solutions. The compromise resulting from the Benelux proposal is, thus, of particular interest.

Similarly, efforts are being made at the present time to assimilate French and German rules governing the conflict of laws. In this connection, a team comprised of French and German jurists published, in 1954, a volume entitled *Private International Law in France and Germany Concerning the Family*.[14] With regard to each question considered (*e.g.*, marriage conditions, effects of marriage), the French collaborator has explained the position in French law, the German collaborator the position in German law, and a brief comparative evaluation has been undertaken by one or other of the authors alternatively. That is the necessary starting point for an assimilation of the rules governing conflicts of law—the foreign rules must be understood and observed in day-to-day practice. Recently, members of the French Committee on Private International Law have been invited to a session of the German council on the same subject, and careful attention will be paid to the suggestions made at that session in connection with the forthcoming reforms of German private international law. Such meetings are extremely useful in enabling neighboring countries to understand each other's law.

Conflict avoidance has recently come to the fore in the fields of the laws of contract and of companies in connection with an attempt to formulate contracts or to establish companies that would not be subjected to any particular body of law. The question has been methodically studied on the initiative of the Council of Europe, particularly in regard to the creation of European companies that would not be subject to the law of any definite country. The Council has delegated the study

[13] See the text of the proposal in 40 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 710 (France 1951).

[14] J. C. B. MOHR AND L. SIREY, PRIVATE INTERNATIONAL LAW IN FRANCE AND GERMANY CONCERNING THE FAMILY (1954) (the German volume appeared in 1955).

of the problem to its economic and juridical commissions. The former has approached the problem with a certain scepticism, posing the question of whether it is not illusory to imagine that countries would be in favor of establishing companies whose creative statute could not be tested by any of the respective laws of those countries. These companies, it is pointed out, would enjoy facilities enabling them to carry on their activities throughout the whole of Europe and to compete with companies operating under the legal strictures imposed by countries that had taken pains to establish and maintain a careful equilibrium between the varying interests of shareholders, directors, and third parties. Why should special favor be shown to companies immune from these protective limitations and, at the same time, not subjected to analogous regulations by any other foreign law? The economic commission has, thus, concluded that the establishment of European companies cannot be contemplated other than in the field of public services, where the problem of competition does not arise.

The judicial commission has, accordingly, drafted a proposal that permits the conferment of European status upon private companies that are the holders of a concession in the nature of a public service. Although the concession would depend on the competence of the country or countries territorially interested, it will, thus, be possible to confer this status on companies which are comprised, to a large extent, of citizens or governments of different countries, and whose work will have to be performed or whose services will have to be rendered in the territory of several countries—or whose work and services will have to be of interest to countries other than that in which operation takes place. The status is to be accorded upon the recommendation of the "European Office" by means of a convention concluded between the countries interested. What is involved, therefore, is the creation of a company by an act of public international law, which can be anything but frequent; and, in addition, the act will be limited to companies exploiting a public service.

Article three of the proposal stipulates that the conferment of European status implies for the company benefiting thereby the acceptance of the competence of the European Office for all individuals as well as for all governments interested. This stipulation appears to attribute to that Office a jurisdictional or even a legislative function, but, unfortunately, there is no further explanation of that function.

The European company is to be governed, in the main, by the rules contained in the convention providing for its creation and, in a subsidiary way, by the legislation of a named country, specified in the convention. Thence arises, from a juridical point of view, the main and most interesting difficulty of the proposal. Its authors hope that the convention creating each of these future companies will be capable of assigning to the company concerned sufficiently detailed rules of operation rendering unnecessary any recourse to a particular law. They have, however, perceived the uncertainty of such a method and, as a subsidiary measure, have provided for reference to a particular named body of law. But in the latter eventuality, the problem is no longer that of a company which would escape the operation of all

existing law, even allowing for the fact that the reference to any particular law is stated to be subsidiary.

Another difficulty foreseen in the proposal is that pointed out by Gianini at the Lucerne session of the International Law Association in 1952, where an examination of the problem was on the agenda. The question arises as to whether the countries that do not sign the convention creating such a company will recognize the company as having a juridical existence. If the reply to the question is in the negative, the future companies would be less well treated than existing companies which are subject to a named body of law, but whose existence is everywhere recognized. That this difficulty has been perceived is seen in article eight of the proposal, which provides for the intervention by the European Office in regard to those countries that are members of the Council of Europe but have not been parties to the convention creating a particular company. Nothing, however, is said in regard to countries that are not members of the Council of Europe.

Finally, the proposal indicates the advantages which it would be desirable to obtain from the interested countries for the benefit of the companies created. In essence, these are freedom to transfer capital moneys; custom franchises; free entry of managerial and executive personnel; guarantees against seizure of property (a difficult matter in any event); power to make contracts including clauses as to guarantees, rates of exchange, or price; and the immutability of certain clauses despite legislative measures modifying contracts made between a state and individual citizens (an aim likewise extremely difficult to achieve).

The secretariat of the Council of Europe has received numerous requests for information on the subject and has, fortunately, prepared a small brochure (which is not in commercial circulation) containing an interesting account of the work of the judicial commission and of certain preliminary steps already taken in the direction contemplated. Two of these ventures are quite instructive. First, there is the Bank of International Settlement, which, ideally, should not depend on the law of any one country. Created by an international convention signed at the Hague on January 20, 1930, it has been described by Mr. Van Zeeland as a really European institution. The negotiators of this convention, however, did not find it possible to avoid all reference to an existing body of law, and so, it was provided that juridical personality should be conferred on the Bank by a resolution of the Federal Swiss Council, with a head office at Basle. But the convention added that the creative statute and any modification thereof should be valid and take effect despite any contradiction with the provisions present or future of Swiss law. The reference to a resolution of the Federal Swiss Council appeared to establish the Bank as a juridical person subject to Swiss law. But how could this starting point be reconciled with the power to adopt the creative statute, even in contradiction with the provisions of Swiss law? The idea reappears that the Bank ought to be able to exist on the authority of its own creative statute, the precision of which would serve as a valid legal basis. It

is not certain that such a hope can be realized, although no difficulty seems to have arisen as yet.

The same difficulty arises in another most curious and typical case, namely, that of the Scandinavian Airlines System. Again, it is the Scandinavian countries that afford an example of the need for special relations between countries organized so as to avoid, to as great an extent possible, the conflict of laws. The three companies which constitute the System understandably wished that the new organism should be neither Danish, Norwegian, nor Swedish, and so, its English title is not a mere commercial invention, but rather gives effect to the underlying reason for its formation. It is not simply a question of a contract between companies preserving their respective independence, in as much as the creative statute of the System provides that the consortium is to act as an autonomous moral person. (Article fifteen.)

The statute specifies at the end of its provisions that "the present agreement has been made in three original copies in the English language"; that each party is to have the text translated in its own national language; that the translations are to be exchanged among the parties; and that in case of any difference among the texts translated into any national language, the English text is to prevail. It was also desired that the head office of the System should not indicate attachment to any one of the countries concerned. Thus, article nine provides that the Council of Administration is to choose the place for the head office as well as for any other offices, and the Council is, under article eight, to meet in each of the three countries alternatively.

The founders of the System have thought of eventual difficulties. Under article seventeen, differences between the associated companies are to be submitted to an arbitral tribunal composed of three members, nominated respectively by a Danish, Norwegian, and Swedish judge. The statute goes on to provide that the tribunal is to elect its own president, adopt its own rules of procedure, and determine its own place of meeting and the "national jurisdiction" which is to be applied. By "national jurisdiction," "national law" is doubtless intended to be understood.

The totality of these provisions shows the founders of the System persevering in their wish to remove therefrom anything in the nature of a national character. They have, however, understood that such an objective could only be attained by depriving the judges of the particular countries concerned of any jurisdiction whatever in the resolution of difference arising from the application of the creative statute. Nevertheless, they have not thought it possible to affirm that the arbitral tribunal should be able to exclude any possible reference to any body of law whatever. Not having ventured to choose such a body of law themselves, they have left that duty to the arbitrators, for whom, however, the task is not any the easier. As a matter of fact, however, it may well be that difficulties will be rare and that these will perhaps be matters of fact rather than of law. Further, if they are legal, the similarity of the three bodies of law when compared will probably often allow of

a solution which will not depend expressly on one such body of law rather than any other.

These experiments give rise to the thought that the creation of companies whose creative statutes are, at the same time, their sole basic law will scarcely be able to avoid the simultaneous creation of jurisdictions specially entitled to interpret those statutes. This point, indeed, was raised at the Lucerne session of the International Law Association in 1952. A rather powerful movement has arisen in favor of what are called "chartered companies"—that is to say, companies whose creation, decided in agreement with the governments concerned, would be governed by statutes so detailed that recourse to any body of law whatever would be unnecessary. That movement contemplates powerful companies pursuing their activities in several countries without having a principal establishment in any of them—as is often the case with holding companies. Why should it not then be recognized that these companies may exist in conformity with their creative statutes instead of exacting their submission to the law of a country with which they have no more substantial connection than with another country? The artificial character of this latter course becomes quite apparent when companies of this sort subject themselves, as they often do, to the laws, more liberal in effect, of small countries with which they have no significant bond. It would surely be better to recognize the reality of the situation, namely, that what is in question is a form of international companies which, in all seriousness, cannot be subject to any determined body of law.

In contrast to the movement favorable to chartered companies, another current of ideas sets up the impossibility of all-inclusive creative statutes, however well they may be framed. To say that the creative statute of a company shall be its legal basis is to contend that such a statute will comprehend an experience as extensive as a complete juridical system, and such a contention can hardly be upheld. A belief much in vogue with men of business is that the general conditions of a contract, provided that they are sufficiently detailed and precise, are sufficient to avoid all litigation, and, in any case, all recourse to a body of law. That may be true in a considerable proportion of cases, but jurists know that problems will always arise for which no solution can be found either in the creative statute of the company or in the general conditions of the contract. The judges, therefore, or the arbitrators confronted with the problem will have to interpret and complete the relative creative statute or contract, and inevitably they will be led to rely on a general system—that is to say, on some existing body of law. It can hardly be expected that a judge or an arbitrator will create *sui generis* a method of interpretation and general rules for the particular case submitted to him. The recent experiments, such as that of the Scandinavian Airlines System, show that the refusal to subject the contract or creative statute of a company to a particular body of law raises the necessity of providing for an arbitral jurisdiction that will create the rules necessary for the fulfillment of the contract or statute. In so far as the bodies of law affected are relatively similar,

the task will be easy of realization. If it is a question of more divergent bodies of law, some work of synchronization will doubtless be required. It will, above all, be necessary to avoid a position in which each judge would interpret the conventions of the parties according to his own system.

It is difficult for the writer to visualize a contract establishing obligations on its own without being set within the framework of a judicial system which determines in what conditions the judges may enforce the contract. But this problem is outside the scope of the present article.