

Comparative Law and Private International Law

I. Comparative law

Comparative law was traditionally defined narrowly as the comparison of different legal systems. Today, it is understood more broadly as that academic discipline that deals with the diversity and plurality of legal systems. This encompasses three strands. The first one is the comparison of legal rules and orders of different legal systems, including the recognition, explanation and sometimes evaluation of similarities and differences, and, if desired, the determination of the better law. A second strand of comparative law is dedicated to analysing the mutual interactions and influences between legal orders – especially through so-called legal transplants. A third strand, finally, concerns the development of a general understanding of law and legal theory on the basis of individual legal phenomena. All these strands exist both in a pure and an applied variant. Whereas pure comparative law analyses aims merely at the acquisition of knowledge, applied comparative law wants to make such knowledge useful for projects of adjudication and legislation (either legal harmonisation and unification, or domestic law reform).

Just as comparative law encompasses a variety of strands, it also encompasses a variety of methods. Comparative law was once confined to the comparison of black letter rules. This was followed by calls for functional comparative laws: legal rules and institution should be compared with regard to their functions, and two institutions are functionally equivalent and thus comparable if they fulfil the same function, even if they are doctrinally different. In addition, and sometimes opposition, much contemporary comparative law is

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cultural, paying close attention to the local meaning of legal rules, their embeddedness in a society's culture and values.

Comparative law scholars thought for some time that the mere exposition of foreign law is not yet comparative law but rather mere collection of information. Nowadays, it is more and more acknowledged that the recognition and understanding of foreign law itself already imply a necessarily comparative approach, and thus comparative law competence.

With its focus on the plurality of legal system, and an attention towards their interactions and equivalences, comparative law displays obvious parallels with private international law. Practical application of private international law always engages at least two legal systems—that of the forum, and a foreign one. In this sense at least, private international law will frequently require some of comparative law. An analysis of the specific interactions between comparative law and private international law goes beyond this general truth and provides insights relevant for both disciplines.

Although the connections between private international law and comparative law are manifold, they can be grouped. This article follows a trichotomy first proposed by *Ernst Rabel*: comparative private international law (II.), comparative law in the application of private international law doctrines (III.), comparative law as the basis of private international law (IV.)

II. Comparative private international law

1. Scholarship

As long as different countries have different systems of private international law, these systems and their rules can be the object of comparison like any other domestic law. In

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private international law scholarship, comparison has always been prominent (though far from universal), more so perhaps than in other areas of law, no doubt because its international focus made comparisons more intuitive. Techniques like *renvoi*, characterization, etc., were developed in one legal system and then adopted by others. Such comparative studies culminated in *Ernst Rabel's* big treatise on comparative private international law. The *Instituto italiano di studi legislativi* edited, between 1937 and 1956, a collection called '*Giurisprudenza comparata di diritto internazionale privato*'.

Comparative private international law plays a prominent role in various leading publications, like *Rabels Zeitschrift für ausländisches und internationales Privatrecht* and the Yearbook of Private International Law. Today, contemporary treatises contain comparative treatments, though to different degrees – more so in Germany and Switzerland than in France or the United States (USA (including Louisiana and Oregon)), for example.

For a long time, there have been attempts to formulate general principles of private international law on the basis of comparison. Such formulation has been made more difficult after the rise of the radically different approach to private international law in the US; it has become less interesting to Europeans since their attention has been captured, almost exclusively (and somewhat parochially), by the creation of European private international law. Nonetheless, proposals to develop general principles of private international law, are still being made, most recently under the aegis of UNIDROIT in Rome and the Hague Conference on Private International Law, at least as regards choice of law.

2. Comparison of foundations and individual rules

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Such comparison shows not only great differences in individual rules of private international law. It also demonstrates that private international law, more so than other disciplines, rests on very different foundations as between different legal systems. In the common law tradition, especially in the US, private international law is based strongly on ideas of sovereignty. Questions of private international law become questions of mediating the powers and regulatory interests of different sovereigns. Private international law deals with actual conflicts of laws; its job is to determine first whether a conflict actually exists, and then to resolve it. The dominant legal technique is one of broad standards and principles; justice in the individual case is often prioritized over *ex ante* predictability.

In a continental European tradition, by contrast, questions of private international law have traditionally been viewed in closer proximity to private law; the aim is to determine the law that is most appropriate for the parties (Private International Law, concept and purpose). Here, predictability and uniformity of result are sometimes considered more important than the proper decision in the individual case, although escape clauses enable judges to account for the need for justice in the individual case. The dominant technique is often that of precise formal rules, though experience has shown that the application of such rules in concrete cases still leave much decision to the adjudicator.

Of course, this contrast is overdrawn – in every system of private international law there are public and private concerns. Also, the contrast is overly simplistic; it does not account for the peculiarities of other legal traditions (though it seems fair to see that a civil law conception and a common law conception have been the most influential in the world). Finally, private international law is a discipline that has traditionally seen an unusually high level of theoretical and foundational differences of views even within legal traditions.

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These foundational differences account for the persistence of differences in rules between legal systems.

3. Application of comparative private international law

Comparison of different national solutions has been especially important for the creation and application of unified private international law. The Hague Conference, the prime institution aimed at such treaties, relies, in its work, on extensive comparative research. Nonetheless, foundational differences between legal traditions have frequently led to different understandings. This became obvious for the Hague Conventions on Evidence and on Service, both of which some Europeans viewed as exclusive, whereas US American viewed them as supplementary. Negotiations towards a Hague Judgments Convention failed largely because negotiators had very different conceptions of what such a treaty should achieve.

Similarly, the European legislator, which has to combine different national approaches, must resort to comparative law. In doing so, it has often prioritized continental European over English understandings (especially in the area of jurisdiction), which has led to problems and frustration in England.

Likewise, domestic lawmakers have made frequent use of comparative law. No modern codification of private international law is written without surveying foreign models. Sometimes, such codifications, especially outside of Europe, seem to follow these models so closely that they sometimes deal more with problems emerging in Europe than with those in their own systems.

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Judges also sometimes use comparison to develop choice of law solutions to new questions of private international law. For a long time, when private international law was judge-made law in most countries, such comparative use was especially useful and thus frequent. Now that more and more private international law rules are codified, the use of comparative law by judges seems to be in decline. An exception concerns the interpretation of private-international-law treaties: here, a judge must frequently consider interpretations given to the treaty in other member states, so the goal of uniform interpretation can be achieved. Arbitrators, by contrast, sometimes compare different private international law rules and the results of their application in order to designate the applicable law.

Finally, private parties (or, more precisely, their attorneys) must often engage in sophisticated comparison of private international law regimes in order to make the right decisions in issues of (Forum (and law) shopping), and in Choice of forum and submission to jurisdiction), and the structuring of transactions in accordance with one or the other legal regime. Such use has become more relevant with the recent expansion of party autonomy.

III. Comparative law in the application of private international law doctrines

Comparative law is involved in the application of private international law doctrines. This is obviously the case for such private international law methods that determine the applicable law on the basis of the substantive content of different rules. By contrast, traditional European private international law has often been described as involving a strict two-stage test, according to which the applicable law is first determined without regard to its content, and then applied without regard to the process by which it was determined. In

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reality, this dichotomy is untenable: comparison permeates almost all doctrines of European private international law, too.

1. Characterization

Classification (characterization) is a classical area for comparative law. Against proposals that characterization of foreign law rules had to occur strictly pursuant to *lex fori* or *lex causae*, *Ernst Rabel* suggested a comparative characterization: concepts of private international law should be characterized according to a universal understanding based on the comparison of the different conceptions in different legal systems. Such a universalist method has not ultimately prevailed, due to both practical and theoretical reasons.

However, even a judge who refuses such a universalist approach and characterizes according to the *lex fori* will need to compare the concepts used in his own choice-of-law rules with the institutions under foreign law. For example, characterization of the Islamic figure of the mahr requires not only understanding in the Islamic context, but also a comparison with domestic rules on contract, marriage, marital property, post-divorce support, and succession law. Such comparison will often occur along teleological or functional lines and thus benefit from the functional method as developed in comparative law.

2. Renvoi

Renvoi is engaged with comparative law in several ways. The first, most obvious one, is that *renvoi* requires engagement of foreign choice of law rules, and thus requires the judge to properly understand and apply those rules. This can be especially problematic in the case

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of a hidden *renvoi*, which requires the judge to expand the scope of the foreign law. In addition, comparison may be necessary, or at least helpful, should it be necessary to decide on where to break a possible *renvoi* cycle. The English foreign court theory, according to which the English judge should decide exactly as though he was a judge from the state whose law has been designated as applicable by English law, is the most obvious example in which a comparative approach is required. Finally, the existence of the *renvoi* problem also points to problems that follow from differences between different choice of law regimes, and thus to a mutual interest in unification of such regimes. Between two systems with similar choice of law regimes, a *renvoi* problem cannot occur, because both systems will designate the same law as applicable.

3. Determining the content of foreign law

As a consequence, determining the content of foreign law (Foreign law, application and ascertainment) is, to some extent, a comparative law activity. Practitioners confronted with foreign law in the context of a private international law analysis are well aware of this, and of its difficulties: *Max Rheinstein* once found that of 40 private international law decisions appearing in US casebooks, 32 involved a wrong application of foreign law, and although applying foreign law has since become easier, it still presents challenges.

This means that comparative law insights are relevant for the process of determining the content of foreign law. This begins with formulating the precise question, which often occurs in the forum's own legal system and is posed to a foreign legal system that may operate in a different framework and with different concepts. Once the question has been properly translated for the foreign law, the judge must try to understand foreign law on its

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own terms as much as possible, instead of seeing it through her own domestic lens and concepts. This means especially that she must go beyond determination of the applicable positive rules of the foreign law and must inquire how they are applied in practice.

Comparative law makes a similar plea for finding the law in action as opposed to the law in the books.

Courts, especially in the common law world, routinely call on experts on foreign law, though this costly procedure is not always necessary. Moreover, experts from the foreign legal system are not always necessarily superior, as was nicely expressed by *Rudolf Schlesinger*: asked whether he, a German émigré teaching in the US, really claimed to know more about French law than a French professor, he responded: “No, but I can explain it to the tribunal better.” (Robert S. Summers, *Professor Schlesinger’s Memories, and a Bit More*, 28/2 Cornell Law Forum (Fall 2001) 10, 17).

When the content of foreign law cannot be established, judges routinely apply the *lex fori* instead. Alternative have been proposed that would involve comparative law thought. One would be to determine, and apply, a closely related law—that of a neighbouring country, or a similarly situated country, or a country that was influential. Another is to apply general principles of law instead, which are determined by comparative law.

4. Better law

Some private international law rules and approaches ask explicitly for a comparison between different potentially applicable laws. This is certainly so for the “better law” approach, which still plays a minor role in US private international law. Under this approach, the applicable law should be the better of several potentially applicable laws.

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Better law is defined, typically, as “superiority of one rule of law over another in terms of socio-economic jurisprudential standards” (Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 296 (1966))– in other words, as a result of legal comparison.

Although European private international law rejects a better law approach, some of its rules require some comparison, too. Sometimes, the choice between different laws (and thus the comparison), for example between the place of conduct and the place of injury in tort law, is left to one of the parties (usually the plaintiff.) This is the case, eg, in art 6(3)(b) Rome II Regulation (unfair competition affecting more than one market) and art 7 Rome II Regulation (environmental damage). Here, the plaintiff will likely compare simply on the basis of expected outcomes.

In other areas, the choice must be made by the judge. For example, in contracts between parties with unequal bargaining power (consumers, employers), a choice of law by the parties cannot deprive weaker party of the protection afforded to it by the law that would apply to the contract absent such a choice (arts 6(2)(2), 8(1)(2) Rome I Regulation). Where the judge has to make the choice, the question is what criteria should count. Most importantly, the question is whether the laws should be compared in their entirety, or with regard to the result of their application in the particular case – a distinction resembling that in comparative law between macro and micro comparison.

5. False conflicts

Governmental interest analysis looks at the content of the laws, but this does not mean that it also requires explicit comparison. However, in contemporary versions of interest

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analysis, comparison plays a role. This is the case, first, for false conflicts. Under governmental interest analysis, a false conflict exists in two situations: first, when only one state is interested in the application of its own law; second, when all states' policies coalesce, so that application of one state's law will further also the policies of the other states. The latter situation in particular includes a necessary comparison: the judge is required to compare the policies underlying the respective laws. Judges in practice are often rather superficial in this process. On the one hand, in *Sun Oil Co. v. Wortman* (486 U.S. 717 (1988)), the U.S. Supreme Court upheld a Kansas court's rather daring assertion that Kansas law was effectively similar to that of other states. On the other hand, in *F. Hoffman-La Roche Ltd. v. Empagran*, Justice Breyer considered a detailed comparison between US and European laws of antitrust "too complex to prove workable" (542 U.S., 155, 168 (2004)) and thus refused to apply US law to foreign plaintiffs' claims, even though US and European antitrust policies are similar to a large degree. In reality, false conflicts analysis without a proper comparison is meaningless.

A parallel issue arises in European private international law in the problem whether the choice of law can be left open if all potentially applicable laws would lead to the same result (the Dutch speak of an *antikiesregel*). Although courts sometimes like to speculate on this question with often superficial analysis of the different laws, the question cannot be properly answered without a detailed comparison of these laws. Such a detailed comparison, if done properly, will often be so burdensome that deciding the choice of law problem would be the lesser evil.

6. Comparative impairment

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Another area in which interest analysis requires comparison is in the resolution of true conflicts, situations in which the judge must decide which of several laws, all of which ask to be applied, should prevail. *Brainerd Currie*, (Currie, Brainerd) the proponent of the approach, explicitly rejected any comparison: for him, the *lex fori* should always apply if the forum had an interest in its application, regardless of the content of the foreign law or the strength of the foreign government's interest in its application. Methods used by courts, however, often require comparison, most obviously so courts in California which use a method called comparative impairment. Here, the applicable law is the law whose policies would be more impaired by its non-application. This process requires an explicit comparison, and sometimes this comparison takes place along functional equivalence. For example, in *Tucci v. Club Mediterranee, S.A.* (107 Cal. Rptr .2d 401), the court decided not to apply California's requirement that employers should carry Californian workers' compensation insurance, in order to avoid claims by their employers under tort law, with regard to a workplace accident that happened in the Dominican Republic. The main argument was that Californian policies were not significantly impaired because the defendant held an insurance with a French insurer. (A European court might have applied substitution.) From the perspective of comparative law, this suggests that the French insurer was viewed as a functional equivalent of a Californian insurer.

7. Ordre public

Perhaps the most obvious use of comparative law in traditional private international law takes place when a foreign law remains inapplicable, or a foreign judgment unrecognizable (Recognition and enforcement of judgements), because the consequence of such

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application or recognition would be incompatible with the judge's own law's fundamental principles (Public policy (*ordre public*)).

It has been argued that the content of the *ordre public* itself has a comparative component. Thus, it has been suggested that a legal order's principles should not be considered part of the *ordre public* if they are anomalous in comparison with foreign law. Some go even further and ask that an *ordre public* be determined on a supranational level – either European or even worldwide. Judicial practice mostly goes the opposite way: US courts and lawmakers subsume the singularly wide protection of free speech under US law as part of the country's *ordre public* precisely because other countries do not provide similar protection.

Once the *ordre public*'s content has been determined, the comparison of those principles with the foreign law or judgment is a comparative law process. A functional comparison can often be made useful here. For example, when the German Federal Court of Justice was asked to recognize a Californian Judgment that included punitive damages, the Court did not simply refuse recognition tout court as incompatible with the German idea that punishment is the exclusive domain of public law. Instead, the Court asked to what extent punitive damages fulfil functions that are fulfilled by other private law or procedural devices in German law and suggested that insofar enforcement would not violate the German *ordre public* (*BGH 4 June 1992, BGHZ 118, 312*).

8. Coordination of different laws: adaptation, transposition, substitution

After the content of the foreign law has been properly determined, its application can raise new problems of comparative law. This is so because the adjudicator must coordinate the

foreign law with other laws. Sometimes, coordination is necessary because the law applicable to a situation changes over time, for example because a party changes her nationality. Sometimes, coordination is necessary because more than one law is applicable, and there is some inconsistency between these laws.

Private international law has developed a variety of techniques to deal with such coordination: adaptation, transposition, and substitution. In all of these, the question is whether the legal concepts from one legal order is sufficiently equivalent to the other. One example concerns the question whether a Swiss notary public can be used to fulfil formal requirements of German law (BGH 17 December 2013, BGHZ 199, 270). Another deals with the similarities and differences between the Islamic kafala and Western adoption rules (Cass civ 1^{re} 10 Oct 2006, Bull civ. I no. 431, p. 370) . In all these cases, the judge has to engage in a (functional) comparative exercise.

9. Substantive rules in private international law

Comparative law is necessary, finally, in attempts to develop specific substantive rules for international transactions instead of applying the law of one state or the other. Broadly, two variants of this approach are related to comparative law. In the first variant, the judge is asked to create and apply a median solution between those of the different legal systems. Without sophisticated use of comparative law, such a process will establish only an arithmetic result, not a workable legal rule. Indeed, quite frequently comparison shows that a median rule is not superior to that of either legal system in question.

In the second variant, rather than applying one of the affected laws or trying to find a compromise between them, the judge instead resorts to some substantive law distilled from

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a comparison of all legal systems. Such an approach provided one justification for an alleged *lex mercatoria*; it has been revived, at least in scholarship, for the area of intellectual property. Whatever other benefits and problems may exist with such an approach, the task of distilling a proper law from a comprehensive comparison of all laws is a comparative law task of such enormous scope that it must necessarily go beyond the ability of any one judge. Where judges attempt to formulate such a global law, more often than not they fall back, knowingly or not, on their own substantive law.

10. Forum non conveniens

Comparison is necessary in the application of the *forum non conveniens* doctrine – the idea that a court can refuse to exercise its own jurisdiction if it finds itself to be inadequate, and an alternative forum to be both available and more appropriate. Determining the availability of the alternative forum already requires an exercise of comparative law. Moreover, determination of whether an alternative forum is adequate necessarily requires a process of comparison. Courts have found that precise similarity is not required – even foreign legal systems that do not offer cross-examination, jury trial, and pre-trial discovery, can still be considered adequate from the perspective of a common law judge. Similarly, assessing whether the alternative forum is significantly superior involves a process of comparison. Such comparison involves factual elements – like the relative availability of evidence – but also legal elements.

IV. Comparative law as the basis of private international law

1. The third school of comparative law

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Yet in another way comparative law has been used for the development of private international law. *Franz Kahn* suggested as early as 1900, a third school of private international law that he also called the comparative method. This method is based on the assumption that the substantive laws of different states represent the stuff of private international law. Private international law, even where it is the positive law of one state, can therefore not be developed on the basis of just that state's substantive laws, as the nationalist school of private international law does; this approach can only produce unilateral private international law rules. Nor, however, is it possible to develop rules of private international law in a sphere entirely detached from all substantive laws, as was done in the so-called internationalist school. Instead, private international law rules must be developed on the basis of a comparison of the world's existing private law rules. The idea was taken up and expanded later by *Ernst Rabel*, especially in the area of characterization (see supra III.1.).

As attractive as it looks, the approach has been only moderately successful. The hope, implicit in the method, that a comparatist method can transcend domestic policies, has proven erroneous, both empirically and theoretically. Empirically, legislators still tend to develop private international law rules in close parallel to the development of substantive law rules. To name but one example, the German legislator adopted a private international law provision for registered partnerships only when such registered partnerships were accepted in German domestic law, just as though the choice of law problem could only occur at that moment. It might be desirable if private international law rules were developed more in view of the laws of other countries, but presumably, the political

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salience of issues that are not part of a country's substantive law is not great enough in most situations.

Theoretically, the idea that a private international law based on a comparison of the respective substantive laws can transcend politics, seems implausible: although such an approach can and should transcend the substantive policies of the individual laws, it merely leads to the formulation and negotiation of specific choice of law policies and interests.

2. Private international law as applied comparative law

The shortcoming of the third school of private international law can be phrased differently: even a comparative perspective can never be a truly neutral perspective; although the judge is enlightened by the engagement with foreign law, he remains an officer of his own state, situated within his own legal system. This insight parallels the recent shift in comparative law from a functionalist to a culturalist perspective, paired with the insight that comparative law is not a neutral discipline, that the comparatist is always situated and that her own interests shape, inevitably, her analysis.

In this regard, private international law has lessons to teach comparative law. First, private international lawyers are aware of their own situatedness and the inability to fully transcend it; they are therefore experienced in dealing with this situation. Secondly, private international lawyers inevitably confront foreign law in very concrete situations. They are therefore forced to engage in very specific comparison, something that more careless comparative lawyers sometimes eschew. Thirdly, private international lawyers cannot confine themselves to an understanding of different laws in isolation; they are required to coordinate these laws and thus understand them also in their interaction. Fourthly, private

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international lawyers must necessarily render a decision (resolve a true conflict): they must, in the end, prefer the solution of one law over that of another. They are thus not only forced to make a value decision between different laws (albeit one based on values found in the private international law regime), but also to justify such a solution to the losing party.

It is therefore not much of an exaggeration to claim that what a private international lawyer engages in is, ultimately, a form of comparative law that can be called applied comparative law. The private international lawyer is engaged in all three strands of comparative law as explained in the introduction: she must understand and compare different legal systems, she must transplant solutions from foreign law into her own legal system, and she must transcend the substantive law of any one given legal system in building an internationalist perspective. Methodologically, she will often benefit from a functionalist perspective, while being aware of her own situatedness within her own legal system. This is applied comparative law, because it is done in the context of a particular litigation and situation, but as such it is not inferior to academic comparison that can be more abstract.

V. Consequences

It should have become clear that comparative law and private international law are intricately connected – not only in their objects (a plurality of laws), but also in their application. Yet, although the connection between comparative law and private international law is often mentioned in theory, it is not often operationalized in practice. Comparative lawyers rarely pay attention to private international law at all. Private international lawyers use insights from comparative law more rarely than they should. Both disciplines could benefit more from each other than they presently do.

As concerns the consequences for private international law, the judge is in multiple constellations required, at least in theory, to engage in a sophisticated comparative law analysis. Insofar, it is deplorable that private international law practitioners are often insufficiently aware of modern insights in the discipline of comparative law, whether methodological or substantive. It has often been suggested that the judge is incapable of such an analysis, which must instead be exercised by scholars. Yet the judge's inability to fulfil a perfect comparison should not be enough reason for her to refrain from proper comparison altogether.

Moreover, the requirements in practice are often less high than those in theory. Usually, the judge need not compare solutions from all legal systems, but only from those that could possibly be applicable. Sometimes, as in the alternative application of different laws, comparison goes merely to the concrete result of application and does not require a more comprehensive understanding of the foreign law. Sometimes, as in the *ordre public* reservation, the comparison serves merely as the basis for what remains, to some extent, a judgment call on whether the core of the forum's legal order is endangered – here, comparison needs not be exact (though it does need to be accurate). In addition, even in systems in which questions of law are allocated to the judge, in reality, the parties and their counsel will bear a significant part of the comparative law burden. Alternatively, the parties can release the judge thereof, by choosing the *lex fori* as applicable law, or by agreeing that the foreign law should be presumed to have a certain content.

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Keywords for the alphabetical index

Adaptation
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Classification (characterization)
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Forum non conveniens Comparative impairment
Interest analysis
Ordre public

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Renvoi
Substitution
Transposition
Unification of private international law
Universalism

List of abbreviations used

Am.J.Comp.L.	American Journal of Comparative Law
Am. J. Comp. L. Sup.	American Journal of Comparative Law (Supplement)
Cal. Rptr .2d	California Reporter
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Rec. des Cours	Recueil des Cours de l'Academie de Droit International de la Haye
Rev. int. dr. comp.	Revue international de droit compare
Zeitschr Int Priv & StrafR	Zeitschrift für Internationales Privat- und Strafrecht
ZVglRWiss	Zeitschrift für vergleichende Rechtswissenschaft
ZZP	Zeitschrift für Zivilprozess

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 - Rome II Regulation
 - Art 6(3)
 - Art 7

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