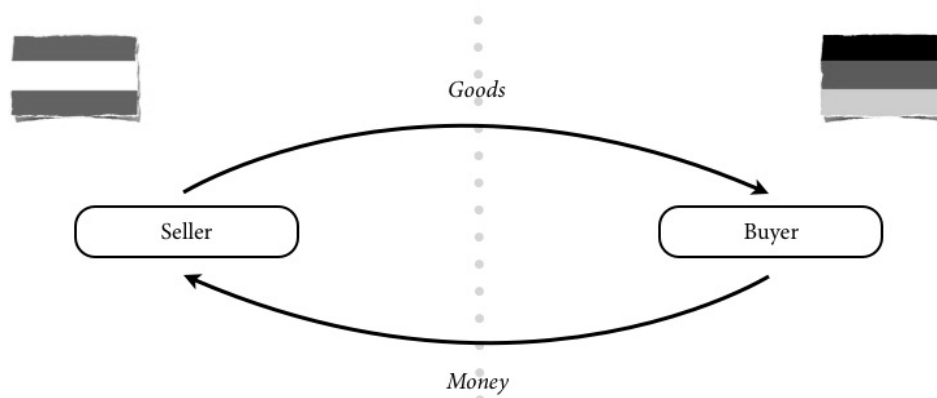


The Foreign Element

To highlight the relevance of PIL rules in an international scenario, we can adjust any purely domestic private law scenario by injecting a single 'foreign' element:

Seller A (in Austria) and buyer B (in Germany) conclude a contract for the delivery of certain goods in Germany on October 11, 2010. The contract specifies the nature of the goods, as well as the price to be paid, but it does not designate the applicable substantive law, nor does it designate a specific forum for the resolution of disputes which might arise. When A delivers the goods on October 12, 2010, B refuses to accept or pay for them. A then sues B for damages in an Austrian court.



The only difference between this case and a purely domestic one is the foreign element 'Germany' (the buyer's foreign domicile), but this difference renders the legal landscape in *Case 1b* 'international' and, as we shall see, much more complex, since the foreign element raises a series of PIL issues, each of which might well affect the ultimate outcome of the dispute.

Step 1: Jurisdiction

Because the defendant (B) in *Case 1b* is not domiciled in the forum where the plaintiff (A) has decided to bring his action (Austria), we cannot take for granted that the Austrian court is competent to adjudicate the parties' dispute. To resolve the competency issue in *Case 1b*, the Austrian Court must first select the relevant rule-set on International Jurisdiction. Once the Austrian Court determines the International Jurisdiction rule-set (which might, for example, be the Jurisdiction rule which applies to contractual matters) to determine whether there is a basis for the assertion of jurisdiction by

the Austrian court in a case like this. In other words, the first PIL step might actually be a 2-step affair.

Step 2: Choice of Law/Applicable Law

To take the next step in our international scenario (*Case 1b*), let's assume that the application of the relevant jurisdiction rule (PIL step 1) leads to the conclusion that the Austrian court is in fact competent. Let's also assume, for present purposes, that B appears to defend.

Having determined its competence, the Austrian Court will now need to take the next major PIL step which relates to the **applicable substantive law**.

Note: At first glance, it might seem unnecessary to take this step (to make a choice between the laws of different countries), since we have already determined that the courts in question have jurisdiction. Can we not assume that (e.g.) a competent Austrian court will apply Austrian law? The answer to that question is NO: we cannot make that assumption regarding the law applicable to the merits of the dispute. When determining a dispute with an international element (such as parties from different countries) a court will always apply its own procedural rules (including its own PIL rules), but it may well apply the substantive law of a different country in order to resolve the merits of that dispute. In other words, even if an Austrian court assumes jurisdiction, that court may find that the substance of the dispute between the parties is governed by (e.g.) French law. This illustrates an important concept in private international law: the issues of jurisdiction and applicable law are (basically) independent of each other and are governed by separate sets of rules.

*Given that there are a number of competent courts in Europe, in case every court applies its *lex fori* the claimant could choose the applicable law (with high damages or a specific evidence scheme) by suing at a special court.*

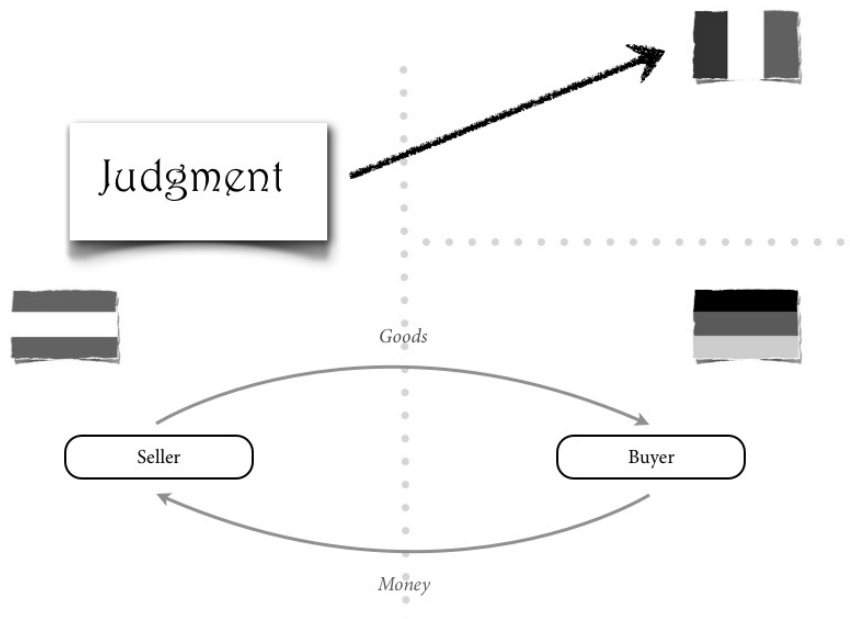
*NB: An extensive publication on the different legal solutions adopted in Contract Law in Europe is available by **Thomas Kadner Graziano, Comparative Contract Law 2009, Palgrave Macmillan**.*

In order to determine which State's substantive law governs the dispute at hand, the court must first determine which choice-of-law rule applies in this kind of case. Then, on that basis, it must decide which State's private law to apply. A **Choice of Law Rule decides which of different substantive laws apply to the case**. After the court has selected the applicable choice of law rule and has made the choice between 'competing' substantive law it can proceed to determine the substantive outcome (who wins on the merits) on the basis of this decision.

Step 3: Recognition & Enforcement

Once a competent court determines the outcome of a given commercial litigation with an international element, other courts (e.g. in France and the UK) may need to apply the PIL rules, which regulate the recognition and enforcement of foreign judgments.

Same Facts as Case 1b. A court in Austria renders a judgment against B on the basis of German law (i.e. A is awarded damages), but B – who has substantial assets in France – fails to pay A the damages awarded.



Under these circumstances, A might have reason to ask a court in France to enforce the judgment against B (e.g.) by seizing B's assets in France, in order to satisfy the judgment rendered in Austria (secure payment of the damages due). If the judgment rendering court is located in an EU Member State (Austria), the issue of recognition and enforcement of that judgment in another Member State (France) will be regulated by the Brussels I regulation rules, and the Austrian judgment will almost certainly be enforced in France. We will come back to that topic later.

Readings for November 25, 2011:

Walker, Internationales Privatrecht, 5. Aufl., Wien 1934, pp. 1-22

Audit, Droit International Privé, 5. Aufl., Paris 2008, pp. 9-14

Dicey, Morris & Collins, The Conflict of Laws, 14. Aufl., London 2006, pp. 3&4 – skip 5-8, please! – 9-12