

JUSTITIA ET PACE  
INSTITUT DE DROIT INTERNATIONAL

**Session of  
Santiago de Compostela - 1989**

**Equality of Treatment of the Law of the Forum  
and of Foreign Law**

*(Tenth Commission, Rapporteur : Mr Pierre Gannagé)*

*(The French text is authoritative. The English text is a translation.)*

*The Institute of International Law,*

*Whereas* nowadays there is a strong tendency towards national codification of the rules of private international law ;

*Whereas* at the same time the number of treaties, in particular of those concluded under the auspices of The Hague Conference on Private International Law, continues to increase ;

*Whereas* international harmonization is one of the objectives that States are to pursue in establishing and implementing choice of law rules ;

*Whereas* it is contrary to a balanced and open-minded regulation of international relations to regard the law of the forum as superior in nature to foreign law ;

*Whereas* the adoption of bilateral choice of law rules tends usually to favour this objective ;

*Whereas* equality of treatment of the law of the forum and of foreign law appears equally necessary and may nowadays more easily be achieved as a result of the development of ways of obtaining information on foreign law ;

*Referring* to its Resolution adopted at Siena on 25th April 1952 which recommended that, when laying down choice of law rules, States shall "generally use criteria which may be applied internationally, that is to say, which in particular may be adopted in international conventions, so as to avoid the risk of conflicting solutions being reached in a particular case in different countries",

*Deems* it useful to elaborate and supplement that Resolution in the following fields :

## **I. In Shaping Choice of Law Rules**

1. It is recommended that States :

- a) unless their essential interests require otherwise, adopt choice of law rules based on connecting factors which lead to the application of foreign law under the same conditions as lead to the application of the law of the forum; and, consequently,
- b) refrain from adopting choice of law rules which broaden the scope of the application of the law of the forum as against that of foreign law ;

and, in particular, exclude such rules whenever their application would result in discrimination between parties based on factors under which one of them is personally connected to the state of the forum, such as nationality or religion.

2) It is recommended that States, when it seems necessary to them to adopt subsidiary choice of law rules, use connecting factors which lead to the application of foreign law under the same conditions as lead to the application of the law of the forum.

3) It is recommended that States, when introducing choice of law rules whose objective is to achieve a particular substantive result, such as alternative reference rules, use connecting factors which lead to the application of foreign law under the same conditions as lead to the application of the law of the forum.

## **II. In Implementing Choice of Law Rules**

a) Given the mandatory nature of choice of law rules, which select either foreign law or the law of the forum as applicable, it is recommended that, to the extent that their general rules of procedure permit, States :

- require their competent authorities to raise *ex officio* the question of the application of the choice of law rule ; and
- when that rule is applicable, apply *ex officio* the foreign law determined by it.

b) It is recommended that judicial authorities, through means available under the rules of procedure of their country, should be able to take the necessary initiatives to ascertain the content of foreign law as applied in the foreign country, in particular by seeking the assistance of the parties.

c) It is recommended that the application of foreign law shall allow for the granting of remedies similar to those available when the law of the forum is applied.

d) It is recommended that the applicable foreign law shall only be set aside if its effects are manifestly contrary to public policy.

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(12 September 1989)