

Private International Law

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4 (Four) Law Credits

Prerequisite Courses: The Law of Contract, Family Law I and II

A dispute involving a well-defined foreign element cannot be resolved by exclusively relying on the domestic legal framework. In scenarios where the matters before the judiciary have a strong foreign element, the disputes must be resolved by reference to private international law. Also known as the conflict of laws, private international law is that part of the domestic legal system which comes into operation whenever the court is confronted with a dispute that comprises a specific and clear foreign element. It is primarily a procedural law that identifies which legal system possesses jurisdiction and which laws would apply to a particular dispute – its function being to pinpoint the system of applicable law – much like an office at a railway station where the passenger can learn the specific platform in which the train is arriving. In that sense, private international law is not a specific branch of a legal system such as contract or criminal law. However, it has a distinct flavour of its own since the subject, through specifically identified legal mechanisms, guides the ascertainment of the legal system applicable to a case.

Foreign elements in a dispute can be presented in numerous ways, ranging from the parties' different nationalities or domicile to the cause of action originating in more than one jurisdiction. For example, A domiciled in India files a suit against B domiciled in Britain for breach of an employment contract to be performed in France. The scenario presents foreign elements in the form of the domicile of B and the contract's place of performance. In such situations, exclusive reliance on domestic legal systems results in the prospect of the forum's laws coming into conflict with the legal system with which the case's facts are intimately connected. It needs to be highlighted that the reference to a foreign system of law with a federal legal structure is not to be understood in the sense of 'state' in international law but to specific federal units. For instance, a reference to the law of the US indicates relevant laws of California, Texas, etc. The hybrid nature of the subject involving international elements and the domestic legal system has given rise to several narratives on the subject's nomenclature.

Private parties to international trade must know in advance the court that will adjudicate any disputes that may arise from the transaction – but also the circumstances in which they may be permitted to avoid the jurisdiction of that court by pleading *lis pendens*, *forum non*

conveniens or by concluding a forum-selection clause that allows them to adjudicate the dispute before a court of their choice. Adjudicating the dispute before a wrong court or in violation of an arbitration agreement may render the judgment *brutem fulmen* (ineffective) that cannot be recognised or enforced in the court where the defendant has assets. Similarly, the parties must know the law that their dispute will be subject to in the case of an eventuality. In international disputes, it is equally essential that traders and individuals are aware of the plausible problems of being subject to a certain law to effectively address these predicaments in advance. For instance, parties may not be aware of the significance of choosing the applicable law in advance. Consequently, their failure to select the governing law in advance would mean that they would now have to suffer the risk of being subject to ambiguous rules that the courts in these jurisdictions would apply to determine the applicable law.

As regards India, despite the presence of a large diaspora spread across jurisdictions and the enlarged cross border economic transactions, the Republic has not enacted precise legislation regulating the principles applicable to civil and commercial disputes with foreign elements before national courts. Instead, the principles have evolved gradually responding to the varied social, political and legal structures in operation. The country's legal infrastructure is primarily shaped by the common law system and carries the influence of British colonial rule. In many legal systems, including the UK, whose laws have been instrumental in shaping the course of legal developments in India, predictability and certainty have prompted lawmakers to address most nuances governing cross-border relations through codified rules. Others, such as the European Union, and some of the other fastest-growing countries in Asia, such as Japan, China, and South Korea, follow similar practices where rules governing foreign relations have not merely been extensively codified but have been promulgated, keeping in mind the intricate nature of international trade. This has, however, not been the case in India, where the absence of codification means that courts must invariably extend rules typically designed for domestic matters by analogy to disputes with foreign elements (for instance, when parties belong to different nationalities or the performance of an obligation takes place overseas). Further, while several countries such as China, Dubai, France, Germany, and Cyprus have created specialised commercial courts to handle international disputes, India has been slow to adapt despite being the fifth largest economy and the largest ordinary law jurisdiction. Its framework for resolving international commercial disputes remains fragmented across various legislations, with many critical questions left to judicial interpretation. This creates uncertainty, increased transaction costs, and a reputation for India as one of the most arduous jurisdictions for enforcing contracts. The promulgation of the (Indian) Commercial Courts Act

in 2015 was a milestone. Still, its reliance on domestic civil procedure rules for disputes with a foreign element poses significant challenges stemming inter alia from the lack of clear principles on the bifurcation of jurisdiction when a foreign court is contemporaneously competent, or when the parties have expressly ousted the jurisdiction of the Indian court altogether by agreement. While arbitration is not free from judicial interference, since Indian courts retain the prerogative to determine referrals to arbitration and to review enforcement of awards, unlike the former, which has benefitted from codification and amendments, litigation remains ill-equipped to handle disputes involving multiple jurisdictions, sovereign immunity, choice of law complexities, and enforcement hurdles. Absent codification, litigants are often in bewilderment given the ambiguous nature of the conflicts rules that govern cross-border disputes in India. Are Indian courts competent to decide the matter? If they are, is their decision even capable of enforcement overseas if the debtor is not found to have assets capable of attachment in India? How should the liability of the parties be determined? What happens when a commercial dispute arises concerning goods purchased from or services rendered by State-owned business entities? Are such corporations, as instruments of the State, exempt from all liability, especially if incorporated in non-market economies such as China? How should litigants respond to challenges when their contract stipulates the settlement of their international commercial disputes through arbitration, but the law to which one is subject does not allow such agreements to oust the jurisdiction of national courts?

Set against this background, this elective on *Private International Law* offers students a comparative, practice-oriented foundation on the conflicts rules applicable to commercial disputes with foreign elements with a focus on India. Key topics include court jurisdiction, applicable law, and the recognition and enforcement of foreign judgments. The course prepares students to strategically select between arbitration and litigation, informed by a nuanced understanding of legal systems. At its core, the course aims to bridge the divide between global best practices and India's evolving conflict of laws framework, enabling future lawyers and policymakers to navigate better, advise on, and reform India's role in the global dispute resolution landscape. It aims to prepare future lawyers and adjudicators to address procedural hurdles, foresee enforcement challenges, and strategically draft and interpret international commercial contracts.

13-Week Learning Design

Week 1: Introduction

- Overview of private international law and its importance for global trade and commerce.
- Understanding the interplay between the three fundamentals of private international law – the international jurisdiction of courts, the governing law, and the recognition and enforcement of foreign decisions (judgments and arbitral awards)

Weeks 2 and 3: The Initiation of Suits in Cross-Border Civil and Commercial Matters and the Competence of Indian Courts

- Jurisdiction of Indian courts, foreign sovereign entities, and treaty implications.
- Challenges raised by the extension of domestic legal principles to international disputes.

Week 4: Ousting Jurisdiction of Indian Courts

- Forum-selection clauses, arbitration agreements, and *forum non conveniens*.
- India's participation (or non-participation) in the Hague and UN Conventions.

Week 5: Navigating Jurisdictional Chaos – Comparative Lessons

- Whether parties should oust Indian courts or rely on comparative models (while retaining jurisdiction).
- Lessons from EU (Brussels Ibis), China, and Russia.

Weeks 6 and 7: Jurisdiction and Governing Law – Doctrinal Ideals vs Reality

- Party autonomy, governing law, and Indian judicial inconsistencies.

Week 8: Comparative Lessons for Modernisation

- Lessons from the EU, the UK, China, and Russia.
- Gap-filling Indian law using comparative and soft law approaches.

Week 9: Family Disputes with Foreign elements

- The law governing matrimonial disputes and succession.

Week 10: Jurisdiction Agreements as Tools for Predictability

- Using jurisdiction clauses to manage choice-of-law uncertainty.

Module 11 to 13: Recognition and Enforcement of Foreign Decisions

- Effectiveness of judgments and arbitral awards.
- The Hague Convention on Choice of Court Agreements (2005), the Hague Judgments Convention (2019) and India's prospects.

Week 13: Reading & Revision

- Solving past question papers.

Learning Outcomes:

By the end of this course, students will be able to:

1. Critically evaluate existing mechanisms for adjudicating cross-border civil and commercial disputes with foreign elements.
2. Predict the legal and practical challenges parties will likely face in litigation and arbitration involving a foreign element.
3. Advise clients on enforcement risks when pursuing cross-border litigation or arbitration in India.
4. Draft practical choice of law and dispute resolution clauses that minimise the risk of enforcement issues in international contracts.
5. Suggest reforms or soft law solutions to bridge the gaps in India's current framework and enhance its attractiveness as a hub for international commerce.

Compulsory Readings

1. Adrian Briggs, *The Conflict of Laws* (5th edn Clarendon Law Series, Oxford 2024).
2. Anne van Aaken, 'Blurring Boundaries between Sovereign Acts and Commercial Activities: A Functional View on Regulatory Immunity and Immunity from Execution' in Anne Peters, Evelyne Lagrange, Stefan Oeter and Christian Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Brill Nijhoff 2015) 131

3. Erwin Spiro, 'The Incidence of Jurisdiction in the Recognition and Enforcement of Foreign Judgments' (1978) *Acta Juridica* 59
4. Jürgen Basedow et al. (eds.) *Encyclopaedia of Private International Law: Vol 3*, (Edward Elgar Publications 2017) – (select chapters)
5. Malcolm N Shaw, 'Chapter 13: Immunities from jurisdiction' in *International Law* (6th edn, Cambridge University Press 2021)
6. Pippa Rogerson on *Collier's Conflict of Laws* (4th edn, Cambridge University Press 2013 CUP)
7. Ronald A Brand, 'Understanding Judgments Recognition' (2015) 40 North Carolina International Journal of Law and Commerce Regulation 877
8. Se-In Lee, 'Study on Drafting Appropriate Dispute Resolution Clause in International Contract' (2019) 29 J Arb Stud 39
9. Stellina Jolly and Saloni Khanderia, "Indian Private International Law", Hart Publications – Studies in Private International Law- Asia Series (2021)
10. Yip Man and Giesela Rühl, 'Success and Impact of International Commercial Courts: A First Assessment (2022–23)' (2023) 24 Yearbook of Private International Law 45