

## **Scientific Foundations for Developing Commercial Law Based on Private Law**

**Mohamed Amer Mohamed**

mohammed@ik.edu.iq

Ibn Khaldun Private University College .Baghdad .Iraq.

### **Abstract:**

The Enhancements of legal recognition of electronic commercial documents and records is representing the one of the basic principles of managements.

Private international law—which governs the resolution of disputes between individuals involving a foreign element—centers on four key topics: the nationality of citizens (a fundamental pillar of state sovereignty); the status of aliens (defining the rights of both citizens and foreigners); conflict of laws (a subject that has evolved through both classical and modern schools of thought); and the issue of conflict of jurisdictions and the application of foreign law, which relies on the "rule of reference" (or choice-of-law rule).

Developments such as e-commerce, electronic contracts, electronic signatures, electronic records, digital platforms, cross-border trade, and automated systems have emerged, alongside the use of artificial intelligence in contracting and the management of commercial operations.

The international community has moved toward developing modern legal frameworks to address these developments; a prominent example is the work of UNCITRAL. ...models in this field include the work of the United Nations Commission on International Trade Law (UNCITRAL).

Hence, there is a need to examine the scientific foundations upon which the development of commercial law should rest. Such development should not merely be a piecemeal response to new developments, but rather a

comprehensive legislative project grounded in the principles of private law while taking into account economic, social, and technological requirements.

**Keywords:** Commercial law, private law, commercial, transactions, commercial.

### **Introduction:**

Legal scholars have differed on the definition of private international law due to the relatively recent emergence of this branch of law and the diversity of its subject matter and sources. Regarding the subject matter and the resulting definition of private international law, two perspectives can be identified. The first limits the study of the field—and its subject matter—exclusively to the issue of the conflict of laws (i.e., the conflict of legislative jurisdiction). Consequently, proponents of this view often title their works on the subject "Conflict of Laws" rather than "Private International Law"; this approach prevails in Italy and Germany. Under this view, the field is defined by "conflict rules" or "rules of attribution" that designate the applicable law (the competent law) from among the laws of various states competing to govern a case involving a foreign element. Thus, private international law is defined as: "the body of legal rules determining the applicable law in a legal relationship involving a foreign element." Dr. Shams al-Din al-Wakil from Egypt is among the Arab jurists who support this view (1).

In Anglo-Saxon countries, however, the definition and subject matter of private international law are not limited to the conflict of laws; they also encompass the conflict of international judicial jurisdiction—specifically, determining the extent of a state's court jurisdiction over disputes involving a foreign element. This is because a dispute arising from a legal relationship with a foreign element may fall within the jurisdiction of courts in more than one state due to the connection of specific elements of that relationship to those states, thereby necessitating a determination of which court is competent to hear the dispute. Accordingly, private international law can be defined as: "the body of legal rules determining legislative jurisdiction and international judicial jurisdiction in a legal relationship involving a foreign element."

Among the Arab commentators who support this view are Dr. Edmond Naim from Lebanon and Dr. Murtada Nasrallah from Iraq.

There is another perspective that views private international law more broadly, encompassing—in addition to conflict of laws and conflict of international jurisdiction—nationality, domicile, the legal status of aliens, and the enforcement of foreign judgments. This approach prevails in the Latin legal tradition followed in France and in other countries that model their legislation on it—such as Jordan, Iraq, Egypt, Syria, and Lebanon.

Indeed, scholarly works and university curricula regarding private international law in these countries encompass—in addition to rules governing conflicts of laws and conflicts of international jurisdiction—provisions concerning nationality, domicile, the legal status of aliens, and the enforcement of foreign judgments. Thus, private international law may be defined as: "The body of legal rules that determines the applicable law and the competent court in a case involving a foreign element, and defines domicile, nationality, the legal status of aliens, and the enforcement of foreign judicial judgments" (1,3).

. States rigidly adhered to the principle of sovereignty—applying their laws to all disputes and persons within their territory—while simultaneously refusing to recognize any legal status for aliens. A foreigner held no rights outside their own state and possessed no recognized legal personality; they were equated with slaves—capable of being the object of a right, but never its holder. Consequently, if a dispute arose between a foreigner and another person outside the foreigner's home state,

they could not resort to the judiciary to claim their rights or seek compensation for harm caused by the actions of others. Thus, there were no concepts of conflict of laws, conflict of international jurisdiction, legal status of aliens, or nationality in the modern sense. The prevailing philosophy of the time held that the city-state was a community bound by a shared faith; therefore, one could neither enjoy the protection of its laws nor acquire... Legal personality—and the enjoyment of rights associated with it—was reserved exclusively for nationals. This principle prevailed among the Greeks and Romans, in feudal European states, and in ancient China. In Greece, Isocrates articulated this view by stating: "The difference between a Greek and a

foreigner is like the difference between a human and an animal." Greek laws granted foreigners no rights or protection, regardless of how long they resided in the country. Instead, a system of hospitality was applied, whereby a foreigner would be hosted by a Greek, thereby enabling them to conduct dealings with the Greek population. Additionally, Greek city-states concluded agreements among themselves that permitted commercial relations between their respective subjects (2).

When the Greek city-states ceased to exist and the Roman Empire came to dominate the world, Roman laws applied to all occupied territories and their inhabitants; in the event of a dispute between a Roman and a foreigner.

### **First: Research Problem**

The research problem lies in the extent to which traditional commercial law rules can accommodate the rapid developments in the modern commercial environment, and the necessity of developing these rules within the framework of general private law principles

### **Definition of Law:**

The word "law" suggests more than one meaning and conveys multiple connotations; there is the linguistic meaning, the jurisprudential meaning, and the view of it as a science.

Law is inextricably linked to human society; indeed, it is inseparable from it and inconceivable without it. It undergoes changes over time because—as the German jurist Savigny, founder of the Historical School of Law, stated—law is not the product of a single opinion or a single day; rather, it is the product of history and the passage of eras. Consequently, like human society, law is subject to the principle of continuous evolution; it adapts to a society whose ideas, customs, and systems shift over the course of time (3).

### **First: Domestic or National Sources**

1- Legislation: Legislation is defined as the body of written legal rules enacted by the competent legislative authority. This source is relatively modern compared to the others; consequently, the role of the other sources is less prominent in matters of private international law.... Legislation plays a vital and primary role regarding nationality, as nationality defines one of the fundamental pillars of the state—namely, the people—and is a matter touching upon state sovereignty (4).

While custom plays no role in the realm of nationality, it has played a major and influential role in other areas of private international law—specifically regarding conflict of laws and international jurisdictional conflict—and has served to complement legislation concerning domicile and the legal status of aliens.

Some argue that there are international customs pertaining to private international law, such as the minimum standard of treatment for aliens, the requirement for a genuine and substantial link between the individual and the state granting nationality, and the principle of state autonomy in matters of nationality.

3- Case Law (Judicial Precedent): This refers to the body of judicial rulings issued by national and international courts that have become established practice in addressing private international law issues. While this source has no impact in the realm of nationality, it plays a supplementary and subsidiary role in other areas of private international law (5).

Although case law is generally considered a national interpretive source, in Britain, it ranks as a formal and primary source of law.

While treaties are typically classified as either multilateral or bilateral, within the field of private international law—and depending on the subject matter—they can also be categorized into treaties that unify conflict-of-law rules and treaties that unify substantive rules. In the first type, the treaty's objective is limited solely to unifying choice-of-law rules within the domestic laws of the contracting states; in the second type, however, the drafters go beyond merely unifying choice-of-law rules to unifying the substantive rules that directly govern the dispute (6).

Treaties play a significant role across all areas of private international law, as states rely on them to regulate matters within this field. However, the impact of treaties varies: it is direct in areas such as conflict of laws, international jurisdictional conflicts, domicile, and the status of aliens, whereas it is indirect regarding nationality (7).

In other words, while international agreements do influence nationality provisions, they do so through domestic legislation; the legislation incorporates the agreement's nationality-related provisions.

3- International Custom, or Unwritten Rules of Private International Law: Custom played a significant role in the past, particularly regarding the conflict of laws; for instance, the rule that a decision is governed by the law of the place where it was rendered has long been established, as has the rule that a harmful act is governed by the law of the place where the act occurred. It is worth noting that, although custom has played a major role... While it plays a role in the field of conflict of laws, its significance diminishes considerably in other areas—such as nationality and the status of aliens—due to the close link between these matters and state sovereignty. In reality, international custom has lost much of its importance in the face of the growing trend toward codification and legislation (8).

## **Second: The German Theory**

Savigny, the theory's founder, posited that all states aim to achieve justice—a goal attainable only through mutual cooperation. He introduced a completely new criterion based on three factors: natural law, the legal seat of the legal relationship, and voluntary submission.

- Regarding rules governing the individual, jurisdiction is assigned based on the individual's legal seat—specifically, the law of their domicile. Thus, the law of domicile determines the individual's status (e.g., whether they are of legal age or a minor) (9).

## **Third: The Modern French School**

This school emerged in France in the late 19th century, founded by the jurist Pillet. He rejected the notion of basing the resolution of conflicts of laws on the principles of personality or territoriality.

Pillet argued that conflicts should be resolved by identifying the social purpose the law seeks to achieve—specifically, the protection of either the individual or society (10).

He maintained that if the law's objective is to protect the individual or the family, the personal law should apply; conversely, if the objective is to protect society, the local law should apply to all legal relationships within the state.

Since it is not always easy to determine exactly whom the law intends to protect, a secondary method is employed: identifying who would suffer the greatest harm if the law were not applied (11).

### **Subject matters comprise can represent as:**

- 1- Nationality.**
- 2- The status of aliens.**
- 3- Conflict of jurisdiction and the enforcement of foreign judgments.**
- 4- Conflict of laws.**

#### **\*\*First: Nationality\*\***

Nationality serves as the governing criterion that defines a state's population. It is considered one of the most important subjects of private international law. Generally, nationality is defined as the political and legal bond linking an individual to their state; it determines who is a citizen and who is an alien. Every state is keen to enact its own nationality laws freely, taking its specific circumstances into account, although this freedom is somewhat constrained by the dictates of international agreements in this field (12).

## **\*\*Second: The Status of Aliens\*\***

The legal framework governing the rights, duties, and restrictions of foreign citizens (non-nationals) residing or doing business within a specific country.

Having already noted the importance of nationality, another subject falling within the scope of private international law is the status of aliens. From it and inconceivable without it. It undergoes changes over time because—as the German jurist Savigny, founder of the Historical School of Law, stated—law is not the product of a single opinion or a single day; rather, it is the product of history and the passage of eras. Consequently, like human society, law is subject to the principle of continuous evolution; it adapts to a society whose ideas, customs, and systems shift over the course of time (13).

For this reason, legal history falls within the scope of legal science, as it focuses on studying law through the evolution of its historical sources and legal systems:

- The history of sources aims to understand the legal rule and its development across various eras; these sources may originate from religion, custom, legislation, judicial precedent, or juristic deduction.
- The history of legal systems aims to understand the body of legal rules governing relationships within public law (such as the system of government and related matters) and private law (such as contract law, family law, etc.) (17).

These sources and systems form the focal point of research into civilizations, as humanity has witnessed a succession of great civilizations since the dawn of history. Ancient civilizations—such as those of Mesopotamia, Pharaonic Egypt, Greece, and Rome—are considered among the most significant, having left a profound impact on historical development. ...to the law (18).

### **Third: Conflict of jurisdiction:**

The rules used to decide which country's courts have the legal authority (competence) to hear and resolve a dispute that involves international elements. Enforcement of foreign judgments: The legal process and conditions under which a court in one country will recognize and enforce a ruling made by a court in a different country.

### **Fourth: Conflict of laws:**

The rules that determine which country's substantive laws should be applied to resolve a legal dispute when the laws of two or more nations are involved.

## **Requirements for Developing Iraqi Commercial Law and Its Future Prospects**

The Need to Review Commercial Legislation. Iraqi Commercial Law No. 30 of 1984 constitutes an important legislative framework; enhance the protection of parties to transactions; develop rules regarding commercial evidence; regulate electronic records; strengthen commercial dispute resolution mechanisms; keep pace with international trade; and establish preliminary rules for automated commercial transactions and artificial intelligence(17).

### **Towards a Modern Iraqi Commercial Legislative**

#### **Model**

**A modern model for Iraqi commercial law can be built upon a set of principles:**

1. The principle of technology neutrality.
- 2-Principle of functional equivalence.
4. The principle of protecting legitimate expectations.
5. Principle of legal certainty.
- 6.Principle of liability.
7. Principle of data protection.

## 8.Principle of consumer protection.

### **First: Findings**

1. Commercial law is a branch of private law; it cannot be properly developed in isolation from the general principles underpinning private law.

### **Second: Conclusion, Recommendations**

1. Conduct a comprehensive review of Iraqi Trade Law No. 30 of 1984 to align it with economic and technological developments.
2. Draft comprehensive e-commerce legislation that defines the provisions governing commercial contracts and transactions.
- 3 - Enhancing the legal recognition of electronic commercial documents and records.
- 4 - Regulating automated contracting and establishing rules defining the legal effects of contracts formed or executed via automated systems.
- 5 - Establishing legal rules for commercial transactions based on artificial intelligence, while defining liability for errors and unexpected outputs.
- 6 - Developing commercial rules of evidence to accommodate electronic evidence and data.

- 7 - Strengthening the protection of commercial data and information in the digital environment.
- 8 - Developing electronic means for commercial dispute resolution.
- 9 - Leveraging UNCITRAL model texts when drafting Iraqi legislation.
- 10-Involving specialists in law, economics, information technology, and artificial intelligence in the process of drafting commercial legislation.
- 11-Adopting the principle of technology neutrality.
- 12-Strengthening international legislative cooperation to facilitate e commerce and cross-border trade

### **References:**

- 1- Gabriel al-Banna, \*Lessons in Roman Law\* (1st ed.), Al-Irshad Press, Baghdad, 1949, p. 60; and Michel Villey,
- 2-\*Roman Law\* (trans. Dr. Hashim al-Hafiz), Al-Irshad Press. - Baghdad/1964, pp. 63–67;
- 3-Dr. Sabih Maskouni – \*Roman Law\*, 1st Edition – Shafiq Press – Baghdad/1968, p. 45; Dr. Edmond Naim, \*op. cit.\*, p. 13; and
- 4- See Dr. Hassan Al-Hadawi – \*A Concise Treatise on Private International Law: Nationality\* – Baghdad 1962, p. 159.
- 5- See Dr. Edmond Naim – \*op. cit.\* – p. 13.
- 6-Iraqi legislation
- 7- Iraqi Trade Law No. 30 of 1984
- 8- Iraqi Civil Code.
- 9-: Iraqi legislation related to electronic transactions, electronic signatures, and the digital environment.

- 10- United Nations Commission on International Trade Law (UNCITRAL), Model Law on Electronic Commerce, 1996.
- 11- UNCITRAL, United Nations Convention on the Use of Electronic Communications in International Contracts, 2005.
- 12- UNCITRAL, Model Law on Electronic Transferable Records, 2017.
- 13- UNCITRAL, Model Law on Automated Contracting, 2024.
- 14- UNCITRAL, Texts and Status – International Trade Law.
- 15- Dr. Firas Karim Shiaan Al-Baidhani, Lecture titled "Sources of Private International Law," University of Babylon, 2017.
- 16-Dr. Abdul-Rasoul Abdul-Ridha Jaber Shawka, Lecture titled "Historical Development of Conflict of Laws Rules," University of Babylon, 2013.
- 17- Dr. Ahlam Beydoun, \*A Brief Overview of Private International Law\*, Faculty of Law, Political Science, and Administrative Sciences, Lebanese University, 2011/2012.