PART ONE

INTRODUCTION
CHAPTER 1

Literature and Sources of Conflicts Law

I. Scope of Conflicts Law

In the American literature, the law of conflicts includes both choice of law, which contemplates the determination of the particular state law applicable to specific cases typically within the sphere of private law, and jurisdiction of courts, regarded by some writers as an aspect of legislative jurisdiction. In following this pattern, we shall observe the limitations of private law more strictly than is usual and only to the extent necessary explore the implications of constitutional, administrative, procedural, criminal, and public law generally. Thus, the rules of judicial jurisdiction will be considered in connection with those matters which are governed in this country by the domestic or internal law of the jurisdiction (the lex fori) and consequently depend upon choice of court rather than on choice of law.

According to the French doctrine, "private international law" combines choice of law, the law of nationality, and the legal status of foreigners. This last subject, concerned with the rules granting or refusing foreigners equal treatment with nationals, in theory is thoroughly different from conflicts law conceived primarily as choice of law. It presupposes that the law applicable to aliens has been selected and found to be the internal law of the state. For this reason, it is not regarded in Germany as part of private international law.1

In this country, likewise, rules relative to "foreign" individuals—aliens and non-residents—typically do not appear in the treatises on conflicts law. The explanation given is

1 See 1 ZITELMANN 256; KAHN, 1 Abhandl. 263 ff.
that citizens and non-citizens are not differentiated \(^2\) in respect to private law; this seems to contemplate exclusively relations between the American sister states. Nevertheless, the rules concerning foreign corporations, pertaining for the most part to internal law and in fact presenting many special features in the United States and to some degree in Germany, are included in the usual orbit of conflicts discussion. This practical method will be followed, although the regulation of foreign corporations is different from choice of law and in general forms part of administrative law.

Similar considerations make it desirable to give some attention to substantive provisions concerned with property situated or contracts performed or acts done in another state, or that otherwise involve foreign elements. Such provisions often appear as purely internal rules, but they may include genuine conflicts rules. For instance, a rule stating that a money debt expressed in foreign currency may be paid, at the option of the debtor, in domestic currency at the exchange of a certain date, is substantive merely. But the principle, enunciated in certain American statutes and judicial decisions,\(^3\) that statutory formalities prescribed for insurance contracts apply only to contracts executed within the state, is not merely a rule of municipal law territorially limited; it contains two rules, the one substantive, imposing formalities, the other, a conflicts rule, however delicate the borderline may be.\(^4\) There are also scattered throughout the national legislations numerous provisions that are not intended or are unsuitable for appli-

\(^2\) 1 BEALE 8. On the rules, see MOORE, 4 Digest of International Law (1906) ch. XIII.


\(^4\) In fact, the provision cited in New York Life Ins. Co. v. Long (supra n. 3) has been characterized as a “spatially limited” internal rule by NUSSBAUM, Principles 70.
cation by foreign courts, as for instance, the peculiar English provisions imposing upon certain persons the burden of support of indigents. All such internal regulations, with potential international significance, deserve systematic examination in connection with the laws of the particular countries. In the present survey, it will be possible only to make occasional reference to such problems. On the other hand, in view of their preponderant influence, internal rules embodying so-called stringent public policies, and hence superseding the operation of general conflicts rules, must be taken into account.

The observations in the present introduction are not intended to serve as a general analysis of conflicts law. Modern writers in this field have begun to develop a body of generalized theories, but most of the topics they deal with are beyond present purposes. Certain problems, such as the attitude of the courts in the different countries with regard to public policy or the methods of considering foreign law in lawsuits, involve positive formulations of law, which ought to be reported in a comparative survey and will be referred to in their appropriate connections. Other long-standing problems of deep scientific interest, such as the exact classification of conflicts law in the legal system, do not need more international discussion. Others, including the dubious role of the “preliminary question,” have not matured sufficiently to warrant general observations.

Finally, there are problems regarding the structure and application of conflicts rules that are of interest from the viewpoint of method and have attracted wide and vivid attention.

6 See infra pp. 325, 611, n. 8, 622, n. 63.
6 A penetrating analysis has been made by MAURY in his Hague lecture, “Règles générales des conflits de lois,” 57 Recueil 1936 III 325. Other lectures under the same title by ACO, 58 Recueil 1936 IV 247; Davies, an English author, 62 Recueil 1937 IV 427; and H. Lewald, published separately, Basel, 1941, (an elegant theoretical study). See, moreover, I. Henri Hijmans, Algemeene Problemen van Internationaal Privaatrecht (1937).
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during recent years. The purpose of this introduction is to summarize the writer's view on these questions. This view premises that each case should be considered on its merits; therefore it does not presuppose the determination of individual problems by general dogmas.

II. LITERATURE

1. The International Historical Background

In its generally accepted sense, the law of conflicts or private international law dates from the medieval school of the postglossators (also named legists or commentators), who in the late thirteenth century succeeded the glossators in the universities of northern Italy and southern France. Like

The titles of many of the works cited by authors' names in the following brief survey are to be found in the bibliographical list on page 661. The accompanying dates indicate the years in which the first considerable publications of the respective authors occurred.


Historical summaries are given in almost every handbook; particularly recommendable are those by Weiss, 3 Traité 8-129, 130-149; Gutzwiller, Internationalprivatrecht 1521-1534; Espinola, 7 Tratado 115-313.

10 The last and most authoritative member of the school of glossators, Accursius, instigated the query by his brief annotation (A. D. 1228) to the first Imperial decree of the Justinian Codex (C. J. 1, 1, 1), the Constitutio "Cunctos populos." The postglossators developed the treatment of the conflict of statutes (i.e., those of the upper Italian cities) as glosses to this Constitution. The most outstanding postglossators were also the main authorities for conflicts law: Bartolus de Saxoferrato (1314-1357) and Baldus de Ubaldis (1327-1400).
the Roman law into which it was artificially incorporated, this branch of law was regarded as universally binding. The territorial realm of the doctrines of the postglossators exceeded even the boundaries within which the canon and Roman laws were received as "written reason," representing the law of all Christendom. These doctrines, as accepted and transformed by eminent scholars in France \(^{1}\) and Holland \(^{2}\) during the sixteenth and seventeenth centuries, gained recognition in England and in the United States.

The law of conflicts thus became one field, in which the common and civil laws had a common doctrinal basis and which could be thought of as a truly international law. This conception of a world community was still prevalent when in 1834 the great American, Joseph Story, merged the Dutch doctrine with the Anglo-American cases. His treatise acquired authority in both hemispheres and contributed to the continuation, in renewed form, of an internationally-minded school on the European Continent. In particular, Germany's greatest jurist, Friedrich Carl von Savigny (1849) using Story's materials and rational method,\(^ {3}\) established the fundamentals of modern conflicts law. It was significant that his treatment of this subject formed the last part of the celebrated System of Modern Roman Law; for him, there was no doubt about the suprastate nature of the subject matter. This work of the leader of the historical school became the principal authority in all Europe and Latin America during most of the nineteenth century and is still highly regarded

\(^{1}\) The most famous scholars were Molinaeus (Charles Dumoulin) (1500-1566), and Argentaeus (Bertrand d'Argentre) (1519-1590). On these see also Meili, "Argentaeus und Molinaeus und ihre Bedeutung im internationalen Privat- und Strafrecht," 5 Z.int.R. (1895) 363, 452, 554. For what is now Belgium, Nicolaus Burgundus (1586-1649), and for Holland, Christian Rodenburgh (1618-1668), may be mentioned.


\(^{3}\) See Savigny iv (tr. Guthrie 44); Gutzwiller, 29 Recueil 1929 IV at 341.
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In certain countries. The international conception of "international private law" was adopted by Foelix (1843) in France, a professed follower of Story, by the Belgian Laurent (1880), the Italian Fiore (1869), the Swiss Brocher (1871), and by almost all outstanding authors until approximately 1890. These authors wrote on conflicts law in a common atmosphere, among brethren of the same creed, envisaging its application in all countries. So did also the scholars who with the eminent German, Ludwig von Bar (1862), protested against being classified among the internationalists but who nevertheless thought that special studies, restricted to the positive laws of particular legal systems, unaided by general theory, narrow in perspective, are prone to choose improper premises or to misconceive the sphere of individual principles in the "organism" of international private law.

In time, the international community disintegrated. The common law lawyers, segregated from the civil law background, instinctively receded from naïve cosmopolitan attitudes. Absorbed in the judicial decisions of their countries, they gave slight attention to developments elsewhere. In the civil law countries on the other hand, from the end of the eighteenth century, there appeared an increasing number of

14 Pasquale Fiore, Elementi di diritto internazionale privato (Firenze, 1869).
16 Nussbaum, D. IPR. 11, and in an extensive paper, "The Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws," 42 Col. L. Rev. (1942) 189, 194, accounts for the prevalence of universalism or aprioristic thought from 1870 to 1930, on divers assumptions which the present writer does not share. See also Gutzwiller, review of Nussbaum's D. IPR., 8 Z. ausl.PR. (1934) 652, and see the list of "nationalists" by Kahn, 1 Abhandl. 3 n. 2 and 270 n. 29.
17 Bar, Das internationale Privat- und Strafrecht (Hannover, 1862).
18 Bar, "Neue Prinzipien und Methoden des internationalen Privatrechts," 15 Archiv des öffentlichen Rechts (1900) 1 at 11, 45.
19 Preface to the second edition of Bar, 1 Theorie und Praxis des internationalen Privatrechts vii (tr. Gillespie viii).
national codifications of private law, which divided the European Continent into separate units, excluding them behind progressively higher barriers of national legislation. Relatively late, the impact of this process reached the conflicts law. The specialists in this branch of law, which seems predestined always to lag behind the currents of general jurisprudence, were tardily and rudely awakened by the discovery that the supposed international source of law did not exist. Former universalist conceptions gave way to the knowledge that conflicts rules no less than other rules of law must have their roots in the soil of some state and that international rules in the proper sense flow only from international custom or treaties, and at that in a very thin stream. Thus, the long-established international community of conflicts studies was dissolved, and the national conflicts rules succumbed to the same spirit of isolationism that permeated other fields of law. Against this background, the meager achievements of the Hague Conventions of 1902 and 1905 appeared like a little island of blossoming internationalism.

Although the doctrine of "national" or "positive" origin of conflicts rules has been definitely established long since, a few ingenious thinkers have resented its dismal consequences. They have tried to revive universal rules by new ideas. With this in view, Pillet (1894) distinguished two classes of municipal law, viz., necessarily territorial general rules and "permanent" rules of extraterritorial application, the distinctive criterion being the "social purpose" of the rules. The German professor Zitelmann (1897), in a work full of suggestive ideas, conceived the possibility of creating a vast

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20 The scientific formulation of the "positivistic" approach was given by Niemeyer, Zur Methodik des internationalen Privatrechtes (1894) 26.
system of conflicts law upon the basis of the law of nations.\textsuperscript{23} Belatedly, Frankenstein (1926) has spun a whole web of conflicts rules from the premise that the only "scientific" choice of law is primarily predicated upon the dominance of each state over its citizens and over things in its territory.\textsuperscript{24} Such deductive systems have been commonly rejected.

A third movement was initiated by the Italian patriot, Mancini (1851).\textsuperscript{25} His vigorous emphasis on the function of the nation produced a wave of emotional nationalism in the field of international law. When Mancini advised the drafting of the preliminary provisions of the Italian Civil Code of 1865, his postulates were transferred from international public law to conflicts law, as expressed in the principle that all persons should be governed by the law of the state whose citizens they are, which by an eventful transition of ideas became identified as the \textit{national} law. This principle was adopted in all Central and Southern Europe, as well as in Brazil, Japan, and China. It was advocated by internationalists such as Laurent, André Weiss, and Bartin and appears in the German, Swedish, Polish, and many other legislations, clearly embodying the doctrine of positivism. No other doctrine has found more fervent adherents; none has more estranged the civil and common laws from each other.

These three schools, the aprioristic internationalists, the faithful expositors of fragmentary statutes and cases, the

\textsuperscript{23} See GUTZWILLER, "Zitelmann’s völkerrechtliche Theorie des International­privatrechts,” in Festgabe, 16 Archiv für Rechts- und Wirtschaftsphilosophie (1923) 468. A pious apology for Zitelmann’s doctrine was written by BETTI, "Ernst Zitelmann e il problema del diritto internazionale privato," 17 Rivista (1925) 33, continued at 188.


\textsuperscript{25} “Della nazionalità come fondamento del diritto delle genti,” inaugural address at the University of Turin.
propagandists of nationality as the standard of personal rights and duties, have had their time, and their time is over. A new epoch began about 1925. Previously, a few far-seeing scholars, Bar, Kahn, Anzilotti, Niemeyer, perceived that conflicts rules, though derived from a national source like other ordinary legal rules, have special functions and purposes requiring a method of international scope. Kahn, one of the most acute advocates of positivism, went so far as to postulate that both the international and the positivistic methods should be integrated through the comparative method and so superseded.

2. Modern Treatises

The following are the most significant works on conflict of laws of the nineteenth century and of the first quarter of the twentieth.

_England._ The English courts were slow and reluctant to adjust themselves to the application of foreign law. Until recently, the literature was sparse. In the nineteenth century Westlake alone wrote a treatise (1858) purporting to establish a system of conflicts. With this exception, the English writers refrained from criticism of the courts and left the law in the incoherent state represented in the cases. The often re-edited treatise of Dicey (1896) illustrates this descriptive method with its finest and its less desirable characteristics.

26 Archiv des öffentlichen Rechts (1900) 1, _supra_ n. 18.
27 _Kahn, Abhandl._ 311, 315, 322, 326; _Anzilotti, Diritto internazionale nei giudizi interni_ (1905) 151 (see his earlier _Studi critici di diritto internazionale privato_ (1898) 130 V), declared the conflicts rules national in form (source) and suprastatal in substance: this formula served as a basis of a peculiar theory which was followed by numerous Italian and French writers. _Cf._ _Ago, Teoria_ 83 n. 2; _Maury, Recueil_ 1936 III at 366; _Niemeyer, Das IPR._ des BGB. 50.
28 _Abhandl._ 502 (written in 1900).
29 Treatises by Westlake, Foote, Dicey, Hibbert, Burge.
30 See Harrison, _On Jurisprudence and the Conflict of Laws_ (1878, 1879, reprinted and annotated by Lefroy, 1919) 121. The first writers were Jabez Henry (1823) and Burge (1838) according to Harrison, Clunet 1880, 429; see also Gutzwiller, 29 _Recueil_ 1929 IV at 338.
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The intercourse within the parts of the British commonwealth occasioned a certain interest in their different legislations. The early work of Burge on colonial law, including private international law, is being published in a revised, monumental, though unsystematic, edition.

United States. 31 Succeeding Chancellor Kent’s influential Commentaries (1826–1830), 32 Joseph Story’s work (1834) was of immense importance. 33 Admittedly, Story, who employed an eclectic method to choose among the various doctrines of his predecessors, the statutists, in substantial measure preserved their conceptions and solutions, but his touch modernized the wealth of casuistic practice that lay immersed in the literature of half a millenium. These materials he enriched with the English and American case law, and he was the first to master the huge subject with the wisdom of a great judge.

Thereafter, only two notable treatises appeared during many decades: Wharton’s valuable and richly documented two volumes (1872), which recognized legislative action, instead of “moral duty” or “comity” as assumed by the Dutch writers and Story, as the source of conflicts rules; and the instructive compendium of Minor (1901), providing a doctrinal analysis of the cases as of the turn of the century.

A radical change came with the extraordinary achievements of Beale. In an admirable effort, he collected and sifted the case materials, which had piled up to a gigantic height, and,

Treatises: KENT, STORY, WHARTON, MINOR, GOODRICH.
Casebooks: BEALE, LORENZEN, HARPER and TAINTOR, and by CHEATHAM, DOWLING, GOODRICH and GRISWOLD.
33 See the praise by HARRISON, supra n. 30, at 119; 3 BEALE 1912.
after many special studies, undertook to reconstruct the American conflicts law into a unified system. His life work culminated in the Restatement of the Law of Conflicts of Laws,84 inspired and primarily prepared by Beale, which has been promulgated (1934) by the American Law Institute, and in his Treatise (1935) which presents an authoritative commentary on the Restatement. One might compare the historic role of Beale’s work in American conflicts law with that of the Glossa Magistralis of Accursius in the late Middle Ages. More than a century of Anglo-American case law was condensed under the leadership of a strong methodical mind. Values buried in the vast mass of decisions were brought to light and preserved for the future. In various subjects, court practice gained increased certainty, and theoretical thinking received decisive impulses; indeed, a new literature grew up. Goodrich, footing on Beale’s theories but adding his own experience and sense for social policy, has written an excellent leading textbook.

Most American writers, however, though grateful for Beale’s work, have turned against his doctrines. Beale was the last eminent advocate of the theory of territorialism that dominated the Dutch statutists. In its proper sense, the territorial nature of law predicates exclusive control by domestic law in each jurisdiction. This theory, however enfeebled by gradual concessions, is the exact antipode of private international law. This foundation of Beale’s system was entirely destroyed by Lorenzen and Cook. The revived theory of vested rights by which Beale tried to maintain the doomed principle of territorialism was successfully attacked by Yntema, Cook, Lorenzen, Heilmann, and, on the Continent, by

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Arminjon, Wigny, and others who simultaneously were particularly interested in combatting Pillet’s kindred philosophy. In addition, many particular points peculiar to the Restatement were the object of special critical studies. Thus, a new school has arisen, paralleling German efforts and promising further improvements.

France and Belgium. The French masters of statutist doctrine in the sixteenth century, d’Argentré and Dumoulin, and their many disciples in the two succeeding centuries established a tradition that has continued until recently, just as the method of the postglossators in private law survived after the Napoleonic codes for a considerable period into the nineteenth century. This heritage, it would seem, included various traits—a certain conservatism in method, an inclination toward a priori assumptions, an alert interest in the problems presented in the courts, and comprehensive elaboration of the arguments involved in particular issues. Concurrently, the influence of Story and Savigny added new elements. A large number of talented authors assured the French literature a leading role, more completely justified in the second half of the nineteenth century and the first quarter of the twentieth than in the sixteenth or the eighteenth. Richly documented treatises by Laurent, Boucher, and Rolin were followed by the original systems of Vareilles-Sommières (1897), Bartin (Études 1897, 1899), and Pillet (Principes 1903, Traité 1923–1924). André Weiss (Traité 1892–1905) consolidated theory and practice in a comprehensive work, in which the nationality principle was brought to its climax. Numerous periodicals, headed by the Journal de droit inter-

35 See infra pp. 23ff.
36 Treatises of FOELIX, BOUCHER, VAREILLES–SOMMIÈRES, BARTIN, PILLET, WEISS, AUDINET, DESPAGNET, VALÉRY, SURVILLE, NIROYET, LEREBOURS–PIEONNIÈRE, ARMINJON (the last three now leading).
Belgium: LAURENT, ROLIN, POULLET (the last now leading).
37 Most famous: FROLAND (published 1729, died 1746); BOULLENOIS (1680–1762); BOHIER (1673–1746).
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national of Clunet (1874–) and the Revue de droit international published by Darras (1905–), in addition to the Dictionnaire de droit international privé published by Vincent and Pénaud in 1888,\(^3\) collected so many French and foreign decisions that, as early as 1905, H. Donnedieu de Vabres was able to describe the "evolution"\(^3\) of the French practice in a monograph.

Bartin, Niboyet, Pillet's outstanding disciple, and Arminjon, a critically-minded former judge at the Egyptian Mixed Tribunals, continued this brilliant literature. These and other modern writers have constantly studied the judicial decisions and meditated on general problems such as public policy, formalities of legal acts, capacity, matrimonial property law, etc., while the courts have been interested in the theoretical as well as the practical aspects of the cases. The Revue has been continued in two rival periodicals edited, respectively, by Niboyet and La Pradelle, who formerly had jointly published the useful Répertoire de droit international privé in ten volumes.

The French manner of conceiving conflicts problems contains a two-fold weakness. The tradition deriving from d'Argentré, the French predecessor of Ulricus Huber, has laid an extraordinary emphasis upon the national interest. The following chapters dealing with the law of persons will show the devastating effect of innumerable open or concealed considerations of French "ordre public." For decades, writers sharply criticized the tendency of the courts to apply French law despite the ordinary principles of conflicts law, but, more recently, the Traité of Niboyet (1938) and the Précis of Lerebours-Pigeonnière (1928), undoubtedly the two leading French works, testify to a violent struggle between the

\(^3\) R. Vincent et E. Pénaud, Dictionnaire de droit international privé (Paris, 1888–1889).

\(^3\) H. Donnedieu de Vabres, L'évolution de la jurisprudence française en matière de conflits des lois (Paris, 1905).
nationality principle, expounded by André Weiss and his followers, and the fears and wishes of an apprehensive, ambitious territorialism, represented by a movement, reflecting the interests of an immigration country, that accentuates the peculiarities of French legislation. On the other hand, the individualism and independent judgment characterizing French judges and jurists, which produce an abundance of ideas within the limits of their methods, have resulted in a curious instability. In many topics of conflicts law, every conceivable opinion has its advocate. Neither writers nor courts feel bound by precedent. Consequently, French conflicts law as a whole presents a great wealth of inspiring conceptions, attended by a degree of uncertainty, if not chaos, that is scarcely compatible with the very purpose of this branch of law.

Italy.⁴⁰ Dionisio Anzilotti, eminent scholar of international public law, has devoted a part of his work to conflicts law and is to be regarded in both fields as the founder of an important school, which also includes Cavaglieri, Salvioli,⁴¹ and Udina. At a relatively early date, Diena published monographs on international commercial law (1900–1905) and the principles of private international law (1908–1910). In the 1930's, a succinct manual by Pacchioni (1930) and a perspicacious treatise by Fedozzi (1935), accompanied under his leadership by works of other writers on ecclesiastical, commercial and procedural conflicts, continued the Italian tradition. This tradition has been characterized by refined abstract theory, nourished by intimate knowledge of the French and German developments. While Anzilotti possessed a high sense of practicality, his successors have more and more yielded to the scholastic passion for formulae and dialectic argument.

⁴⁰ Treatises: FIORE, DIENA, GABBA, ANZILOTTI, CAVAGLIERI, UDINA, PACCHIONI, FEDOZZI, AGO, GEMMA, BOSCO, SCERNI.
⁴¹ G. SALVIOLI, Storia del diritto italiano (Torino, 1930).
Italian writers have been the last in Europe to consider court decisions. Fortunately, the light has recently been seen by the younger authors noted below.

The distinguished periodical founded by Anzilotti in 1906, the *Rivista di diritto internazionale*, includes important contributions to conflicts law, but only few selected decisions. Fedozzi founded a promising *Rivista italiana di diritto internazionale privato e processuale* (1931–1932), which was ended by his lamented death.

*Other Latin countries.* Numerous meritorious compendiums related to the French, Belgian and Italian literature on conflicts law have been published in Argentina (Zeballos, Calandrelli, Alcorta, Romero del Prado and, now leading, Vico), Brazil (Clovis Bevilaqua, Rodrigo Octavio, Pontes de Miranda, Eduardo Espinola and his son), Colombia (Restrepo-Hernández), Cuba (De Bustamante), Guatemala (Matos), Rumania (Antonescu), and Spain (Lasala Llanas, Trías de Bes).

*The Netherlands.* During this period, three outstanding works appeared, namely, those of Asser (1880), Jitta (1916), and Kosters (1917).

*Germany.* In Germany there was a less known statutist school from the sixteenth to the nineteenth century, when Waechter destroyed the entire doctrine (1842). The modern development was brilliantly inaugurated by Savigny in 1849. His theories were accepted both by Roman law scholars such as Seuffert, Keller, Holzschuher, Unger,

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42 Thorough survey and criticism by Waechter, 24 Arch. Civ. Prax. (1841) 230 ff., and Bar § 19 ff.; see for the names also Gutzwiller, 29 Recueil 1929 IV 329–331.


44 On Savigny's work and effect: Gutzwiller, Der Einfluss Savignys auf die Entwicklung des Internationalprivatrechts (1923), and same, in 29 Recueil 1929 IV at 353.
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Windscheid, and Regelsberger and by students of German legal history like Walter, Gerber, Beseler, Roth, and Gierke.\textsuperscript{45} Although an admirer of Savigny, Bar (1862), in his works, especially in the second edition of his treatise, entitled \textit{Theory and Practice} (1889), took a distinct position, joining theoretical conception with profound study of civil and common law cases and presenting, for the first time since Story, a comprehensive comparative law of conflicts. Zitelmann's highly refined system and the penetrating analytical studies of Franz Kahn, as well as the historical works of Neumeyer, characterized the high level of scientific treatment in Germany at the turn of the century. Leading decisions were reproduced in the \textit{Zeitschrift für Internationales Recht} of Böhm, later Niemeyer. Gebhard's drafts of the Law of 1896\textsuperscript{46} and the commentaries thereon by Niemeyer, Habicht and Niedner are noteworthy.

Nevertheless, this literature was sporadic and heterogeneous, without definite working plan and method. The courts struggled for principles; their decisions, although by no means negligible, were not conveniently digested and, consequently, were for the most part unknown. The German courts, otherwise meticulous, often ignored the conflicts problems hidden in cases.

In striking contrast to the richness of the French literature, for many years there was no textbook on conflicts law in Germany, and a good Austrian handbook by Walker was used in repeated editions by the few interested students.

\textit{Switzerland}.\textsuperscript{47} In the nineteenth century, only the legislation of Zurich aroused more than local interest from the viewpoint of conflicts law. At the beginning of the present century, the work of Meili, succeeding Brocher, was well known. It

\textsuperscript{45} For details see GUTZWILLER, Der Einfluss Savignys auf die Entwicklung des Internationalprivatrechts 50, 56.
\textsuperscript{46} Einführungsgesetz of August 18, 1896.
\textsuperscript{47} Treatises of Brocher, Meili, Stauffer, Beck, Schnitzer.
has been followed more recently by the booklet of Stauffer, by Beck’s extensive commentary on the Swiss enactments, and finally by treatises on private and commercial laws by Schnitzer.

_Greece._ Greece has exhibited much devotion to private international law. There are excellent contributions of recent date by G. Streit and Maridakis.

3. New Orientation

Roughly speaking, it may be contended that, until about 1925, in the Anglo-American orbit, the theoretical approach and, in the Continental literature, the practical understanding, left very much to be desired. Had minds such as those of Story and Bar continued to illuminate the way, grave mistakes and defects would have been avoided. The deplorable state of this branch of law was worse than the experts would acknowledge. A few overrated controversies were endlessly discussed. Other problems, often involving the simplest questions of daily occurrence, were neglected. Few things were certain, and there were more incongruities than in any other field of law. It needed the unspoilt mind of a newcomer to conflicts law to be appalled at the maze of confusion and injustice. Mancini’s outburst at the absurd, deplorable anarchy in the conflicts rules is famous. In 1879 Frederick Harrison stated:

"There is a department of Law, the first principles of which have been furiously disputed by lawyers; the canons of which are hesitating and contradictory; the sources of which are themselves a matter of argument; having an authority which is most differently interpreted by doctors and judges; and a sphere which is understood in various ways;—and yet this branch of Law is attaining in our day continual development and fresh importance from a variety of causes, and in a manner often unobserved." 49

48 Treatises of KALLIGAS, OEKONOMIDES, KRASSAS, STREIT, MARIDAKIS.
49 HARRISON, Jurisprudence and the Conflict of Laws 98.
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Each word of this indictment, despite all efforts, remained true for half a century thereafter. Recently, Cook has described the American cases as "hopelessly contradictory and chaotic," even on the simplest questions.\(^{50}\) This situation, bad enough in each particular country, is worse in a world in which conflicts laws are inconsistent. A marriage may be valid in one jurisdiction, invalid in another, previously valid but dissolved in a third. Such is the state of the contractual relation, regarded as the most solemn and sacred, whose existence or failure involves the most vital interests of the spouses, their issue, and their relatives. The reaction of the business world to the desperate plight of national conflicts laws—in the words of a terrified corporation lawyer, a veritable labyrinth,\(^{51}\)—superimposed upon the divergent national commercial laws, has resulted in a striking phenomenon; international commerce has devised an elaborate network of arbitration and standard forms to eradicate these conflicts laws so far as feasible.

It is reassuring that a thorough revision now appears in the offing. On the one hand, the technical revolution of the means of communication reducing distances and destroying isolation and, on the other, the political and economic upheaval caused by the first World War, have made it clear that international life needs a better order. The peace and postwar treaties and the numerous international tribunals created after the war brought little improvement, but they did exhibit appreciation of this need and at the same time added a great many new problems.

In Germany,\(^{52}\) depressed and struggling for life, the situation was most acute, and the interest in foreign and inter-

\(^{50}\) Cook, Legal Bases 136.


\(^{52}\) Treatises: see text. Monographs and papers: DUDEN, ECKSTEIN, H. LEWALD, NEUNER, RAPE, RABEL, RAISER, WAHL, WENGLER.
national law became painfully alive. While, before the war, the otherwise richest juridical literature of the world had left comparative law and conflicts rules to very few scholars and no funds seemed available in the prosperous prewar times for research in these subjects, the distress of the war and postwar years reversed this attitude. The change of views was distinctively reflected in the creation of two comprehensively planned and broadly conceived institutes in Berlin, devoted respectively to foreign and international private law and to foreign public and international law (1924–1925). In these institutes, facts and legal phenomena were to be collected, current problems defined, and the functions and purposes of legal institutions clarified by comparative research. With respect to conflicts of laws, the German cases had first of all to be collected. This undertaking was greatly facilitated by the works of Lewald and Melchior, who each for his own handbook assembled the materials, both the older and more recent. In 1926, the Institute of Foreign and International Private Law initiated a yearbook of German decisions and commenced in its Review to provide surveys of the foreign cases. To signalize this modified outlook, the Review celebrated the fiftieth anniversary of the Reichsgericht (1929) in a series of articles constructing special doctrines on the basis of judgments of this, the supreme court of Germany, comparable to the American style of treatment and entirely dissimilar to the usual European literature. It was one of the tasks of the Institute to answer inquiries of German courts, attorneys, and administrative authorities; in many hundreds


54 Die Deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts in den Jahren 1926 und 1927 (Berlin, 1928–).

55 Zeitschrift für ausländisches und internationales Privatrecht (Berlin, 1926–).
of opinions, information on conflicts matters was given, ex-
tending knowledge and intelligent use of the applicable rules
so that the gulf between theory and practice, which had existed
since the end of the statutist period, was almost closed.

German lawyers were amazed at the number and quality
of the newly discovered precedents, which were soon given
attention by several handbooks. Lewald (1930-1931) was
the first to renovate the German conflicts law (excepting com-
mercial matters) on the basis of decided cases, with well-
considered conclusions. Melchior (1932), following the form
of Dicey's treatise, regarded the decisions as a true source of
law, supplementary to the Code; in this belief, he inquired
primarily into the ideas underlying the cases and formulated
rules of impressive originality. All other German writers
deny the binding force of case law. Nevertheless, Nussbaum
(1932) in his treatise devoted primary attention to cases and
procedure and preferred a practical treatment to theoretical
analysis. Raape (1931) provided a profuse exegesis of the
provisions in the Introductory Law of 1896; because of its
explicitness, this book will be most frequently cited in our
survey as representing the German doctrines. Finally, Martin
Wolff (1933) masterfully condensed the subject matter in a
textbook, small in size but rich in content. More recently,
Raape, the only one of these writers still in Germany, pub-
ished a commendable introduction to the present German
conflicts law (1938-1939).

Thus, the long-standing scarcity of production was re-
placed during a few years by a vigorous stream of literature.
As deductive considerations gave way to practical studies,
many values were modified. However, it is not in the nature
of German students to sacrifice entirely systematic thinking
to empirical considerations.\footnote{This seems to be disapproved by \textsc{Nussbaum}, Book Review, 40 Col. L. Rev. (1940) 1461, 1470, who condemns what he calls the new "logistic school."} In addition to the treatises
mentioned, the learned outlines by Gutzwiller (1931) and a number of monographs (Neuner, Raiser, Wengler, etc.) contain good science. But for the time being too much had and still has to be corrected to allow much generalization.

This new German school quickly influenced other European countries. In conservative England, the pitiful state of conflicts law was suddenly subjected to refreshing criticism by Foster 57 and Beckett; 58 a new handbook by Cheshire challenged Dicey's leading treatise, the second edition appearing shortly after and extending the reforms suggested in the first. An admirable collaborative undertaking was initiated in Italy. Through the endeavors of Salvatore Galgano, commencing in 1927, several comprehensive periodicals were inaugurated, covering and annotating foreign decisions; of these, the Giurisprudenza comparata di diritto internazionale privato continued after the outbreak of the present war. Authors such as Babiński and Przybylowski in Poland, 59 and younger scholars, including Vittorio Tedeschi and Balladore-Pallieri in Italy, Fragistas, Vallindas and Zepos in Greece, von Steiger and Niederer in Switzerland, participate in this practical international co-operation.

A little later than in Europe, a corollary reform began in the United States and Canada. 60 Here, the enormous case material had been assembled by Beale as the basis of the Restatement. Immediately, new studies, criticizing antiquated doctrines and correcting inaccurate terminology, appeared by such eminent scholars as Lorenzen, Cook, Yntema,

60 See Cheatham, Cases, ix, x.
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Cheatham, Falconbridge in Canada, Harper, Griswold and Stumberg, who also published a realistic handbook. Another modern treatise was devoted to the conflicts law of one particular state, Arkansas, by Leflar. The methodological postulates of this reform have recently been stated in Cook's magistral *Logical and Legal Bases of the Conflict of Laws* (1942). Numerous law review articles and a monograph or two, such as Hancock's book on torts, are promising for the future development of this branch of law.

The American literature has attracted much attention in France and Belgium, where its importance has been stressed by Barbey, Leprêtre, Wigny, and Batiffol, the last being the best informed French expert on foreign conflicts law and international needs.

A common feature of all these new attempts is the decided turning from deductive methods to considerations of policy. There are many other points of agreement, but also many controversies as respects method. Private international law has again become a young science, and children do have diseases.

It remains to summarize what has recently been done for research in foreign conflicts law. In the first place, foreign cases, enactments, and literature have been reproduced or reviewed on a large scale in the publications of the above-mentioned institutes in Berlin and Rome, as well as in other

61 Moffatt Hancock, Torts in the Conflict of Laws, Michigan Legal Studies (Ann Arbor, Chicago, 1942).

62 Institute of Berlin: Zeitschrift für ausländisches und internationales Privatrecht (since 1926/27), containing continuous reviews of conflicts law in Austria, Belgium, France, Italy, Great Britain, the Netherlands, Switzerland, selected decisions involving conflicts law in the United States, Scandinavian cases, and reports from many other countries; Deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts (1928-); Beiträge zum ausländischen und internationalen Privatrecht (1928-). Rome Institute for Legislative Studies (Instituto italiano di studi legislativi), editor Galgano: Annuario di diritto comparato (1927-); Giurisprudenza comparata di diritto internazionale privato (1932-) (among seven periodicals).
periodicals 63 and books of reference. 64 For an excellent collection of the enacted conflicts rules in force throughout the world, as of 1929—an indispensable work—we have to thank A. N. Makarov. 65 Under the auspices of the Hague Academy of International Law, many competent lecturers have treated the laws of particular countries as well as special problems of comparative interest. 66

In addition, Niboyet and La Pradelle, generously aided by foreign contributors, have published the Répertoire de droit international, which includes reports on the conflicts laws of many countries, some not previously examined, as well as articles on related topics in French law accompanied by comparative observations. Much information is given in the Rechtsvergleichendes Handwörterbuch of Schlegelberger, in which the conflicts laws of the world were, for the first time, described in an excellent, though sketchy, synthetic review (1933). 67 The treatise on Greek Private International Law (1937) of the distinguished Greek diplomat and scholar, G. Streit, and his valiant disciple, Vallindas, admirably indicates the literary doctrines of all countries. In the United States, Lorenzen 68 deserves commendation for attracting the

63 Especially for Eastern Europe the periodicals of the Institute in Breslau (Osteuropa Institut): Zeitschrift für osteuropäisches Recht (1925–1927), later merged with Ostrecht into Zeitschrift für Ostrecht (1927–1934) and finally again, Zeitschrift für osteuropäisches Recht (Neue Folge, 1934–).


66 Published in Recueil des cours de l’Académie de droit international de la Haye (1925–).


attention of the scholarly world to foreign conflicts laws. Finally, Arthur K. Kuhn has coordinated on broad lines American and European institutions of private international law (1937) and Nussbaum has published a volume of comparative observations on the general doctrines of common law and civil law (1943). 69

III. Sources

1. Codifications

The first considerable codification of conflicts rules was provided in articles 7 to 31, inclusive, of the Introductory Law that accompanied the German Civil Code of 1896. This body of rules had been elaborated carefully by Gebhard but, for somewhat obscure reasons, allegedly political, was reduced by Bismarck and the upper House so as to cover in its final form only a part of the subject matter. Contracts are left out entirely, and most rules are limited to cases in which the application of German law is required (so-called unilateral rules). What is more, these provisions lack the elaborate detail work for which the Code is famous. Nevertheless, the task was novel, and the skill and precision employed were high enough to impress contemporaries. Subsequently, this part of the German law served as a model for a slightly more extensive Japanese Law of June 15, 1898, and for a similar Chinese Law of August 5, 1918. The Hague Conventions of 1902 and 1905 on divers matters of conflicts law were based on the same principles, and they were in turn closely followed by the Swedish statutes of July 8, 1904, amended by later laws, and of June 1, 1912. Also, the excellent Austrian draft of 1913 of an international private law was conceived on the same

69 Unfortunately I do not know more than the title of LÉVY ULLMANN, Cours généralé de droit international privé selon la méthode historique, jurisprudentielle et comparative (année universitaire 1931-1932) stenographie publié par "Les cours de droit" (licence, 3° année).
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lines; it served as the basis of the important Polish Law of August 2, 1926 (whose principal author Zoll had been a member of the Vienna draft committee), as well as for the frequently cited Czechoslovak draft of 1924 and 1931. Indirectly, the German law has influenced all more recent legislative projects in Europe.

The Code Napoléon of 1804 devoted to the problem of its territorial application only one article of the preliminary title and a few other dispersed provisions, and in European France there was no subsequent codification. Likewise, the Austrian Civil Code (1811), which is still in force in some regions, was satisfied with a few superficial rules (§§ 4, 34-37, 300), in contrast to the Prussian Landrecht (1794), which incorporated more comprehensive provisions, partly based on statutist doctrine (see e.g., Introduction, §§ 27-49) and partly representing original ideas. The European and Latin American civil codes of the French type have retained the custom of touching on conflicts in a preliminary title, or law, but with gradual additions, for instance, Italy (1865, and enlarged in 1938 and 1942), the Netherlands (1829), Quebec (1866), Brazil (1942).

Recently, such preliminary provisions have taken the shape of short codifications in the civil codes of Greece (1940), Rumania (1939),70 and Peru (1936).

Moreover, the statutory regulations of French Morocco (1913) and Spanish Morocco (1914), concerning relations between subjects and foreigners, include a number of modern conflicts rules based on the French doctrines. In the absence of codifications in the motherlands, these provisions are often cited. Suggestions for legislation have been made by learned

70 The Civil Code and Code of Civil Procedure appeared in the Monitorul Of. on November 8, 1939, and were ratified by the Constituent Assembly by law of December 21, 1939, but the effective date was delayed to September 15, 1940. We are not informed whether these codes and the new Commercial Code, similarly deferred, are in force.
societies. In particular, a draft of the Society for Legislative Studies, concerning the status of foreigners in France and of Frenchmen in foreign countries,\textsuperscript{71} deserves attention. Bartin considers this project as the legislation of tomorrow,\textsuperscript{72} but it is a singular document of overstressed nationalism.

A separate position has been taken by Switzerland. The statute of June 25, 1891, was mainly a regulation of the inter-state conflicts between the Swiss cantons having at that time full legislative power over private law. A few additional provisions incidentally considered Swiss citizens abroad (arts. 28–31) and foreigners in Switzerland (arts. 32–34). In 1912, when the Federal Civil Code of 1907 became effective, the significance of the statute of 1891 was limited to cases of the latter type; thus, international private law was left largely dependent upon these not too well-drafted sections and certain additions (C. C., final title, art. 59). What the Federal Tribunal has been able to do with this precarious legislation is noteworthy.

The most extensive national codification of conflicts law has been undertaken in the tiny principality of Liechtenstein; provisions dealing with conflicts have been inserted in the various chapters of a recent civil code, which has been partially promulgated. This codification is a curious mixture of clauses inviting big finance and reflecting inordinate nationalism.\textsuperscript{73}

2. Special Legislation

Conflicts rules on special matters exist, of course, in many countries. In numerous states of the United States, various uniform laws and other statutes deal with the conflicts aspects of marriage and wills; also provisions on immovable prop-

\textsuperscript{71} Deliberations and Project have been published in Bulletin de la Société d'études législatives; see the tentative draft in 24 \textit{ibid.} (1928) 399; discussion 26 \textit{ibid.} (1930) 76; and definitive text in 26 \textit{ibid.} (1930) 175. \textsc{Bartin} was president and \textsc{niboyet} reporter of the draft committee.

\textsuperscript{72} \textsc{Bartin}, 2 \textit{Principes} 201.

\textsuperscript{73} See the review by \textsc{Wahle}, 2 \textit{Z.ausl.PR.} (1928) 134.
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ey, contracts and capacity are frequent.74 There is but one exceptional Federal enactment,75 although Congress apparently has legislative power on the subject.76

3. Multilateral Treaties

(a) Montevideo Treaties. The treaties on international law of Montevideo of February 12, 1889, are a worthy object of pride for the five countries that have ratified them, viz., Argentina, Bolivia, Paraguay, Peru, and Uruguay.77 The first international agreements of their kind, they achieved an extensive unification, remarkable despite the close relationship of the legislations involved, facilitating cooperation. Of this unification, the treaties concerned with “international civil law” and “international commercial law,” in particular, will be considered in the appropriate connections in the present book. To celebrate the fifty years’ anniversary of the treaties, a conference was held in Montevideo in 1939 and 1940, which adopted considerable modernizations of the old rules.78 How-

74 An attempt to collect these and certain other statutory provisions has been made by MAKAROV, Quellen 242-266.
75 U. S. C. tit. 22 § 72, see infra p. 238, n. 161.
77 Texts: Official (Spanish) text in ERNESTO RESTELLI, Actas y tratados del Congreso sudamericano de derecho internacional privado, Montevideo 1888-1889 (1928).
History: Actas de las sesiones del Congreso sudamericano de derecho internacional privado, Buenos Aires, 1889.
ever, the new texts have not yet been ratified. For the most part, conflicts rules are contained in the treaties respectively concerning international “civil” law, the law of land commerce, and the law of maritime commerce. In the present volume, the first of these treaties is of special interest and will be referred to as the treaty of Montevideo.

(b) Hague Conventions. Widely praised but much less comprehensive, the Hague Conventions of 1902 and 1905 were concluded only after arduous efforts. Their provisions cover but a few selected questions, and these they answer with many reservations on the part of the reluctant member states. With the exception of the relatively popular procedural

79 Conventions of The Hague of 1902 and 1905. Official (French) text in MARTENS, 31 Recueil général de traités, 2° série, 706-715; 6 ibid. 3° série, 480-489.


treaty, they were ratified by only a few, though important, states and later partially deserted even by some of these.

In 1938, the conventions were binding upon the following states:

(i) Convention to regulate the conflict of laws in regard to Marriage, of June 12, 1902.
   Danzig, Germany, Hungary, Italy, Luxemburg, the Netherlands, Poland, Portugal, Rumania (old territory), Sweden, Switzerland.

(ii) Convention to regulate the conflict of laws and jurisdictions in regard to Divorce and Separation, of June 12, 1902.
    Danzig, Hungary, Italy, Luxemburg, the Netherlands, Poland, Portugal, Rumania (old territory).

(iii) Convention to regulate the Guardianship of Minors, of June 12, 1902.
     Belgium, Danzig, Germany, Hungary, Italy, Luxemburg, the Netherlands, Poland, Portugal, Rumania (old territory), Spain, Sweden, Switzerland.

(iv) Convention concerning the conflict of laws relating to the Effects of Marriage on the rights and duties of the spouses in their personal relations and on the property of the spouses, of July 17, 1905.
    Danzig, Germany, Italy, the Netherlands, Poland, Portugal, Rumania (old territory), Sweden.

(v) Convention concerning Interdiction and similar Measures of Protection, of July 17, 1905. (Interdiction means the deprivation of an adult's competency to act legally.) Austria, Danzig, Germany, Hungary, Italy, the Netherlands, Poland, Portugal, Rumania (old territory), Sweden.

(vi) Convention concerning Civil Procedure, of July 17, 1905 (treats only the participation of foreigners in lawsuits).
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Austria, Belgium, Czechoslovakia, Denmark, Danzig, Estonia, Finland, France (as to the signatories of the protocol of ratification of July 4, 1924), Germany, Hungary, Italy, Latvia, Luxemburg, the Netherlands, Norway, Poland, Portugal, Rumania (old territory), Spain, Sweden, Switzerland, Yugoslavia.

During the first World War, it was disputed whether the conventions were suspended as between the two belligerent groups. Italian courts negatived the question, but it may be reopened in the present war.

A very important step has been taken by the Protocol signed at The Hague, March 27, 1931, recognizing the competence of the Permanent Court of International Justice to interpret the Hague conventions on private international law, acceded to by Belgium, Estonia, the Netherlands, and Portugal.

(c) Código Bustamante. This is a complete codification in 437 sections, including the entire international private law in 295 sections and in the remainder criminal and procedural conflicts law. Drafted by the Cuban jurist, Antonio Sánchez de Bustamante y Sirven, this Code of International Private Law was adopted at the Sixth Pan-American Conference in Havana on February 20, 1928, and has been ratified by

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80 Especially App. Venezia (Oct. 9, 1917) Giur. Ital. 1917, I, 2, 440; also KOSTERS-BELLEMANS 493. For other opinions, see the survey by RÜHLAND, 32 Z.int.R. (1924) 74, 78.

81 Came into force April 12, 1936. 167 League of Nations Treaty Series (1936) 341.


On the history of the Code, see ANTONIO SANCHEZ DE BUSTAMANTE y SIRVÉN, La Comisión de jurisconsultos de Rio de Janeiro y el derecho internacional (Habana, 1927), translated by GOUlé: La Commission des jurisconsultes de Rio de Janeiro et le droit international (Paris, 1928); El Código de Derecho Internacional Privado y la VI. Conferencia panamericana (Habana, 1929),
fifteen Latin American states, viz., Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela. Bolivia and Peru, having adhered to both the Montevideo Treaties and the Havana Treaty, have authoritatively declared the former to prevail in their relations with each other.  

(d) Scandinavian Treaty. Extensive legislative cooperation among the Scandinavian countries, fostered by their historic affinity, has found significant expression with respect to conflicts law in a convention concluded in Stockholm on February 6, 1931, by Denmark, Finland, Iceland, Norway, and Sweden, containing "provisions of private international law translated by GOULE: Le Code de droit international privé et la VIe Conférence panaméricaine (Paris, 1929).


83 For ratification and accessions to this and the subsequently mentioned treaties, see League of Nations, Official No. A.6.1939. Annex I. V.

84 In signing the Código Bustamante, Bolivia reserved its obligations under the Montevideo Treaties. This has been held decisive for the relations between Bolivia and Peru by the Supreme Court of the latter country. Decision of González, Dec. 7, 1935, 2 Tratados, convenciones y acuerdos vigentes entre el Perú y otros Estados (1936) 516; LUIS G. ALVARADO, Apuntes de derecho internacional (1940) 60.

85 Relatively uniform legislation on marriage, adoption and guardianship was introduced in Sweden, Denmark and Norway from 1917 to 1927, and Finland approximated its laws to this convention in 1925 and 1929. Conventions, including Iceland, followed on: Collection of Maintenance Allowances, of February 10, 1931 (English and French translations in 126 League of Nations Treaty Series (1932) 51; HUDSON, 5 Int. Legislation 885 No. 282); on Recognition and Enforcement of Judgments, of March 16, 1932 (139 League of Nations Treaty Series (1934) 181; HUDSON, 6 Int. Legislation 6 No. 305); on Bankruptcy, of November 7, 1933 (155 League of Nations Treaty Series (1935) 133; HUDSON, 6 Int. Legislation 496 No. 351); and on Inheritance and Succession, of November 19, 1934 (164 League of Nations Treaty Series (1935) 279; HUDSON, 6 Int. Legislation 947 No. 397, 953 No. 397a). Cf. UDDGREN, 9 Z.ausl.PR. (1935) 513; MARKS VON WÜRTEMBERG, 10 Z.ausl.PR. (1936) 711.
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law in the field of marriage, adoption, and guardianship,” in force from January 1, 1932. 86

(e) Conventions on Negotiable Instruments. Substantial success was attained in the two Geneva conventions of 1930 and 1931, providing a Uniform Law of Bills of Exchange and a Uniform Law of Checks: 87

(i) Convention for the settlement of certain conflicts of laws in connection with Bills of Exchange and Promissory Notes, of June 7, 1930, in force from January 1, 1934.

Austria, Belgium, Danzig, Denmark, Finland, France, Germany, Greece, Italy, Japan, Monaco, the Netherlands, Norway, Poland, Portugal (without colonies), Sweden, Switzerland.

(ii) Convention for the settlement of certain conflicts of laws in connection with Checks, of March 19, 1931, in force from January 1, 1934.

Danzig, Denmark (except Greenland), Finland, France, Germany, Greece, Italy, Japan, Monaco, the Netherlands, Nicaragua, Norway, Poland, Portugal (without colonies), Sweden, Switzerland.


In Yugoslavia, a law has approved all six Geneva conventions but no ratification seems to have occurred.

(f) *Other multilateral efforts*. On the fringe of our subject matter, recent important conventions have been concluded on the following topics: 88

(i) Protocol on Arbitration Clauses, opened for signature at Geneva, September 24, 1923. 89
Alabama, Austria, Belgium, Brazil, Great Britain (and many parts of the British commonwealth), Czechoslovakia, Denmark, Danzig, Estonia, Finland, France, Germany, Greece, Italy, Japan, Luxemburg, Monaco, Netherlands, Norway, Poland, Portugal, Rumania, Spain, Sweden, Switzerland, Thailand.

Austria, Belgium, Great Britain (and parts of the British commonwealth), Czechoslovakia, Denmark, Danzig, Estonia, Finland, France, Germany, Greece, Italy, Luxemburg, the Netherlands, Portugal, Rumania, Spain, Sweden, Switzerland, Thailand.

(iii) Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, opened for signature at The Hague, April 12, 1930, in force from July 1, 1937. 91
Ratifications or accessions until August 28, 1939, by Belgium, Brazil, Great Britain (all territories), Canada,

"L'unificazione internazionale del diritto cambiario," 7 Annuario Dir. Comp. (1932) 220.
89 27 League of Nations Treaty Series (1924) 157; MARTENS, 19 Nouveau recueil général de traités 3e série, 156; HUDSON, 2 Int. Legislation 1062 No. 98.
Australia, India, China, Monaco, the Netherlands, Norway, Poland, Sweden.

(iv) Simultaneously with the Convention under (iii), a "Protocol relating to a Certain Case of Statelessness" and a "Special Protocol concerning Statelessness" have been concluded, the first of which is in force from July 1, 1937 in Brazil, Great Britain (with all territories), Australia, South Africa, India, Chile, China, the Netherlands, Poland, El Salvador.

More conflicts rules have been established in multipartite conventions providing uniform treatment of such matters as communication and transportation, with respect to problems that proved inaccessible to unification.

(g) Drafts. The tireless efforts of the Dutch Government in promoting the Hague Conferences on conflicts law were continued in 1925 and 1928, and resulted in elaborate treaty drafts regarding the law of succession on death (1925 and 1928) and bankruptcy (1902 and 1928), which were not ratified. Moreover, certain provisions supplementary to the earlier conventions, referring in particular to persons without nationality or having more than one nationality, were adopted and, although not ratified, apparently have had some influence. Attempts to unify the conflicts rules on sales of goods, however, did not succeed. Both political contrasts and doctrinal controversies contributed to all these failures.


93 For example, see the rules concerning aviation, enumerated by HUDSON, 4 Int. Legislation 2354.


95 The remarkable last draft, by a Special Committee of June 2, 1931 has been published in 7 Z.ausl.PR. (1933) 957.
4. Bilateral Treaties

In addition to the multilateral treaties concluded under the auspices of the League of Nations, the postwar period of the 1920's and early 1930's produced numerous bilateral treaties, containing clauses promoting international intercourse. The subjects treated include status of foreign persons, both individuals and business organizations, judicial assistance, enforcement of foreign judgments, and the like, with occasional true conflicts rules interspersed. In this way, more progress was achieved than in any other, and for the first time Great Britain participated.

5. Case Law

It has already been noted that even in civil law countries conflicts rules to a large extent are judge-made. French and Belgian courts have to operate almost without any written rules. The manner in which German courts, from early times, have treated the problems in this field and have done so since 1900 in the absence of provision by the Introductory Law, has some similarity to Anglo-American practice. The same is true of Switzerland, whose statute is insufficient, and in many other countries.

Consequently, the rules are flexible and incomplete, and very far from being frozen or petrified as certain theorists imagine. Precedents are reversed, when shown to be unreasonable.

In the United States, it is problematical whether conflict of laws is subject to general federal law, in addition to common law as coined in the different jurisdictions. It seems now settled that no such source of law is available to the federal courts in diversity of citizenship cases. Except in such cases,

96 See GUTZWILLER, 6 Z.ausl.PR. (1932) 75.
the question is open but has so far remained without practical importance. Federal courts may perhaps still subject conflicts rules regarded as procedural to an approach different than in state courts.

However, as may be noted by foreign readers, this question has nothing to do with the influence of the Federal Constitution, as developed by the Supreme Court of the United States, on the application of the conflicts rules. As the cases, in their overwhelming majority, involve the relations between two sister states of the Union rather than international intercourse with a foreign country, constitutional requirements respecting due process of law, interstate commerce, privileges and immunities of citizens, full faith and credit of acts, documents and judicial proceedings, or impairment of obligations, exercise a more or less intensive effect by unifying and controlling the solution of conflicts in the separate jurisdictions.

6. International Custom

Apart from treaties, is there any international conflicts law established by custom within the international community of states? According to an opinion universally obtaining, each member of this community is bound to have some sort of conflicts law, in order to leave to other states the power of adjudicating situations, persons or things, exclusively belonging to

98 Cook, Legal Bases 108, 143.
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Their respective domains. What does this maxim practically mean, however, after Zitelmann’s failure to derive the conflicts law from the requirements imposed by the law of nations upon states? Probably no tangible derivation can be found. Of course, outside of the domain of conflicts law, public international law has important aspects for the treatment of foreigners and assumption of jurisdiction.

There are, finally, certain rules of almost universal force, such as the rules that the law of the situs governs immovable property, that a tort is governed by the law of the place where the allegedly tortious act transpires, or that the formalities of legal acts are determinable by the law of the place where they occur. These rules were established by statutist doctrines at a time when state borders did not exist as today. But now these uniform rules are national. The law of nations never was their source. They are simply customary law of a great majority of states, though as such important. International courts have been glad to avail themselves of such rudiments of trans-national rules. The common law countries possess in common numerous additional rules of customary origin, which because of their significance are known as principles of conflict. No conflicts rule, however, has attained, on the basis of international usage, a universal standing without ex-
ception, equivalent to that of the general principles of the *jus gentium*.

7. Conclusion

It is notable that of the enacted or restated conflicts rules existing today in the world, only the two Latin American multipartite treaties and the Restatement, the latter not a law but purporting to reproduce the law, are comparable in comprehensiveness and elaborateness to codifications of private law as known to lawyers in most countries. The remaining efforts, rudimentary if not poor, contrast strikingly with the usual fondness of civil law countries for statutes and codes and even with the recent increase of legislation in Anglo-American jurisdictions. Niboyet once tried to justify the complete absence of French legislation on conflicts law by the elusive nature of the subject. But the chaotic brilliance of the French literature and practice suggests rather that the preparation for crystallizing the law has been insufficient. The German enactment as a whole is so unsatisfactory that, as early as 1927, a movement for a new codification appeared.

However, the two copious formulations of conflicts law achieved in the Western hemisphere have remarkably analogous defects, despite their very different history, function, and character. The American Restatement has been accepted in the courts and, it seems, in the literature, to the extent that it reflects the actual cases or clarifies controversial issues. Its doctrinal background has been repudiated almost unanimously. Hence, many rules asserted in the Restatement as flowing from principles are devoid of authority. The Havana Code introduced a great wealth of refined provisions in the laws of

106 For the predilection of civil law countries for statutes, attention may be recalled to SPERL, "Case Law and the European Codified Law," 19 Ill. L. Rev. (1925) 505.


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the participant states\(^\text{108}\) and is admired throughout Latin America. But, as the Code largely rests on a selection among literary opinions, mostly of French writers, its practical usefulness has yet to be tried in the fire of litigation. Of such confirmation, nothing is known so far. As all doctrinal studies of the Code evidently suggest, there are certain difficulties in analyzing its rules.

Once more, the immaturity of this branch of law appears and its need of intensive, prolonged cultivation.

\(^{108}\) Occasionally, the thesis has been adopted that the code represents the general law of the country. Thus, the Brazilian Supremo Tribunal Federal, sentença estrangeira no. 993 (July 17, 1940) 58 Arch. Jud. 83 has applied its jurisdictional rules in relation to Portugal. Similarly, the Supreme Court of Peru (July 2, 1929) 25 Anales Jud. (1929) 78 has termed the Montevideo Treaty "the law of the land" in relation to Japan.