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

¹ See ZITELMANN 256; KAHN, Abhandl. 263 ff.
in the treatises on conflicts law. The explanation given is that citizens and non-citizens are not differentiated 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 conflict 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, 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. There are also scattered throughout the national

2 I 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
legislations numerous provisions that are not intended or are unsuitable for application 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

n. 3) has been characterized as a "spatially limited" internal rule by Nussbaum, Principles 70.

5 See infra pp. 349, 655, n. 8, 667, 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 Hijnmans, Algemeene Problemen van Internationaal Privaatrecht (1937) and W. Niederer, Einführung in die allgemeinen Lehren des internationalen Privatrechts (ed. 2, 1956).
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“preliminary question,” 7 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 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 8

1. The International Historical Background 9

In its generally accepted sense, the law of conflicts or private international law dates from the medieval school of the

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8 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 Weis, 3 Traité 8-129, 130-149; Gutzwiller, Internationalprivatrecht 1521-1534; Espinola, 7 Tratado 115-313.
postglossators (also named legists or commentators), who in the late thirteenth century succeeded the glossators in the universities of northern Italy and southern France.¹⁰ Like 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 France¹¹ and Holland¹² 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

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. i, i, 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).

¹¹ The most famous scholars were MOLINAEUS (CHARLES DUMOULIN) (1500–1566), and ARGENTRAEUS (BERTRAND D'ARGENTRE) (1519–1590). On these see also MEILL, "Argentraeus und Molinæus und ihre Bedeutung im internationalen Privat- und Strafrecht," 5 Z.int.R. (1895) 363, 452, 554; and GAMILLSCHEG, Der Einfluss Dumoulins auf die Entwicklung des Kollisionsrechts (1955). For what is now Belgium, NICOLAUS BURGUNDUS (1536–1649), and for Holland, CHRISTIAAN RODENBURGH (1618–1668), may be mentioned.

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greatest jurist, Friedrich Carl von Savigny (1849) using Story’s materials and rational method,13 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 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),14 the Swiss Brocher (1871),15 and by almost all outstanding authors until approximately 1890.16 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),17 protested against being classified among the internationalists18 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

13 See Savigny, iv (tr. Guthrie 44); Gutzwiller, 29 Recueil 1929 IV at 341.
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. (1924) 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.
sphere of individual principles in the "organism" of international private law.\textsuperscript{19}

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 national codifications of private law, which divided the European Continent into separate units, secluding 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.\textsuperscript{20} 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.

\textsuperscript{19} Preface to the second edition of \textit{BAR, x Theorie und Praxis des internationalen Privatrechts} vii (tr. Gillespie viii).

\textsuperscript{20} The scientific formulation of the "positivistic" approach was given by NIEMEYER, \textit{Zur Methodik des internationalen Privatrechts} (1894) 26.
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They have tried to revive universal rules by new ideas. With this in view, Pillet (1894),21 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.22 The German professor Zitelmann (1897), in a work full of suggestive ideas, conceived the possibility of creating a vast system of conflicts law upon the basis of the law of nations.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.24 Such deductive systems have been commonly rejected.

A third movement was initiated by the Italian patriot, Mancini (1851).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 be-

22 Cf. GAUDEMET, "La théorie des conflits de lois dans l'œuvre d'Antoine Pillet et la doctrine de Savigny," 1 MéLANGES PILLET (1929) 89.
23 See GUTZWILLER, "Zitelmann's völkerrechtliche Theorie des International privatrechts," 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.
25 "Della nazionalità come fondamento del diritto delle genti," inaugural address at the University of Turin.
came identified as the 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 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

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26 15 Archiv des öffentlichen Rechts (1900) 1, supra n. 18.
27 KAHN, 1 Abhandl. 317, 315, 322, 326; ANZILOTTI, Il 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, 57 Recueil 1936 III at 366; NIEMEYER, Das IPR. des BGB. 50.
28 1 Abhandl. 502 (written in 1900).
29 Treatises by WESTLAKE, FOOE, DICEY, HIBBERT, BURGE.
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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.

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. Succeeding Chancellor Kent’s influential Commentaries (1826–1830), Joseph Story’s work (1834) was of immense importance. 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 millennium. 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.

80 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.


Treatises: Kent, Story, Wharton, Minor, Goodrich.

82 J. Kent, Commentaries on American Law (4 vols., ed. 1, New York, 1826–1830).
83 See the praise by Harrison, supra n. 30, at 119; 3 Beale 1912.
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, 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,44 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 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 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

35 See infra pp. 23ff.
36 Treatises of FOELIX, BOUCHER, VAREILLES-SOMMIÈRES, BARTIN, PILLET, WEISS, AUDINET, DESPAGNET, VALÉRY, SURVILLE, NIBOYET, LEBOURS-PIGEONNIÈRE, 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); BOUHIER (1673-1746).
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 international of Clunet (1874–) and the Revue de droit international privé published by Darras (1905–), in addition to the Dictionnaire de droit international privé published by Vincent and Penaud in 1888, collected so many French and foreign decisions that, as early as 1905, H. Donnedieu de Vabres was able to describe the “evolution” 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 con-
tains 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 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 mono-

40 Treatises: Fiore, Diena, Gabba, Anzilotti, Cavaglieri, Udina, Paccioni, Fedozzi, Ago, Gemma, Bosco, Scerni.
41 G. Salvioli, Storia del diritto italiano (Torino, 1930).
graphs 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. 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
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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, Windscheid, and Regelsberger and by students of German legal history like Walter, Gerber, Baseler, Roth, and Gierke. Although an admirer of Savigny, Bar (1862), in his works, especially in the second edition of his treatise, entitled *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 *Zeitschrift für Internationales Recht* of Böhmm, later Niemeyer. Gebhard's drafts of the law of 1896 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, conse-

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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.

45 For details see Gutzwiller, Der Einfluss Savignys auf die Entwicklung des Internationalprivatrechts 50, 56.

46 Einführungsgesetz of August 18, 1896.
quently, 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.

Switzerland. 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 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. Greek legal science 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

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47 Treatises of Brocher, Meili, Stauffer, Beck, Schnitzer.
48 Treatises of Kalligas, Ekonomides, Krassas, Streit, Maridakis.
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

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.

49 HARRISON, Jurisprudence and the Conflict of Laws 98.
50 COOK, Legal Bases 136.
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 international 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).53 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 re-

52 Treatises: see text. Monographs and papers: DUDEN, ECKSTEIN, H. LEWALD, NEUNER, RAAPE, RABEL, RAISER, WAHL, WENGLER.
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 of opinions, information on conflicts matters was given, extending 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 commercial 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

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-).
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, published a commendable introduction to the present German conflicts law (1938–1939).

Thus, the long-standing scarcity of production was replaced 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. 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 and Beckett; 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 World War II.

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56 This seems to be disapproved by Nussbaum, Book Review, 40 Col. L. Rev. (1940) 1461, 1470, who condemns what he calls the new "logistic school."


INTRODUCTION

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, 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,⁶¹ 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

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⁶⁰ See Cheatham, Cases, ix, x.

⁶¹ MOFFATT HANCOCK, Torts in the Conflict of Laws, Michigan Legal Studies (Ann Arbor, Chicago, 1942).
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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 periodicals and books of reference. For an excellent collection of the enacted conflicts rules in force throughout the world, as of 1953—an indispensable work—we have to thank A. N. Makarov. 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.

In addition, Niboyet and La Pradelle, generously aided

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).

63 Especially for Eastern Europe until World War II 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, 1934–1944). This tradition is continued since 1955 by Osteuropa-Recht (1955–).


Journal du droit international. Fondé par Clunet, continué par André-Prudhomme et Goldmann (1874–).

International Law Quarterly (1947–1951), continued as International and Comparative Law Quarterly (1952–).

64 BERGMANN, Internationales Ehe- und Kindschaftsrecht (ed. 3, 1952).


66 Published in Recueil des cours de l'Académie de droit international de la Haye (1925–).
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). 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 deserves commendation for attracting the 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).

4. Developments after World War II

The upheavals of the war and the post-war period, resulting in displacement of many millions of people, have presented a variety of new conflicts of laws problems. In Germany, absorbed by urgent practical issues, only the pre-war books of Raape and Martin Wolff have reappeared,

69 Unfortunately I do not know more than the title of LÉVY ULLMANN, Cours générale de droit international privé selon la méthode historique, jurisprudentielle et comparative (année universitaire 1931–1932) stenographie publié par "Les cours de droit" (licence, 3e année).
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each in two revised editions, reflecting in their supplements the special problems of German interzonal law. Italy’s new codification of 1942 has given rise to the treatises of Balladore Pallieri, Monaco, and Morelli.\(^{69b}\) In France, still strongly influenced by Niboyet’s territorialism, as last embodied in his extensive *Traité*,\(^{69c}\) Lerebours-Pigeonnière’s *Précis* has been revived in three post-war editions and the valuable *Traité* of Batiffol has been added.\(^{69d}\) Especially gratifying is the active interest of English lawyers. Besides the thoroughly revised post-par edition of Dicey’s treatise and new editions of Cheshire’s and Martin Wolff’s treatises,\(^{69e}\) the English literature has been enriched by the books of Graveson and Schmitthoff.\(^{69f}\) In Spain, Goldschmidt’s comprehensive *Sistema* and the treatises of Arjona, Miaja, Orúe and Verplaetse are noteworthy,\(^{69g}\) and in Sweden those of Gihl, Michaeli, and Karlgren.\(^{69h}\) In their respective


countries, the treatises of Borum (Denmark), Brakel (the Netherlands), Poullet and de Vos (Belgium), Schnitzer and Niederer (Switzerland), Maridakis (Greece), Blagojević and Eisner (Yugoslavia), and Lunz (Soviet Russia), are representative.

In the Americas, the fertility of the Latin-American production and the scarcity of the Anglo-American literature are in strange contrast with the practical importance of conflict of laws in their respective areas. In the United States, the two standard works of Goodrich and Stumberg have been re-edited. In Canada, the new enlarged edition of Falconbridge's *Essays* comes close to being a treatise. Among the recent Latin-American publications, the treatises of Romero del Prado, Ennis and Sapena (Argentina), Albónico and Duncker (Chile), Tenório and Valladao (Brazil), Quintin Alfonsin (Uruguay), Salinas (Bolivia), Caicedo and Cock (Colombia), and Ortiz (Costa Rica) are valuable.


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In the field of comparative conflict of laws, studies restricted to two countries form a new development, designed primarily for practical purposes. This type of comparative study, inaugurated in booklet form by the "Bilateral Studies" edited by Nussbaum, has achieved a high degree of perfection in a binational co-operative work on the Franco-German conflict of laws in the field of domestic relations.

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


690 Le droit international privé de la famille en France et en Allemagne (1954); German ed.: Das internationale Familienrecht Deutschlands und Frankreichs (1954).
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 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 Czechoslovakian Law of March 11, 1948. 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), Peru (1936), Egypt (1948), and Syria (1949).70

70 Also the modified Civil Code of Rumania of 1940, published in the Monitorul Oficial no. 206 of September 6, 1940, contained in its preliminary provisions a codification of conflict rules. The code, however, never entered into force after its effective date had been deferred to an undetermined future time (Decree-law 4 225 of December 30, 1940, Monitorul oficial no. 306 of December 31, 1940); German translation 54 Zeitschrift für vergleichende Rechtswissenschaft (1941) 221-229.
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 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 interstate 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

\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. Bartin was president and Niboyet reporter of the draft committee.

\textsuperscript{72} Bartin, 2 Principes 201.
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 property, contracts and capacity are frequent.\textsuperscript{74} There is but one exceptional Federal enactment,\textsuperscript{75} although Congress apparently has legislative power on the subject.\textsuperscript{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.\textsuperscript{77} The first international agreements of their kind, they achieved an extensive unification, remarkable despite the

\textsuperscript{73} See the review by WAHLE, 2 Z.ausl.PR. (1928) 134.

\textsuperscript{74} An attempt to collect these and certain other statutory provisions has been made by MAKAROV, Quellen.

\textsuperscript{75} U. S. C. tit. 22 § 72, see infra p. 257, n. 161.


\textsuperscript{77} Texts: Official (Spanish) text in ERNESTO RESTELLI, Actas y tratados del Congreso sudamericano de derecho internacional privado, Montevideo 1888-1889 (1928).

\begin{itemize}
  \item French: MARTENS, 18 Recueil général de traités, 2e série, 424-453; German: HECK in 1 Z.int.R. (1891) 339-340, 477-482; MEHIL, Die Kodifikation des internationalen Civil- und Handelsrechts (1891) 103-138.
  \item History: Actas de las sesiones del Congreso sudamericano de derecho internacional privado, Buenos Aires, 1889.
\end{itemize}
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.\(^7\) However, the new texts have been ratified only by Uruguay and Argentina. 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.\(^7\) Their provisions


\(^7\) 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.


On the history of the Hague Conventions see Actes de la Conférence de la Haye,chargée de réglementer diverses matières de droit international privé (13–27 septembre 1893) (2 vols. in 1, La Haye, 1893); Actes de la Deuxième Conférence de la Haye chargée etc. (25 juin–13 juillet 1894) (La Haye, 1894); Actes de la Troisième Conférence de la Haye pour le droit international privé (29 mai–18 juin 1900) (La Haye, 1900); Actes et documents de la Quatrième Conférence de la Haye pour le droit international privé (16 mai–17 juin 1904) (La Haye, 1904). Provisions of national law and cases relating to the Conventions: J. KÖSTERS and F. BELLEMAN, Les conventions de la Haye de 1902 et 1905 sur le droit international privé (La Haye, 1921).
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 treaty, they were ratified by only a few, though important, states and later partially deserted even by some of these.

In 1954,\textsuperscript{79a} the conventions were binding upon the following states:

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

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


\textsuperscript{79a} See \textit{43 Revue Crit.} (1954) 893.
(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.
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.)
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).
Austria, Belgium, Czechoslovakia, Denmark, Finland, France (as to the signatories of the protocol of ratification of July 4, 1924), Germany, Hungary, Israel, Italy, Luxemburg, the Netherlands, Norway, Poland, Portugal, Rumania (old territory), Spain, Sweden, Switzerland, Yugoslavia.

During both World Wars, it was disputed whether conventions were suspended as between the belligerent groups. Italian and Dutch courts negatived the question. The peace treaties after World War I enumerated only the conventions mentioned under (iii) and (vi) among the multilateral conventions to be revived. The peace treaties after World


80a But several conventions were reinstated later by bilateral agreements; see Makarov, Quellen (1929) 335, 342, 346, 352, 356.
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War II were deliberately tacit on this point, the prevailing opinion being that multilateral treaties are only suspended during the war.\(^{80b}\)

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, now the International Court of Justice,\(^{81}\) to interpret the Hague conventions on private international law, now binding on Belgium, Denmark, the Netherlands, Norway, and Sweden.

(c) Códido 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 Sirvén, this Code of International Private Law was adopted at the Sixth Pan-American Conference in Havana on February 20, 1928,\(^{82}\) and has been ratified by fifteen Latin American states, viz.,\(^{83}\)

\(^{80b}\) Note, 46 Am. J. Int. Law (1952) 532. Doubtful cases are settled in bilateral agreements. Thus, the applicability of The Hague conventions to the Federal Republic of Germany was expressly stipulated as respects its former enemies of World War II situated west of the Iron Curtain, except Belgium as to the Convention on Guardianship and Portugal as to the Convention on Civil Procedure.

\(^{81}\) Between member states of the Statute of the new court the attribution of competence to the former court is substituted (art. 37 of the Statute); see 43 Revue Crit. (1954) 896.

\(^{82}\) Spanish text with Portuguese, French and English translations in 86 League of Nations Treaty Series (1929) 711; English and French in HUDSON, 4 Int. Legislation 2279 No. 186, 2283 No. 186a; French by PAUL GouLÉ in NIBOTET et GOULÉ, 2 Recueil de textes usuels de droit international (1929) 508. Also in BUSTAMANTE y SIRVÉN, Le Code de droit international privé et la Sixième Conférence panaméricaine (1929) 150. In German, books I and II by MAKAROV and REUPKE, in MAKAROV, Quellen (1929) 397-418.

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.


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. UDDEGREN, 9 Z.ausl.PR. (1935) 513; MARCS VON WÜRTEMBERG, 10 Z.ausl.PR. (1936) 711.
law in the field of marriage, adoption, and guardianship,” in force from January 1, 1932.86

(c) 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), Soviet Union, 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.


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

On the fringe of the war, the three Baltic countries adopted a slightly modified version of all six Geneva conventions;\(^{87a}\) after the war, Yugoslavia and Czechoslovakia enacted the Geneva conflict rules in their internal legislation.\(^{87b}\)

(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.

(ii) Geneva Convention on the Execution of Foreign Arbitral Awards, opened for signature at Geneva, September 26, 1927.\(^{90}\)


\(^{87b}\) Yugoslavian Law on Bills of Exchange (Dec. 26, 1946) art. 94-100, to which also the Law on Promissory Notes (Dec. 26, 1946) refers (art. 23); Czechoslovakian Law on Bills of Exchange and Promissory Notes (Dec. 22, 1950), title I §§ 91-98, title II §§ 69-75 (German and French translations of all texts: MAKAROV, Quellen).

\(^{88}\) See list of ratifications and accessions League of Nations, Official No. A.6.1939. Annex I.V.

\(^{89}\) 27 League of Nations Treaty Series (1924) 157; MARTENS, 19 Nouveau recueil général de traités 3° série, 156; HUDSON, 2 Int. Legislation 1062 No. 98.

\(^{90}\) 92 League of Nations Treaty Series (1929) 301; HUDSON, 3 Int. Legislation 2153 No. 183.
Austria, Belgium, Great Britain (and parts of the British commonwealth), Czechoslovakia, Denmark, Danzig, Estonia, Finland, France, Germany, Greece, Italy, Japan, Luxemburg, the Netherlands, Portugal, Rumania, Spain, Sweden, Switzerland, Thailand.


Ratifications or accessions until August 28, 1939, by Belgium, Brazil, Great Britain (all territories), Canada, 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,\footnote{League of Nations Document, C.226.M.III.1930.V; League of Nations Document, C.227.M.III.1930.V., HUDSON, 5 Int. Legislation 381 No. 251 and 387 No. 252.} 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. 93

(g) Drafts. The tireless efforts of the Dutch Government in promoting the Hague Conferences on conflicts law were continued in 1925, 1928, 94 1951, 95 and 1956, 95a and resulted in elaborate treaty drafts regarding the law of succession on death (1925 and 1928), bankruptcy (1902 and 1928), on the recognition of foreign corporations, renvoi, and civil procedure (1951), on transfer of title and jurisdiction in international sales, support of minors, and execution of support titles (1956), which were not ratified. The draft on uniform conflicts rules for the sale of goods (1951), which also was not ratified, is outstanding. 95b Moreover, certain provisions supplementary to the earlier conventions, referring in particular to persons without nationality or having more than one nationality, were adopted.

93 For example, see the rules concerning aviation, enumerated by Hudson, 4 Int. Legislation 2354.
95b Comments by de Castro, 5 Revista Españ. Der. Int. (1952) 765; Nial and Denemark, 40 Svensk Juristtidning (1955) 81; and supra n. 95. Former drafts are reprinted in Gutzwiller and Niederer, Beiträge zum Haager International-privatrecht 1951 (Freiburg/Schweiz, 1951) 64 ff.
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and, although not ratified, apparently have had some influence. Both political contrasts and doctrinal controversies contributed to all these failures.

Also, the Convention on uniform rules of Private International Law, concluded on May 11, 1951, by Belgium, the Netherlands, and Luxemburg is as yet not ratified.

4. Bilateral Treaties

In addition to the multilateral treaties, both the postwar periods 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

95c The French text with motives is reprinted in 40 Revue Crit. (1951) 710 (41 ibid. (1952) 165 and 377), an English translation appears in 1 Int. Comp. Law Q. (1952) 426. See MEIJERS, 2 Am. J. Comp. Law (1953) 1.

96 See GUTZWILLER, 6 Z.ausl.PR. (1932) 75.
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.\(^{97}\) Except in such cases, the question is open\(^ {98}\) 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.\(^ {99}\)

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.\(^ {100}\)


\(^{98}\) Cook, Legal Bases 108, 143.


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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 their respective domains.101 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.102 Of course, outside of the domain of conflicts law, public international law has important aspects for the treatment of foreigners103 and assumption of jurisdiction.104

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

101 Since SAVIGNY § 348, a constant principle. See for literature AGO, Teoria 70 n. 1, 82 n. 1, 126 n. 1, and for analysis BARTIN, I Principes 112.
103 See M. WOLFF, IPR. 10.
104 See CHEATHAM, 89 Univ. of Pa. L. Rev. (1941) 430 ff., supra n. 102.
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 exception, 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 analo-

105 Burge, 2 Colonial and Foreign Law 29–36 (Statement of Principles); 1 Wharton 1 (“preliminary principles”); Dicey (Table of Principles and Rules) XLV–CXXIX.
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.
gous 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 the participant states \(^{109}\) 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.

\(^{109}\) 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.