

# Table of Contents

The Author	3
General Introduction	15
Chapter 1. Introduction	15
§1. SCOPE AND COVERAGE	15
§2. THE AMERICAN FRAMEWORK	16
§3. THE RELATIVE INSIGNIFICANCE OF INTERSTATE BOUNDARIES AND THE HIGH NUMBER OF CONFLICTS CASES	19
Selected Bibliography	21
Part I. Federalism and Conflicts Law	23
Chapter 1. Jurisdiction	23
§1. LEGISLATIVE JURISDICTION	23
I. The Division of Lawmaking Competence between the Federal and State Governments	23
II. Constitutional Limitations on Federal and State Powers	26
§2. ADJUDICATORY JURISDICTION	26
I. Federal and State Courts	26
II. Terminology and Other Basics	28
III. The Territorial Jurisdiction of State Courts	29
A. Some History and Basic Concepts	29
B. General Jurisdiction	31
C. Specific Jurisdiction	31
1. Appearance and Consent	32
2. Long-Arm Statutes: Torts and Contracts	32
3. Status and Domestic Relations	34
IV. Federal Court Jurisdiction	34
A. Introduction	34
B. Exclusive or Concurrent Jurisdiction	36
C. Territorial Jurisdiction	37
V. Forum Selection Clauses	37



## Table of Contents

VI. <i>Forum Non Conveniens</i>	39
VII. Federal Transfers	40
Chapter 2. Federalism and Choice of Law	42
§1. INTRODUCTION	42
§2. LAW APPLIED IN FEDERAL COURTS	42
I. In General	42
II. Law Applied in Diversity Cases	43
A. Substantive Law	43
B. Procedural Law	44
C. Choice of Law	45
§3. FEDERAL LIMITATIONS ON STATE CHOICE OF LAW	46
I. The Four Principal Constitutional Clauses	46
II. The Full Faith and Credit and Due Process Clauses	47
A. From Interventionism to <i>Laissez Faire</i>	47
B. Overview and Comparison with Jurisdiction and Choice of Law	52
III. Privileges and Immunities	54
IV. Foreign Affairs	55
A. Federal vs. State Competence	55
B. Executive vs. Judicial Function	58
Part II. Choice of Law	63
Chapter 1. The Traditional Choice-of-Law System	63
§1. INTRODUCTION	63
§2. JOSEPH STORY	64
§3. JOSEPH H. BEALE	65
I. Territoriality	65
II. Vested Rights	67
§4. THE FIRST CONFLICTS RESTATEMENT	68
I. Some of the Restatement's Flaws	68
II. The Restatement's Contributions	69
III. Some of the Restatement's Specific Rules	70
A. Torts and Contracts	70
B. Property, Marital Property and Successions	71
IV. The Restatement's Following	72
Chapter 2. The Mechanics of Choice of Law: The Structure and Operation of the Choice-of-Law Syllogism	74
§1. THE CHOICE-OF-LAW RULE AND ITS COMPONENTS	74
§2. CHARACTERIZATION	75
§3. LOCALIZATION	77



## Table of Contents

§4. THE APPLICATION OF THE DESIGNATED LAW AND ITS EXCEPTIONS	77
I. Substance vs. Procedure	78
II. <i>Renvoi</i>	81
III. The Public Policy Exception	83
IV. The Penal-Law Exception	85
V. The Foreign Tax-Law Exception	86
§5. DOMICILE	88
§6. JUDICIAL NOTICE AND PROOF OF FOREIGN LAW	89
 Chapter 3. The Choice-of-Law Revolution	 92
§1. INTRODUCTION	92
§2. THE SCHOLASTIC REVOLUTION	92
I. The First Critics	92
A. Walter W. Cook	92
B. David F. Cavers	94
II. An Open Revolution: Brainerd Currie	95
A. Anti-rulism	95
B. The 'Domestic Method'	96
C. The Concept of Governmental Interests	96
D. Currie's Assumptions about State Interests	97
E. False, True and In-Between Conflicts	98
F. Forum Favouritism	100
G. Currie's Contribution	100
III. Comparative Impairment	101
IV. Leflar and the 'Better Law' Approach	102
V. The First Synthesis: The Second Conflicts Restatement	103
A. Section Six	103
B. The 'Most Significant Relationship'	104
C. Rules	105
D. Presumptive Rules	105
E. Pointers	106
F. <i>Ad Hoc</i> Analysis	106
§3. THE JUDICIAL REVOLUTION IN TORTS AND CONTRACTS	107
I. Introduction	107
II. The Erosion of the <i>Lex Loci Delicti</i> Rule	107
A. <i>Babcock v. Jackson</i>	108
1. Issue-by-Issue Analysis	108
2. <i>Dépeçage</i>	109
3. The Distinction between Loss-Distribution and Conduct-Regulation Issues	109
4. Policy Analysis	110
B. After <i>Babcock</i>	111
III. The Erosion of the <i>Lex Loci Contractus</i> Rule	111
§4. THE CHOICE-OF-LAW REVOLUTION TODAY	112
I. Introduction	112
II. The Restatement (Second)	112



## Table of Contents

III. Significant-Contacts Approaches	114
IV. The New York Experience	115
A. Tort Conflicts	115
B. Contract Conflicts	118
V. Currie-Based Approaches	119
A. Modified Interest Analysis	120
B. Comparative Impairment	121
C. The <i>Lex Fori</i> Variant	122
VI. The Better-Law Approach	125
A. Early Cases: The Biases	125
1. Pro-Forum Law Bias	125
2. Pro-Plaintiff, Pro-Recovery Bias	126
3. Pro-Forum-Litigant Bias	126
B. Recent Cases: Eclecticism and Watering-Down	126
1. Eclecticism	127
2. De-emphasis of Better-Law Factor	128
VII. Other 'Combined Modern' Approaches	128
VIII. Modern Codifications	128
A. Louisiana	128
B. Puerto Rico	130
C. Oregon	130
 Chapter 4. Torts and Products Liability	 132
§1. INTRODUCTION	132
§2. THE DISTINCTION BETWEEN CONDUCT-REGULATION AND LOSS-DISTRIBUTION	132
§3. LOSS-DISTRIBUTION TORT CONFLICTS	136
I. Introduction	136
II. Defining the Typical Patterns	136
A. The Pertinent Connecting Factors	136
B. The Content of the Involved Laws	137
C. The Typical Fact-Law Patterns in Conflicts Involving Two States	138
III. Common-Domicile Cases Arising from Torts in Another State	139
A. Pattern 1: The <i>Babcock</i> Pattern	140
B. Pattern 2: The <i>Converse-Babcock</i> Pattern	140
C. A Common-Domicile Rule	142
D. Cases Analogous to Common-Domicile Cases	143
IV. Split-Domicile Cases – Intrastate Torts	144
A. Direct or True Conflicts	144
1. Pattern 3: Split-Domicile Cases in Which the Conduct, the Injury and the Tortfeasor's Domicile Are in a State Whose Law Favours the Tortfeasor	144
2. Pattern 4: Split-Domicile Cases in Which the Conduct, the Injury and the Victim's Domicile Are in a State Whose Law Favours the Victim	146



## Table of Contents

B. Inverse Conflicts or No-Interest Cases	148
1. Pattern 5: The <i>Neumeier</i> Pattern	148
2. Pattern 6: The <i>Hurtado</i> Pattern	150
3. Summary and Rule	151
V. Split-Domicile Cases – Cross-Border Torts	152
A. Pattern 7: Cases in Which the Conduct and the Tortfeasor’s Domicile Are in a State Whose Law Favours the Tortfeasor, while the Injury and the Victim’s Domicile Are in a State Whose Law Favours the Victim	152
B. Pattern 8: Cases in Which the Conduct and the Tortfeasor’s Domicile Are in a State Whose Law Favours the Victim, while the Injury and the Victim’s Domicile Are in a State Whose Law Favours the Tortfeasor	155
VI. Split-Domicile Conflicts Involving Three States	156
VII. Summary and Rules for Loss-Distribution Conflicts	158
§4. CONDUCT-REGULATION CONFLICTS	160
I. Introduction	160
II. Generic Conduct-Regulation Conflicts	161
A. The Pertinent Contacts and Typical Patterns	161
B. Pattern 1: Conduct and Injury in Same State	162
C. Pattern 2: Conduct and Injury in Different States that Prescribe the Same Standards of Conduct	164
D. Pattern 3: Conduct in State with High Standard and Injury in State with Lower Standard of Conduct	165
E. Pattern 4: Conduct in State with Lower Standard and Injury in State with High Standard	168
F. Summary and Rule for Conduct-Regulation Conflicts	170
III. Punitive-Damage Conflicts	171
A. Introduction	171
B. The Pertinent Contacts and Typical Patterns	172
C. Group 1: All Three Contacts	173
D. Group 2: Two-Contact Patterns	174
1. State(s) of Defendant’s Domicile and Conduct Impose(s) Punitive Damages	174
2. State(s) of Conduct and Injury Impose(s) Punitive Damages	175
3. State(s) of Injury and Defendant’s Domicile Impose(s) Punitive Damages	176
E. Group 3: Single-Contact Patterns	177
1. Only the Defendant’s Home State Imposes Punitive Damages	177
2. Only the State of Conduct Imposes Punitive Damages	177
3. Only the State of Injury Imposes Punitive Damages	178
F. Group 4: None of the Above (Victim’s Nationality or Domicile)	179
G. Summary and Rule	179



## Table of Contents

§5. PRODUCTS LIABILITY	180
I. Introduction	180
A. Scope of This Section	180
B. The Pertinent Contacts	181
1. The List	181
2. Qualifications	181
3. Dispersement of Contacts	183
C. The Content of the Contact-States' Laws	183
D. Typical Patterns of Product Conflicts	183
II. Cases in Which the Three Plaintiff-Affiliating Contacts Were in the Same State	184
A. Direct Conflicts	184
B. Inverse Conflicts	185
III. Cases in Which Two Plaintiff-Affiliating Contacts Were in the Same State	186
A. Plaintiff's Domicile and Injury	186
B. Victim's Domicile and Product Acquisition	187
C. Injury and Product Acquisition	188
IV. The Rest of the Cases	188
V. General Observations	188
A. The Role of State Policies and Interests	188
B. A Contacts Analysis	189
1. Plaintiff's Domicile	190
2. Place of Injury	190
3. Place of the Product's Acquisition	191
4. State of Manufacture	191
5. Defendant's Principal Place of Business	191
C. Forum-Shopping is Neither Common nor Rewarding	192
D. Plaintiffs Tend to Sue at or Close to Home	193
E. No Pro-Plaintiff Bias	194
F. No Favouritism toward Forum Domiciliaries	195
G. No Pro-Forum Law Bias	195
H. No Surprise to Manufacturers	196
I. The Cases, on the Whole	196
 Chapter 5. Contracts	 197
§1. CONTRACTUAL CHOICE OF LAW (PARTY AUTONOMY)	197
I. The Principle	197
II. Its Parameters and Limitations	198
A. The Distinction between Waivable and Non-waivable Rules	198
B. Basis for the Parties' Choice: Substantial Relationship or Reasonable Basis	199
C. Substantive Limitations: Public Policy	200
1. The Public Policy Limitation in General	200
a. Which State's Public Policy?	201
b. Which Level of Public Policy?	202



## Table of Contents

2. Examples	204
a. Employment Contracts	204
b. Franchise or Distributorship Contracts	206
c. Insurance Contracts	207
III. Modalities of the Choice-of-Law Agreement	208
A. Which Law Determines Existence and Validity	208
B. Written, Express and Implied Choice	209
C. Multiple or Partial Choice	209
D. Timing of Choice	210
E. Choice of an Invalidating Law	210
F. Choice of Non-state Norms	210
G. Choice of Conflicts Law and Procedural Law	211
H. Choice-of-Forum Clauses and Floating Clauses	212
IV. The Scope of the Choice-of-Law Clause	212
A. Intended Scope	213
B. Permissible Scope	213
V. The Uniform Commercial Code	215
A. The Present Version	215
B. The Proposed Version	216
VI. Arbitration Clauses	217
A. Foreign Arbitration	217
B. Domestic Arbitration	221
§2. CONTRACTS WITHOUT CHOICE-OF-LAW CLAUSES	223
I. The Traditional Approach	223
II. The Restatement (Second)	225
A. Section 188	225
B. Particular Contracts	226
C. Particular Issues	227
D. Application	228
III. Other Modern Approaches	229
IV. Insurance Contracts	229
Chapter 6. Status and Domestic Relations	234
§1. INTRODUCTION	234
§2. MARRIAGE	234
I. Validity	234
II. Incidents	236
§3. SAME SEX MARRIAGES AND SIMILAR RELATIONS	237
I. The Movement For and Against	237
II. DOMA and Its Constitutionality	239
III. Interstate Recognition of Same Sex Relationships	241
§4. DIVORCE	246
§5. CHILD SUPPORT AND CUSTODY	249
I. Child Support	249
II. Child Custody	251
§6. LEGITIMACY AND ADOPTION	251



## Table of Contents

Chapter 7. Property, Marital Property and Successions	254
§1. PROPERTY	254
I. Immovables	254
II. Movables	256
§2. MARITAL PROPERTY	257
I. Substantive Law	257
II. The Conflicts Problem	258
III. The Problem of Moving Spouses	260
A. From a Separate-Property State to a Community-Property State	260
1. The Traditional Approach	260
2. The Pure Borrowed-Law Approach	261
3. The Pure Quasi-Community Property Approach	261
4. The Louisiana Approach	262
B. From a Community-Property State to a Separate-Property State	264
§3. SUCCESSIONS	265
I. 'Unity' or 'Scission' of the Estate	265
II. The Two Restatements	266
III. Legislative Interventions	267
Chapter 8. Statutes of Limitation	272
§1. INTRODUCTION	272
§2. THE TRADITIONAL AMERICAN SYSTEM	272
I. The Basic Approach	272
II. Legislative Exceptions: Borrowing Statutes	274
III. Judicial Exceptions	276
IV. Current Status	277
§3. MODERN APPROACHES	278
I. The New Uniform Act	278
II. New Judicial Approaches	281
III. The New Revision of the Restatement (Second)	283
A. The Text	283
B. Representative Cases	283
IV. The Louisiana and Puerto Rico Codifications	287
§4. SUPREME COURT CASES	289
§5. LESSONS DERIVED FROM COMPARISON	292
Chapter 9. Conflicts between Federal Law and Foreign Law	295
§1. INTRODUCTION	295
§2. CONGRESSIONAL POWER AND ITS LIMITS	295
I. International-Law Limits	295
II. Constitutional Limits	297



## Table of Contents

§3. STATUTES EXPRESSLY APPLICABLE TO FOREIGN EVENTS OR PERSONS	298
I. Statutes Applicable to US Citizens Present or Acting Abroad	298
II. Statutes Applicable to US Citizens Injured Abroad	299
III. Statutes Applicable to Foreign Events or Persons	299
IV. Statutes Applicable to the High Seas	301
V. Statutes Applicable to Aliens while in the US	301
VI. Interpretation	302
§4. STATUTES THAT ARE SILENT OR AMBIGUOUS ON THEIR TERRITORIAL REACH	303
I. Introduction	303
II. The Territorial Presumption: The Early Version	304
III. Foreign Ships and Their Internal Affairs	304
IV. Bilateralism: <i>Lauritzen</i> and Maritime Conflicts	310
V. The 'Effects Doctrine': Foreign Conduct with Domestic Effects	313
VI. The Territorial Presumption, Again	315
VII. The 'Effects Doctrine', Again	315
VIII. The Effects Doctrine Tempered by Internationalism	317
IX. The 'Headquarters Doctrine': Domestic Conduct with Foreign Effects	319
§5. A FEW REMARKS ON METHODOLOGY	324
 Part III. Recognition and Enforcement of Foreign Judgments	 327
 Chapter 1. Sister State Judgments	 327
§1. THE BASIC POLICIES	327
§2. REQUIREMENTS FOR RECOGNITION	330
§3. PRECLUSIVE EFFECT OF THE JUDGMENT	330
§4. ENFORCEMENT AND DEFENCES	331
 Chapter 2. Foreign-Country Judgments	 333
§1. <i>HILTON</i> : THE STARTING POINT, IN THE MIDDLE	333
§2. 'CODIFICATIONS' OF CURRENT OR FUTURE PRACTICE	334
§3. RECIPROCITY	335
§4. JURISDICTION	336
I. Jurisdictional Bases	336
II. Default Judgments	338
III. Contested Proceedings	339
§5. PROCEDURAL FAIRNESS	339
I. Fairness of Foreign Courts or Proceedings	339
II. Judgment Obtained or Tainted by Fraud	344
III. Notice Requirements	345
§6. SUBSTANTIVE DEFENCES	346
I. The Public Policy Exception	346
II. Penal Judgments	348



**Table of Contents**

III. Tax and Fiscal Judgments	349
IV. Inconsistent Judgments	350
V. Other Defences	350
§7. ARBITRAL AWARDS	351

Table of Cases	355
Index	361