

ASPEN CASEBOOK SERIES

BRILMAYER  
GOLDSMITH  
O'HARA O'CONNOR

CONFLICT OF LAWS  
Cases and Materials

*Sixth  
Edition*



Wolters Kluwer

Law & Business

ASPEN CASEBOOK SERIES

# **Conflict of Laws**

## **Cases and Materials**

**Sixth Edition**

**Lea Brilmayer**

**Howard M. Holtzmann Professor  
of International Law  
Yale University**

**Jack Goldsmith**

**Henry L. Shattuck Professor of Law  
Harvard University**

**Erin O'Hara O'Connor**

**Professor of Law  
Vanderbilt University**



**Wolters Kluwer**  
Law & Business

Copyright © 2011 Lea Brilmayer, Jack Goldsmith, Erin O'Hara O'Connor.

Published by Wolters Kluwer Law & Business in New York.

Wolters Kluwer Law & Business serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.wolterskluwerlb.com)

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or utilized by any information storage or retrieval system, without written permission from the publisher. For information about permissions or to request permissions online, visit us at www.wolterskluwerlb.com, or a written request may be faxed to our permissions department at 212-771-0803.

To contact Customer Service, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

**Wolters Kluwer Law & Business**  
**Attn: Order Department**  
**PO Box 990**  
**Frederick, MD 21705**

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-0-7355-5745-1

**Library of Congress Cataloging-in-Publication Data**

Brilmayer, Lea.

Conflict of laws : cases and materials / Lea Brilmayer, Jack Goldsmith, Erin O'Hara O'Connor.—6th ed.

p. cm.—(Aspen casebook series)

Includes index.

ISBN 978-0-7355-5745-1

1. Conflict of laws—United States—Cases. I. Goldsmith, Jack L. II. O'Connor, Erin O'Hara, 1965- III. Title.

KF410.M37 2011

342.73'042—dc23

2011022860

---

# About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading global provider of intelligent information and digital solutions for legal and business professionals in key specialty areas, and respected educational resources for professors and law students. Wolters Kluwer Law & Business connects legal and business professionals as well as those in the education market with timely, specialized authoritative content and information-enabled solutions to support success through productivity, accuracy and mobility.

Serving customers worldwide, Wolters Kluwer Law & Business products include those under the Aspen Publishers, CCH, Kluwer Law International, Loislaw, Best Case, ftwilliam.com and MediRegs family of products.

**CCH** products have been a trusted resource since 1913, and are highly regarded resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and healthcare reimbursement and compliance professionals.

**Aspen Publishers** products provide essential information to attorneys, business professionals and law students. Written by preeminent authorities, the product line offers analytical and practical information in a range of specialty practice areas from securities law and intellectual property to mergers and acquisitions and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date and effective resources for successful instruction and study in all areas of the law.

**Kluwer Law International** products provide the global business community with reliable international legal information in English. Legal practitioners, corporate counsel and business executives around the world rely on Kluwer Law journals, looseleaves, books, and electronic products for comprehensive information in many areas of international legal practice.

**Loislaw** is a comprehensive online legal research product providing legal content to law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms and treatises.

**Best Case Solutions** is the leading bankruptcy software product to the bankruptcy industry. It provides software and workflow tools to flawlessly streamline petition preparation and the electronic filing process, while timely incorporating ever-changing court requirements.

**ftwilliam.com** offers employee benefits professionals the highest quality plan documents (retirement, welfare and non-qualified) and government forms (5500/PBGC, 1099 and IRS) software at highly competitive prices.

**MediRegs** products provide integrated health care compliance content and software solutions for professionals in healthcare, higher education and life sciences, including professionals in accounting, law and consulting.

Wolters Kluwer Law & Business, a division of Wolters Kluwer, is headquartered in New York. Wolters Kluwer is a market-leading global information services company focused on professionals.

---

***To Our Teachers and Students***

## Preface to the Sixth Edition

Erin O'Hara O'Connor joins Lea Brilmayer and Jack Goldsmith in editing the sixth edition of this casebook begun by the late Professor James Martin in 1978. The sixth edition modernizes the book in several ways. First, three new chapters have been added. A new introductory chapter introduces the students to the subject matter and provides a sense of the breadth of Conflict of Laws issues. A new chapter entitled "Choosing Legal Regimes" consolidates and expands upon the choice-of-law and choice-of-forum clause materials and adds a treatment of arbitration clauses to provide students with an understanding of the ability of parties to privately choose the rules that will govern dispute resolution. A new chapter entitled "Choice of Law in Complex Litigation" introduces the students to both the challenges and the unique relevance associated with choosing law in class actions and in multi-district litigation. Second, materials in pre-existing chapters have been updated and rearranged to further enable students to appreciate the current issues in conflict of laws. Material from the chapter on Internet conflicts has been incorporated into chapters throughout the book on the theory that court treatment of Internet conflicts are not different in kind from other types of conflicts. The chapter on conflicts in the international setting has been narrowed in scope to provide a more thorough treatment of the extent to which federal laws apply extraterritorially. Several new cases and notes have been added to all of the other chapters as well. Same-sex marriage, noncompete clauses, and franchise contracts are each considered in multiple places in the text. To make room for these changes, we have eliminated the fifth edition's chapter 5 ("Conflict of Laws in the Federal System") because a user survey indicated that very few teachers cover this chapter in any detail. For those who still want to teach it, this chapter is now available in its entirety on our casebook's companion website at [www.aspenlawschool.com/books/brilmayer\\_conflicts](http://www.aspenlawschool.com/books/brilmayer_conflicts). We hope that the book continues to meet the needs of teachers in the field and to attract curious students.

*Lea Brilmayer*  
*Jack Goldsmith*  
*Erin O'Hara O'Connor*

May 2011

## Preface to the Second Edition

The teacher of conflicts already knows that it is a fascinating course. The student is about to find out. It is, moreover, one of those courses in which to be “theoretical” is to be “practical”; the supposed war between those two qualities is not even a skirmish in conflicts law, where changes have come (and will no doubt continue to come) so quickly that the only preparation is understanding, not memorization.

This book is organized to present the heart of conflicts first: choice-of-law problems. In the first chapter the “traditional” approach is exposed; in the second, the struggle of the courts and the commentators to come up with a more responsive (but not unduly complicated) approach. The remaining broad topics—constitutional limitations on choice of law, the *Erie* doctrine, personal jurisdiction, recognition of judgments, and conflicts in the international context—are considered in light of the wisdom derived from consideration of the basic choice-of-law problems. I have attempted to make the materials short enough so that they really can be covered in a three-or four-hour course, but we have all experienced the temptation to slow down and inspect in detail some of the particularly intriguing questions that are raised in conflicts.

Questions and comments at the ends of cases or case groupings tend to be brief, concentrating on the problems raised by the principal cases rather than adding notes about other cases. Occasionally the opinion of the editor may show through in questions and comments, but many questions that may seem to present a point of view are asked in the spirit of the devil’s advocate.

Cases have been severely edited to eliminate citations. Thus, they do not read like real case reports, but they do read somewhat more smoothly. Citations are retained on some occasions when they refer to other important cases, when they refer to writings of important conflicts scholars, when they cite the editor of this casebook, or otherwise seem worthy of retention. Footnotes in cases and other quoted material have generally been eliminated without the use of ellipses. Those that have survived editing retain their original numbers, while the editor’s footnotes employ asterisks and daggers.

*Jim Martin*

January 1984

## Acknowledgments

Numerous people deserve thanks for their contributions to the publication of the sixth edition of this casebook. Our most enthusiastic thanks go to Brent Culpepper, Byron Talmadge Infinger IV, Nina Kumar, William Marra, Harriet McConnell, and Aisha McWeay for outstanding research assistance. Christie Bishop provided critical support in helping to secure copyright permissions. John Devins and Gretchen Otto both provided terrific (and patient) editorial support. Finally, several of our colleagues suggested improvements to the manuscript, including Richard Graving, Michael Hoffheimer, Richard Nagareda, Larry Ribstein, Bo Rutledge, and Suzanna Sherry.

We also thank the copyright holders whose materials we have either excerpted or adapted, including:

AAA Consumer Due Process Protocol, American Arbitration Association.  
American Law Institute, selections from Restatement, Conflict of Laws. Copyright 1934 by The American Law Institute. All rights reserved. Reprinted with the permission of The American Law Institute.  
\_\_\_\_\_, selections from Restatement (Second), Conflict of Laws. Copyright 1971, 1989 by The American Law Institute. All rights reserved. Reprinted with the permission of The American Law Institute.  
Cooper, Aggregation and Choice of Law, 14 Roger Williams U. L. Rev. 12 (2009). Reprinted by permission of Roger Williams University Law Review.  
Cramton, Currie & Kay, Conflict of Laws 25 (3d ed. 1981). Reprinted by permission of Thomson Reuters.  
Currie, Comments on *Babcock vs. Jackson*. Copyright © 1983 by the Directors for the Columbia Law Review Association, Inc. All rights reserved. This article originally appeared at 63 Colum. L. Rev. 1233 (1963). Reprinted by permission.  
\_\_\_\_\_, Selected Essays on the Conflict of Laws, Copyright © 1963 by Duke University Press.  
Escher, drawing entitled “Drawing Hands.” © 2011 The M.C. Escher Company-Holland. All rights reserved. Reprinted by permission.  
Goldsmith, Against Cyberanarchy, 65 U. Chi. L. Rev. 1199 (1998). Reprinted by permission.  
International Centre for Dispute Resolution Arbitration Rules.  
JAMS Consumer Minimum Standards (2009). Reprinted with permission.  
JAMS Employment Arbitration Rules and Procedures. Reprinted with permission.



- Johnson & Post, Law and Borders—The Rise of Law in Cyberspace, 48 Stan. L. Rev. 1367 (1996). Reprinted with permission.
- Lapres, translation of Licra and UEJF v. Yahoo! Inc. (Tribunal de Grande Instance de Paris, May 22, 2000), available at *www.lapres.net/yaheb.html*. Reprinted with permission of the translator.
- Leflar, Choice-of-Law Statutes, 44 Tenn. L. Rev. 951, 958 (1977). Reprinted by permission of the author's estate and the Tennessee Law Review Association, Inc.
- , Conflicts Law: More on Choice-Influencing Considerations, 54 Cal. L. Rev. 1584 (1966). Copyright © 1966, California Law Review, Inc. Reprinted by permission.
- Nature, Following Ancestral Footsteps, 360 Nature 514 (1992). Copyright © 1992 Nature Publishing Group. Reprinted with permission.
- Perritt, Will the Judgment-Proof Own Cyberspace? 32 Int'l Lawyer 1121 (1998). Copyright © 1998 by the American Bar Association. Reprinted with permission of the American Bar Association. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without written consent of the American Bar Association.
- Sedler, The Governmental Interest Approach to Choice of Law: An Analysis and Reformulation, 25 UCLA L. Rev. 181 (1977).

# Introduction

## A (Very) Brief History of the Subject

Conflict of laws encompasses several related areas of law: choice of law, constitutional limitations on choice of law, jurisdiction of courts, recognition of sister-state judgments, and *Erie* problems.

Of these topics, choice of law is at the heart of the course. A choice-of-law problem arises in the selection of the governing law for a case with connections to two or more jurisdictions. Choice-of-law questions have arisen wherever people have been subject to the authority of more than one state, nation, or tribal law. The late Professor Yntema said that a choice-of-law rule was found on the wrappings of a crocodile mummy in Egypt. Yntema, *The Historic Bases of Private International Law*, 2 Am. J. Comp. L. 297, 300 (1953). The Corpus Juris of the Roman Empire tended to eliminate such problems by the direct method of eliminating all laws but one (namely, Roman law). Choice-of-law problems arose again in the Middle Ages, however, especially in Italy, which was divided into many commercially active city-states. The “statutists” of medieval Italy approached conflicts problems by dividing statutes into the “real” and “personal” category—the former applied only within the jurisdiction that promulgated it; the latter followed the person wherever he went. Unfortunately, the statutes were not labeled, and the crunch came in trying to determine which statutes were which. Overriding the Italian efforts in the area was the notion of what is now sometimes termed a “superlaw,” which was based in part on the natural law and which was viewed as having more authority than the local laws in conflict.

In the 1600s, Holland became influential in choice-of-law theory. The greatest of the Dutch scholars was Ulric Huber, who took the position that states defer to the law of other states in appropriate cases not because some superlaw requires them to do so, but rather because of “comity”—a kind of golden rule among sovereigns. His book, *De Conflictu Legum Diversarum in Diversis Imperiis* [On The Conflict of Diverse Laws of Different States], translated in Ernest G. Lorenzen, *Selected Articles on the Conflict of Laws* 136 (1947), set forth three postulates from which he derived his solutions to conflicts problems:

- (1) The laws of each state have force within the limits of that government and bind all subjects to it, but not beyond.
- (2) All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.

(3) Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects.

Lorenzen, *supra*, at 163.

Huber's work had a strong effect on Joseph Story, a Justice of the United States Supreme Court who was considered the foremost conflicts scholar in the English-speaking world in the nineteenth century. Story's approach was similar to Huber's and helped entrench the "comity" rather than "superlaw" orientation in the United States. Story's *Commentaries on the Conflict of Laws* (1834) was the most influential work in the field until A. V. Dicey, in England, produced his vested-rights theory at the turn of the century. In the United States, Professor Joseph Beale of the Harvard Law School took up Dicey's vested-rights theory, with strong doses of territorialism. The theory was enshrined in the American Law Institute's *Restatement of Conflict of Laws* (1934) and appeared for a time to be headed for apotheosis by the United States Supreme Court as a branch of the law of due process. Beale's system tended to select a governing law on the basis of where various critical acts occurred, such as where a contract was signed or where a tort was committed.

Beale's approach was heavily criticized by three outstanding scholars—Cook, Lorenzen, and Cavers. But these criticisms had little influence in the courts for many years. In the 1950s, Professor Brainerd Currie attacked the First Restatement approach and suggested in its place a system of conflicts known as "interest analysis." Currie's work influenced courts and provided a basis for others to build on. In 1971, the American Law Institute published the *Restatement (Second) of Conflict of Laws*, which tried to accommodate the policy-based insights of Currie and others. Today choice of law in the United States is something of a hodge-podge. In the context of torts and contracts, most states have rejected the traditional approach and have adopted one of a variety of policy-based approaches. But the traditional approach fares better in other contexts, such as marriage, corporate internal affairs, and real property.

## About the Terminology

The late Professor Prosser once said, in an oft-quoted comment, that "[t]he realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it." Prosser, *Interstate Publication*, 51 Mich. L. Rev. 959, 971 (1953). A small amount of introduction to the terminology may then be in order. *Comity*, a term already used above, indicates the nonmandatory acceptance by one jurisdiction of the law of another. *Vested rights* is a term with meaning very similar to its meaning in constitutional law and is used in connection with theories that indicate, for example, that the victim of a tort would acquire a vested right to recovery under the law of the place where the tort occurs, a right that thereafter accompanies the person and may be used as the basis for a lawsuit even in a jurisdiction that would not impose liability if the same

events had taken place within its own borders. Closely connected with vested rights is the phrase *lex loci* and its children, *lex loci contractus* and *lex loci delicti*. *Lex loci* is simply “the law of the place,” with *contractus* adding “of the contract” and *delicti* adding “of the tort.” Another term important to your reading of the cases is *domicile*, which refers to the political jurisdiction (state, country, etc.) in which a person makes his or her permanent home. We will see many cases elaborating that sketchy definition.

Finally, you will probably already have noted that several terms are used interchangeably for the topic under discussion. “Conflicts of laws,” “choice of law,” and “private international law” are common labels for what you are about to study, although “choice of law” is often restricted to choice-of-law questions, excluding such other questions as jurisdiction and recognition of judgments.

# **Conflict of Laws**

# Summary of Contents

<i>Contents</i>	<i>xi</i>
<i>Preface to the Sixth Edition</i>	<i>xix</i>
<i>Preface to the Second Edition</i>	<i>xxi</i>
<i>Acknowledgments</i>	<i>xxiii</i>
<i>Introduction</i>	<i>xxv</i>
Chapter 1. Introduction	1
Chapter 2. Traditional Approaches to Choice of Law	15
Chapter 3. Modern Approaches to Choice of Law	177
Chapter 4. Constitutional Limitations on Choice of Law	297
Chapter 5. The Jurisdiction of Courts Over Persons and Property	393
Chapter 6. Recognition of Judgments	489
Chapter 7. Extraterritoriality of Federal Law	567
Chapter 8. Choosing Legal Regimes	633
Chapter 9. Choice of Law in Complex Litigation	737
<i>Table of Cases</i>	<i>805</i>
<i>Table of Secondary Authorities</i>	<i>815</i>
<i>Table of Restatement Sections</i>	<i>825</i>
<i>Index</i>	<i>829</i>

# Contents

<i>Preface to the Sixth Edition</i>	<i>xix</i>
<i>Preface to the Second Edition</i>	<i>xxi</i>
<i>Acknowledgments</i>	<i>xxiii</i>
<i>Introduction</i>	<i>xxv</i>

## **Chapter 1. Introduction 1**

Problem 1: Male or Female?	2
Questions and Comments	4
Problem 2: The Long Arm of the Law	5
<i>Licra and UEJF v. Yahoo! Inc.</i>	5
Questions and Comments	7
Problem 3: Whose Artwork?	9
Questions and Comments	12

## **Chapter 2. Traditional Approaches to Choice of Law 15**

A. Torts	15
1. Nonintentional Torts	15
<i>Alabama Great Southern Railroad v. Carroll</i>	15
Questions and Comments	20
Selections from the First Restatement of Conflicts, on Wrongs	25
2. Intentional Torts	28
<i>Marra v. Bushee</i>	28
Questions and Comments	33
B. Contracts	35
Selections from the First Restatement of Conflicts, on Contracts	35
<i>Poole v. Perkins</i>	40
<i>Linn v. Employers Reinsurance Corp.</i>	44
Questions and Comments	47
An Exercise	50

## xii Contents

C. Domicile	51
Selections from the First Restatement of Conflicts, on Domicile	51
<i>White v. Tennant</i>	53
<i>Rodriguez Diaz v. Sierra Martinez</i>	56
Questions and Comments	64
D. Marriage	66
Selections from the First Restatement of Conflicts, on Marriage and Legitimacy	66
In re May's Estate	68
<i>Lanham v. Lanham</i>	73
Questions and Comments	75
In re Marriage of J.B. and H.B.	78
Questions and Comments	85
E. Property	87
Selections from the First Restatement of Conflicts, on Real Property	87
<i>Burr v. Beckler</i>	90
<i>Thomson v. Kyle</i>	92
Questions and Comments	94
Selections from the First Restatement of Conflicts, on Personal Property	95
<i>Blackwell v. Lurie</i>	97
<i>Morson v. Second National Bank of Boston</i>	101
Questions and Comments	103
F. Corporations	105
Selections from the First Restatement of Conflicts, on Corporations	105
<i>McDermott Inc. v. Lewis</i>	107
<i>Irving Trust Co. v. Maryland Casualty Co.</i>	112
Questions and Comments	114
G. Wrinkles in the Theory	117
1. Characterization	117
<i>Haumschild v. Continental Casualty Co.</i>	117
Questions and Comments	121
2. Renvoi	122
In re Estate of Damato	123
<i>University of Chicago v. Dater</i>	125
Questions and Comments	129
3. Substance vs. Procedure	132
Selections from the First Restatement of Conflicts, on Procedure	132
<i>Sampson v. Channell</i>	133
<i>O'Leary v. Illinois Terminal Railroad</i>	138
Questions and Comments	141
<i>Grant v. McAuliffe</i>	142
Questions and Comments	145



4. Statutes of Limitations	146
Selections from the First Restatement of Conflicts, on Statutes of Limitations	146
<i>Duke v. Housen</i>	146
Questions and Comments	155
5. Public Policy	156
Selection from the First Restatement of Conflicts, on Public Policy	156
<i>Marchlik v. Coronet Insurance Co.</i>	157
<i>Holzer v. Deutsche Reichsbahn-Gesellschaft</i>	160
Questions and Comments	161
6. Penal Laws	164
Selections from the First Restatement of Conflicts, on Penal Laws and Tax Claims	164
<i>Paper Products Co. v. Doggrell</i>	164
Questions and Comments	168
H. Proof of Foreign Law	170
<i>Tidewater Oil Co. v. Waller</i>	170
Questions and Comments	173

### **Chapter 3. Modern Approaches to Choice of Law 177**

A. Introduction	177
B. Interest Analysis: In Theory and in Practice	193
1. Theoretical Foundations of Interest Analysis	193
Currie, Notes on Methods and Objectives in the Conflict of Laws	193
2. Judicial Applications	197
a. True Conflicts	197
<i>Lilienthal v. Kaufman</i>	197
b. True Conflicts vs. Apparent Conflicts	201
<i>Bernkrant v. Fowler</i>	201
Questions and Comments	204
c. Unprovided-For Cases	205
<i>Hurtado v. Superior Court</i>	205
Questions and Comments	208
3. Recent Theoretical Criticisms of Interest Analysis	209
4. A Short Note on Interest Analysis in Other Nations	212
C. Comparative Impairment	215
<i>Bernhard v. Harrah's Club</i>	216
Questions and Comments	223
<i>Kearney v. Salomon Smith Barney, Inc.</i>	225
Questions and Comments	228
D. The "Better Rule"	231
Leflar, Conflicts Law: More on Choice-Influencing Considerations	231
<i>Milkovich v. Saari</i>	233
Questions and Comments	238