

TREATISE ON THE CONFLICT OF LAWS

Albert A. Ehrenzweig



A TREATISE
ON THE
CONFLICT OF LAWS

By

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PREFACE

"In Conflict of Laws, the wilderness grows wilder, faster than the axes of discriminating men can keep it under control. The concepts of the Restatement have been shattered by the devastating attacks of Cook and Lorenzen. . . . The demolition of obsolete theories makes the judge's task harder, as he works his way out of the wreckage. . . . He has a better chance to arrive at the least erroneous answer if the scholars have labored in advance to break ground for new paths. . . ."

Thus Justice Traynor has admonished us to help the judge in his difficult task. In the 1959 edition of Part One of this treatise I tried to heed that admonition in a largely new systematic analysis. Several distinguished courts, rejecting "official doctrine," have since on occasion availed themselves of that analysis, and some of it may have proved useful to counsel in arguing against deceptive black letter rules.

Moreover, four years of experience and critical evaluation in reviews and oral comment have given substance to my hope that this book might also be welcome to some of my colleagues. Where in our teaching we must shift from thesis to antithesis, from the law's specificity to doctrinaire generality, there is often compelling need for synthesis. Finally, I have tried to assist the student by giving him some of that basic information which courses on conflict of laws, jurisdiction, and procedure must leave to self-study in order to relieve class discussion from the pressure of growing subject matter. Those of my students who found difficult the unguided comprehension of a style compressed by lack of space and skill, have assured me that the book has proved useful to them for purposes of review.

These experiences have helped to overcome my misgiving about this attempt to offer the same tool to bench, bar, and school. Indeed, there was no other way: A text for students alone would have tended to restate an oversimplified fiction that would mislead them in later practice; a guide for lawyers alone would have tended to conceal new thought in "acceptable" language at the risk of perpetuating chaotic dogma; and a treatise for the scholar alone would have tended to emphasize speculation as to what the law ought to be. For better or worse I have tried to describe the law as it appears in the actual decisions rather than in the language of the courts. This technique, though perhaps overambitious and often controversial, seems unavoidable today. It must prepare the way for those more fortunate who in the future, no longer burdened by dogmatic heritage, will be able to follow courts and writers in accepted categories and terms. Then the time will also have come when practical and systematic treatment can be separated on solid ground.

Analysis of actual court practice, as opposed to court language, has been even more difficult with regard to choice of law than it was in my earlier attempt on the law of jurisdiction. That the American Digest System does not

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include choice of law in its classifications, is well-known. But the marshaling of pertinent case law has been even more seriously impeded by the prevailing custom (abetted by the American Law Institute's Restatement in the Courts) to cite, as authorities for conflicts "rules," decisions that do not state, and often do not even involve a conflict. Such false authorities unhappily constitute the bulk of the case law customarily relied on in our field. They have been noted throughout to facilitate proper concentration on true conflicts decisions. Where such decisions fail to supply a rule, I have so stated and attempted to prepare the way for future solutions by an analysis of the history and of the policy background of each question.

To achieve the purposes of this book it has been necessary to draw primarily on current practice. But many cases predating the past two decades have been retained or at least kept accessible by citation to leading law review comment. And, in view of the scarcity of authority, international conflicts cases have been fully covered. Their partial separation from interstate conflicts cases in Part One has found almost unanimous acclaim. In order to facilitate this separation, "foreign" contacts have again been named "extranational" when related only to foreign countries rather than to both such countries and sister states. References to foreign literature (including that of the Soviet orbit) are extensive but limited to writings which lead to useful analyses of problems similar to those arising in this country. For, the primary concern of this book has remained everyday practice in interstate law.

To my critics go my thanks for whatever improvement I might have been able to achieve either in the present revised edition of Part One on Jurisdiction and Judgments or in the new Part Two on Choice of Law; above all to the reviewers and those colleagues and friends who read chapters bearing on their fields of specialization. The list is long and includes B. N. Armstrong, H. Aufricht, E. L. Barrett, G. W. Bartholomew (Singapore), H. Batiffol (Paris), E. E. Cheatham, Z. Cowen (Melbourne), R. E. Degnan, R. De Nova (Pavia), J. G. Fleming, E. C. Halbach, G. C. Hazard, I. M. Heyman, V. Hoffmeyer (Hamburg), B. D. Inglis (New Zealand), R. W. Jennings, S. Kagel, G. Kegel (Cologne), F. Kessler, W. T. Laube, D. W. Louisell, F. C. Newman, W. L. Prosser, S. A. Riesenfeld, R. B. Schlesinger, H. H. Schreter, D. H. Vernon, P. R. H. Webb (Nottingham), R. J. Weintraub, and A. Yianopoulos. T. Reynolds' ever patient assistance in the library was invaluable. As in the preface to Part One, I should like to conclude by acknowledging my indebtedness to the work of those who, following W. W. Cook and E. G. Lorenzen, have been the pioneers of the new era: D. F. Cavers, B. Currie, R. A. Leflar, A. Nussbaum, E. Rabel, M. Rheinstein, G. F. Stumberg, and H. E. Yntema. How much I owe to A. L. Corbin will appear throughout the chapter on contracts.

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ABBREVIATIONS OF PERIODICALS

In addition to the standard abbreviations of periodicals
published in English

- Abh. IPR:** Abhandlungen zum internationalen Privatrecht
Acta Jur.: Acta Juridica (Budapest)
Ann. Fr.: Annuaire Français de droit international (Paris)
Ann.I.D.I.: Annuaire de l'institut de droit international (Basle)
Arch. Civ. Pr.: Archiv für die civilistische Praxis (Tübingen)
Bull. Tchécosl.: Bulletin de droit tchécoslovaque (Prague)
Clunet: Journal du droit international (until 1914 Journal du droit international privé)
et de la jurisprudence comparée (Paris)
Com. e Studi: Comunicazioni e studi dell'Istituto di diritto internazionale e straniero
dell'Università di Milano
Cuadernos: Cuadernos de derecho anglo-americano (Barcelona)
Cursos: Academia interamericana de derecho comparado e internacional, Cursos
Monográficos
Dir. Int.: Diritto Internazionale (Milan)
Giurispr.: Giurisprudenza comparata di diritto internazionale privato (Rome)
Jahrb. Int. R.: Jahrbuch für internationales Recht (Göttingen)
J. Bl.: Juristische Blätter (Vienna)
J. Dr. Int., see Clunet
J. Dr. Int. Pr., see Clunet
Jug. Rev. Med. Pr.: Jugoslovenska Revija za Medunarodno Pravo (Beograd)
JZ: Juristenzeitung (Tübingen)
Ned. Tijdschr. Int. R.: Nederlands Tijdschrift voor internationaal Recht (Leiden)
NJW: Neue Juristische Wochenschrift (Munich and Berlin)
Neue Justiz: Berlin
Nord. Tidsskr. Int. R.: Nordisk tidsskrift for international ret (Copenhagen)
N. Rev. DIP: Nouvelle revue de droit international privé (Paris)
Öst. J. Z.: Österreichische Juristenzeitung (Vienna)
Öst. Z. Öff. R.: Österreichische Zeitschrift für öffentliches Recht (Vienna)
Rabels Z.: Zeitschrift für ausländisches und internationales Privatrecht (since 1961 Rabels
Zeitschrift) (Berlin and Tübingen)
Rec.: Académie de Droit International, Recueil des Cours (Leiden)
Rev. Crit.: Revue critique de droit international privé (succeeding Revue de droit inter-
national privé, 1905-1934, and Revue critique de droit international, 1934-1947) (Paris)
Rev. Crit. DIP, see Rev. Crit.
Rev. Crit. Dr. Int., see Rev. Crit.
Rev. Cub.: Revista cubana de derecho (Havana)
Rev. Dr. Int. & Comp.: Revue de droit international et de droit comparé (Brussels)
Rev. Dr. Int. & Lég. Comp.: Revue de droit international et de législation comparée
(Paris)
Rev. Esp.: Revista española de derecho internacional (Madrid)
Rev. Hell.: Revue hellénique de droit international (Athens)
Rev. Int. Dr. Comp.: Revue internationale de droit comparé (Paris)
Riv. Dir. Int.: Rivista di diritto internazionale (Milan)
Schw. Jb. Int. R.: Schweizerisches Jahrbuch für internationales Recht (Zurich)
S.J.Z.: Schweizerische Juristen-Zeitung (Zurich)
Svensk Jur.: Svensk Juristtidning (Stockholm)

ABBREVIATIONS OF PERIODICALS

Tidsskr. Rettv.: Tidsskrift for Rettsvitenskap (Oslo)

Travaux: Comité Français de droit international privé, Travaux (Paris)

Ugeskr.: Ugeskrift for Retsvaesen (Copenhagen)

Unidroit: International Institute for the Unification of Private Law (Rome)

Z. Int. Pr. Str. R.: Zeitschrift für internationales Privat-und Strafrecht (Leipzig) (1890-1902, see Z. Int. R., *infra*)

Z. Int. R.: Niemeyers Zeitschrift für internationales Recht (Berlin) (1910-1914, following Zeitschrift für internationales Privat-und öffentliches Recht 1903-1909, and Z. Int. Pr.Str.R., *supra*)

Z. für Rechtsvergl.: Zeitschrift für Rechtsvergleichung (Vienna)

Z. f. Zivilprozess: Zeitschrift für Zivilprozess (Berlin)

Z. Schw. R.: Zeitschrift für Schweizerisches Recht (Basle)

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Rest.: American Law Institute, *Restatement of the Law of Conflict of Laws* (1934, Supplement 1948)
Rest. Continued: American Law Institute, *Restatement of the Law Continued, Conflict of Laws, Tent. Drafts No. 1* (1953); *No. 2* (1954)
Rest. Second: American Law Institute, *Restatement of the Law Second, Conflict of Laws, Tent. Drafts No. 3* (1956); *No. 4* (1957); *No. 5* (1959); *No. 6* (1960); *Draft No. 7* (1962)
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