Albert A. Ehrenzweig
Erik Jayme

PRIVATE INTERNATIONAL LAW

A Comparative Treatise on American International Conflicts Law, Including the Law of Admiralty

VOLUME II. SPECIAL PART

Jurisdiction, Judgments, Persons (Family)

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Volume Two

SPECIAL PART

Jurisdiction, Judgments, Persons (Family)

by

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PREFACE

When the first volume was published in 1967, this General Part was soon to be followed by a Special Part which was to justify and further test the themes underlying the analyses of the "Sources" (ch. II), the Theory (ch. III), the Structure (ch. IV), and the Application (ch. V) of conflicts rules. A chapter on Admiralty Law was designed to prepare the way with that law's simple and straightforward thought and language (ch. VI). But completion of this Special Part was somewhat delayed by the senior author's cours général at the Hague Academy which attempted to combine the general hypotheses of the first volume with previews of specific topics (A.W. Sijthoff 1969), as well as by his "Psycho-analytic Jurisprudence" which was in part designed further to explore the purposes, bases, and techniques of comparative research (A.W. Sijthoff 1971). Two new editions of the "Nutshells" on Jurisdiction and Conflict of Laws were to bring our readers and the authors up to date on American developments.

During this delay it became increasingly obvious that a fruitful exploration of problems and solutions in our wholly international area, if it was not to be undertaken by one equal to Ernst Rabel, the late Master, would have to be shared across the Ocean. Inevitably, the task of one man thus became that of two and will, we hope, remain thus, overcoming life's vicissitudes. The junior author's ten years' concentration on the conflicts law of the family has helped to speed the completion of the present volume which, in addition to Jurisdiction and Judgments, is primarily dedicated to this all-important subject, including related topics from the law of succession. Chapters on Contracts, Torts, and Property will, we hope, conclude the Treatise.

We have maintained the original concept of presenting a *comparative* analysis which, we feel, is indispensable for any international discourse. But we have also continued to use the framework of *American* international conflicts law. For we believe that fruitful comparison is possible only in a projection against a single legal system rather than in a juxtaposition of several laws. Murad Ferid's Französisches Zivilrecht represents such a truly comparative treatment. Leaving aside the author's unique mastery, his achievement appears due to the fact that he has presented his comparison in the language and within the system of his own law. Why we have chosen American law for our own unilateral comparison will be obvious to anybody who during the last decade has followed American developments and foreign reactions to them in addition to those referred to in the preface to the first volume.

As stated in that preface, we have also sought to offer our readers the first attempt at isolating the study of American *international* conflicts law from its interregional counterpart by whose intrusion this study has been so seriously impeded in both orbits. The groundwork for this endeavor was laid in an (interstate) Treatise on the Conflict of Laws of 1962. Since then segregation has become even more pressing.[1] Yet, in addition to case law supporting this proposition, we have also relied on interstate and non-American sources in order to bring closer to mutual understanding both the law of jurisdiction whose very concept has in each orbit remained largely incomprehensible as to the other's usage, and the substantive laws of the family which so sorely require international stability. Our bibliography, if it might appear unduly ambitious, has greatly reduced the length of the footnotes whose brevity has been further enhanced by shortening traditional modes of citation to a serviceable minimum. But there has been an enormous growth in literature as well as case law since the publication of the first volume, and many new editions have made unavoidable repetitions of entries contained in the first bibliography.

The long list in the first preface of expressions of gratitude to critics both gentle and stern should have been continued by gratefully adding friends and foes of the first volume. But we may be permitted to limit ourselves to a general acknowledgment, though not without emphasizing our special indebtedness to Kurt Siehr's thoughtful monograph on what is so often misstated elsewhere as our "lex fori theory".[2] To him and his co-critics we owe it above all if we should have succeeded in reducing some of the perhaps over-enthusiastic propositions of the General Part to more modest dimensions in specific contexts, and in avoiding some of many other pitfalls which appeared to threaten our somewhat novel approach. It is difficult, also, to overstate the gain each author has derived from his studies on the other's home ground. This invaluable exchange was made possible by the International Legal Studies program of Boalt Hall, "Fulbright," and the Deutsche Forschungsgemeinschaft. Finally, the faithful and able help we have received from our assistants Leer and Robertson and our secretaries Pott, Rosenthal, and Snodgrass, should not remain anonymous. To our publisher friends in both worlds, old and new, again our affectionate thanks.

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E.J.

1. This pressure has been increased by the publication, in 1971, of the Second Restatement of the American Law Institute. Its general emphasis upon general formulas is controversial even in the interstate area. See e.g. Ehrenzweig, Desperanto, supra s. 27. That this emphasis, contrary to the Institute's original theory (supra s. 27 note 68), has been extended to international conflicts (RS § 10), has a crucial bearing on many themes of this book. For some insight into the genesis of the Institute's approach in this respect, see Proceedings, 1965, pp. 240-244. In favor of the segregation here advocated, see e.g. Leflar 10-11; Scoles, passim; Cramton and Currie 296-297.

2. See infra s. 244 note *.

TABLE OF CONTENTS

Chapter VIII

PERSONS AND FAMILY

First Subchapter: General Theory

INTRODUCTION

158-1. *Method, scope, and organization.* Significantly, Continental doctrine, while largely lacking the stimulation of everyday concern, has excelled in an analysis of the "règles générales" of conflicts law.[1] Equally significantly, scholars in the Commonwealth and the United States, while largely lacking the academic stimulus of an age-old tradition, have drawn on immense laboratories of daily experience in the solution of individual problems. The present volume attempts to learn from the questions raised and the answers given in both orbits, by combining the pragmatic approach of an American casebook with the analytical structures of European treatises.

Certain technical problems have thus become unavoidable. In the General Part of this work it was suggested that, in the absence of legislative provisions and settled judicial rules stating abstract propositions, *analytically* all rules of private international law would have to be treated as creating specific exceptions from each spatially unlimited substantive rule of the forum (ss. 30-50). Since such a treatment would, however, be quite inadequate for *practical* needs, this Special Part will be based on traditional general classifications of subject matter, even at the risk of piecemeal repetitions of some of those theoretical considerations which were presented as a whole in the General Part.

A comparison between Commonwealth, civilian[2] and American treatises shows a wide variety in the scope and organization of their Special Parts. This is largely due, we believe, to historical accident whose results should not be perpetuated. Thus, it is still the usage in most Romance countries to begin with the law of nationality. But this technique, far from being required by theoretical considerations, may, in addition to ancient attitudes toward the alien,[3] be due to the national pride which found its lasting expression in

1. See e.g. most "Cours Généraux" of the annual series of lectures in the Hague Academy of International Law, beginning with Pillet in 1925. For additional citations, see Recueil s.l. Indeed, many continental and other civil law treatises are limited to "General Parts". See e.g. Aguilar Navarro; de Castro; Dölle, Duncker-Biggs; Herráu Medina; Neuhaus; Quadri; Sperduti; Valladão; Vitta.

2. We shall, throughout, refer to the "civil law" as opposed to the common law, the former including for our purposes the conflicts laws of the socialist countries. Use of the term "continental law" would have been only justified if we had excluded the important African, Asian, and Latin-American jurisdictions, and use of the term "Romanist laws" [Hazard, Communists and their Law (1969)] appears to overemphasize one element characteristic of the civil law orbit in varying degrees. See generally, Jurisprudence ch. 2.

3. See e.g. Batiffol-Lagarde s. 9.