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DICEY, MORRIS & COLLINS
ON THE CONFLICT OF LAWS



戴雪、莫里斯和柯林斯
论冲突法

(第14版)

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〔英〕劳伦斯·柯林斯爵士 主编



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ON
THE CONFLICT OF LAWS

FOURTEENTH EDITION

UNDER THE GENERAL EDITORSHIP OF
SIR LAWRENCE COLLINS
LL.D. (Cantab.), F.B.A.

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PREFACE

The editorial team continues to have the great responsibility of maintaining the standard of what Lord Goff of Chieveley very generously described in the House of Lords as “the prince of legal textbooks.” Professor Dicey, and even Dr Morris, could not of course have foreseen the huge impact which a supranational body of law, namely European law, would have on the subject of the conflict of laws. Since the last edition was published in 2000, the Judgments Regulation (Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), “Brussels II *bis*” (Council Regulation (EC) 2201/2003 on the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility) and Council Regulation (EC) 1346/2000 on Insolvency Proceedings have come into force, and there has been a raft of statutory instruments giving effect to Directives in the fields of consumer protection and insurance.

That the impact of European law is not by any means entirely for the good is illustrated by the adverse reaction in England to the controversial decisions of the European Court in Case C-116/02 *Erich Gasser GmbH v MISAT srl* [2003] E.C.R. I-14693, [2005] Q.B. 1; Case C-159/02 *Turner v Grovit* [2004] E.C.R. I-3565, [2005] 1 A.C. 101; and Case C-281/02 *Owusu v Jackson* [2005] E.C.R. I-1383, [2005] Q.B. 801. The criticism which has been widely voiced is that the effect of these decisions is (inter alia) to remove the beneficial powers of the English court to grant injunctions to prevent abusive and oppressive foreign proceedings, or proceedings brought in breach of English jurisdiction agreements.

These and other developments have led to extensive re-writing and amplification for this edition. The main changes are these:

- (1) The section on comity in Chapter 1 has been expanded.
- (2) The section on the enforcement of public law and the act of state doctrine in Chapter 5 has been re-ordered and expanded.
- (3) Chapter 8 includes new material on the European Union Service Regulation (Council Regulation (EC) 1348/2000) and the European Union Taking of Evidence Regulation (Council Regulation (EC) 1206/2001).
- (4) Chapters 11, 12, 13 and 14 have been revised extensively to take account of the Judgments Regulation.
- (5) Chapter 16 has been re-ordered and modernised, and contains new treatments of the governing law, anti-suit injunctions in arbitration, and international investment arbitration.
- (6) Chapter 17 has been revised to deal with the Gender Recognition Act 2004 and the Civil Partnership Act 2004.
- (7) Chapter 18 has been expanded to deal with Brussels II *bis*, and the Civil Partnership Act 2004.

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- (8) Chapter 19 has been revised to take account of Brussels II *bis*, and the many new cases on international child abduction.
- (9) Chapter 21 has been rewritten to take account of the Mental Capacity Act 2005 when it is brought into force.
- (10) Chapter 29, on trusts, has been substantially revised and rewritten.
- (11) Chapters 30 and 31 have been substantially rewritten to take account of Council Regulation (EC) 1346/2000 on Insolvency Proceedings.
- (12) Chapter 33, on particular contracts, has been revised in the light of extensive legislation, mainly derived from European law, including: the directive on electronic commerce, implemented by the Electronic Commerce (EC Directive) Regulations 2002; the directive on distance contracts, implemented by the Consumer Protection (Distance Selling) Regulations 2000; the directive on certain aspects of the sale of consumer goods and associated guarantees, implemented by the Sale and Supply of Goods to Consumers Regulations 2002; and the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001.
- (13) Chapter 34, on restitution, has been substantially revised and rewritten.
- (14) Chapter 35, on torts, has been expanded in the light of the developments in the case law on the Private International Law (Miscellaneous Provisions) Act 1995, Pt III, and to take account of the impact of the internet on defamation claims.
- (15) Chapter 36, on foreign currency obligations, has been re-ordered and modernised.

Unfortunately, illness prevented the continued participation of Professor Jonathan Hill in this edition. Professor Jonathan Harris and Professor Campbell McLachlan have joined the team of editors. The responsibility of the editors for this edition is as follows: Professor Briggs is responsible for Chapters 2, 3, 4, 9, 12, 14, 24, 26, and 28; Professor Harris is responsible for Chapters 7, 13, 15, 22, 23, 27, 29 and 34; Professor McClean is responsible for Chapters 8 (the sections on judicial assistance and security for costs), 17 to 21, and Rule 219 in Chapter 33; Professor McLachlan is responsible for Chapter 16 (jointly with the General Editor) and 36; Professor Morse is responsible for Chapters 30, 31, 33 (except Rule 219) and 35. In addition to my overall responsibility as General Editor, I am responsible for Chapters 1, 5, 8 (the section on *Mareva* or freezing injunctions), 10, 11, 16 (jointly with Professor McLachlan), 25 and 32.

As before, we have had the advantage of much advice and information from friends and colleagues. We should mention especially Professor Emmanuel Gaillard, Steven Gee QC, Dr Pierre Karrer, and Alan Redfern; and also Dame Mary Arden; Professor Bernard Audit; Professor Piero Bernardini; Martin Bernet; Rachel Boyd; Kate Brookson-Morris; Joanna Campbell; Philip Croall; Professor James Fawcett; Professor Ian Fletcher; Arabella Foster; Judith Gill; Professor A.G. Guest; Professor Trevor Hartley; Daniel Kalderimis; Sir David Kitchin; Professor François Knoepfler; Yasmine Lahlou; Dr Julian Lew QC; Sir David Lloyd Jones; Arthur Marriott QC; Katy Marsh; Professor William

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W. Park; Oliver Parker; Jan Paulsson; Ariella Puterman; Nigel Rawding; Professor Michael Reisman; The Hon. Stephen Schwebel; Audley Sheppard; Rt Hon Sir Christopher Staughton; Patrick Taylor; Robert Turner, the Senior Master; Professor Hans van Houtte; Professor Frank Vischer; Professor Janet Walker; and Nell Wiseman.

We also acknowledge the administrative assistance of Kelly Chilton, A.D. Parkinson MBE, Lorraine Stylianou, and Tracy Warbrick, and the valuable efforts of the staff of the publisher in maintaining the technical excellence of the book.

This edition endeavours to state the law as at January 2, 2006. Later developments (including the awaited decision of the House of Lords in *Harding v Wealands*) will be dealt with in the first supplement.

Lawrence Collins
June 2006

BIOGRAPHICAL NOTE

ALBERT VENN DICEY, the author of this book, was born on February 4, 1835. He was educated at Balliol College, Oxford, where he took a first in Honour Moderations in 1856 and a first in Greats in 1858; he was also President of the Union. He was elected a Fellow of Trinity College, Oxford, in 1860, and held his Fellowship until his marriage in 1872.

He was called to the Bar by the Inner Temple in 1863 and for some years “devilled” for Sir John Coleridge, afterwards Solicitor-General and Attorney-General. In 1870 he published his first law book, *Parties to Actions*, which (it is interesting to observe) was arranged in the form of rules and illustrations. His practice at the Bar was never very lucrative, though in 1876 he was appointed Junior Counsel to the Commissioners of Inland Revenue, a position which he held until 1890, when he took silk. In 1879 he published his second law book, on Domicil.

From a very early age he was intensely interested in politics. From family tradition and associations he belonged to the Whig as opposed to the Radical wing of the Liberal party. He was a convinced Free Trader. He ardently supported the cause of the North in the American Civil War, and the cause of Italian unity. He disliked the autocratic pretensions of Louis Napoleon and rejoiced in his fall. When Mr Gladstone split the Liberal party in two over the Home Rule question in 1885–1886, Dicey identified himself with the Unionist cause, and was prominent in its support from then until 1921. He wrote many pamphlets against Home Rule, and was an active speaker on Unionist platforms. This—the ruling political passion of his later years—naturally brought him into association with leading Conservative statesmen, whom hitherto he had tended to regard with suspicion. But he never lost his faith in Liberalism. “I am an old, an unconverted, and an impenitent Benthamite” he declared in 1913.

In 1881 the Vinerian Professorship of English law in the University of Oxford fell vacant, and after some hesitation Dicey resolved to become a candidate. He was duly elected in the following year. This Chair, of which Blackstone had been the first occupant, carried with it a Fellowship at All Souls College, and it was here that Dicey’s most lasting work was done. He chose as the subject of his inaugural lecture the question “Can English law be taught at the Universities?” to which he replied with a vehement if closely reasoned affirmative. He admitted the immense advantages of reading in chambers, but argued that at the universities “a student can be taught to regard law as a whole, and to consider the relation of one part of English law to another”; that at the universities “can be taught the habit of looking upon law as a series of rules and exceptions, and of carefully marking off the exact limits of ascertained principles.” In 1885 he published his *Law of the Constitution*, a book which was based on his Oxford lectures, and made his fame, not only in England but also in France and the United States, as the leading constitutional lawyer of the day. In 1898 he was invited to deliver a course of lectures at the Harvard Law School, the fruit of which was published in 1905 as *Law and Opinion in England*.

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His *magnum opus*, however, was *The Conflict of Laws*, at which he was working from 1882 onwards, and which was first published in 1896. In a letter to a friend he declared in 1922 that “a successor of Blackstone should show that of one branch of English Law at least he could speak with authority.” Shortly after the publication of the first edition, he thus described the book in a characteristic letter to his friend James Bryce: “In outward look it is like Story. I cannot flatter myself there is much other resemblance. For after reading much on the Conflict of Laws, I am well assured that Story and Savigny have written the only great books on the subject and, considering the state of legal speculation in Story’s time and country, I am not sure that his is not the greater achievement of the two. If I had Westlake’s knowledge, or if Westlake could have expressed himself as clearly as I can, a considerable book might have been produced. As it is, my clearness makes patent my errors. He has, I must add, acted with great generosity in giving me help when asked for and, if I had had more impudence, I believe I might have asked for and obtained much more. . . . My Introduction I like and some of the appendices. I doubt if there is much else really good which is not to be found in my *Domicil*, but I am tired and not quite a fair judge. Still, my impression is that the ‘practical’ man will prefer Foote, and the theorist Story or Savigny. What a queer thing life is. Why should I ever have become involved in this conflict of laws?” Four years later he wrote: “It is unlucky that the endless labour expended on the *Conflict of Law* cannot, from the nature of things, ever be visible to my Oxford friends to whom I principally wish, so to speak, to vindicate my work. If they say the labour was misspent, I more than half, though not completely, agree with them. My faith in digests has declined.”

In 1907 the University of Oxford conferred on Dicey the degree of Honorary D.C.L., and in 1909 he resigned the Vinerian Chair, having unquestionably brought more lustre to it than any of his predecessors since Blackstone. He still retained his interest in teaching and in the Conflict of Laws, and in the following year All Souls College created especially for him a Lectureship in Private International Law, which he held until 1913. The duties of the post included giving informal instruction as well as lecturing, and he was thus brought into close contact with a number of under-graduates, largely Rhodes scholars, whose society he greatly enjoyed. Many of the Rhodes scholars were Americans, and he felt that his teaching created a new link with the United States. He died on April 7, 1922, at the age of 87, a few days after the publication of the third edition of this book.

J. H. C. M.

BIOGRAPHICAL NOTE

JOHN HUMPHREY CARLILE MORRIS, “whose contribution to the conflict of laws has excelled even that of his great predecessor. A. V. Dicey” (Lord Denning M.R.¹), the General Editor of the 6th to 10th editions of this book and whose name appeared as co-author from the 8th edition in 1967, was born in 1910. He was an undergraduate of Christ Church, Oxford, and took firsts in the Final Honour School of Jurisprudence and in the B.C.L. and was elected Eldon Scholar. In 1934 he was called to the Bar by Gray’s Inn, and following pupillage he practised for a short time in the chambers of Sir Andrew Clark before taking up a Fellowship at Magdalen College, Oxford in 1936, which he retained until his retirement in 1977, when the College elected him to an Honorary Fellowship. From 1951 to 1977 he was Reader in the Conflict of Laws at Oxford University. During that time, and until his death, he achieved and retained a distinction in teaching and scholarship, particularly in the conflict of laws, which earned him worldwide renown and respect and the devotion of generations of his Oxford pupils.

Dicey’s great work on the Conflict of Laws, which had, following his death in 1922, suffered a considerable decline, was revived under John Morris’ general editorship in 1949. In 1945 he was invited to undertake the sole editorship but (as he put it in the preface to the 6th edition) by October 1946 he felt that the task was beyond his strength and he therefore invited seven learned friends to help him. Those friends were Zelman (later Sir Zelman) Cowen, Rupert (later Sir Rupert) Cross, Otto (later Sir Otto) Kahn-Freund, Dr (later Professor) K. Lipstein, Dr (later Professor) Clive Parry, Mr R.S. Welsh and Professor Ben Wortley. In the preface to the 6th edition he regretted that no practitioner had felt able to accept his invitation to be an editor; but this deficiency was remedied in later editions, among whose editors were two practising barristers (who subsequently became High Court judges, and then members of the Court of Appeal, and one of whom became a distinguished Law Lord) and one practising solicitor (subsequently appointed a High Court judge). His wife, whom, as Jane Kinch, he had married in 1939, was a great support to him and had the unique experience of contributing to the accuracy of the work by reading successive editions aloud to the general editor.

There is no doubt that, even among these distinguished co-editors, it was John Morris’ influence as general editor which was paramount in re-establishing the book as the leading work on the subject in the Commonwealth. In succeeding editions the influence of Dicey (from 1967, Dicey and Morris) grew, because under his guidance it kept up with, and anticipated, the great changes in the law caused by the 20th century revolution in communication and travel, and by new social attitudes to family life. As Lord Scarman put it

¹ *The Hollandia* [1982] Q.B. 872, 884 (C.A.). See for an appreciation of his life and work, Professor G. Treitel in (1984) 55 B.Y.I.L. p. ix–xiv; Dr P. M. North in (1988) 74 *Proceedings of the British Academy*, pp. 443–482.

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in the foreword to an entire issue of the *International and Comparative Law Quarterly* in 1977 devoted to essays in honour of John Morris, “the depth and range of his learning coupled with his gift of critical analysis brought the flattering consequence that what Dicey said on a point mattered as much to the judges who made the case law as did their case law to the editor of Dicey”.²

He was also the author of several important articles in the conflict of laws and in property law. Among the most influential in the former field were those on the proper law of contract in 1940, which was co-authored by Professor Cheshire, who acknowledged, however, that it was conceived and written by John Morris³; on the choice of law clause in statutes⁴; on family law, especially polygamy⁵ and recognition of foreign divorces⁶; on property, especially transfer of chattels⁷ and intestate succession to land.⁸ No article was more influential than “The Proper Law of a Tort”,⁹ which had a profound effect on American case law and the American Law Institute Restatement (Second) of the Conflict of Laws.

In addition to his articles and work on this book, John Morris produced four editions of a case-book on the conflict of laws first published in 1939, a book of cases and materials (with Dr P. M. North, now Sir Peter North) in the year of his death, and an influential students’ text book on the Conflict of Laws in 1971, the third edition of which was also prohibited in the year of his death. He was editor of three editions of *Theobald on Wills* and the general editor of one edition of *Chitty on Contracts*, as well as co-author (with W. Barton Leach) of a well-known book on the Rule against Perpetuities.

Although he was no seeker of honours, the excellence of his work, and his influence on the law, was marked by a series of distinctions: he was awarded the degree of Doctor of Civil Law by Oxford in 1949; he was elected an Associate Member of the Institute of International Law (1954); Associate Member of the American Academy of Arts and Sciences (1960); Fellow of the British Academy (1966); Honorary Bencher of Gray’s Inn (1980); Queen’s Counsel (1981). But unlike Dicey, he never became Vinerian Professor at Oxford. As the author (rumoured to be a highly reliable source) of his obituary in *The Times* put it, “in 1964 the Vinerian Chair of English Law at All Souls College fell vacant, and Morris was strongly tipped for the succession. The Chair was offered to him, but to the surprise of his friends and many academic lawyers he declined it. He was devoted to Magdalen, which he served long and faithfully as a Fellow, Clerk to the College and (for one year) as Vice-President and could not bear the thought of migrating to All Souls, for which he had a life-long antipathy.” As a result John Morris was entitled to the title of professor only twice, once when he was visiting professor at Harvard Law School in 1950–1951, and latterly when, despite his life-long devotion to

² (1977) 26 I.C.L.Q. 701.

³ (1940) 56 L.Q.R. 320, 339. See also (1950) 3 Int. L.Q. 197.

⁴ (1946) 62 L.Q.R. 170. See also (1979) 95 L.Q.R. 59.

⁵ (1953) 66 Harv. L.Rev. 691, first published in *Festschrift für Martin Wolff* (1952), p. 287.

⁶ (1946) 24 Can. Bar Rev. 73; (1952) 29 B.Y.I.L. 283; (1975) 14 I.C.L.Q. 635.

⁷ (1945) 22 B.Y.I.L. 232.

⁸ (1969) 85 L.Q.R. 339. See also (1937) 18 B.Y.I.L. 32 (renvoi); (1938) 54 L.Q.R. 78 (marriage settlements).

⁹ (1951) 64 Harv. L.Rev. 884. See also (1949) 12 M.L.R. 248.

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Oxford, he spent a happy year in 1978–1979 as Goodhart Professor at Cambridge University and Fellow of Gonville and Caius College.

He completed work on the last supplement to the 10th edition only a few days before his death on September 29, 1984, and on September 19 he wrote “It is with relief, not untinged with emotion, that I lay down the burden of the task I assumed as long ago as January 1945. I have improved the book—no question about that—and perhaps prevented it from dying a natural death.”

L. A. C.

TABLE OF FOREIGN CASE REFERENCES

A.	Atlantic Reporter (USA)
Abb.N.C.	Abbott's New Cases, New York (USA)
A.D.	Appellate Division (South Africa)
A.I.R.(All).	All India Reports (Allahabad)
Ala.	Alabama Reports (USA)
A.L.R.	American Law Reports
A.L.R.	Australian Law Reports
Alta.L.R.	Alberta Law Reports (Canada)
Argus L.R.	Argus Law Reports (Australia)
Ariz.	Arizona Reports (USA)
Atl.	Atlantic Reporter (USA)
A.T.P.R.	Australian Trade Practices Reports
B.C.R.	British Columbia Reports (Canada)
Cal.	California Reports (USA)
Cal.App.	California Appellate Reports (USA)
Can.S.C.R.	Canada Supreme Court Reports
C.B.R.	Canadian Bankruptcy Reports
C.L.R.	Commonwealth Law Reports (Australia)
Conn.	Connecticut Reports (USA)
C.P.D.	Cape Provincial Division (South Africa)
D.	Session Cases, 2nd Series (Dunlop) (Scotland)
Del.Ch.	Delaware Chancery Reports (USA)
D.L.R.	Dominion Law Reports (Canada)
E.A.	East African Law Reports
E.D.C.	Eastern Districts Court (South Africa)
E.D.L.	Eastern Districts Local Division (South Africa)
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F.	Session Cases, 5th Series (Fraser) (Scotland)
F.	Federal Reporter (USA)
F.L.C.	Family Law Cases (Australia)
F.L.R.	Federal Law Reports (Australia)
F.Supp.	Federal Supplement (USA)
Fam.L.R.	Family Law Reports (Australia)
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Hill	Hill's New York Reports (USA)
Ill.	Illinois Reports (USA)
Ill.App.	Illinois Appeal Reports (USA)
I.L.R.Bom.	Indian Law Reports (Bombay)
I.L.R.Calc.	Indian Law Reports (Calcutta)
I.L.R.M.	Irish Law Reports Monthly
Iowa	Iowa Reports (USA)
I.R.	Irish Reports
Ir.C.L.	Irish Common Law Reports
Ir.L.T.	Irish Law Times Reports
Kan.	Kansas Reports (USA)
L.C.J.	Lower Canada Jurist
L.C.R.	Lower Canada Reports
L.R.I.A.	Law Reports Indian Appeals
L.R.Ir.	Law Reports Ireland
M.	Session Cases, 3rd Series (Macpherson) (Scotland)
Macq.	Macqueen's Reports (Scotland)

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Man.L.R.	Manitoba Reports (Canada)
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Md.	Maryland Reports (USA)
Mich.	Michigan Reports (USA)
Milw.	Milward's Ecclesiastical Reports (Ireland)
Minn.	Minnesota Reports (USA)
Misc.	Miscellaneous Reports, New York (USA)
N.B.Eq.	New Brunswick Equity Reports (Canada)
N.B.R.	New Brunswick Reports (Canada)
N.E.	Northeastern Reporter (USA)
N.H.	New Hampshire Reports (USA)
N.Ir.	Northern Ireland Reports
N.J.	New Jersey Reports (USA)
N.L.R.	Natal Law Reports (South Africa)
N.P.D.	Natal Provincial Division (South Africa)
N.S.R.	Nova Scotia Reports (Canada)
N.S.W.L.R.	New South Wales Law Reports (Australia)
N.S.W.R.	New South Wales Reports (Australia)
N.W.	Northwestern Reporter (USA)
N.Y.	New York Court of Appeals Reports (USA)
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Q.L.R.	Quebec Law Reports
Qu.K.B.	Quebec Reports King's Bench
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Que.S.C.	Quebec Superior Court Reports
R.	Session Cases, 4th Series (Rettie) (Scotland)
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R.I.	Rhode Island Reports (USA)
S.	Session Cases, 1st Series (Shaw) (Scotland)
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S.C.	Supreme Court Reports (Cape of Good Hope)
S.C.R.	Canadian Supreme Court Reports
S.E.	Southeastern Reporter (USA)
Sing.L.R.	Singapore Law Reports
S.L.R.	Scottish Law Reporter
S.L.T.	Scots Law Times
So.	Southern Reporter (USA)
S.R.N.S.W.	State Reports New South Wales (Australia)
St.R.Qd.	State Reports Queensland (Australia)
S.W.	Southwestern Reporter (USA)
Terr.L.R.	Territories Law Reports (Canada)
T.P.D.	Transvaal Provincial Division (South Africa)
T.S.	Transvaal Supreme Court (South Africa)
U.C.C.P.	Upper Canada Common Pleas
U.C.Q.B., U.C.R.	Upper Canada Queen's Bench
U.S.	United States Supreme Court Reports
V.L.R.	Victoria Law Reports (Australia)