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PART I
STARTING OFF

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CHAPTER 1

Introduction

§ 1 Private international law

As explained in the Preface, this book is based on the traditional subject of private international law, but goes beyond it and treats it in a new way. At least in England (see § 2, below, for other countries), private international law has traditionally been concerned with three topics:

- international or inter-territorial jurisdiction of courts in civil and commercial litigation;
- choice of law (whether the law of another State or territory should be applied); and
- recognition and enforcement of foreign judgments.

Certain related matters are also considered – for example, the ways in which the content of foreign law may be established (proved).

§ 2 Names and what they mean

In England, this subject has traditionally been called 'conflict of laws', a name that goes back at least as far as the seventeenth century, when the Dutch jurist Huber called his book *De Conflictu Legum* (*On the Conflict of Laws*).[1] This is the name of the leading present-day practitioners' textbook.[2] It is also the name under which cases, statutes and other materials on the subject are usually indexed.[3] In deference to foreign terminology, however, the subject also became known as 'private international law',[4] the name under which it is most often known on the Continent, especially (today) in EC documents. In England, 'conflict of laws' and 'private international law' mean exactly the same thing. However, the word 'international' in the latter name is misleading in one respect: the subject is just as much concerned with relations between different legal systems *within* a State – between England and Scotland, for example – as relations between different

1 Ulrich Huber, *De Conflictu Legum Diversarum in Diversis Imperiis*. Huber lived from 1636 to 1694.
2 Dicey, Morris and Collins, *The Conflict of Laws* (14th edn, Sweet & Maxwell, London, 2006).
3 For example, in *Current Law*.
4 This is the title of another well-known book, Cheshire, North and Fawcett, *Private International Law* (14th edn, Oxford University Press, Oxford, 2008).

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States. This is even more evident in Canada, Australia and the United States, where most cases concern inter-provincial or inter-state[5] conflicts.

In the United States, 'conflict of laws'[6] is the normal name of the subject. According to the American Law Institute's *Restatement of the Law Second: Conflict of Laws*,[7] the subject covers the same three areas as in England: jurisdiction, choice of law, and foreign judgments.[8] In law schools, however, courses on conflict of laws often deal only with choice of law. Jurisdiction and (inter-state) recognition of judgments are then dealt with in courses on civil procedure.

In the United States, conflict of laws is concerned mainly with relations among the different states of the United States. This is the context in which the question usually arises. However, the subject also covers cases involving foreign States. The title 'private international law' is usually given to books and law-school courses only when it is wished to emphasize the international, rather than inter-state, aspects of the subject. Matters falling on the borderline between public and private international law – for example, sovereign (State) immunity – may also be emphasized.

In the United States (as in other common-law countries), the same choice-of-law rules apply to international and to inter-state conflicts. This is also largely true for jurisdiction, although there is an important constitutional element in these rules. The recognition of judgments, however, is a different matter. There is one set of rules, based on the Full Faith and Credit Clause of the US Constitution, for the recognition of sister-state judgments, and another set, based on the common law and on statute, for the recognition of foreign-State judgments.

In France, *droit international privé* (private international law) is the accepted name for the subject. It is regarded as being made up of two main parts, *conflits de lois* (conflict of laws) and *conflits de juridictions* (jurisdictional conflicts).[9] The former is choice of law and the latter covers jurisdiction and the recognition of foreign judgments. This terminology can cause confusion: French lawyers often think that 'conflict of laws' in English means *conflits de lois* and are surprised to be told that it includes what they call *conflits de juridictions*.

In Germany, *Internationalesprivatrecht* (international private law) covers only choice of law. Jurisdiction and the recognition of judgments fall under a completely different subject, *Internationales Zivilprozessrecht* (international civil-procedure law). This terminology is more logical, but it has the effect of separating matters that are closely related.

In this book, British terminology will be adopted.

5 In this book, 'state' with a lower-case 's' refers to a sub-unit of a State in the international sense – for example, an American or Australian state – while 'State' with a capital 'S' refers to a State in the international sense.
6 Sometimes shortened to 'conflicts law'.
7 American Law Institute, *Restatement of the Law Second: Conflict of Laws* (American Law Institute Publishers, St Paul, MN, 1971).
8 *Ibid*., pp. 2–3.
9 Nationality law and the status of aliens (foreigners) are also regarded as part of private international law.

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§ 3 What is it based on?

Throughout most of its history, writers have sought to base conflict of laws on something more substantial than ordinary law. It was somehow felt that a set of rules that determine how far the legal system of a State can extend internationally must derive its authority from something more elevated than that legal system itself. The very name 'private international law' suggests that it is a branch of international law. Despite its name, however, private international law is just a branch of the ordinary law of the land: it has no special authority. The only exceptions are the limited number of treaties or conventions on the subject, and the increasing number of EU instruments that deal with it.[10] In federal States, there are sometimes federal rules on it, but often it is just part of the law of the units. In the US, for example, it is mainly state law.

This means that there is no one system of conflict of laws for the whole world: each country has its own system, and that system will differ from the systems in other countries. This in turn can generate conflicts between conflict systems: courts in two different countries might each claim the right to decide a case; each might say that *its* law applies. The resulting tangles are illustrated in some of the cases set out in later chapters.

§ 4 International uniformity of result: a grand objective?

Some theorists argue that private international law has one grand objective, an objective so important that it eclipses all others. This may be called 'international uniformity of result'. It is the idea that the result of legal proceedings should be the same irrespective of the country in which they are brought. Friedrich Carl von Savigny, the famous German jurist of the nineteenth century, made this objective the linchpin of his system.[11] His idea was that this could be achieved if all States applied the same choice-of-law rules. He thought they would then apply the same substantive law to any given case. This, he argued, would produce uniformity of outcome. Savigny therefore considered that the test of a good choice-of-law rule was whether it would commend itself to the nations of the world for universal adoption.[12]

If this were true it would mean that jurisdiction would become unimportant, something that would justify the disdain for jurisdictional matters felt by many conflicts writers in the past. However, it is not true: the outcome of a case depends much more on jurisdiction than choice of law. This has become clearly apparent, at least in leading centres of litigation, in recent times. It explains why parties will fight tooth and nail on jurisdictional issues; then, once these

10 Public international law may impose limits on what a State can do, though these limits are rarely in issue. Exceptions are considered where relevant, especially in Part VI of the book.
11 An English translation of his book is available: *Private International Law: A Treatise on the Conflict of Laws, and the Limits of their Operation in Respect of Place and Time* (translated by William Guthrie, Edinburgh, 1869).
12 *Ibid*., p. 115.

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are decided, settle the case without further litigation. This in turn accounts for the fact that in England today there are far more reported cases on international jurisdiction and procedure than on choice of law.

There are various reasons why choice of law has such a limited influence on the outcome of litigation. The first is that it never applies to procedure: the decision as to where the case will be litigated also determines what procedure will apply. This could hardly be otherwise: it would be hopelessly impractical for a court to decide a case according to foreign procedure. However, this is a vital question: procedure is often more important than substantive law in determining the outcome of litigation.

First of all, if a person wants to litigate, he has to find a lawyer. Whether he can afford a lawyer might depend on the system of legal fees in operation in a particular country. Is legal aid[13] possible? Are contingent or conditional fees allowed?[14] Must the losing party pay the fees of the winning party's lawyer?[15] Choice of law never applies to these rules: they always depend on the law of the country in which the proceedings are brought.

Obtaining evidence is another vital question. The claimant has to prove his case. If he cannot obtain the necessary evidence, he cannot bring the action. Methods of obtaining evidence prior to trial (and at the trial itself) differ to a considerable extent from country to country. The United States stands at one end of the spectrum. There, it is normal to have extensive discovery before trial. Parties and non-parties alike can be summoned to a hearing where they will be questioned on oath on anything relating to the case. No judge will be present, but, if they refuse to answer, court proceedings can be brought to require them to do so. The depositions that result will often give a party the evidence he needs to bring the action. Records and other written documents must be produced. Though burdensome to the persons involved, US pre-trial discovery is a potent weapon for obtaining the evidence needed to bring (or defend) legal proceedings.

In England, pre-trial disclosure (discovery) is much less extensive, but parties are still required to exchange relevant documents before trial. In a few special cases, non-parties can be required to produce evidence. In some non-common-law countries, on the other hand, there is often no way of obtaining evidence before trial, unless the person concerned is willing to give it. In the case of products liability, for example, it is far more difficult to bring proceedings in such a country than in the United States, where the manufacturer will be required to disclose internal documents on the design and testing of the product.

Another difference between US procedure and that in many other countries is that civil trials are usually held with a jury. In a personal-injury action, for example, the jury will determine the level of the damages. Since juries tend to

13 This is the system under which the lawyer is paid out of public funds if the litigant could not otherwise afford to bring proceedings.
14 This is the system where the client pays the lawyer only if he wins the case. Under the American contingent-fee system, the fee may be a percentage of the award. In some countries, conditional and contingent fees are forbidden on the ground that, if the lawyer has a financial interest in the outcome of the case, he might be tempted to act dishonestly.
15 This is true in most European countries, but not in the United States.

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identify with the victim, they usually give much higher awards than judges. Personal-injury awards can be five or ten times higher in the United States than in some European countries. For this reason, it is not unknown for major manufacturers in big cases – aircraft crashes, for example – to offer to admit liability if the claimant will agree to have the case heard in Europe, rather than in the United States. On the other hand, patent holders are terrified of the prospect that the validity of valuable patent rights will be decided by juries with no technical knowledge, rather than by a judge with specialist expertise.

These procedural differences alone make jurisdiction more important than choice of law. However, even where the case turns on a point of law, jurisdiction is still more outcome-determinative than choice of law. Deciding whether the law of State X or State Y is to apply to a particular issue is only one step (and a fairly small step) in deciding the outcome of the case. Even if two courts apply the law of the same country to decide a legal controversy, they may disagree as to what that law is. If it is foreign law, it will be particularly difficult to determine it accurately.

Even if they agree on the actual rules, they may apply those rules differently. Legal rules are not mathematical formulae: they do not have a clear and precise meaning. They are deliberately open-textured. They are intended to leave the court a certain measure of flexibility. This is to enable it to adapt the rule to the circumstances of the case. Whoever made the rule cannot foresee all possible circumstances in which it will be applied. There will always be some circumstances in which any given rule will produce injustice. Most legal rules have a certain degree of 'give', but some leave so much to the court that the interpretation and application of the rule are more important than the rule itself. This is true, for example, where the rule uses concepts like reasonableness, good faith, fault, negligence, causation or intention. Differences in the interpretation of these concepts can account for the different outcomes.

These differences in interpretation are not always due to random factors. The general 'world outlook' – the attitudes and values – of the court will often play a decisive part. To take an example from the area of family law, it is well known that in child-custody cases the mother will usually be in a better position in Western countries, while the father will be better situated in Islamic countries. This is because of differing perceptions of the role of men and women in society. In the field of commercial law, courts in some countries are more likely to enforce the contract according to its terms, while those in other countries may be more concerned with protecting a party from unfairness.

In addition to differences of attitude, there are also differences in competence and integrity. Only relatively few countries in the world have judges who are fully able to understand the technical aspects of patent-licensing agreements, international loan agreements, shipping contracts and reinsurance contracts: in many countries, the courts will not understand what the agreement is all about. In some countries, courts are routinely biased against foreigners, especially major corporations doing business with locals. In many countries, corruption is a problem. These are additional reasons why jurisdiction is so important.

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Uniform choice-of-law rules are irrelevant if the court is incompetent, biased or corrupt.

For all these reasons, attempts to attain international uniformity of result are futile. However, they are more than futile: they can be positively harmful. In attempting to frame choice-of-law rules capable of universal acceptance, writers and courts avoid any policy content in case the policy is unacceptable to some States. They also tend to view the exercise as one of delimiting the application of a legal system in space – something akin to determining legislative jurisdiction – rather than solving a concrete case. The result is that legitimate policy considerations and the interests of the parties are often ignored. Futile attempts to attain international uniformity of decision thus distort the choice-of-law process, thereby jeopardizing other (attainable) objectives. This is the unwelcome part of Savigny's legacy.

Although there is no general, overall objective to conflict of laws, there are a number of more limited objectives. These are different for each of the three main aspects of conflict of laws – jurisdiction, choice of law, and recognition of judgments. They will be discussed in subsequent chapters of this book.

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PART II
JURISDICTION

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CHAPTER 2

Jurisdiction: an analysis

§ 1 What is jurisdiction?

The word 'jurisdiction' has several meanings. Apart from meaning a territory subject to the control of a particular court, it refers to the power of a governmental entity to do something. Jurisdiction in this sense can be divided between domestic (internal) jurisdiction and international jurisdiction. The former is concerned with the power of different governmental organs within the country concerned – for example, the division of power between the executive and the legislature. This is usually a matter of constitutional law. It is of no concern to us.

International jurisdiction concerns the division of powers between different States or other international entities. In some States, there is a similar division of power internally between different sub-units, in the sense that the same principles may apply at this level. Examples include the relations between Scotland and England (and Wales) within the United Kingdom, or between different states in the United States. This is also treated as involving international jurisdiction.

International jurisdiction includes legislative jurisdiction (the power of a legislature to legislate – for example, to pass laws affecting people outside its territory)[1] and executive jurisdiction (the power of the executive to act in particular circumstances – for example, to arrest a fugitive outside its territory).[2] At this point,[3] we are not concerned with these, but with the jurisdiction of courts (judicial jurisdiction).[4] This may be defined as the power of a court to give a binding ruling on a legal controversy.

The jurisdiction of a court may be looked at in various ways. Many aspects of judicial jurisdiction are purely domestic (internal), and therefore of no concern to us. What is often called 'subject-matter jurisdiction' is an example.[5] It deals with the question whether a court has jurisdiction with regard to a particular subject. Specialized courts are sometimes set up with jurisdiction over certain

1 Where the international limits of a State's power to legislate are in issue, this is sometimes called 'jurisdiction to prescribe': see the *Restatement of the Law Third: Foreign Relations Law of the United States*, § 402.
2 Where the extent of a State's power under international law to act extraterritorially is in issue, this is sometimes called 'jurisdiction to enforce': *ibid*., § 431.
3 See, further, Chapter 32, § 1, below.
4 Where the international limits of a State's power are in issue, this is sometimes called 'jurisdiction to adjudicate': *ibid*., § 421.
5 The phrase 'subject-matter jurisdiction' is sometimes also used in a different sense to mean 'jurisdiction to adjudicate' as defined above: see *per* Hoffmann J in *Mackinnon* v. *Donaldson, Lufkin & Jenrette Securities Corporation* [1986] Ch 482 at p. 493. However, this is not the usual meaning of the term.

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subjects only: they have no jurisdiction to decide other matters – for example, a specialized tax court cannot grant a divorce. In the United States, 'subject-matter jurisdiction' has a different meaning. It is concerned with the question whether the federal courts can hear a particular case or whether it has to be brought in the state courts. This will be considered in Chapter 7, § 1.1, below.

International judicial jurisdiction may be analysed on the basis of the effect that the judgment is intended to have. Here, the most common division is between jurisdiction *in personam* and jurisdiction *in rem*. There are also certain other proceedings – for example, divorce or custody proceedings – that do not fit into either category, but we shall not be concerned with them.

§ 2 Jurisdiction *in personam*

Jurisdiction *in personam* (jurisdiction over the person), or 'personal jurisdiction' as it is sometimes known, leads to a judgment *in personam*. A judgment *in personam* is a judgment that binds only a specific person (or several specific persons) and requires that person to do or not to do something (usually to pay money). This is the most common form of judgment. The following chapters will deal with different aspects of it.

§ 3 Jurisdiction *in rem*

Jurisdiction *in rem* (jurisdiction over property) leads to a judgment *in rem*. This is binding on everyone in the world, though only to the extent that they have an interest in the property with regard to which the action is brought (the *res*). In English law, actions *in rem* are possible only with regard to ships and certain things related to ships.[6] They can be brought only for a limited number of claims – for example, claims by cargo owners for damage to the cargo, claims by seamen for their wages, and claims by persons who have repaired the ship for the cost of the repairs. Where the action is *in rem* only, it can be enforced only against the *res* – by seizing and selling it by order of court. It cannot, therefore, be enforced for more than the value of the *res* (the ship).[7]

Figure 2.1 illustrates the ideas set out above.

§ 4 Objectives

In this book, we shall concentrate on jurisdiction *in personam*. What limits are there, or should there be, to this form of jurisdiction? Why should the law of a

6 It can be wider in the United States.
7 In practice, an action *in rem* is often also *in personam*, in which case this limitation does not apply: if the owner of the ship defends the action on the merits (substance), this has the effect under English law of transforming it into an action *in personam*, as well as being an action *in rem*. If this happens, the resulting judgment can be enforced against the defendant even if it is for more than the value of the ship.

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