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Introduction

1.1 Prologue

In almost every textbook on private international law, there is a reference to the Medieval and Early Modern jurists who, it is claimed, wrote on the conflict of laws. Such references are often very brief. Some appear to unveil the foundation stone of our whole doctrinal edifice, but many others may look and feel ornamental, of no importance to their author's argument. What matters most is that, when viewed as a whole, these references constitute an integral aspect of our thinking about private international law – an aspect that, it will be argued in this book, is important, if neglected and often misunderstood.

Accordingly, this is a monograph about conflict of laws scholarship in the Middle Ages and the Early Modern period – several centuries that are grouped together in the literature as "theory" or "theories" of statutes. The choice of title, which is explained subsequently in this Introduction, is meant to convey the need to rethink early conflicts doctrine. Medieval and Early Modern scholarship must first be understood in the context of its own time and place. At the same time, these texts have acquired most of their meaning over time: they can thus only be truly appreciated – and, I would argue, truly understood – when viewed from a wide perspective taking us all the way to the present – and to our immediate ("classical") past. Accordingly, we approach the past in the hope of understanding the present, but we must also understand the present (ourselves) in order to gain a meaningful understanding of the people we have come to think of as our discursive ancestors.

This is why, properly speaking, the historical study of Medieval and Early Modern conflicts doctrine in this monograph consists of two detailed examinations of two canonical texts, rather than a comprehensive narrative such as is usually found in conflicts historiography. This is also why the actual historical study effectively constitutes the second half of this work, the first two parts laying the intellectual groundwork.

Conflict of laws today has been described as a tributary stream of past theories and doctines, but it may be more of an estuary: an essential understanding of that fertile and complex area would be important before we start near the river's sources.

This book is an historical contribution to contemporary private international law. At its core, this is a work of doctrinal legal history (with some touches of intellectual history). But its writing necessitated broad reflections about the role of history – and, more broadly, historical consciousness – in private international law. What is "history" for us and how are we reconstructing the past? Does all of this truly matter? If yes, what has been the role(s), in conflicts doctrine, of invocations of the past – and what should we do with that famously "foreign country?" How should the history of private international law be written? From a certain point of view, this book constitutes an introduction to the history of private international law.

From yet another point of view, this book could be seen as an historical introduction to private international law. Exaggerated as such a claim might be, without question this book is motivated by the present-day state of this field. It is inspired by the discussions about the legal treatment – and conceptualization – of transnational activities and about the role of legal scholarship – and practice – in our "globalized" world. To write a history of private international law means also to take account of the foundational concepts and ongoing theoretical debates and concepts of private international law; to trace and seek explanations for, as well as guidance from, the present state of certain conflicts doctrines.

Each of these descriptions has its merits but it only goes far enough in identifying the three themes running through this book: current doctrinal concerns and premises; the role and formation of historical consciousness; and the lessons to be drawn from a historical study and the reasons of the choice of topic. Sections 1.2–1.4 of this chapter are devoted to a preliminary elaboration of these themes. Once the project has been better explained, the next step is to provide the necessary background. The fifth section of this chapter ("1.5: An Historical Outline") provides a brief history of private international law aimed at acquainting the reader with the historical material, perceptions in doctrinal literature and the author's own perspective. The choice of title is explained in that section. The next section ("1.6: Essential Premises") presents the basic concepts and analytical tools underpinning this book: on the one hand, the socio-epistemological perspective of the legal field that leads us to emphasize the notion of private international law as an autonomous discipline (and

discursive community) and why this matters; on the other hand, the functional perspective that leads us to an appreciation of the multidimensional governance and other functions that private international law is tasked with performing.[1]

1.2 The End of History for Private International Law?

These are interesting times for private international lawyers across the globe. New national legislation, international instruments, and authoritative academic projects – in matters big or small – proliferate on a global, regional, and national level. The European Union (EU) has already gone further than anyone ever has in achieving the late nineteenth-century dream of international codification. EU instruments are even given uniform interpretation by the European Court of Justice. Regional organizations in other parts of the globe have sought to emulate the EU. The Hague Conference on Private International Law is being made truly global, as its membership expands. The Conference acts sometimes in concert, sometimes in parallel, sometimes in a friendly competition with other international institutions such as the United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for the Unification of Private Law (Unidroit). The role of institutions representing international business – such as the International Chamber of Commerce (ICC) or specialized trade federations – in global rule-making is generally acknowledged. Moreover, under the auspices of these institutions, international commercial arbitration has given rise to a veritable constellation of transnational jursdictional systems. As to national judiciaries, they are achieving a degree of institutionalized communication with each other that gives new meaning to notions of judicial comity.

These are also exciting times for the theoretically minded among us. The upheaval of the "conflicts revolution" has subsided and there is little of the Cold War-era talk of a "crisis" in the conflict of laws. For most scholars today, the key words appear to be consolidation, empiricism, and synthesis.[2] At the same time, the increased complexity of private-law regimes creates new types of problems, which may or may not require new kinds of solutions. The technological revolution challenges our

[1] These ideas are then elaborated in the first two Parts of the book.
[2] See e.g. S. Symeonides, "Private International Law: Idealism, Pragmatism, Eclecticism (general course)," *Recueil des cours*, 384 (2017), 9–385.

fundamental premises about how to draw the best connection between cases and polities. The emergence and proliferation of regulatory law, and especially the increased appetite of regulatory regimes, both national and regional, for reaching beyond their territory, contrary to the traditional notions about public law, pose another set of challenges.[3] These new realities invite the exploration of interdisciplinary insights.[4] Perhaps for the first time, we are also witnessing other legal fields weighing potential lessons from conflicts doctrine.[5]

These are also times of anxiety. Much of the excitement generated in the field over the past generation relates to legislative projects such as the EU Regulations. Yet it is widely – and correctly – felt that "[t]he agenda [these instruments] promote is not the design of optimal rules for choice of law, but rules which serve [the] homogenising project [of European integration]."[6] In general, private international lawmaking has become more controlled by bureaucrats and is sometimes used more to fulfill work quotas and to explain political statements than to effectively resolve real problems. Admittedly, few outsiders would share our lament about the loss of "the brio and intellectual challenge of the subject."[7] But many of the new instruments are not free from retrograde doctrinal positions.[8]

[3] See e.g. the essays in F. Ferrari and D. Fernández Arroyo (eds.), *Private International Law: Contemporary Challenges and Continuing Relevance* (Cheltenham: Edward Elgar, 2019); and M. Lehmann, "Regulation, Global Governance and Private International Law: Squaring the Triangle," *Journal of Private International Law*, 16 (2020), 1–30.

[4] See e.g. M. Whincop and M. Keyes, *Policy and Pragmatism in the Conflict of Laws* (Aldershot: Ashgate/Dartmouth, 2001); H. Muir-Watt, "Aspects économiques du droit international privé," *Recueil des cours*, 307 (2004), 25–383; and F. J. Garcimartín Alvarez, "Regulatory Competition: A Private International Law Approach," *European Journal of Law and Economics*, 8 (1999), 251–270; T. Putnam, *Courts without Borders: Law, Politics and US Extraterritoriality* (Cambridge: Cambridge University Press, 2016).

[5] See e.g. G. Teubner, "Altera Pars Audiatur: Law in the Collision of Discourses" in R. Rawlins (ed.), *Law, Society and Economy* (Oxford: Oxford University Press, 1997), 149–176; the special issue on "Transdisciplinary Conflict of Laws" in *Law and Contemporary Problems*, 71(3) (Summer 2008), 1ff.

[6] R. Fentiman, "Choice of Law in Europe: Uniformity and Integration," *Tulane Law Review*, 82 (2008), 2022–2051, 2049.

[7] C. Forsyth, *Private International Law*, 5th ed (Cape Town: Juta, 2012), 61: "[M]any theoretical questions – classically, how is local sovereignty to be reconciled with the application of foreign law – have been resolved by the wand of European regulation. The brio and intellectual challenge of the subject is much diminished. Legislation is inevitably a political act. So compromise, not principle, shapes the form of the law that emerges."

[8] See e.g. S. Symeonides, "Rome II and Tort Conflicts: A Missed Opportunity," *American Journal of Comparative Law*, 56 (2008), 173–222.

Conflict of laws also appears to face a broader, existential problem. Regardless of which point in time one identifies as the beginnings of conflicts doctrine, or of conflict of laws as a subject, conflict of laws was truly made a distinct, popular subject during the first wave of globalization, between the mid-nineteenth and early twentieth century.[9] This is indeed the period when the very notion – and term –*private international law* comes into being. Private international law, as we know it, was a pillar and a child of this so-called first globalization and it has remained the pillar of global interactions even after its reputed demise – continuing at the same time its doctrinal evolution into a more sophisticated edifice. But, unlike the nineteenth century, our discipline did not seem to attract much enthusiasm from intellectuals and ideologues of the present-day globalization.[10] In fact, contemporary technological and outright developments have coincided with an outright challenge to the necessity and long-term viability of the conflict of laws itself. The EU's Regulations on private international law matters are presented as only the interim stage for large-scale projects for the unification of private law across Europe, with the adoption of a European Civil Code prominent among them. In the legal world of international commerce, the conflicts paradigm is under attack by a coalition of civil and business law professors, lapsed conflicts lawyers, legal theorists, and social scientists. The "terrible and odious practice of the conflict of laws" is deplored, and polemical statements are unearthed to that effect from the past.[11] Others declare the

[9] I do not seek to take part in the debate as to the historical beginnings of globalization, nor indeed attempt a definition. For present purposes it is enough to follow the established view among economists, especially. See e.g. K. O'Rourke and J. Williamson, "When Did Globalization Begin?," *European Review of Economic History*, 6 (2002), 23–50. As the fields of economic history and global history are expanding, it is becoming clear that the Early Modern Era must be seriously considered in order to understand what led to the nineteenth-century developments. See C. A. Bayly, *The Birth of the Modern World, 1780–1914: Global Connections and Comparisons* (Oxford: Blackwell, 2004), 41–42.

[10] There has on the contrary been an increasing effort to address globalisation from a private international law perspective. See e.g. the essays in and the essays in H. Muir Watt and D. Fernandez Arroyo (eds.), *Private International Law and Global Governance* (Oxford: Oxford University Press, 2015).

[11] O. Lando, "Some Features of the Law of Contract in the Third Millenium," *Scandinavian Studies in Law*, 40 (2000), 345–501, 354 quoting Thibaut in translation: "If there is no unity of laws then the terrible and odious practice of the conflict of laws will arise . . . so that in their intercourse the poor subjects will be stuck and suffocated in such a constant maze of uncertainty and shock that their worst enemies could not advise them worse. Unity of law would, however, make smooth and safe the road of the citizen from one state

irrelevance of private international law to international practice.[12] Arbitral proceedings are often presented as operating in a world of their own. Transnational business law, often in the guise of *lex mercatoria*, is presented as a "rival" to private international law; "conflictualists" are contrasted to "internationalists," in a narrative of polar opposition where they are supposed to "represent" two "radically different approaches to the same problem," with an "abyss ... separat[ing] their respective schools of thought."[13] Even among those who consider complete uniformity of private law improbable in the foreseeable future, those who regard such complete unity as an aim to strive for outnumber those who regard legal diversity as a value by itself.

The external challenge to the viability of private international law is related to an internal challenge: the doctrinal consciousness of private international lawyers. We have apparently reached an armistice in wars about the method – or methods – used in private international law, due to the exhaustion of everyone involved rather than to a clear victory for any warring faction. In responding to the – theoretical and practical – challenges of the modern world, conflicts doctrine has become more inward-looking, more technical, as well as – perversely – more conceptualist.[14] To paraphrase Gutzwiller, it would appear that in private

to the other, and wicked lawyers would no longer have the opportunity to sell their legal secrets and thereby to extort and maltreat the poor foreigners."

[12] H. P. Glenn, "The Nationalist Heritage" in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003), 76–127, 98 ("private international law is now systematically avoided by nearly all those with the knowledge and means of doing so, in favor or international arbitration").

[13] For notable examples of lapsed private international lawyers see e.g. F. Juenger, "The *Lex Mercatoria* and Private International Law," *Louisiana Law Review*, 60 (2000), 1133–1150, notably at 1136–1140 (where Juenger speaks exactly of "the problems of private international law," meaning conflict of laws). See moreover F. Juenger, "Some Random Remarks from Overseas" in K.-P. Berger (ed.), *The Practice of Transnational Law* (The Hague/London/Boston: Kluwer Law International, 2001), 81–89, 81, acknowledging the fear that "[s]uch a new *lex mercatoria* would of course obviate the need for choice-of-law rules," which might cost him and other conflicts lawyers their jobs; this however "never kept [him] from straying beyond the confines of the conflict of laws to ponder the need for a universal commercial law" – and finding his colleagues' "disregard of an emerging reality deplorable."

[14] See e.g. Teubner, "Altera Pars Audiatur," 144–776, who, in advocating "a new law of conflicts" for the collision of discourses, presents – positively – the "traditional international conflict of laws" as possessing "an abundance of circular references, self-references and paradoxes" (159) as well as terms providing "a legal form for oscillating

international law, "method" is everything – but this is often a method isolated from its theoretical foundations and policy implications.

We are thus still arguing as to whether we should remain loyal to the traditional method of "bilateral," "jurisdiction-selecting" rules, which designate as applicable the law of one or another state – *a priori*, in neutral and abstract terms. If not, what is the alternative? Under which criteria can we let the local substantive law determine its own reach? If yes, how do such choice-of-law rules function, and how are they reconciled with devices such as *renvoi* or legal characterization, which – depending on the beholder – manipulate their reach, or facilitate their operation but most certainly complicate things? And what about escape devices, such as the *ordre public* exception or the "unilateral," preemptive application of certain domestic norms to transnational situations? Choice-of-law rules themselves have become more complicated. There are by far more rules, each dealing with very specific, often specialized subject matter. Many of these rules tend to describe in detail the material situation which should trigger the application of "law A" or "law B," and often operate in layers of "exceptions to the exception." All this is accompanied by abstract thinking which often puzzles students and uninitiated lawyers alike.

This industrialization or *grammarization* of legal thinking is not strictly a conflict-of-laws phenomenon, but it certainly characterizes the workings of our field. What is even more remarkable, however, is the intellectual separation of the conflict of laws from substantive law, namely private law. Many private-law concepts and policies have been integrated into the conflicts discourse, new breeds of conflicts rules have an explicit substantive impact and the best doctrinal work includes excellent analyses of the substantive-law stakes. But it still appears as if the conflict-of-laws ideology of substantive-law neutrality has led to a pervasive disregard of policy considerations.

A similar attitude is noticeable with regard to the role of the international aspect of private international law. There are those in the literature who disclaim any "special link" between public and private international law.[15] Others on the contrary stress the importance of the

between inside and outside, for blending the foreign with the familiar, and for the game of confusion of self-reference and hetero-reference" (160).

[15] See e.g. K. Lipstein, "The General Principles of Private International Law," *Recueil des cours*, 135 (1972), 97–230, 168ff; Forsyth, *Private International Law*, 5 ("The word 'international,' thus serves only to mark the existence of those foreign or international

relationship, or the "confluence" of the two fields.[16] What these attitudes have in common is that authors tend to build upon their own view of the international milieu. Private international law certainly impacts international governance; its function and structures may help consolidate or undermine the existence and operation of an international system of sovereign states. Yet that international system appears in conflicts works as immutable, as a given. In fact, a basic reason for the total war declared on private international law by certain "globalists" or "transnationalists" seems to be exactly their aspiration that its demise will help achieve a different global ordering of relations involving individuals, corporate entities, and even political entities.

1.3 An Historicism for the Age of Globalization

"When a scientific province, such as ours, has been cultivated by the unbroken exertion of many centuries, a rich inheritance is offered to us who belong to the present," wrote Friedrich Carl von Savigny in the Preface inaugurating his *System of Contemporary Roman Law*, almost two hundred years ago:[17]

> It is not merely the mass of truth won which falls to our share; every direction essayed by the intellectual powers, all efforts of past time, be they fruitful or abortive, are also good for us as pattern or warning and thus we are in some sense in the position of working with the united powers of centuries passed away. If now we would, through indolence or conceit, neglect this natural advantage of our position and in a superficial treatment leave to chance how much of that rich inheritance is to influence our culture, we should then be dispensing with the priceless benefits inseparable from the nature of real science – the communion of scientific

elements which raise the question of whether the lex fori is the appropriate law to apply, or not"), 70 ("Public international law is no guide for the resolution of conflict problems"); M. Bogdan, "Private International Law as Component of the Law of the Forum (General Course on Private International Law," *Recueil des cours*, 348 (2011), 9–252, 35 ("The word 'international' in 'private international law' has thus a meaning that differs from what the same word means in 'public international law'. It does not have in mind the origin of the rules or the essential qualities of the parties, but refers rather to the cross-border character of the legal relationship involved").

[16] A. Mills, *The Confluence of Public and Private International Law* (Cambridge: Cambridge University Press, 2009).

[17] F. C. von Savigny, *System des heutigen römisches Rechts*, vol. I (Berlin, 1840), ix ("Vorrede"). Excerpted passages come from F. C. von Savigny, *System of the Modern Roman Law*, vol. I, trans. William Holloway (Madras, 1867), iii. Citations are to the German original.

> convictions and at the same time with the constant, living, progress without which that communion might pass over into a dead letter.[18]

Today, Savigny's words sound so close, and so distant, for those who have chosen as their vocation the legal field of which he has provided the most important paradigm. We must pay heed to his warning of how "superficial treatment," may, "through indolence or conceit . . . leave to chance" the role "of that rich inheritance" in our culture.

Savigny's proposed remedy was to synthesize, to restate, "from time to time," the juristic output of the past, and present, "in a unifying legal consciousness."[19] In the past two centuries, our philosophical premises – regarding both history and law – have become more sophisticated, and less assured. Savigny clearly understood how legal discussion is altered by the discovery of new material, and the emergence of new factual problems. With hindsight, we can today claim a superior awareness of the contingency of historical research with its contemporaneous context, and of the inherent contradictions of legal reasoning. But his basic ideas, and ambition, have not lost their value, nor their vitality.

It is the ambition of this book to be part of such "unifying consciousness" of contemporary private international law, to contribute a renewed appreciation of this "rich inheritance" and the "living connection which knits the past to the present."[20] This is a book that tries to adhere to the standards and methodology of legal history, while remaining motivated by presentist concerns – and by the conviction that the study of the history of conflicts doctrine matters in today's world.

History matters, first and foremost, because it can help us better undertand who we are, where we are coming from – and where we are going. What is unique about present-day doctrines, about our problems and aspirations – and what is not. History can help us place things – and

[18] Savigny, *System*, ix–x.

[19] Ibid., x: "In order that this may not happen, it is desirable that from time to time, the researches and gains of individuals should be summarized in a unifying consciousness. The holders of science, living at the same time, are often in sharp opposition to one another; but those contrasts come out still more strongly when we compare all ages. Here our business is not to choose the one and reject the other; the task consists rather in dissolving the perceived oppositions in a higher unity which is the only way to a safe progress in the science."

[20] Ibid., xiv–v: "The essence of [the historical] view rather consists in the uniform recognition of the value and the independence of each age and it merely ascribes the greatest weight to the recognition of the living connexion which knits the past to the present, and without which we recognize merely the external appeareance, but do not grasp the inner nature, of the legal condition of the present."

ourselves – in perspective. It has been suggested that "in private international law, history is everything" – or even that "everything worthy of trying has been tried before." This is certainly not correct. There might be more to the notion of present-day doctrine as an estuary of past ideas and doctrines. There is also educative value to historical narratives.

This brings us to the second reason as to why historical study matters for private international law. Historical imagery, historical narratives abound in present-day discussions of conflicts theory and doctrine. Our modern or "postmodern" discourse is replete with genealogies of favored approaches, with venerated relics, with examples to imitate and/or avoid. "History" is used as an argumentative weapon in the discourse. Like certain kinds of weapons, the impact of historical invocations is not always felt immediately and they may produce effects long after the endeavor in which they were deployed has faltered. An author may offer a historical narrative of dubious accuracy in support of a doctrinal project that is soon dismissed; but his historical imagery might yet live on, often mutating and influencing our perceptions. In that sense, writing a history of private international law has also necessitated the critical examination of the role of existing historical literature in the present-day discourse of private international law.

There is a duality involved in this project. One cannot write history without achieving a certain degree of understanding of the world in which one's subjects lived, and in which they sought to make their own contribution. Such understanding will always remain imperfect: the past shall forever be "a foreign country," and an ever-changing one at that, but we can aspire to a better understanding.[21] It also necessitates a certain degree of detachment from – as well as awareness of – present-day predicaments and sensibilities. But to establish such "living connection," it is not enough to engage in an archaeological exploration of the past. It is important to be explicit and self-aware of the preconceptions with which we, and those before us, approach our material. It is in effect necessary to consider our present condition and aspirations – to place ideas and struggles in perspective, and achieve a certain degree of

[21] D. Lowenthal, *The Past Is a Foreign Country—Revisited* (Cambridge: Cambridge University Press, 2015). The quote ("The past is a foreign country: they do things differently there") is the opening line of the novel by L. P. Hartley, *The Go-Between* (1953). Given that engaging with foreign countries is an important part of the vocation of private international law (and comparative law) scholars, the phrase may aptly describe the challenge involved.