

CONTENTS

<i>List of Figures, Tables and Maps</i>	xvi
<i>Acknowledgments</i>	xxii
1 Introduction	1
1.1 Prologue	1
1.2 The End of History for Private International Law?	3
1.3 An Historicism for the Age of Globalization	8
1.4 Revisiting the Early History of Private International Law	11
1.5 An Historical Outline	17
1.5.1 Theories of Statutes, or: Preclassical Conflict of Laws	18
1.5.1.1 History and Prehistory	20
1.5.2 The Choice-of-Law Method, or: Classical Conflict of Laws	21
1.5.3 Revolution, Crisis, Pluralism: Modern Conflict of Laws	24
1.5.4 Classical, Preclassical, and Modern	26
1.5.5 Theory and Practice	27
1.5.6 On Conflict of Laws, Private International Law, and Other Names	31
1.6 Conceptual Premises	33
1.6.1 The Discipline of Private International Law	34
1.6.2 The Governance Functions of Private International Law	35
1.6.2.1 International Governance and Private International Law	36
1.6.2.2 Private-Law Governance and Private International Law	37
1.6.2.3 Autonomy	38
1.6.3 A “Remarkable Trinity”	39
1.7 Structure of the Book	41
PART I History and Historiography in the Conflict of Laws	45
2 Uses of History in Private International Law	47
2.1 Introduction	47
2.2 Materials	49

2.2.1	Conflicts History as Textbook History	51
2.2.1.1	Structure and Narratives	53
2.2.1.2	Historical Consciousness in the Common-Law World	54
2.2.2	Historical Studies	56
2.3	Conflicts Historiography in the Beginnings	58
2.3.1	Preclassical Historical Consciousness	58
2.3.2	Moments of Transition	60
2.3.2.1	Savigny	61
2.3.2.2	Demangeat	62
2.3.2.3	John Westlake in 1858	63
2.4	The Discipline Ascendant: Progress Narratives in Classical Private International Law	64
2.4.1	François Laurent in 1880	65
2.4.2	Armand Lainé in 1888	68
2.4.3	A Lost Cause? de Vareilles-Sommières in 1897	70
2.4.4	Eugen Ehrlich in 1906	71
2.5	The Discipline Persists: Interwar Progress Narratives	72
2.5.1	Scientific Optimism: Max Gutzwiller in 1929	72
2.5.2	Progress as Struggle: Meijers in 1934	74
2.5.3	The Triumph of Comparative Law: Ernst Rabel in 1945	75
2.6	History as Pedigree: Conflict and Eclecticism in Modern Private International Law	78
2.6.1	Variations on a Theme	79
2.6.1.1	History as Quest	79
2.6.1.2	History as Dialectics	80
2.6.1.3	History as Marxist Narrative	81
2.6.1.4	History in Circles	82
2.6.2	Historicism and Pedigree History	84
2.6.2.1	Explanatory Historicism	84
2.6.2.2	Normative Historicism	85
2.6.2.3	Archaeological Historicism	87
2.6.3	Historical Narratives as Opposition	88
2.6.3.1	The Genealogies of <i>Lex Mercatoria</i>	89
2.6.3.2	The End of History as Progress Narrative	89
2.7	Concluding Remarks	90
3	Preclassical Conflict of Laws in the Historical Consciousness	93
3.1	Introduction	93
3.2	The Narrative	94
3.2.1	Mutations	96
3.3	The Division into Schools	98
3.3.1	Schools as Paradigm	98
3.3.1.1	Italian School	99

CONTENTS

ix

3.3.1.2	French School	100
3.3.1.3	Dutch School	101
3.3.1.4	A Comment	102
3.3.2	National Schools	102
3.3.3	A Sociological Approach	104
3.3.4	A Contextual Definition	108
3.4	The Foundational Moment: “Si Bononiensis”	110
3.4.1	Of Founders	111
3.4.2	Foundations	115
3.4.3	An Alternative Foundational Moment? Aldricus: “potior et utilior”	122
3.5	Neglected Influences? Alternative Narratives about the Foundational Moment	124
3.5.1	A Role for Court Practice and Customary Law	124
3.5.2	Law Merchant and the Conflict of Laws	128
3.5.3	Canon Law and the Conflict of Laws	129
3.6	Conclusion	133
PART II Current Concerns		137
4	Conflict of Laws as a Conceptual Battlefield	139
4.1	Introduction	139
4.2	Territorialism and Personalism	140
4.2.1	Definitions	143
4.2.2	Personalist Approaches: Domicile v. Nationality	144
4.2.3	Territorial Approaches: <i>Actus v. Situs</i>	149
4.2.3.1	Public Policy Territorialism	151
4.3	Unilateralism in the Conflict of Laws	152
4.3.1	Doctrinal Unilateralism: The Choice-of-Law Process	154
4.3.1.1	Technically Unilateral Rules	154
4.3.1.2	Determining Who Determines the Scope of Foreign Law	155
4.3.1.3	Doctrinal Unilateralism as “International Governance”	156
4.3.1.4	Jurisprudential Aspects of Doctrinal Unilateralism	157
4.3.2	Political Unilateralism: Extraterritorial Effects of Regulation	158
4.3.3	Limited Unilateralism	160
4.3.4	Absolute Unilateralism	161
4.4	Universalism and Particularism	161
4.5	Perspectives and Ideologies: Internationalism, Nationalism	163
4.6	Conflict of Laws as a “Conflict of Sovereignties”	165
4.6.1	The “Conflict of Sovereignties” in Historical Narratives	167

4.6.2	A Critique	168
4.7	Conclusion	171
5	Conflict of Laws as a Doctrinal Exercise	172
5.1	Introduction	172
5.2	Legal Reasoning in Conflicts Works	173
5.2.1	On Rules and Formalism	173
5.2.2	The Invocation of General Principles	177
5.3	The Classification of the Legal Subject Matter	179
5.4	The Distinction between Formalities, Procedural, and Substantive Matters in the Conflict of Laws	183
5.4.1	Form as a Private-Law Construct	184
5.4.1.1	Formalities as a Burden or Intervention	185
5.4.1.2	Formalities as the Liberal Course of Action	186
5.4.2	Procedural Formalism and the Distinction between Substance and Procedure in Conflicts Doctrine	188
5.5	Conflict of Jurisdictions and Conflict of Laws	189
5.5.1	On the Relationship between Choice-of-Law and Jurisdiction Rules	191
5.6	Individuals, Party Autonomy, and the Conflict of Laws	193
5.6.1	On the Individual as the Epicenter of a Conflicts System	195
5.6.2	On Party Autonomy	197
5.7	Decisional Harmony	198
6	Conflict of Laws as a World System	201
6.1	Introduction	201
6.2	Mediating between Perspectives	203
6.3	International Law as a Governance Project	204
6.4	International Law as Doctrinal Foundation	210
6.5	World Views and World Systems	211
6.6	Conclusion	215
	PART III Bartolus da Sassoferrato and the Conflict of Laws in the Middle Ages	217
7	“<i>Nunc veniamus ad glossam</i>”: Bartolus on the Conflict of Laws	219
7.1	Introduction	219
7.2	The Commentary on <i>cunctos populos</i>	220
7.2.1	Establishing the Text	222
7.2.2	Basic Structure	224
7.3	“ <i>Cujus occasione videnda sunt duo . . .</i> ”	225
7.4	“ <i>. . . utrum statuta porrigantur ad non subditos</i> ”	225
7.4.1	Contracts (nus. 13–19)	225

CONTENTS

xi

7.4.2	Wrongs (nu. 20)	228
7.4.3	Testaments (nus. 21–26)	229
7.4.4	Rights over Real Property (nus. 27)	231
7.4.5	Clerical Privileges (nus. 28–31)	231
7.5	“... <i>utrum effectus statuti porrigat extra territorium statuentium</i> ”	233
7.5.1	Prohibitive Statutes (nus. 32–33)	233
7.5.2	Permissive Statutes (nus. 34–43)	235
7.5.2.1	Statutes Conferring a Privilege	236
7.5.2.2	Statutes Facilitating Permissible Acts	236
7.5.2.3	The English Question: Primogeniture and Effects as to Property	243
7.5.3	Punitive Statutes (nus. 44–49)	244
7.5.3.1	Statutes with Explicit Extraterritorial Effect	245
7.5.3.2	Statutes Expressed in General Terms	247
7.5.4	Effects of Judgments (nus. 50–51)	248
7.5.4.1	Judgments as to Persons (in personam)	248
7.5.4.2	Judgments as to Property (in rem)	249
8	The Political Context of Bartolan Conflict of Laws	252
8.1	Introduction	252
8.2	Polities and Hierarchies	253
8.2.1	A World Empire (with Its Common Law)	253
8.2.2	Cities (and the Power to Make Law)	256
8.2.2.1	The Legislative Jurisdiction of Cities	256
8.2.2.2	The “Internal Sovereignty” of Cities	260
8.3	Laws and Their Hierarchies	261
8.3.1	Of <i>Ius Gentium</i> and the Law Common to All Peoples	262
8.3.2	From City Laws to City Law	264
8.3.3	<i>Iura propria</i>	266
8.3.3.1	Citizens at Home	267
8.3.3.2	Foreigners Abroad	267
8.3.3.3	Foreigners in the City	268
8.3.3.4	Subjects Abroad	269
8.3.3.5	Legal Acts and Legal Rights	270
8.4	Bartolus, <i>Ius Commune</i> , and the Conflict of Laws	273
9	Doctrinal Aspects of Bartolan Conflict of Laws	277
9.1	Introduction	277
9.2	Legal Style	278
9.2.1	Structure of the Text	278
9.2.2	Mode of Reasoning	282
9.3	Organization of the Legal Subject Matter	284
9.3.1	Contracts	285
9.3.2	Delicts, Wrongs, and Crimes	288

9.3.3	Succession	289	
9.3.4	Property	291	
9.3.5	Bartolus and the Law of Persons	293	
9.3.6	Marriage and the Family	294	
9.4	Form, Substance, and Procedure	298	
9.4.1	Form, Solemnitas, and Formalities	299	
9.4.2	Formalities and the Validity of Legal Acts	301	
9.4.3	“Form,” “Substance,” and the Limits on the Reach of Local Law	304	
9.4.4	Substance and Procedure	306	
9.5	Conflicts of Jurisdictions and Conflicts of Laws	308	
9.6	Individual Autonomy and Bartolan Conflict of Laws	311	
9.7	Harmony of Solutions	313	
9.8	Conclusion	315	
10	Bartolan Conflict of Laws in the Conceptual Battlefield		317
10.1	Introduction	317	
10.2	Bartolus and the Basic Theory of Statutes	319	
10.2.1	Bartolus, the Basic Theory, and the Modern Historical Consciousness	320	
10.2.2	Territorialism, Personalism, and the Bartolan Doctrine	324	
10.2.3	Bartolus and the English Case	328	
10.3	Bartolus and the Limits of Unilateralism	336	
10.3.1	Permissive and Punitive Statutes	339	
10.3.2	Punitive Statutes and Unilateralism	341	
10.3.3	An a priori Unilateralism?	344	
10.4	Bartolus and the Conflict of Sovereignties	345	
10.5	Conclusion	347	
	PART IV Ulrik Huber and Conflict of Laws in the Early Modern Period		351
11	“<i>Saepe fit, ut negotia</i>”: Huber on the Conflict of Laws		353
11.1	Introduction	353	
11.2	<i>De Conflictu Legum Diversarum</i>	357	
11.2.1	The Text	357	
11.2.2	Structure of the Text	359	
11.3	Foundations	360	
11.3.1	Foregrounding (§ 1)	360	
11.3.2	Statement and Justification (§ 2)	361	
11.3.2.1	The Axioms	361	
11.3.2.2	Citing the Digest	361	
11.3.2.3	Discussing the Axioms	363	

CONTENTS

xiii

11.4	Primary Rule: <i>locus regit actum</i>	364	
11.4.1	Acts inter vivos and mortis causa	365	
11.4.1.1	Testaments (§ 4)	365	
11.4.1.2	Contracts (§ 5)	366	
11.4.2	Res judicata and Actions	367	
11.4.2.1	Res judicata (§ 6)	367	
11.4.2.2	Actions (§ 7)	368	
11.4.3	Marriage	369	
11.4.3.1	Validity (§ 8)	370	
11.4.3.2	Effects (§ 9)	371	
11.4.4	Limitations	372	
11.4.4.1	Intention of the Parties (§ 10)	372	
11.4.4.2	The Prejudice Exception (§ 11)	373	
11.5	Second Rule: Personal Status and Capacity	374	
11.5.1	The Rule: Personality (§ 12)	375	
11.5.2	The Rule Does Not Create Personal Statutes (§§ 13–14)	375	
11.6	Third Rule: The <i>lex rei sitae</i> Exception (§ 15)	376	
11.6.1	The Rule as to Immovables	376	
11.6.2	Intestate Succession and a Reference to Movable Property	378	
11.7	Concluding	378	
12	The Political Context of Huber’s Conflict of Laws	380	
12.1	Introduction	380	
12.2	Ulrik Huber in Political Context	381	
12.2.1	A Commercial Republic (or Republics)	382	
12.2.2	Sovereignty and the State	384	
12.2.2.1	Citizens, Foreigners, and Domicile	389	
12.2.3	Religion	390	
12.2.3.1	Protestantism, Catholicism, and Conflicts in Huber’s Friesland	391	
12.2.3.2	Religion and Early Modern Marriage	394	
12.3	Legal Sources and Their Hierarchies	395	
12.3.1	Natural Law and the Law of Nations	396	
12.3.2	Civil Law	400	
12.3.3	Judicial Power and Discretion	405	
12.4	Sovereignty and Jurisdiction in Huber	407	
12.4.1	Civil Jurisdiction over Foreigners in Huber	409	
12.4.1.1	Arrest-Based Jurisdiction	413	
12.4.2	Res Judicata, Jurisdiction, and Huber on the Conflict of Laws	416	
12.4.3	Jurisdiction Theories and Huber	418	
12.5	Conclusion	419	

13	Doctrinal Aspects of Huber's Conflict of Laws	422
13.1	Introduction	422
13.2	Legal Style	422
13.2.1	Structure	423
13.2.2	Rational Ordering	424
13.2.2.1	A Novel Method	427
13.2.3	Practice and Pragmatism	428
13.3	The Organization of the Legal Subject Matter	431
13.3.1	Huber as an Institutist	432
13.3.2	Contracts and Obligations	434
13.3.3	Law of Persons	438
13.3.3.1	Marriage	440
13.3.3.2	Marital Property	444
13.3.4	Testaments and Property	446
13.4	Form and Substance in Huber	448
13.4.1	From Testaments to Contracts	449
13.4.2	Formal and Substantive Validity of Marriages	450
13.4.3	Procedure: or, Control by the Forum through Carving an Area of Form	452
13.5	Huber and the Conflict of Jurisdictions	453
13.6	Individual Autonomy in Huber's Conflict of Laws	454
13.7	Harmony of Solutions	460
13.8	Conclusion	461
14	Huber's Conflict of Laws in the Conceptual Battlefield	463
14.1	Introduction	463
14.2	Huber and Territorialism	464
14.2.1	Huber and Actus Territorialism	464
14.2.2	Actus Territorialism and Personalism	465
14.2.3	Actus and Situs Territorialism	469
14.2.4	Huber and Public Policy Territorialism	472
14.3	Huber as Unilateralist	473
14.4	Comity in Huber's Doctrine	475
14.4.1	Huber's Third Axiom	477
14.4.2	Comity from Paul to Johannes Voet	483
14.4.3	Comity as Foundation	488
14.4.4	Comity and Exceptions	492
14.4.4.1	Fighting against Evasion	493
14.4.4.2	Defending Local Laws	497
14.4.4.3	Defending Local Rights: Third-Party Rights and Conflicts of Obligations	501

CONTENTS

xv

- 14.5 Huber and the Conflict of Sovereignties Discourse 502
14.6 Conclusion 504

Part V Epilogue 509

- 15 Preclassical Conflict of Laws Configured 511**
15.1 Introduction 511
15.2 *De Statutis* 513
15.3 Addressing Private Law Problems 517
15.4 Political Foundations and Legal Hierarchies 524
15.5 A Conflicts Literature (and Discourse) 529
15.6 From Preclassical Conflict of Laws to Private
International Law 532
15.7 The Hedgehog and the Fox 539

Bibliography 543

Index 576