

Table of Contents

Table of Abbreviations	xvii	
Preface	xxvii	
Introduction	1	
1. Private International Law and Social Change	1	
2. Recent Trends in Private International Law	3	
3. Purpose and Methods of Private International Law	6	
a) Legal certainty in a multi-jurisdictional world	6	
b) Exclusive jurisdiction	8	
c) Application of foreign law pursuant to choice of law	9	
d) Choice of law and the welfare state	11	
e) The principle of recognition	12	
4. Private and Public Actors	14	
5. The Levels of Rule-making and the Conflict of Laws	15	
6. Survey	18	
Part I	From Closed Nation-States to the Open Society	21
Chapter 1	The Advent of the Open Society	23
Section 1: The Open Society in Political Philosophy		23
1. Henri Bergson		23
2. Karl Raimund Popper		25
Section 2: Globalization as a Driving Force of the Open Society		28
1. Technological Innovation		28
2. The Impact on Trade in Goods and Services		31
3. Foreign Direct Investment		33
4. Migration		34
5. Globalization		36
a) The nation-State as the starting point		36
b) Opening frontiers towards global life		38
6. Conclusions		39

Chapter 2	Globalization and the Law	43
Section 1:	Legal Underpinnings and Attendants of Globalization	43
1.	Free Trade in Goods	44
2.	Trade in Services	47
3.	Free Movement of Capital	48
	a) Foreign direct investment	48
	b) Other capital flows	50
4.	The Free Flow of Data	51
5.	Migration	52
6.	Institutionalization and Private Rights	54
Section 2:	Consequences for Policy-Making and Regulation	56
1.	The Loss of State Knowledge and Private Rule-Making	57
2.	Delocalization and the Choice of Connecting Factors	61
3.	Regulatory Competition	65
	a) Private choice and State sovereignty	65
	b) Theoretical underpinnings	66
	c) Types of regulatory competition	67
	d) Limitations	70
4.	The Loss of Influence of Individual States and Their Reactions	73
	a) National policy versus free trade	73
	b) Extraterritorial application of national law	75
	c) International minimum standards	78
5.	Collaboration of States: Unification, Harmonization, Coordination, Cooperation	79
	a) Purposes, institutions, history	79
	b) Forms of legal unification and harmonization	82
	c) Coordination by common rules on private international law	83
	d) Procedural cooperation	85
Section 3:	Outlook	88
Part II	Private Ordering	89
Chapter 1	Substantive "Anational" Private Arrangements	91
Section 1:	The International Transaction Dilemma	91
1.	Legal Pluralism and Its Economic Effects	91
2.	Public and Private Remedies	92
Section 2:	The Export Trade	94
1.	Balancing Manifold Interests – the <i>Lex Mercatoria</i>	94
2.	Sellers and Buyers (Incoterms)	96
	a) Multifarious constellations	96
	b) The Incoterms	97
3.	Carriers and Their Liability	99
	a) The significance of transport documents	99
	b) The carrier's liability	100
4.	Banks and Payment (Uniform Customs and Practices for Letters of Credit)	102

a)	Evolution of the letter of credit	102
b)	The Uniform Customs and Practice for Documentary Credits	104
5.	Insurance	105
	Section 3: International Tourism: Package Tour Operators	107
1.	Emergence and Specific Demand	107
2.	Increasing Certainty through Regulation	108
	Section 4: Conclusion – The Domestication of International Transactions	110
Chapter 2	Theory of Choice of Law and Party Autonomy	115
	Section 1: Party Autonomy in International Contract Law	116
1.	Worldwide Recognition of Party Autonomy	116
2.	Exclusion of Party Autonomy in Latin America	117
a)	Brazil	117
b)	Uruguay	118
3.	Exclusion of Party Autonomy in the Middle East	119
4.	Limitations on the Power to Choose the Applicable Law	121
a)	Choice of non-State law – <i>lex mercatoria</i>	121
b)	Relation between the contract and the law selected	123
c)	Restrictions for specific contracts	124
d)	Conclusion and outlook	124
	Section 2: A Priori and Derivative Conceptions of Party Autonomy	125
	Section 3: Theoretical Objections to Party Autonomy	127
1.	Sovereignty	127
a)	Choice of law as an impairment of sovereignty	127
b)	Objective conception of the law	128
c)	Criticisms and countervailing contractual theories of State and law	130
d)	Conclusions	131
2.	Ordre public	131
a)	Specifications of the ordre public	132
b)	Domestic contacts	133
c)	Conclusions for choice of law	134
3.	No Binding Effect of Contracts outside a Legal Order	134
a)	The conclusion of a contract as a result of the applicable law	134
b)	The core and corona of the agreement	135
4.	Protection of Weaker Parties	136
a)	Freedom of choice and power	136
b)	Neutralization through competition	137
c)	Imbalances in motivation	137
d)	Macro-economic and individual disequilibrium	138
5.	Conclusion	139
	Section 4: Theoretical Basis for Freedom of Choice	139
1.	Efficiency	139
2.	Freedom and Natural Will	142
3.	Binding Effect	143

4.	Choice-of-Law Agreements as Self-fulfilling (Dispositional) Contracts	145
5.	Freedom of Choice as a Pre-governmental Right	146
	a) Enlightenment philosophy and human rights	146
	b) Clarification of freedom of choice as derived from human rights	148
	Section 5: Conclusion	149
1.	Interaction of Choice of Law and Objective Law	149
2.	The Scope of Freedom of Choice in Private Law	151
Chapter 3 New Domains for Party Autonomy		153
Section 1: Contractual Relations Involving Third Parties		153
1.	Agency	154
	a) The structure of agency relations	154
	b) Choice of law and party autonomy	154
	c) Party autonomy under positive law	156
	d) Comments on the Hague Agency Convention	158
	e) Conclusion	159
2.	Assignment of Claims	160
	a) General backdrop	160
	b) Third-party effects: the Dutch solution	161
	c) The law governing third-party effects: national conflict rules	164
	d) A dual-track approach	167
Section 2: Tort and Delict		168
1.	The Specificity of Tort and Delict	168
	a) Primary and secondary rules of conduct	168
	b) Contract and tort	170
2.	The Development of International Tort Law	173
	a) Lex fori	173
	b) Lex loci delicti	174
	c) Lex loci actus and lex loci iniuriae	176
	d) Specification and flexibilization	177
3.	Party Autonomy	179
	a) Survey	179
	b) Ex post choice of law	180
	c) Indirect ex ante choice of law	181
	d) Direct ex ante choice of law: Rome II Regulation	183
	e) Direct ex ante choice: other jurisdictions	186
	f) Summary	187
4.	Limits of Party Autonomy for Specific Torts	187
5.	Conclusion: Comparative Assessment and Policy Considerations	190
	a) Party autonomy and its discontents	190
	b) Protection of the weaker party? About contract and tort	191
	c) Freedom of contract in substantive law and tort conflicts	193

Section 3: Property Rights	194
1. The Development Towards Lex Situs	195
a) The lex situs and its rationale	195
b) A critical policy appraisal	197
2. Party Autonomy: Acquisition and Loss of Rights in Rem in Movables	199
a) Inconveniences of the situs rule	199
b) Party autonomy as a solution	200
c) Indirect admission of party autonomy through an escape clause	201
d) Choice-of-law clauses with inter partes effects	202
e) Title retention clauses in export contracts	203
f) Party autonomy for movable property	204
g) Summary	205
3. Negotiable Instruments: Security Interests in Financial Collateral	206
a) Changes of the commercial environment	206
b) From lex situs to party autonomy	208
4. Intellectual Property	212
a) Nature, development and territoriality of intellectual property rights	212
b) The framework of the lex loci protectionis in international law	214
c) The scope of party autonomy	218
5. Summary	222
Section 4: Persons	223
1. Scope and History of the Law of Persons	223
a) The law of persons – a remainder of the Middle Ages	223
b) Divergent policies	224
2. Capacity and the Protection of Adults	226
a) The rigidity of personal law	226
b) First traces of party autonomy	227
c) Enduring powers to act for incapable persons	228
Section 5: Family	230
1. The Family, Family Law, and Basic Conflicts Law Orientations	230
a) From social institution to family law	230
b) Traditional choice-of-law approaches and party autonomy	233
2. The Effects of Marriage: Marital Property	235
a) The main property regimes	235
b) Dumoulin and French conflicts law	236
c) A comparative survey over three conflicts principles	238
d) Unification of conflicts law	240
e) Conclusion	243
3. Divorce	245
a) The significance and decline of marital status	245
b) Basic orientations of the conflict of laws	246
c) The decline of nationality as a connecting factor and its consequences	247
d) The development towards party autonomy	250
e) Rome III: Priority of party autonomy	253
f) Conclusion	256

4. Maintenance	256
a) Basic conflicts orientations	256
b) Party autonomy and its exceptions under the 2007 Hague Protocol	259
5. Conclusion	261
Section 6: Succession	262
1. Historical Evolution and Conflict Taboos	262
2. The Trend Towards Party Autonomy	265
3. Party Autonomy and Forced Heirship Restrictions in Present Conflicts Statutes	267
4. Conclusion	271
Section 7 : Procedural Dispositions	274
1. Information on Foreign Law: the Division of Labour between the Parties and the Court	274
2. Strategic Options for the Parties	275
a) Pleading of foreign law	275
b) Procedural agreements	277
c) Allegations in law	278
Section 8: Conclusion	279
1. The Extension of Party Autonomy and its Social Background	279
2. Political Background: the Role of International Organizations	280
3. Limitations of Party Autonomy	281
 Chapter 4 Optional Law in Europe	 283
Section 1: The Europeanization of Private Law	283
1. Evolution	283
2. Types of Legislative Instruments	285
Section 2: Optional Instruments of the European Union and the Conflict of Laws	287
1. Company Law	288
a) Corporate forms and legislative basis	288
b) Conditions of eligibility: the international dimension	289
c) The residual national law and private ordering	290
2. Intellectual Property	292
3. Contract Law	295
a) Development and conceptualization	295
b) The Common European Sales Law and the conflict of laws	298
Section 3: Optional Instruments in International Conventions	300
1. The 1964 Hague Sales Law (ULIS) and other Multilateral Conventions	300
2. The Franco-German Optional Matrimonial Property Regime	301
Section 4: Conclusion	303
 Chapter 5 Deliberate Connections (Indirect Choice of Law)	 305
Section 1: Connecting Factors Favouring Private Choice	306
1. Formal Requirements and the Lex Loci Celebrationis	306
a) The recognition of the lex loci celebrationis	306
b) How the rule evolved	307

c)	Examples of private dispositions	308
2.	From Nationality to Habitual Residence in the Law of Personal Status	311
a)	Rise and decline of nationality	311
b)	Old and new Hague conventions	314
c)	Domicile and habitual residence	316
d)	Private international law in the European Union	317
e)	Habitual residence and the open society	319
3.	Conclusion	320
	Section 2: The Principle of (Mutual) Recognition	321
1.	The Concept of Recognition	321
a)	Multiple meanings and their common core	321
b)	Recognition of foreign judicial and administrative measures	321
c)	Recognition of legal situations	324
2.	The Liberalization of the Recognition of Judgments	326
a)	Abandoning the review of the applicable law	327
b)	Loosening the review of jurisdiction	330
3.	The Liberalization of the Recognition of Foreign Companies	334
a)	Incorporation theory and real seat theory	334
b)	International unification of conflicts law	336
c)	The conflicts approach and private choice	338
d)	European developments	338
e)	Reactions of national conflicts law	340
f)	International company law and regulatory competition	341
	Section 3: Evasion of Law	343
a)	A matter of legal construction	343
b)	Codified rules on evasion of law	343
c)	Freedoms granted by, and evasion of, law	345
	Section 4: Conclusion	347
Part III	Public Regulation	349
Chapter 1	State Action between International and Municipal Law	351
Section 1:	Forms and Addressees of State Action	351
Section 2:	Objectives of State Action	353
1.	Objectives of State rules on choice of law	353
2.	Domestic order and foreign policy in international relations	353
3.	An example: private law conventions and the decline of reciprocity	355
Section 3:	Limitations of State Action	359
Section 4:	Systematic Considerations and Survey	361
Chapter 2	Foreign Policy Measures and Their Effects in Private Law	365
Section 1:	Recognition and Non-recognition of Foreign States or Governments	365
1.	Background in Public International Law	365
2.	Effects of (Non-)Recognition in Private International Law	367

a)	The normative approach	367
b)	The factual approach	369
c)	A differentiated solution	372
Section 2:	Trade Embargoes	373
1.	On Restrictions of Foreign Commerce in General	373
a)	Types of trade restrictions	373
b)	Tendencies	374
c)	Legal issues	375
2.	The Scope of an Embargo	376
a)	The US pipeline embargo	376
b)	The EU embargo against Iran	378
3.	“Enforcement” of an Embargo	379
4.	Other “Effects” of an Embargo	381
a)	Contract terms assigning the risk of an embargo	381
b)	The lex causae theory and shared values	382
c)	The special connection theory (<i>Sonderanknüpfung</i>)	385
Section 3:	Countermeasures (Blocking Statutes)	388
1.	Concept and Reasons for Their Adoption	388
a)	Concept	388
b)	A weapon for economic warfare	390
2.	Occurrence and Content of Blocking Statutes	391
3.	Clawback Claims in Private International Law	393
4.	Blocking Legislation – a Political Instrument	394
Chapter 3	Countervailing State Measures for Asymmetric Private Relations	397
Section 1:	The “Weaker Party” and Its Protection	397
1.	Traditional Civil Law	397
2.	Categorical “Weakness” Resulting from Asymmetric Information	398
a)	Findings in legislation and economic explanation	398
b)	Pros and cons of State intervention in cross-border contracts	400
3.	Categorical “Weakness” Resulting from Market Dominance	401
Section 2:	Consumer Protection	403
1.	Survey	403
2.	Personal Scope	404
a)	The consumer and the professional	404
b)	Inconvenience of the definition	405
3.	Substantive Scope	407
4.	Situative Scope – “Active” and “Passive” Consumers	408
a)	Rationale of the special connection	408
b)	The contracting situation of the passive “consumer”	409
c)	Electronic commerce	410
5.	Special (Bilateral) Conflict Rules for Consumer Contracts	414
6.	The Unilateral Approach	417
a)	The absence of specific conflict rules for consumer contracts	417
b)	Public policy as the vehicle of consumer protection	418

c) Unilateral enforcement in addition to a specific conflict rule ?	419
7. Conclusion	423
Section 3: Employment Contracts	425
1. Market Imperfections and Countervailing State Measures	425
a) Market imperfections	425
b) Complex regulation	426
c) Application to cross-border labour relations: characterization	427
d) Survey: confinement to bilateral conflict rules	429
2. Manifestations of Cross-Border Labour Relations	430
a) General	430
b) Posting of workers	430
c) Modern trends in industrial organization: Outsourcing	431
3. The Unilateral and Territorial Approach	432
4. Steps Towards Bilateralism: United States	436
5. Further Steps Towards Bilateralism: the European Model	438
a) Elements of the European model	438
b) Follow-up legislation outside the EU	438
c) Party autonomy	439
d) Objective connecting factors: habitual workplace	441
e) Overall assessment of the habitual workplace or a cascade connection ?	443
f) The escape clause and maritime labour	445
6. Overriding Mandatory Provisions	446
a) The room left by Article 8 Rome I	446
b) Lex fori, lex contractus and the law of third States	447
c) Definition of overriding mandatory provisions	449
d) Overriding mandatory provisions and the European Court of Justice	451
e) Outlook	452
7. Posted Workers	452
a) The tension between social protection and economic efficiency	452
b) Article 8 Rome I and the Posted Workers Directive of the EU	453
c) The Posted Workers Directive as overriding mandatory provisions	455
Section 4: Conclusion	457
Chapter 4 Imperative Norms: Protection of Foundational Principles	459
Section 1: Foundational Principles – a Survey	460
1. Collective Goods	460
2. Essentials of the Social Model	461
a) The amalgam of public interest and protection of the weaker party	461
b) The policy-mix and the principle of territorial application	462
3. Ethical Foundations	464
a) Personal status and public policy	464
b) Surrogate motherhood	466
c) Other progress of medical and scientific research	468
4. Conclusion	469

Section 2: The Legal Framework of Unilateral Adjudication – Imperative Norms	470
1. Public Policy and Overriding Mandatory Provisions	470
a) Positive and negative public policy	470
b) <i>Lois de police</i> and overriding mandatory provisions	471
2. The Concepts Distinguished	472
a) According to the subject	472
b) According to the general or specific style of regulation	473
c) According to the scope of application	474
d) According to the written or unwritten nature	476
3. Identification of Overriding Provisions and Principles	477
a) Explicit scope rules	477
b) The scope in the absence of scope rules	478
c) The political character of the task	480
d) Review in federal entities	480
e) Self-containment outside federal entities	481
4. International Standards: Human Rights and Fundamental Rights	482
a) Human rights and the conflict of laws	482
b) Connections with the forum State	484
5. Conclusion	485
Section 3: Respect for Foreign Imperative Norms	486
1. <i>Introduction: Respecting Foreign Values</i>	486
2. The Protection of Foreign Currencies	487
a) Currency in private international law	487
b) The IMF Agreement	489
3. The Protection of Foreign Cultural Objects	491
a) Cultural property, other tangibles and specific legislation	491
b) Conflict rules: from <i>lex situs</i> to <i>lex originis</i>	493
c) Conclusion	495
4. The Protection of Competition on Foreign Markets	496
a) The development of competition law	496
b) The effects doctrine as a unilateral conflict rule	498
c) Growing respect for foreign competition law	499
d) Emergence of bilateral conflict rules	501
5. Conclusion	503
Section 4: Conclusion	504
General Conclusion	505
1. Social Change – From Closed to Open Societies	505
2. A Change of Perspective – from Public to Private Ordering	507
3. Multiple Forms and Expansion of Private Arrangements	508
4. Public Regulation	509
5. Paradigm Europe	510

List of Statutory Materials	511
Table of Cases	571
Bibliography	579
Index	627