

CONFLICT OF LAWS

Sixth Edition

Peter Hay

L.Q.C. Lamar Professor of Law Emeritus

Emory University

Alumni Distinguished Professor of Law and Dean Emeritus

University of Illinois

University Professor Emeritus

Technische Universität Dresden

Patrick J. Borchers

Lillis Family Distinguished Professor of Law

Creighton University

Symeon C. Symeonides

Dean Emeritus and Alex L. Parks Distinguished Professor of Law

Willamette University

Christopher A. Whytock

Professor of Law

University of California, Irvine

HORNBOOK SERIES®

 **WEST**
ACADEMIC
PUBLISHING

Table of Contents

| | Page |
|---|----------|
| PREFACE TO THE SIXTH EDITION..... | v |
| CHAPTER 1. INTRODUCTION: THE SUBJECT DEFINED AND OVERVIEW.... | 1 |
| I. Definitions—Conflict of Laws—Private International Law | 1 |
| II. Scope of the Subject..... | 3 |
| CHAPTER 2. THE DEVELOPMENT AND CURRENT STATE OF | |
| APPROACHES TO CHOICE OF LAW..... | 5 |
| I. Introduction | 6 |
| II. A Brief History of European Private International Law | 8 |
| A. From Ancient Greece to Medieval Italy | 8 |
| B. Bartolus and the Italian Statutists..... | 10 |
| C. The French Statutists | 12 |
| D. The Dutch Contribution: Comity..... | 14 |
| E. The German Contribution: Wächter and Savigny..... | 15 |
| III. The American Development Prior to the Conflicts Revolution | 19 |
| A. From “Comity” (Story) to “Vested Rights” (Beale)..... | 19 |
| B. The First Critics (Cook and Cavers)..... | 25 |
| IV. The Scholastic Revolution..... | 27 |
| A. “Governmental Interests Analysis” (Currie)..... | 27 |
| B. The <i>Lex-Fori</i> Approach (Ehrenzweig) | 39 |
| C. Functional Analyses | 42 |
| D. Value-Oriented Approaches..... | 48 |
| 1. In General | 48 |
| 2. The “Better Law” Approach | 52 |
| V. The Second Restatement | 58 |
| VI. The Judicial Revolution | 65 |
| A. The Chronology of the Revolution in Torts and Contracts | 65 |
| 1. Introduction..... | 65 |
| 2. The Erosion of the <i>Lex Loci Delicti</i> Rule | 66 |
| 3. The Erosion of the <i>Lex Loci Contractus</i> Rule..... | 70 |
| B. The Revolution at the Beginning of the 21st Century | 75 |
| 1. Introduction..... | 75 |
| 2. Caveats | 75 |
| 3. The Methodological Camps | 79 |
| 4. Traditional States..... | 81 |
| a. Tort Conflicts..... | 82 |
| b. Contract Conflicts | 88 |
| 5. Significant-Contacts States..... | 92 |
| 6. Second Restatement States..... | 94 |
| 7. Interest Analysis and the <i>Lex Fori</i> Variant..... | 97 |
| 8. Other Modern Approaches | 98 |
| 9. The Louisiana and Oregon Codifications | 99 |

| | |
|--|------------|
| VII. The Evolution of Principled Rules: A Goal for the Future | 104 |
| VIII. Conflicts Law Reform in Other Countries | 110 |
| CHAPTER 3. DETERMINING THE APPLICABLE LAW | 125 |
| I. Introduction | 126 |
| II. Pervasive Problems | 128 |
| A. Characterization | 128 |
| 1. Introduction | 128 |
| 2. Subject Matter Characterization | 130 |
| 3. Connecting Factors | 131 |
| 4. Substance—Procedure Characterization | 133 |
| a. In General | 133 |
| b. Statutes of Limitation | 134 |
| B. Renvoi | 143 |
| C. Public Policy | 149 |
| D. Public Policy—Penal and Governmental Claims | 152 |
| E. Availability of Local Procedure and Remedy | 155 |
| III. Problems of Federalism: Constitutional Limitations on Choice of Law | 156 |
| A. Due Process and Full Faith and Credit: From Interest-Balancing to Contacts | 156 |
| 1. Introduction | 156 |
| 2. The Due Process Cases | 157 |
| 3. The Full Faith and Credit Cases | 166 |
| 4. Constitutional Limitations Analyzed | 171 |
| a. Due Process | 171 |
| b. Full Faith and Credit | 174 |
| B. Privileges and Immunities, Equal Protection and Commerce | 176 |
| 1. Privileges and Immunities and Commerce Clauses | 176 |
| 2. Equal Protection | 180 |
| IV. Problems of Federalism: State Law in Federal Courts | 181 |
| A. The Erie/Klaxon Doctrine: Policy Considerations | 181 |
| B. <i>Erie</i> —Problems in Practice | 184 |
| 1. Byrd, Hanna and the Federal Rules | 185 |
| 2. Court-Closing Rules | 191 |
| 3. Interstate Forum Shopping | 197 |
| a. Interpleader | 197 |
| b. The 100-Mile Bulge Rule | 198 |
| c. Supplemental Jurisdiction | 198 |
| d. Federal Transfers | 199 |
| C. Pervasive Erie/Klaxon Problems | 202 |
| 1. What Is “State Law”? | 202 |
| 2. Klaxon and Constitutional Limitations on Choice of Law | 205 |
| V. Problems of Federalism: Federal Common Law | 207 |
| A. The Standard | 207 |
| B. The Federal Interest | 211 |
| 1. Government Obligations | 211 |
| 2. Contractual Relations with the Government | 214 |
| 3. Tort-Related Issues | 215 |
| 4. Private Disputes over Government-Created Rights | 216 |

| | |
|---|------------|
| C. When Is Federal Common Law Appropriate? | 218 |
| VI. International Treaties..... | 220 |
| A. In General | 220 |
| B. Multilateral Treaties..... | 221 |
| C. Bilateral Treaties..... | 223 |
| D. Conclusion..... | 227 |
| VII. Extraterritorial Application of U.S. Law | 227 |
| A. Extraterritorial Application of the U.S. Constitution | 227 |
| B. Extraterritorial Application of Federal Statutes..... | 229 |
| 1. Introduction..... | 229 |
| 2. Statutes Expressly Applicable to Foreign Events or Persons..... | 229 |
| 3. Statutes That Are Silent or Ambiguous on Their Territorial Reach..... | 233 |
| a. Introduction..... | 233 |
| b. The Territorial Presumption: The Early Version | 234 |
| c. Application of U.S. Law to Foreign Ships | 235 |
| d. The Effects Doctrine: Foreign Conduct with Domestic Effects..... | 241 |
| e. The Territorial Presumption, Again..... | 242 |
| f. The Effects Doctrine, Again | 243 |
| g. The Effects Doctrine Tempered by Internationalism | 246 |
| h. The Headquarters Doctrine: Domestic Conduct with Foreign Effects | 247 |
| i. The Territorial Presumption Returns in Full Force..... | 251 |
| (1) <i>Morrison</i> and the Securities Exchange Act | 251 |
| (2) The Alien Torts Statute (ATS) | 255 |
| (a) <i>Sosa</i> | 255 |
| (b) <i>Kiobel</i> | 256 |
| (c) Post- <i>Kiobel</i> Cases | 258 |
| (3) <i>RJR Nabisco</i> and Civil RICO | 264 |
| 4. A Few Remarks on Methodology | 266 |
| CHAPTER 4. DOMICILE | 269 |
| I. Introduction—The Use of the Domicile Concept in Conflict of Laws | 270 |
| II. Preliminary Matters Significant in Considering Domicile..... | 271 |
| A. Findings, Evidence and Preclusion by Prior Litigation | 271 |
| B. Law Determining or Characterizing Domicile..... | 275 |
| III. Domicile Compared and Defined..... | 277 |
| A. Domicile Compared to Nationality—International Conflicts | 277 |
| B. Domicile Compared to Residence, Habitual Residence and Other Persistent Relationships | 279 |
| C. Domicile Defined..... | 283 |
| IV. Traditional Requirements for the Acquisition of a Domicile of Choice..... | 285 |
| A. In General | 285 |
| B. Physical Presence | 286 |
| C. Intent Necessary for Domicile | 288 |
| 1. In General | 288 |
| 2. Domicile of a Person Having Multiple Homes | 290 |
| 3. Intent Distinguished from Motive | 292 |
| 4. Freedom to Exercise Choice | 293 |
| V. Geographic Boundaries of Domicile | 297 |

| | |
|---|------------|
| VI. Domicile as Affected by Status | 298 |
| A. Domicile of Aliens | 298 |
| B. Domicile of Married Persons | 300 |
| C. Derivative Domicile | 302 |
| 1. Domicile of Origin | 302 |
| 2. Domicile of Minor—General | 304 |
| 3. Children Born out of Wedlock | 306 |
| 4. Adopted Children | 307 |
| 5. Separated Parents | 307 |
| 6. Death of Parent | 308 |
| 7. Emancipation | 309 |
| 8. Marriage of Minor | 310 |
| D. Capacity to Acquire a Domicile | 310 |
| VII. Analogous Relationships of Corporate Entities | 311 |
| CHAPTER 5. BASIC CONSIDERATIONS IN PERSONAL JURISDICTION.... | 313 |
| I. Introduction | 314 |
| II. The Development of American Jurisdiction | 315 |
| A. 1789–1877: Developing Full Faith and Credit Standards | 315 |
| B. 1878–1944: Developing Due Process Standards | 317 |
| C. 1945–Present: The Minimum Contacts Test | 320 |
| III. Traditional Jurisdictional Relationships | 323 |
| A. In Rem Jurisdiction | 323 |
| B. Quasi in Rem Jurisdiction | 325 |
| C. Status Jurisdiction | 327 |
| D. In Personam Jurisdiction | 328 |
| E. Continuing Significance of Traditional Categories | 328 |
| IV. Jurisdictional Relationships | 332 |
| A. Specific Jurisdiction | 332 |
| 1. Related Contacts: Distinguishing Specific from General Jurisdiction | 332 |
| 2. Purposeful Availment | 336 |
| 3. Reasonableness | 341 |
| B. General Jurisdiction | 343 |
| V. The Need for Statutory Authorization | 347 |
| A. State Courts | 347 |
| B. Federal Courts | 349 |
| VI. Other Jurisdictional Issues Compared | 351 |
| A. Notice and Opportunity to Be Heard | 351 |
| B. Competence of the Court—Subject Matter Jurisdiction | 353 |
| C. Venue | 354 |
| VII. Challenging Jurisdiction | 355 |
| A. Direct Attacks | 355 |
| 1. Federal Court—FRCP 12(b) | 355 |
| 2. State Courts | 357 |
| B. Collateral Attacks | 358 |
| C. Limited Appearances | 359 |
| VIII. Continuing Jurisdiction | 360 |

| | |
|--|------------|
| CHAPTER 6. GENERAL JURISDICTION | 363 |
| I. Introduction | 363 |
| II. “Satellite” Bases of Jurisdiction | 365 |
| A. Transient Jurisdiction—The Rule of In-State Service | 365 |
| B. Consent | 367 |
| C. Residence, Domicile and Nationality | 369 |
| D. Appearance | 372 |
| E. Jurisdiction by Necessity | 374 |
| III. Contacts-Based General Jurisdiction | 376 |
| A. Distinguished from Specific Jurisdiction | 376 |
| B. Application to Individual Defendants | 379 |
| C. “Continuous and Systematic” Contacts | 380 |
| CHAPTER 7. SPECIFIC JURISDICTION IN TORT CASES | 387 |
| I. Introduction | 387 |
| II. Personal Injuries | 388 |
| A. Products Liability—The “Stream of Commerce” Test | 388 |
| B. Intentional Torts | 394 |
| C. Negligence | 397 |
| D. Other Strict Liability | 399 |
| III. Injuries to Property | 400 |
| A. Personal Property | 400 |
| B. Real Property | 401 |
| IV. Injuries to Reputation | 402 |
| A. Libel | 402 |
| B. Slander | 406 |
| C. Invasion of Privacy | 407 |
| V. Economic Injuries | 408 |
| A. Interference with Contract and Related Torts | 408 |
| B. Fraud and Related Torts | 409 |
| CHAPTER 8. SPECIFIC JURISDICTION IN CONTRACT CASES | 411 |
| I. Introduction | 411 |
| II. Insurance Contracts | 414 |
| III. Franchise and Similar Contracts | 416 |
| IV. Employment and Personal Service Contracts | 418 |
| V. Purchase and Sale Contracts | 420 |
| VI. Construction Contracts | 422 |
| VII. Leases | 423 |
| VIII. Carriage Contracts | 424 |
| CHAPTER 9. SPECIFIC JURISDICTION IN STATUTORY CASES | 427 |
| I. Introduction | 427 |
| II. Environmental Harm | 429 |
| III. Copyright and Trademark Infringement | 432 |
| IV. Patent Infringement | 434 |
| V. Employment-Related Statutory Obligations | 437 |
| VI. Securities and Related Statutes | 439 |
| VII. Private Antitrust and Other Unfair Trade Actions | 441 |

| | |
|--|------------|
| VIII. Anti-Fraud Statutes..... | 443 |
| CHAPTER 10. SPECIAL JURISDICTIONAL PROBLEMS..... | 445 |
| I. Introduction | 445 |
| II. Federal Court Personal Jurisdiction..... | 446 |
| A. Fifth and Fourteenth Amendment Standards..... | 446 |
| B. Federal Rule of Civil Procedure..... | 450 |
| 1. Incorporation of State Long-Arm Statutes | 450 |
| 2. The “100-Mile Bulge Rule” | 452 |
| 3. Federal Rule 4(k)(2)..... | 454 |
| C. Admiralty Jurisdiction | 456 |
| D. Bankruptcy Cases..... | 460 |
| E. Removed Cases | 462 |
| III. Class Actions..... | 464 |
| A. Jurisdiction over Defendants..... | 464 |
| B. Jurisdiction over Plaintiffs..... | 466 |
| 1. Opt-out Classes | 466 |
| 2. Mandatory Classes | 468 |
| IV. Special Problems of Jurisdiction over Business Associations | 469 |
| A. Partnerships and Other Unincorporated Associations | 469 |
| B. Domestic Corporations | 471 |
| C. Foreign Corporations..... | 473 |
| 1. Historical Development..... | 473 |
| 2. Current Jurisdictional Theory | 475 |
| D. Corporate Parent-Subsidiary Relationships..... | 478 |
| E. Jurisdiction over Individuals for Corporate or Fiduciary Activities | 480 |
| V. Pendent Personal Jurisdiction | 482 |
| VI. Foreign States and Instrumentalities..... | 486 |
| CHAPTER 11. LIMITATIONS ON JURISDICTION | 493 |
| I. Introduction | 493 |
| II. Contractual Limitations on Forum Selection | 494 |
| A. Exclusive and Non-Exclusive Forum Clauses | 494 |
| B. Enforceability in Federal Courts | 496 |
| 1. Non-Diversity Cases | 496 |
| 2. Diversity Cases | 501 |
| C. Enforceability in State Courts | 502 |
| D. Interpretation and Scope of Forum Clauses | 504 |
| E. Judgment Recognition Issues | 506 |
| III. Forum Non Conveniens | 507 |
| A. Introduction | 507 |
| B. Significant Factors in Application..... | 510 |
| 1. Preference for Chosen Forum | 510 |
| 2. Availability of Another Forum..... | 511 |
| 3. Other Factors | 513 |
| 4. Methods of Application..... | 515 |
| 5. State Practice | 515 |
| C. Federal Transfers | 518 |
| IV. Immunities from Service..... | 521 |

| | |
|---|------------|
| V. Other Federal Limitations on State Court Jurisdiction | 522 |
| CHAPTER 12. PROCEDURE..... | 525 |
| I. Notice | 525 |
| A. Method of Notice..... | 526 |
| B. Opportunity to Be Heard | 528 |
| C. Waiver of Notice | 529 |
| II. Service Abroad of Documents..... | 530 |
| III. Taking Evidence Abroad..... | 536 |
| IV. Admissibility of Evidence: Testimonial Privilege..... | 543 |
| A. Introduction | 543 |
| B. Interstate Conflicts..... | 543 |
| C. International Conflicts..... | 547 |
| D. The Interstate and Convention Approaches Compared..... | 548 |
| V. Proof of Foreign Law | 550 |
| A. The Fact Approach to Foreign Law | 550 |
| 1. The Common Law Background..... | 550 |
| 2. Other Legal Systems | 552 |
| B. State Statutes and Uniform Laws..... | 553 |
| C. Federal Law | 554 |
| D. When Proof Fails: Presumptions and Use of the <i>Lex Fori</i> | 558 |
| CHAPTER 13. FORMING DOMESTIC RELATIONSHIPS..... | 563 |
| I. Marriage and Other Domestic Relationships as a Problem in the Conflict of Laws | 563 |
| A. Marriage and Other Domestic Relationships | 563 |
| B. Marriage: Significant Policies..... | 564 |
| C. Marriage and Other Relationships as an Incidental Question | 567 |
| D. Competing Approaches in Choice of Law: Domicile and Nationality | 568 |
| II. Law Governing Recognition of Marriage..... | 569 |
| A. The Traditional Rule | 569 |
| B. Requirements of Place of Celebration | 571 |
| C. Prohibitions of the Domicile of the Parties | 575 |
| 1. Form and Capacity | 575 |
| 2. Substantive Prohibition | 575 |
| 3. Prohibitions upon Remarriage After Divorce: Progressive Polygamy ... | 577 |
| 4. Anti-Miscegenation Laws..... | 580 |
| 5. Incestuous Marriages | 581 |
| 6. Non-Age—Consent of Parent..... | 582 |
| 7. Marriage Evasion Legislation..... | 583 |
| D. Effect in Third State of Marriage Void by Law of Domicile..... | 584 |
| E. Marriage of Parties with Different Domiciles | 585 |
| F. The Covenant Marriage | 586 |
| III. Conflict-of-Laws Issues Regarding Particular Types of Domestic Relationships | 587 |
| A. Polygamous Marriage..... | 587 |
| B. Marriage Under American Indian Tribal Law | 590 |
| C. Islamic Marriage in American Courts..... | 591 |
| D. Same-Sex Marriages..... | 593 |

| | |
|--|------------|
| E. Civil Unions, Registered Partnerships, and Contractual Arrangements | 594 |
| CHAPTER 14. MARITAL PROPERTY..... | 597 |
| I. Preliminary Policy Observations..... | 597 |
| A. Introduction | 597 |
| B. Common Law System | 598 |
| C. Community Property System | 599 |
| D. Marital Property as Conflict of Laws Issues in the United States | 600 |
| E. Foreign Country Approaches | 603 |
| II. Immovables..... | 604 |
| A. Land Owned at Time of Marriage | 604 |
| B. Land Acquired After Marriage | 605 |
| C. Income from Immovables | 607 |
| III. Movables | 608 |
| A. Movables Owned at Time of Marriage | 608 |
| B. Movables Acquired Subsequent to Marriage | 609 |
| C. Income from Movables..... | 612 |
| D. Accrual Values: Insurance, Pensions, etc. | 612 |
| IV. Subsequent Intentional Property Transactions | 614 |
| V. The Separate Property and Quasi-Community Property Concepts | 616 |
| A. Characterization of Separate Property | 616 |
| B. Quasi-Community Property | 617 |
| VI. Contractual Modification of the Marital Property Regime..... | 618 |
| VII. Debts | 620 |
| CHAPTER 15. DISSOLUTION OF DOMESTIC RELATIONSHIPS AND ITS CONSEQUENCES | 623 |
| I. Interstate Recognition of Dissolution Decrees | 624 |
| A. Introduction | 624 |
| 1. In General | 624 |
| 2. Domicile and Choice of Law | 626 |
| B. Ex Parte Divorces | 629 |
| 1. Full Faith and Credit and the Domicile Requirement: The <i>Williams</i> Cases..... | 629 |
| 2. Domicile and Durational Residence Requirements..... | 631 |
| C. Inter Partes Divorces | 633 |
| D. The Effect of a Collateral Determination of Invalidity | 636 |
| E. Conclusion and Outlook | 639 |
| II. Annulment in the United States | 641 |
| III. International Recognition of Dissolution Decrees..... | 644 |
| A. Recognition of Foreign-Country Judicial Divorces in the United States..... | 644 |
| B. Recognition of Foreign Non-Judicial Divorces in the United States..... | 653 |
| C. Recognition of U.S. Dissolution Decrees Abroad..... | 658 |
| IV. Incidents of Divorce Decrees: Support and Custody | 659 |
| A. Divisible Divorce..... | 659 |
| B. Support Obligations..... | 665 |
| 1. Establishing the Support Obligation by Judicial Decree..... | 665 |
| 2. Enforcement and Modification of Support Decrees | 668 |
| a. Lump Sum Child Support and Claims for Additional Support | 669 |

| | | |
|---|---|------------|
| b. | Modification of Support Decrees | 671 |
| c. | Choice of Law for Modification..... | 672 |
| d. | Summary | 673 |
| 3. | International Recognition | 674 |
| C. | Child Custody | 678 |
| 1. | Obtaining Custody..... | 678 |
| 2. | Interstate Recognition and Modification..... | 679 |
| 3. | International Recognition and Modification..... | 687 |
| CHAPTER 16. LEGITIMATION AND ADOPTION..... | | 691 |
| I. | Legitimacy and Legitimation..... | 691 |
| A. | Status | 691 |
| B. | Inheritance Rights of Legitimate and Legitimated Children..... | 695 |
| C. | Inheritance Rights of Illegitimate Children | 696 |
| II. | Adoption | 698 |
| A. | Jurisdiction to Decree an Adoption | 699 |
| B. | Extrastate Consequences of Adoption..... | 703 |
| C. | International Adoptions | 704 |
| CHAPTER 17. TORTS | | 711 |
| I. | Introduction | 713 |
| II. | Choice-of-Law Approaches to Torts in General..... | 715 |
| A. | Traditional Approaches: The First Restatement's <i>Lex Loci</i> Test | 715 |
| 1. | The <i>Lex-Loci-Delicti</i> Rule | 715 |
| 2. | Characterization | 723 |
| B. | Interest Analysis | 726 |
| 1. | In General | 726 |
| 2. | Interest Analysis and the <i>Lex-Fori</i> Variant in the Courts..... | 729 |
| a. | False Conflicts..... | 729 |
| b. | True Conflicts..... | 730 |
| c. | "No-Interest" or "Unprovided-For" Cases..... | 733 |
| d. | The <i>Lex-Fori</i> Variant | 736 |
| 3. | The "Comparative Impairment" Approach | 739 |
| a. | The California Version | 740 |
| b. | The Louisiana Version..... | 748 |
| C. | The "Better Law" Approach | 750 |
| D. | The Most-Significant-Relationship Test and the Second Restatement | 757 |
| 1. | Introduction..... | 757 |
| 2. | The Case Law..... | 759 |
| E. | The New York Experience..... | 766 |
| 1. | <i>Babcock</i> and Guest-Statute Conflicts..... | 766 |
| 2. | From <i>Babcock</i> to <i>Neumeier</i> | 767 |
| 3. | The <i>Neumeier</i> Rules..... | 770 |
| 4. | Extending the <i>Neumeier</i> Rules to Other Loss-Distribution Conflicts: <i>Schultz</i> and <i>Cooney</i> | 771 |
| 5. | Subsequent Cases | 778 |
| III. | From Rules to Approaches to Rules | 780 |
| A. | From Rules to Approaches | 780 |
| 1. | Introduction..... | 780 |

| | | |
|-----|--|-----|
| 2. | Policy Analysis: A Synthesis | 781 |
| a. | False Conflicts | 781 |
| b. | Conflicting Rules: Accommodation | 781 |
| c. | Resolving the Impasse | 782 |
| 3. | Time for Rules? | 783 |
| B. | From Approaches to Rules | 784 |
| 1. | The Distinction Between Conduct-Regulation Rules and Loss-Distribution Rules | 784 |
| a. | The Origins and Meaning of the Distinction | 784 |
| b. | The Difficulties of the Distinction | 788 |
| c. | The Usefulness of the Distinction | 792 |
| 2. | Loss-Distribution Conflicts | 794 |
| a. | Common-Domicile Cases | 794 |
| (1) | The <i>Babcock</i> Pattern | 794 |
| (2) | The Converse- <i>Babcock</i> Pattern | 795 |
| (3) | Summary | 798 |
| (4) | American Rules | 799 |
| (5) | Foreign Rules | 801 |
| b. | Cases Analogous to Common-Domicile Cases | 804 |
| (1) | Domicile in States with Same Law | 804 |
| (2) | Pre-Existing Relationship | 806 |
| (3) | Defendant-by-Defendant Analysis | 807 |
| c. | Split-Domicile Intra-State Torts | 808 |
| (1) | True Conflicts | 809 |
| (a) | Intrastate Torts in Which the Conduct, the Injury, and the Tortfeasor's Domicile Are in a State Whose Law Protects the Tortfeasor (the <i>Cipolla</i> Pattern) | 809 |
| (b) | Intrastate Torts in Which the Conduct, the Injury, and the Victim's Domicile Are in a State Whose Law Protects the Victim (the <i>Hall</i> Pattern) | 815 |
| (c) | Summary and Rules | 818 |
| (2) | "No-Interest" or Unprovided-for Cases | 821 |
| (a) | The <i>Neumeier</i> Pattern | 821 |
| (b) | The <i>Hurtado</i> Pattern | 825 |
| (c) | Summary and Rules | 827 |
| d. | Cross-Border Torts Involving Two States | 830 |
| (1) | Cross-Border Torts in Which the Conduct and the Tortfeasor's Domicile Are in a State Whose Law Favors the Tortfeasor, While the Injury and the Victim's Domicile Are in a State Whose Law Protects the Victim (the <i>Kuehn</i> Pattern) | 831 |
| (2) | Cross-Border Torts in Which the State of Conduct Favors the Victim and the State of Injury Favors the Tortfeasor (the <i>Williams</i> Pattern) | 835 |
| (3) | Summary | 839 |
| (4) | American Rules | 840 |
| (5) | Foreign Rules | 843 |
| e. | Split-Domicile Conflicts Involving Three States | 845 |
| f. | Summary and Rules | 850 |

| | | |
|-----|--|-----|
| 3. | Conduct-Regulation Conflicts | 852 |
| a. | Generic Conduct-Regulation Conflicts | 852 |
| (1) | Pattern 1: Intrastate Torts (Conduct and Injury in Same State)..... | 853 |
| (2) | Pattern 2: Cases Analogous to Intrastate Torts (Conduct and Injury in Different States That Prescribe the Same Standards of Conduct) | 860 |
| (3) | Pattern 3: Cross-Border False Conflicts: Conduct Violates Standards of State of Conduct but Not Those of the State of Injury | 861 |
| (4) | Pattern 4: Cross-Border True Conflicts: Conduct Violates the Standards of the State of Injury, but Not the Standards of the State of Conduct | 868 |
| b. | Summary and Rules | 874 |
| c. | Punitive-Damages Conflicts..... | 879 |
| (1) | The Pertinent Contacts and Typical Patterns | 879 |
| (2) | Three- or Two-Contact Patterns | 880 |
| (3) | Single-Contact Patterns | 885 |
| (4) | The Victim's Domicile or Nationality..... | 892 |
| (5) | Summary and Rule | 895 |
| IV. | Particular Tort Problems..... | 896 |
| A. | Injury to Intangible Values..... | 896 |
| 1. | Fraud and Misrepresentation..... | 896 |
| 2. | Unfair Competition..... | 899 |
| 3. | Alienation of Affections | 902 |
| 4. | Defamation and Invasion of Privacy | 903 |
| B. | Statutory Liability..... | 906 |
| 1. | No-Fault Liability..... | 906 |
| a. | In General..... | 906 |
| b. | Law Governing the Tortfeasor's Liability | 910 |
| c. | Coverage of the No-Fault Statutes | 912 |
| 2. | Workers' Compensation..... | 913 |
| a. | Workers' Compensation Benefits..... | 913 |
| b. | Statutory Benefits and Tort Immunity | 916 |
| c. | Exclusivity with Regard to Subcontractors and Their Employees..... | 918 |
| d. | Mutual Employment for Benefit of Two Employers | 919 |
| C. | Admiralty | 920 |
| V. | Products Liability | 927 |
| A. | In General | 927 |
| B. | Samples from the Case Law | 931 |
| 1. | Common Denominators..... | 931 |
| a. | Recent Trends | 931 |
| b. | Pertinent Contacts..... | 932 |
| c. | Typical Patterns..... | 933 |
| 2. | Cases in Which Each State's Law Favors the Local Litigant (Direct or True Conflicts) | 935 |
| a. | Cases Applying the Pro-Defendant Law of a Defendant-Affiliated State..... | 935 |

| | | |
|-----------------------------------|---|------------|
| b. | Cases Applying the Pro-Recovery Law of a Victim-Affiliated State..... | 939 |
| (1) | Choice Supported by Three Contacts..... | 939 |
| (2) | Choice Supported by Two Contacts | 946 |
| (3) | Choice Supported by a Single Contact..... | 949 |
| 3. | Cases in Which Each State's Law Favors a Litigant Affiliated with the Other State (Inverse Conflicts) | 955 |
| a. | Cases Applying the Pro-Recovery Law of a Defendant-Affiliated State..... | 955 |
| b. | Cases Applying the Pro-Defendant Law of a Victim-Affiliated State..... | 961 |
| (1) | Choice Supported by Three Contacts..... | 961 |
| (2) | Choice Supported by Two Contacts | 974 |
| (3) | Choice Supported by a Single Contact..... | 979 |
| C. | Latent Injuries and the Issue of Time..... | 981 |
| D. | Summary..... | 987 |
| E. | Choice-of-Law Rules | 989 |
| 1. | No Descriptive Rule..... | 989 |
| 2. | American Rules..... | 989 |
| 3. | Foreign Rules..... | 991 |
| VI. | Territoriality and Personality in Tort Conflicts | 994 |
| CHAPTER 18. CONTRACTS..... | | 999 |
| I. | Choice of Law by the Parties (Party Autonomy) | 1001 |
| A. | The Principle..... | 1001 |
| B. | Limitations on Party Autonomy | 1007 |
| 1. | Issues That the Parties Could Resolve by Agreement | 1007 |
| 2. | The Requirement of a "Substantial Relationship" or "Reasonable Basis"..... | 1008 |
| 3. | The Public Policy Limitation..... | 1015 |
| a. | Public Policy Limitation in General | 1015 |
| (1) | Which State's Public Policy? The <i>Lex Limitativa</i> | 1016 |
| (a) | <i>Lex Fori</i> Systems | 1016 |
| (b) | <i>Lex Causae</i> Systems | 1017 |
| (c) | <i>Hybrid</i> Systems | 1020 |
| (2) | Which Level of Public Policy?..... | 1022 |
| (3) | Public Policy and "Mandatory Rules" | 1023 |
| (4) | "Fundamental Policy" | 1024 |
| b. | Public Policy in Specific Contexts..... | 1027 |
| (1) | Consumer Contracts | 1028 |
| (2) | Employment Contracts..... | 1033 |
| (3) | Franchise Contracts..... | 1042 |
| (4) | Insurance Contracts..... | 1048 |
| (5) | Usury | 1049 |
| (6) | Other Contracts..... | 1050 |
| C. | Modalities of the Choice-of-Law Agreement..... | 1052 |
| 1. | Existence and Validity | 1052 |
| a. | Capacity..... | 1052 |
| b. | Consent and Formation..... | 1054 |

| | | |
|-----|---|------|
| c. | Form..... | 1054 |
| 2. | Multiple, Partial, or Subsequent Choice or Change..... | 1057 |
| 3. | Choice of an Invalidating Law | 1059 |
| 4. | Choice of Non-State Norms | 1060 |
| 5. | The Scope-of-the Choice of Law Clause..... | 1063 |
| a. | Substantive or Conflicts Law | 1065 |
| b. | Substantive Law or Procedural Law | 1068 |
| c. | Non-Contractual Issues..... | 1073 |
| (1) | Introduction..... | 1073 |
| (2) | The Case Law | 1076 |
| (3) | Critique..... | 1082 |
| D. | Forum-Selection or Choice-of-Forum Clauses | 1084 |
| 1. | Introduction..... | 1084 |
| 2. | Scenario 1: Action Filed in the Chosen Court..... | 1086 |
| 3. | Actions Filed in a Court Not Chosen (the “Seized” Court)..... | 1088 |
| a. | Scenario 2: Contracts Without a Choice-of-Law Clause..... | 1088 |
| b. | Scenario 3: Contracts with a Choice-of-Law Clause..... | 1092 |
| (1) | Cases Applying Forum Law | 1093 |
| (2) | Cases Applying the Chosen Law | 1094 |
| (3) | Cases Distinguishing Between Enforceability and Interpretation..... | 1098 |
| 4. | Summary | 1101 |
| 5. | Law Governing Interpretation..... | 1101 |
| 6. | Law Governing Enforceability | 1101 |
| E. | Arbitration Clauses | 1103 |
| 1. | Domestic Interstate Arbitration | 1103 |
| a. | Introduction..... | 1103 |
| b. | The Supreme Court’s Strong Pro-Arbitration Stance | 1105 |
| c. | Separability of Arbitration Clause..... | 1108 |
| 2. | Foreign Arbitration..... | 1109 |
| a. | The Supreme Court’s Jurisprudence | 1109 |
| b. | Law Governing the Arbitration Agreement | 1113 |
| (1) | Contractual Capacity | 1115 |
| (2) | Other Issues of Formation of the Arbitration Agreement..... | 1116 |
| (3) | Issues of Scope, Validity, and Enforceability (Other than Arbitrability) | 1116 |
| (4) | Arbitrability..... | 1117 |
| (5) | Public Policy | 1119 |
| c. | Law Applicable in Arbitration | 1120 |
| F. | Section 1–301 of the Uniform Commercial Code..... | 1123 |
| 1. | History..... | 1123 |
| 2. | Party Autonomy..... | 1124 |
| 3. | Limits of Party Autonomy..... | 1126 |
| 4. | Applicable Law in the Absence of Effective Party Agreement | 1127 |
| G. | Other State Statutes on Party Autonomy..... | 1129 |
| 1. | Statutes Welcoming Inbound Choice-of-Law Clauses..... | 1129 |
| 2. | Statutes Prohibiting Outbound Choice-of-Law Clauses | 1130 |
| H. | The CISG..... | 1132 |

| | | |
|----------------------------------|--|-------------|
| II. | Choice of Law in the Absence of Choice-of-Law Agreement..... | 1136 |
| A. | The Classic Approach..... | 1136 |
| B. | Modern Approaches..... | 1139 |
| 1. | Overview..... | 1139 |
| 2. | The Case Law: Issue Identification (Characterization) and Connecting Factors..... | 1140 |
| 3. | The Choice-of-Law Approaches in the Courts: Summary..... | 1146 |
| III. | Contract Choice-of-Law by Subject Matter..... | 1150 |
| A. | Contracts by Subject Matter..... | 1151 |
| 1. | Interests in Land..... | 1151 |
| 2. | Sales of Chattels..... | 1152 |
| 3. | Insurance Contracts..... | 1154 |
| a. | Insurance Statutes..... | 1154 |
| b. | Automobile Insurance..... | 1155 |
| c. | Life Insurance..... | 1158 |
| d. | Commercial Liability Insurance..... | 1159 |
| 4. | Suretyship..... | 1162 |
| 5. | Contracts for the Repayment of Money Lent..... | 1163 |
| 6. | Rendition of Services..... | 1164 |
| 7. | Agency..... | 1171 |
| 8. | Other Contracts..... | 1177 |
| B. | Contract Issues..... | 1180 |
| IV. | Choice-of-Law Alternatives..... | 1183 |
| V. | Unjust Enrichment..... | 1185 |
| A. | Introduction..... | 1185 |
| 1. | In General..... | 1185 |
| 2. | Case Categories..... | 1186 |
| B. | Choice-of-Law Alternatives..... | 1187 |
| 1. | Preexisting (Contractual) Relationships..... | 1187 |
| 2. | Voluntary Bestowal of Benefits..... | 1190 |
| 3. | Claims Related to Tort..... | 1191 |
| 4. | Equitable Remedies..... | 1192 |
| 5. | Extent and Nature of Relief..... | 1194 |
| CHAPTER 19. PROPERTY..... | | 1197 |
| I. | Interests in Land..... | 1198 |
| A. | Introduction..... | 1198 |
| B. | The Situs Rule..... | 1199 |
| C. | Contract and Conveyance Distinctions..... | 1202 |
| D. | Particular Issues..... | 1206 |
| 1. | Conveyances: Effect and Construction..... | 1206 |
| 2. | Covenants..... | 1207 |
| E. | Equitable Interests..... | 1209 |
| 1. | Generally..... | 1209 |
| 2. | Equitable Servitudes..... | 1210 |
| 3. | Equitable Remedies..... | 1210 |
| F. | Encumbrances..... | 1213 |
| II. | Tangible Movables..... | 1217 |
| A. | Policy Considerations..... | 1217 |

| | | |
|-------------------------------------|---|-------------|
| B. | Chattel Transfers | 1219 |
| 1. | Contract and Property Issues | 1219 |
| 2. | Situs and Market Policies | 1221 |
| 3. | Prescription | 1223 |
| 4. | Removal of a Chattel | 1224 |
| C. | Chattel Security | 1226 |
| 1. | Introduction | 1226 |
| 2. | The Uniform Commercial Code | 1226 |
| a. | Introduction | 1226 |
| b. | Documents, Instruments, and Ordinary Goods | 1227 |
| c. | Goods Covered by a Certificate of Title | 1230 |
| d. | Deposit Accounts, General Intangibles, Mobile Goods and Agricultural Liens | 1230 |
| e. | Chattel Paper | 1232 |
| f. | Oil, Gas, Minerals and Timber | 1232 |
| g. | Investment Property and Letters of Credit | 1233 |
| h. | Renvoi | 1235 |
| 3. | Treaties | 1235 |
| III. | Intangibles | 1236 |
| A. | Introduction | 1236 |
| B. | Assignability of Intangibles | 1237 |
| C. | Assignment of Intangibles | 1238 |
| 1. | Introduction | 1238 |
| 2. | Assignments for the Benefit of Creditors | 1239 |
| 3. | Commercial Assignments | 1239 |
| D. | Corporate Stock | 1240 |
| CHAPTER 20. SUCCESSION | | 1243 |
| I. | Introduction | 1243 |
| II. | Intestate Succession | 1244 |
| A. | Immovables—Land | 1244 |
| B. | Movables | 1247 |
| III. | Testamentary Succession | 1250 |
| A. | Introduction | 1250 |
| B. | Wills of Immovables—Land | 1252 |
| 1. | Formal Validity | 1252 |
| 2. | Validity—Testamentary Trusts | 1255 |
| 3. | Construction | 1256 |
| C. | Wills of Movables | 1258 |
| 1. | Validity | 1258 |
| 2. | Restrictions on Charitable Gifts | 1261 |
| 3. | Revocation | 1262 |
| a. | By Instrument or Physical Act | 1262 |
| b. | By Operation of Law | 1263 |
| 4. | Construction | 1264 |
| IV. | Family Protection—Forced Shares—Election | 1266 |
| A. | Forced Shares | 1266 |
| B. | Election | 1268 |
| V. | International Wills | 1270 |

| | |
|---|-------------|
| VI. Devises to Aliens | 1272 |
| CHAPTER 21. TRUSTS AND POWERS OF APPOINTMENT | 1275 |
| I. Trusts | 1275 |
| A. Introduction | 1275 |
| B. Validity | 1276 |
| 1. Testamentary Trusts | 1276 |
| 2. Inter Vivos Trusts | 1278 |
| C. Administration of Trusts | 1281 |
| 1. Introduction | 1281 |
| 2. Qualification of Foreign Trustees | 1282 |
| 3. Administrative Issues | 1283 |
| 4. Change in Place of Administration | 1284 |
| II. Powers of Appointment | 1285 |
| A. Introduction | 1285 |
| B. Validity of a Power | 1286 |
| C. Nature and Scope of a Power | 1286 |
| D. Exercise of Powers | 1287 |
| 1. Generally | 1287 |
| 2. Rule Against Perpetuities | 1290 |
| 3. Exercise by Residuary Clause | 1291 |
| CHAPTER 22. PROBATE AND ADMINISTRATION OF ESTATES | 1293 |
| I. Probate | 1294 |
| A. Introduction | 1294 |
| B. Probate of Will of Movables | 1294 |
| C. Recognition of Foreign Probate | 1295 |
| D. Probate of Will of Immovables—Land | 1297 |
| II. Administration of Estates | 1298 |
| A. Introduction | 1298 |
| B. Place and Necessity of Administration | 1299 |
| 1. Domicile | 1299 |
| 2. Situs of Tangible Assets | 1299 |
| 3. Chattels Temporarily Present Within a State | 1300 |
| 4. Chattels Brought into a State After Owner's Death | 1301 |
| 5. Intangibles | 1302 |
| 6. Commercial Paper | 1305 |
| 7. Corporate Stock | 1307 |
| 8. Life Insurance | 1308 |
| C. Powers of Personal Representative Outside Appointing State | 1309 |
| 1. Power to Sue | 1309 |
| 2. Other Acts | 1311 |
| 3. Payment to a Foreign Representative | 1314 |
| 4. Transfer of Claim by Personal Representative | 1316 |
| 5. Suits Arising out of Administration | 1317 |
| 6. Actions Against Foreign Representatives | 1318 |
| 7. Privity Between Foreign Representatives | 1323 |
| D. Creditors' Claims—Proof and Payment | 1328 |
| E. Spousal and Family Allowances | 1330 |

| | |
|---|-------------|
| III. Accounting and Distribution | 1331 |
| IV. Guardians and Conservators | 1333 |
| A. In General | 1333 |
| B. Conservators | 1333 |
| C. Guardians of the Person | 1336 |
| CHAPTER 23. CORPORATIONS, WINDING-UP, AND BANKRUPTCY | 1339 |
| I. The Law Applicable to Corporations | 1339 |
| A. The Law of the Place of Incorporation | 1339 |
| 1. The General Principle | 1339 |
| 2. Special Choice-of-Law Rules | 1344 |
| 3. Applications of the Incorporation Rule | 1346 |
| B. Regulation of Foreign Corporations by the Forum | 1349 |
| 1. Constitutional Limits | 1349 |
| 2. Qualification Statutes | 1351 |
| 3. Pseudo-Foreign Corporations | 1352 |
| 4. Piercing the Corporate Veil | 1354 |
| C. Dissolution and Winding-up | 1355 |
| II. Bankruptcy | 1356 |
| A. Introduction | 1356 |
| B. Interstate Bankruptcy | 1360 |
| C. International Bankruptcy | 1368 |
| 1. Effect of Foreign Proceedings in the United States | 1369 |
| 2. Effect of U.S. Proceedings Abroad | 1370 |
| D. Insolvency of Related and of Multinational Corporations | 1371 |
| CHAPTER 24. RECOGNITION AND ENFORCEMENT OF FOREIGN | |
| JUDGMENTS AND DECREES | 1375 |
| I. Preliminary Considerations | 1376 |
| A. The Policy of Preclusion | 1376 |
| B. Preclusion and the Enforcement of Interstate Judgments | 1378 |
| C. Preclusion and the Enforcement of International Judgments | 1381 |
| D. Methods of Enforcing Foreign Judgments | 1384 |
| II. Interstate Recognition of Judgments | 1389 |
| A. What Constitutes Enforceable Foreign Proceedings | 1389 |
| 1. Finality | 1389 |
| 2. Equity Decrees: Jurisdiction and Recognition | 1390 |
| 3. Foreign Decrees Relating to Land | 1393 |
| 4. Nature of the Proceeding | 1395 |
| B. Methods of Enforcing Interstate Judgments | 1396 |
| 1. Full Faith and Credit | 1396 |
| 2. Recognition and Enforcement by Registration or Summary Proceeding | 1399 |
| C. Defenses to Claim on Sister-State Judgments | 1400 |
| 1. Lack of Jurisdiction of Rendering Court | 1400 |
| 2. Judgment Obtained by Fraud; Equitable Defenses | 1403 |
| 3. The Public Policy of the Forum, Penal Judgments, Tax Judgments, and Lack of a Competent Court | 1405 |
| a. Public Policy | 1406 |

| | |
|---|------|
| b. No Competent Court in Recognizing Forum | 1409 |
| c. Tax and Penal Judgments and Claims..... | 1410 |
| 4. Foreign Judgment Not on the Merits..... | 1413 |
| 5. Other Defenses..... | 1416 |
| III. International Recognition of Judgments | 1421 |
| A. Recognition and Enforcement..... | 1421 |
| 1. Early Approaches and the <i>Hilton</i> Doctrine..... | 1421 |
| 2. Recognition Practice After <i>Hilton</i> and <i>Erie</i> | 1424 |
| 3. Foreign Approaches and Their Implications for U.S. Recognition Practice | 1428 |
| 4. Federal Preemption by Recognition Treaty | 1435 |
| 5. Valuation of Foreign Money-Judgments | 1439 |
| B. Defenses to Claim on Foreign-Country Judgment | 1441 |
| 1. Jurisdiction | 1441 |
| 2. Foreign Judgment for Taxes or Penalties | 1444 |
| 3. Public Policy | 1445 |
| 4. International Recognition Treaties and Preclusion | 1448 |
| IV. Extralitigious Proceedings, Administrative Determinations, and Arbitral Awards | 1449 |
| TABLE OF CASES | 1455 |
| TABLE OF STATUTES AND RULES | 1545 |
| TABLE OF RESTATMENT CITATIONS..... | 1555 |
| TABLE OF UNIFORM COMMERCIAL CODE CITATIONS | 1565 |
| TABLE OF UNIFORM PROBATE CODE CITATIONS | 1567 |
| INDEX..... | 1569 |