

Transnational Commercial Law

The Conflict of Laws in Commercial Transactions

The general theme: Businessmen don't like the niceties of the law, and commercial lawyers don't like – to put it mildly – private international law (= conflict of laws).

“All this is bad enough. There is, however, the further question of what law is to govern each one of the forty-nine causes of action, or any of the component questions of law which may arise in connection with it; and on this, too, there is no agreement. The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it. In connection with interstate publication, it offers peculiar and baffling difficulties. There are at least ten different and inconsistent theories as to the applicable law, which from time to time have been adopted by some court or suggested by learned writers. No one of them, unless it be the last, can be said to have prevailed, and that one only by default. In such a review of the situations as this, it is impossible to do more than list them, with passing comments.”

William L. Prosser, Interstate publication: 51 Mich. L. Rev. 959-1000 (1953), at p. 971.

I. Complexity of issues raised in even simple cross-border transactions

Example: Carriage of goods by air from France to Poland by German carrier (*G/K/McK*, TCL 2.07-2.12).

- a) Jurisdiction
- b) Contract or tort?
- c) Law governing contract seller-carrier
- d) Law governing delictual claim
- e) What if there are contradictions between laws identified under c) and d)?
- f) Vicarious liability for conduct of the carrier's agent
- g) Direct claim against the carrier? Which law decides?

II. Conflictualism v. Internationalism

F.K. Juenger, The lex mercatoria and private international law, 5 Unif. L. Rev. 171 (2000).

- The importance of “sovereignty” for public and private international law and the assumption of a declining role of the State in international commercial transactions.
- Representatives of important “schools” (or: eras) in the history of conflict of laws:

The statistists:	<i>Bartolus de Sassoferrato</i> (1314-57)
The multi-lateralists:	<i>Joseph Story</i> (1779-1845); <i>Friedrich Carl von Savigny</i> (1779-1861)
The new unilateralists (as one “school” of the US “conflicts revolution”):	most pointedly <i>Brainerd Currie</i> (“governmental interest analysis”): its main antagonists <i>F.K. Juenger</i> (what are the reasons?) and <i>Albert A. Ehrenzweig</i> ..

III. Connecting factors in the conflict of laws and in transnational-commercial-law instruments

Herbert Kronke, Connecting Factors and Internationality in Conflicts of Laws and Transnational Commercial Law, in: Boele-Woelki/Einhorn/Girsberger/Symeonides (eds.), Convergence and Divergence in Private International Law. Liber Amicorum Kurt Siehr, Zurich/The Hague 2010, 57.

Most importantly for commercial law: “party autonomy”, the crucial connecting factor in the law of contracts.