The Law of Open Societies
Private Ordering and Public Regulation
in the Conflict of Laws

by

Jürgen Basedow
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
Table of Contents

Chapter 2  Globalization and the Law  
Section 1: Legal Underpinnings and Attendants of Globalization  
1.  Free Trade in Goods  
2.  Trade in Services  
3.  Free Movement of Capital  
   a)  Foreign direct investment  
   b)  Other capital flows  
4.  The Free Flow of Data  
5.  Migration  
6.  Institutionalization and Private Rights  
Section 2: Consequences for Policy-Making and Regulation  
1.  The Loss of State Knowledge and Private Rule-Making  
2.  Delocalization and the Choice of Connecting Factors  
   a)  Private choice and State sovereignty  
   b)  Theoretical underpinnings  
   c)  Types of regulatory competition  
   d)  Limitations  
3.  The Loss of Influence of Individual States and Their Reactions  
   a)  National policy versus free trade  
   b)  Extraterritorial application of national law  
   c)  International minimum standards  
4.  Collaboration of States: Unification, Harmonization, Coordination, Cooperation  
   a)  Purposes, institutions, history  
   b)  Forms of legal unification and harmonization  
   c)  Coordination by common rules on private international law  
   d)  Procedural cooperation  
Section 3: Outlook  

Part II  Private Ordering  

Chapter 1  Substantive “Anational” Private Arrangements  
Section 1: The International Transaction Dilemma  
1.  Legal Pluralism and Its Economic Effects  
2.  Public and Private Remedies  
Section 2: The Export Trade  
1.  Balancing Manifold Interests – the Lex Mercatoria  
2.  Sellers and Buyers (Incoterms)  
   a)  Multifarious constellations  
   b)  The Incoterms  
3.  Carriers and Their Liability  
   a)  The significance of transport documents  
   b)  The carrier’s liability  
4.  Banks and Payment (Uniform Customs and Practices for Letters of Credit)
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.</td>
<td>Insurance</td>
<td>105</td>
</tr>
<tr>
<td>6.</td>
<td>International Tourism: Package Tour Operators</td>
<td>107</td>
</tr>
<tr>
<td>1.</td>
<td>Emergence and Specific Demand</td>
<td>107</td>
</tr>
<tr>
<td>2.</td>
<td>Increasing Certainty through Regulation</td>
<td>108</td>
</tr>
<tr>
<td>5.</td>
<td>Conclusion - The Domestication of International Transactions</td>
<td>110</td>
</tr>
</tbody>
</table>

### Chapter 2

#### Theory of Choice of Law and Party Autonomy

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Party Autonomy in International Contract Law</td>
<td>116</td>
</tr>
<tr>
<td>a)</td>
<td>Worldwide Recognition of Party Autonomy</td>
<td>116</td>
</tr>
<tr>
<td>b)</td>
<td>Exclusion of Party Autonomy in Latin America</td>
<td>117</td>
</tr>
<tr>
<td>a)</td>
<td>Brazil</td>
<td>117</td>
</tr>
<tr>
<td>b)</td>
<td>Uruguay</td>
<td>118</td>
</tr>
<tr>
<td>3.</td>
<td>Exclusion of Party Autonomy in the Middle East</td>
<td>119</td>
</tr>
<tr>
<td>4.</td>
<td>Limitations on the Power to Choose the Applicable Law</td>
<td>121</td>
</tr>
<tr>
<td>a)</td>
<td>Choice of non-State law - lex mercatoria</td>
<td>121</td>
</tr>
<tr>
<td>b)</td>
<td>Relation between the contract and the law selected</td>
<td>123</td>
</tr>
<tr>
<td>c)</td>
<td>Restrictions for specific contracts</td>
<td>124</td>
</tr>
<tr>
<td>d)</td>
<td>Conclusion and outlook</td>
<td>124</td>
</tr>
</tbody>
</table>

#### Section 2: A Priori and Derivative Conceptions of Party Autonomy

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Sovereignty</td>
<td>125</td>
</tr>
<tr>
<td>a)</td>
<td>Choice of law as an impairment of sovereignty</td>
<td>127</td>
</tr>
<tr>
<td>b)</td>
<td>Objective conception of the law</td>
<td>128</td>
</tr>
<tr>
<td>c)</td>
<td>Criticisms and countervailing contractual theories of State and law</td>
<td>130</td>
</tr>
<tr>
<td>d)</td>
<td>Conclusions</td>
<td>131</td>
</tr>
<tr>
<td>2.</td>
<td>Ordre public</td>
<td>132</td>
</tr>
<tr>
<td>a)</td>
<td>Specifications of the ordre public</td>
<td>132</td>
</tr>
<tr>
<td>b)</td>
<td>Domestic contacts</td>
<td>133</td>
</tr>
<tr>
<td>c)</td>
<td>Conclusions for choice of law</td>
<td>134</td>
</tr>
<tr>
<td>3.</td>
<td>No Binding Effect of Contracts outside a Legal Order</td>
<td>134</td>
</tr>
<tr>
<td>a)</td>
<td>The conclusion of a contract as a result of the applicable law</td>
<td>134</td>
</tr>
<tr>
<td>b)</td>
<td>The core and corona of the agreement</td>
<td>135</td>
</tr>
<tr>
<td>4.</td>
<td>Protection of Weaker Parties</td>
<td>136</td>
</tr>
<tr>
<td>a)</td>
<td>Freedom of choice and power</td>
<td>136</td>
</tr>
<tr>
<td>b)</td>
<td>Neutralization through competition</td>
<td>137</td>
</tr>
<tr>
<td>c)</td>
<td>Imbalances in motivation</td>
<td>137</td>
</tr>
<tr>
<td>d)</td>
<td>Macro-economic and individual disequilibrium</td>
<td>138</td>
</tr>
<tr>
<td>5.</td>
<td>Conclusion</td>
<td>139</td>
</tr>
</tbody>
</table>

#### Section 3: Theoretical Objections to Party Autonomy

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Sovereignty</td>
<td>127</td>
</tr>
<tr>
<td>a)</td>
<td>Choice of law as an impairment of sovereignty</td>
<td>127</td>
</tr>
<tr>
<td>b)</td>
<td>Objective conception of the law</td>
<td>128</td>
</tr>
<tr>
<td>c)</td>
<td>Criticisms and countervailing contractual theories of State and law</td>
<td>130</td>
</tr>
<tr>
<td>d)</td>
<td>Conclusions</td>
<td>131</td>
</tr>
<tr>
<td>2.</td>
<td>Ordre public</td>
<td>132</td>
</tr>
<tr>
<td>a)</td>
<td>Specifications of the ordre public</td>
<td>132</td>
</tr>
<tr>
<td>b)</td>
<td>Domestic contacts</td>
<td>133</td>
</tr>
<tr>
<td>c)</td>
<td>Conclusions for choice of law</td>
<td>134</td>
</tr>
<tr>
<td>3.</td>
<td>No Binding Effect of Contracts outside a Legal Order</td>
<td>134</td>
</tr>
<tr>
<td>a)</td>
<td>The conclusion of a contract as a result of the applicable law</td>
<td>134</td>
</tr>
<tr>
<td>b)</td>
<td>The core and corona of the agreement</td>
<td>135</td>
</tr>
<tr>
<td>4.</td>
<td>Protection of Weaker Parties</td>
<td>136</td>
</tr>
<tr>
<td>a)</td>
<td>Freedom of choice and power</td>
<td>136</td>
</tr>
<tr>
<td>b)</td>
<td>Neutralization through competition</td>
<td>137</td>
</tr>
<tr>
<td>c)</td>
<td>Imbalances in motivation</td>
<td>137</td>
</tr>
<tr>
<td>d)</td>
<td>Macro-economic and individual disequilibrium</td>
<td>138</td>
</tr>
<tr>
<td>5.</td>
<td>Conclusion</td>
<td>139</td>
</tr>
</tbody>
</table>

#### Section 4: Theoretical Basis for Freedom of Choice

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Efficiency</td>
<td>139</td>
</tr>
<tr>
<td>2.</td>
<td>Freedom and Natural Will</td>
<td>142</td>
</tr>
<tr>
<td>3.</td>
<td>Binding Effect</td>
<td>143</td>
</tr>
</tbody>
</table>

5. Freedom of Choice as a Pre-governmental Right
   a) Enlightenment philosophy and human rights
   b) Clarification of freedom of choice as derived from human rights

Section 5: Conclusion

1. Interaction of Choice of Law and Objective Law
2. The Scope of Freedom of Choice in Private Law

Chapter 3 New Domains for Party Autonomy

Section 1: Contractual Relations Involving Third Parties

1. Agency
   a) The structure of agency relations
   b) Choice of law and party autonomy
   c) Party autonomy under positive law
   d) Comments on the Hague Agency Convention
   e) Conclusion
2. Assignment of Claims
   a) General backdrop
   b) Third-party effects: the Dutch solution
   c) The law governing third-party effects: national conflict rules
   d) A dual-track approach

Section 2: Tort and Delict

1. The Specificity of Tort and Delict
   a) Primary and secondary rules of conduct
   b) Contract and tort
2. The Development of International Tort Law
   a) Lex fori
   b) Lex loci delicti
   c) Lex loci actus and lex loci iniuriae
   d) Specification and flexibilization
3. Party Autonomy
   a) Survey
   b) Ex post choice of law
   c) Indirect ex ante choice of law
   d) Direct ex ante choice of law: Rome II Regulation
   e) Direct ex ante choice: other jurisdictions
   f) Summary
4. Limits of Party Autonomy for Specific Torts
5. Conclusion: Comparative Assessment and Policy Considerations
   a) Party autonomy and its discontents
   b) Protection of the weaker party? About contract and tort
   c) Freedom of contract in substantive law and tort conflicts
Section 3: Property Rights

1. The Development Towards Lex Situs
   a) The lex situs and its rationale
   b) A critical policy appraisal

2. Party Autonomy: Acquisition and Loss of Rights in Rem in Movables
   a) Inconveniences of the situs rule
   b) Party autonomy as a solution
   c) Indirect admission of party autonomy through an escape clause
   d) Choice-of-law clauses with inter partes effects
   e) Title retention clauses in export contracts
   f) Party autonomy for movable property
   g) Summary

3. Negotiable Instruments: Security Interests in Financial Collateral
   a) Changes of the commercial environment
   b) From lex situs to party autonomy

4. Intellectual Property
   a) Nature, development and territoriality of intellectual property rights
   b) The framework of the lex loci protectionis in international law
   c) The scope of party autonomy

5. Summary

Section 4: Persons

1. Scope and History of the Law of Persons
   a) The law of persons – a remainder of the Middle Ages
   b) Divergent policies

2. Capacity and the Protection of Adults
   a) The rigidity of personal law
   b) First traces of party autonomy
   c) Enduring powers to act for incapable persons

Section 5: Family

1. The Family, Family Law, and Basic Conflicts Law Orientations
   a) From social institution to family law
   b) Traditional choice-of-law approaches and party autonomy

2. The Effects of Marriage: Marital Property
   a) The main property regimes
   b) Dumoulin and French conflicts law
   c) A comparative survey over three conflicts principles
   d) Unification of conflicts law
   e) Conclusion

3. Divorce
   a) The significance and decline of marital status
   b) Basic orientations of the conflict of laws
   c) The decline of nationality as a connecting factor and its consequences
   d) The development towards party autonomy
   e) Rome III: Priority of party autonomy
   f) Conclusion
4. Maintenance
   a) Basic conflicts orientations
   b) Party autonomy and its exceptions under the 2007 Hague Protocol
5. Conclusion

Section 6: Succession
1. Historical Evolution and Conflict Taboos
2. The Trend Towards Party Autonomy
3. Party Autonomy and Forced Heirship Restrictions in Present Conflicts Statutes
4. Conclusion

Section 7: Procedural Dispositions
1. Information on Foreign Law: the Division of Labour between the Parties and the Court
2. Strategic Options for the Parties
   a) Pleading of foreign law
   b) Procedural agreements
   c) Allegations in law
3. Conclusion

Section 8: Conclusion
1. The Extension of Party Autonomy and its Social Background
2. Political Background: the Role of International Organizations
3. Limitations of Party Autonomy

Chapter 4 Optional Law in Europe
Section 1: The Europeanization of Private Law
1. Evolution
2. Types of Legislative Instruments
Section 2: Optional Instruments of the European Union and the Conflict of Laws
1. Company Law
   a) Corporate forms and legislative basis
   b) Conditions of eligibility: the international dimension
   c) The residual national law and private ordering
2. Intellectual Property
3. Contract Law
   a) Development and conceptualization
   b) The Common European Sales Law and the conflict of laws
Section 3: Optional Instruments in International Conventions
1. The 1964 Hague Sales Law (ULIS) and other Multilateral Conventions
2. The Franco-German Optional Matrimonial Property Regime
Section 4: Conclusion

Chapter 5 Deliberate Connections (Indirect Choice of Law)
Section 1: Connecting Factors Favouring Private Choice
1. Formal Requirements and the Lex Loci Celebrationis
   a) The recognition of the lex loci celebrationis
   b) How the rule evolved
c) Examples of private dispositions
2. From Nationality to Habitual Residence in the Law of Personal Status
   a) Rise and decline of nationality
   b) Old and new Hague conventions
   c) Domicile and habitual residence
   d) Private international law in the European Union
   e) Habitual residence and the open society
3. Conclusion
Section 2: The Principle of (Mutual) Recognition
1. The Concept of Recognition
   a) Multiple meanings and their common core
   b) Recognition of foreign judicial and administrative measures
   c) Recognition of legal situations
2. The Liberalization of the Recognition of Judgments
   a) Abandoning the review of the applicable law
   b) Loosening the review of jurisdiction
3. The Liberalization of the Recognition of Foreign Companies
   a) Incorporation theory and real seat theory
   b) International unification of conflicts law
   c) The conflicts approach and private choice
   d) European developments
   e) Reactions of national conflicts law
   f) International company law and regulatory competition
Section 3: Evasion of Law
   a) A matter of legal construction
   b) Codified rules on evasion of law
   c) Freedoms granted by, and evasion of, law
Section 4: Conclusion

Part III Public Regulation

Chapter 1 State Action between International and Municipal Law
Section 1: Forms and Addressees of State Action
Section 2: Objectives of State Action
1. Objectives of State rules on choice of law
2. Domestic order and foreign policy in international relations
3. An example: private law conventions and the decline of reciprocity
Section 3: Limitations of State Action
Section 4: Systematic Considerations and Survey

Chapter 2 Foreign Policy Measures and Their Effects in Private Law
Section 1: Recognition and Non-recognition of Foreign States or Governments
1. Background in Public International Law
2. Effects of (Non-)Recognition in Private International Law
# Table of Contents

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 ([Sonderanknüpfung](#)) 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  

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
### Section 1: Employment Contracts

1. Market Imperfections and Countervailing State Measures
   - a) Market imperfections
   - b) Complex regulation
   - c) Application to cross-border labour relations: characterization
   - d) Survey: confinement to bilateral conflict rules

2. Manifestations of Cross-Border Labour Relations
   - a) General
   - b) Posting of workers
   - c) Modern trends in industrial organization: Outsourcing

3. The Unilateral and Territorial Approach

4. Steps Towards Bilateralism: United States

5. Further Steps Towards Bilateralism: the European Model
   - a) Elements of the European model
   - b) Follow-up legislation outside the EU
   - c) Party autonomy
   - d) Objective connecting factors: habitual workplace
   - e) Overall assessment of the habitual workplace or a cascade connection?
   - f) The escape clause and maritime labour

   - a) The room left by Article 8 Rome I
   - b) Lex fori, lex contractus and the law of third States
   - c) Definition of overriding mandatory provisions
   - d) Overriding mandatory provisions and the European Court of Justice
   - e) Outlook

7. Posted Workers
   - a) The tension between social protection and economic efficiency
   - b) Article 8 Rome I and the Posted Workers Directive of the EU
   - c) The Posted Workers Directive as overriding mandatory provisions

### Section 4: Conclusion

### Chapter 4: Imperative Norms: Protection of Foundational Principles

#### Section 1: Foundational Principles – a Survey

1. Collective Goods
2. Essentials of the Social Model
   - a) The amalgam of public interest and protection of the weaker party
   - b) The policy-mix and the principle of territorial application
3. Ethical Foundations
   - a) Personal status and public policy
   - b) Surrogate motherhood
   - c) Other progress of medical and scientific research
4. Conclusion
<table>
<thead>
<tr>
<th>Section 2: The Legal Framework of Unilateral Adjudication - Imperative Norms</th>
<th>470</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Public Policy and Overriding Mandatory Provisions</td>
<td>470</td>
</tr>
<tr>
<td>a) Positive and negative public policy</td>
<td>470</td>
</tr>
<tr>
<td>b) Lois de police and overriding mandatory provisions</td>
<td>471</td>
</tr>
<tr>
<td>2. The Concepts Distinguished</td>
<td>472</td>
</tr>
<tr>
<td>a) According to the subject</td>
<td>472</td>
</tr>
<tr>
<td>b) According to the general or specific style of regulation</td>
<td>473</td>
</tr>
<tr>
<td>c) According to the scope of application</td>
<td>474</td>
</tr>
<tr>
<td>d) According to the written or unwritten nature</td>
<td>476</td>
</tr>
<tr>
<td>3. Identification of Overriding Provisions and Principles</td>
<td>477</td>
</tr>
<tr>
<td>a) Explicit scope rules</td>
<td>477</td>
</tr>
<tr>
<td>b) The scope in the absence of scope rules</td>
<td>478</td>
</tr>
<tr>
<td>c) The political character of the task</td>
<td>480</td>
</tr>
<tr>
<td>d) Review in federal entities</td>
<td>480</td>
</tr>
<tr>
<td>e) Self-containment outside federal entities</td>
<td>481</td>
</tr>
<tr>
<td>a) Human rights and the conflict of laws</td>
<td>482</td>
</tr>
<tr>
<td>b) Connections with the forum State</td>
<td>484</td>
</tr>
<tr>
<td>5. Conclusion</td>
<td>485</td>
</tr>
</tbody>
</table>

Section 3: Respect for Foreign Imperative Norms | 486 |
| 1. Introduction: Respecting Foreign Values | 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 lex situs to lex originis | 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 |
<p>| 1. General Conclusion | 505 |
| 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 |</p>
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>List of Statutory Materials</td>
<td>511</td>
</tr>
<tr>
<td>Table of Cases</td>
<td>571</td>
</tr>
<tr>
<td>Bibliography</td>
<td>579</td>
</tr>
<tr>
<td>Index</td>
<td>627</td>
</tr>
</tbody>
</table>