

CONTENTS

Acknowledgements	xi
1. Introduction: EU Private International Law.....	1
1.1 Private International Law at a Turning Point.....	2
1.2 The Structure of the Book.....	4
1.3 The Communautarisation of Private International Law	6
1.3.1 Legal Basis	8
1.3.2 Maastricht, Amsterdam and Nice	12
1.3.3 Union Instruments.....	14
1.3.4 A New Legal Basis in the Lisbon Treaty	15
1.3.5 External Competences	16
1.3.6 Regulation 662/2009	19
1.4 Conflict of Laws Rules in Sectoral Instruments	21
1.5 Influence of Primary Union Law upon the Conflict of Law Rules	23
1.5.1 The Compatibility of Connecting Factors with the TFEU.....	25
1.6 The Method of Interpretation	28
1.6.1 The Method of Interpretation Relating to Rome I	30
1.7 European Public Policy.....	32
2. Rome I Regulation: Party Autonomy as its Cornerstone	35
2.1 A Birds-Eye View on the Development of Private International Law	35
2.1.1 Rome Convention and Rome I Regulation	39
2.1.2 The Content of the Common Rules	41
2.1.3 Party Autonomy.....	44
2.1.4 Party Autonomy in Rome I	47
2.1.5 The Success of Party Autonomy.....	48
2.2 The Function and Operation of Overriding Mandatory Provisions	54
2.2.1 The Origins of Overriding Mandatory Provisions.....	56
2.2.2 The Rome Convention	59
2.2.3 Acceptance of Overriding Mandatory Provisions.....	61

2.3	What are Overriding Mandatory Provisions?.....	63
2.3.1	Mandatory vs Overriding Mandatory Provisions	63
2.3.2	Ordre Public vs Overriding Mandatory Provisions.....	65
2.3.3	Overriding Mandatory Provisions vs Unilateral Conflict of Laws Rules	67
2.3.4	Definition of Overriding Mandatory Provisions.....	68
2.3.5	Crucial for Safeguarding the Political, Social or Economic Organisation of the State.....	70
2.3.6	Union Law	72
2.3.7	Conditions for Application	76
2.4	Foreign Overriding Mandatory Provisions.....	78
2.4.1	The Scope of the Applicable Law.....	79
2.4.2	The Rome Convention	81
2.4.3	Article 9 (3) Rome I: A Solution to a Political Problem	85
2.4.4	Discretion or General Obligation to Apply Overriding Mandatory Provisions of Other Member States.....	89
2.5	Party Autonomy, Protective Connecting Factors and Overriding Mandatory Provisions	93
2.5.1	Distinguishing Between First and Second Generation Overriding Mandatory Provisions	93
2.5.2	The Position of the ECJ.....	97
2.5.3	Public or Private Interest in Article 9 (1) Rome I?.....	99
2.5.4	Consumers.....	100
2.5.5	Article 5 Rome Convention	101
2.5.6	Article 6 Rome I.....	102
2.5.7	The Residual Function of Overriding Mandatory Provisions	106
2.5.8	Employees.....	108
2.6	Special Connecting Factors.....	113
2.6.1	Contracts of Carriage.....	113
2.6.2	Insurance Contracts	118
2.7	Intermediate Conclusions.....	121
3.	Overriding Mandatory Provisions: The National Perspective.....	125
3.1.	France.....	125
3.1.1	Classification	128
3.1.2	Self Limitation.....	133

3.1.3 Foreign Overriding Mandatory Provisions.....	133
3.2 Germany	136
3.2.1 Classification	143
3.2.2 Self Limitation.....	146
3.2.3 Foreign Overriding Mandatory Provisions.....	147
3.3 The Netherlands.....	149
3.3.1 Classification	154
3.3.2 Self Limitation.....	156
3.3.3 Foreign Overriding Mandatory Provisions.....	157
3.4 The United Kingdom.....	161
3.4.1 Classification	165
3.4.2 Self Limitation.....	167
3.4.3 Foreign Overriding Mandatory Provisions.....	168
3.5 Comparative Conclusions	171
3.5.1 The Necessity for a Preliminary Reference.....	173
4. The Scope of Secondary Union Law: A Matter for Rome I?.....	177
4.1 Private International Law in Secondary Union Law Instruments	181
4.1.1 Data Protection Directive.....	183
4.1.2 Return of Cultural Objects Directive.....	186
4.1.3 Timeshare Directive	186
4.1.4 Unfair Contract Terms Directive.....	187
4.1.5 Relationship to the Conflict of Laws Process.....	189
4.2 An Autonomous Approach in the Consumer Acquis?	192
4.3 Autonomous Determination of the International Scope of Application of Secondary Law	197
4.3.1 Ingmar as Authority for an Autonomous Approach	199
4.3.2 An Autonomous Approach via Overriding Mandatory Provisions.....	202
4.3.3 An Autonomous Approach via (implicit) Unilateral Conflict of Law Rules.....	204
4.4 Ingmar – A Judgment Open for Revision?.....	208
4.5 The Legislative History of art. 23 Rome I Regulation	210
4.5.1 Transformation into Rome I: The Wider Perspective.....	212
4.6 Contracts Involving a Link with a Third Country	214
4.6.1 Americanisation or Unfamiliarity with Conflict of Laws?	217

4.6.2 A Possible Solution to the 'Gran Canaria Problem'	219
4.7 Unilateral Conflict of Law Rules in Secondary Law Reconsidered.....	220
4.7.1 Exclusion of Private Autonomy	224
4.8 Interim Conclusions.....	225
4.9 An Autonomous Approach in Labour Law?	228
4.9.1 The TUPE Directive	232
4.9.2 The Worker Participation General Framework Directive.....	234
4.9.3 Ordre Public	235
4.9.4 Posted Workers Directive	236
4.10 Unilateral Conflict of Law Rules in Insurance Contracts and Contracts of Carriage.....	238
4.10.1 The Denied Boarding Regulation	240
4.10.2 The Cabotage Transport Regulation	241
4.11 Conclusions	242
 5. The Harmonisation of Contract Law by the Union.....	245
5.1 The Harmonisation of Contract Law	246
5.2 The Issue of Competence.....	250
5.2.1 Optional Instrument	253
5.2.2 Redundancy of Private International Law.....	256
5.3 The Feasibility of Common Rules	258
5.3.1 Legal Innovation and Competition for the Best Legal System	259
5.3.2 Varying Local Preferences	262
5.4 Heterogeneous and Homogeneous Legal Products	265
5.4.1 Homogeneous and Heterogeneous – Efficiency and Welfare Distribution	267
5.5 Reintroducing Conflict of Laws.....	269
5.6 What Role for Private International Law?	272
 6. Free Movement and the Determination of the Applicable Law.....	275
6.1 Private Parties and the Free Movement Provisions.....	275
6.1.1 Justification.....	280
6.2 Free Movement and Contract Law.....	283
6.2.1 The Absence of a Favor Oferentis.....	285

6.3 Separating 'Public' from 'Private'	288
6.3.1 Is Mutual Recognition Appropriate in Contract Law?	290
6.3.2 Mutual Recognition versus Vested Rights.....	290
6.4 Company Law	291
6.4.1 Real Seat Doctrine under Pressure?	293
6.4.2 Cartesio	294
6.5 Surname Law.....	297
6.5.1 The Recognition of Rights Acquired under the Laws of another Member State.....	299
6.6 Vested Rights.....	303
6.6.1 Vested Rights versus Mutual Recognition.....	304
6.6.2 The Rebirth of Vested Rights.....	306
6.6.3 Vested Rights: A Better Insight to ECJ Case-Law?	307
6.6.4 Vested Rights Beyond Company and Surname law?	308
6.6.5 The Duty to Recognise Originates in Union Law	310
6.6.6 Legitimate Divergence of National Connecting Factors	312
6.6.7 Legitimate Divergence between Potentially Applicable National Laws	312
6.6.8 No Vested Rights Doctrine in Contract Law	313
6.7 The Free Movement and Private Autonomy	313
6.7.1 The Possibility of Choosing the Applicable Law	314
6.7.2 The Scope of Alsthom Atlantique.....	314
6.8 Specific Rules of Contract Law and the Fundamental Freedom.....	317
6.8.1 How to Distinguish between Rules of Administrative Authorisations and Overriding Mandatory Provisions?	318
6.8.2 Free Movement and Protective Connecting Factors	320
6.9 Justification of a Restriction	321
6.9.1 Legitimate Aim	322
6.9.2 Suitability.....	326
6.9.3 Necessity	327
6.10 The E-Commerce Directive	329
6.10.1 Should Article 1 (4) be Ignored?	330

6.10.2 The Harmonised Field as Overriding Mandatory Provisions	333
6.10.3 eDate Advertising	333
6.10.4 The Directive may Affect Private law, but not Conflict of Laws	334
6.11 Conclusions	337
Bibliography	339
Index	367