

EUROPEAN CONFLICTS LAW AFTER THE AMERICAN “REVOLUTION” – COMPARATIVE NOTES

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This symposium looks at American Conflicts Law fifty years after Brainerd Currie’s death and asks, “where is it going?” This Article examines whether the American “revolution” has impacted European conflicts law or whether the European developments, conversely, hold lessons for American law. In particular, the role of renvoi and dépeçage illustrate areas of departure between the two systems and shed light on where American conflicts law is—and should—be going.

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I. INTRODUCTION

This symposium asks mainly, “where is American Conflicts Law today—fifty years after Brainerd Currie’s death, and where is it going?” Parallel questions are whether the American conflicts “revolution” has had an impact beyond America’s shores, particularly on European conflicts law, whether, in reverse, developments in the latter hold lessons for American law, and whether as a result of the foregoing there is a rapprochement between the civil and the common law? A great deal has been said and written on these topics already.¹ The present comments are less ambitious. They seek not to duplicate, but to highlight a few aspects of the growing convergence, as well as some of continuing divergence.

All agree, of course, that European conflicts law has changed tremendously from its traditional model—both conceptually and therefore in the way that it is structured. Professor Michaels likens the changes to a revolution,² the way we think of the American conflicts revolution. It is certainly true that European conflicts law experienced a far-reaching shift away from a purely spatial/territorial rule orientation and the emphasis on “Conflicts Justice,” as the influential German conflicts scholar Kegel and others advocated.³ For him and the European traditional school, conflicts law was a distinct body of law and, as such, required coherence within itself. “Justice” required like results. At the same time, and we still understand it that way today, conflicts law performs an ordering function when there are alternative (“conflicting”) ways to deal

1. See Friedrich K. Juenger, *American and European Conflicts Law*, 30 AM. J. COMP. L. 117, 118 (1982), and FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 88 *passim* (1993), for two early contributions by Professor Juenger, which are particularly important. In 2008, the Duke Center for International and Comparative Law and the Tulane Law Review sponsored a Symposium, entitled Symposium, *The New European Choice-of-Law Revolution: Lessons for the United States*, 82 TUL. L. REV. 1607 (2008), containing especially important articles on the present subject by Professors Michaels and Symeonides. See Ralf Michaels, Introduction to *The New European Choice of Law Revolution*, 82 TUL. L. REV. 1607, 1607 (2008); Symeon C. Symeonides, *The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons*, 82 TULANE L. REV. 1741, 1741 (2008). For other important contributions for the present subject, see MATHIAS REIMANN, CONFLICT OF LAWS IN WESTERN EUROPE: A GUIDE THROUGH THE JUNGLE (1995); Th.M. de Boer, *Prospects for European Conflicts Law in the Twenty-First Century*, in INTERNATIONAL CONFLICT OF LAWS FOR THE THIRD MILLENNIUM: ESSAYS IN HONOR OF FRIEDRICH K. JUENGER 193 (Patrick J. Borchers & Joachim Zekoll eds., 2001). On broader issues of American and European interaction in law, see generally Mathias Reimann, *American Private Law and European Legal Unification—Can the United States Be a Model?*, 3 MAASTRICHT J. EUR. & COMP. L. 217 (1996).

2. See Ralf Michaels, *Die europäische IPR-Revolution: Regulierung, Europäisierung, Mediatisierung*, in DIE RICHTIGE ORDNUNG: FESTSCHRIFT FÜR JAN KROPHOLLER ZUM 70 GEBURTSTAG 151 (Dieter Baetge et al. eds., 2008); Michaels, *supra* note 1, at 1607. Others agree that the changes are very important and substantial, but consider them to be quite compatible with traditional notions and structures. See, e.g., Peter M. North, *Reform, But Not Revolution: General Course on Private International Law*, 220 RECUEIL DES COURS 9, 23–24 (1990–I); Klaus Schurig, *Das Fundament trägt noch*, in INTERNATIONALES PRIVATRECHT IM 20. JAHRHUNDERT: DER EINFLUSS VON GERHARD KEGEL UND ALEXANDER LÜDERITZ AUF DAS KOLLISIONSRECHT 5, at 8 (Heinz-Peter Manse ed., 2014).

3. GERHARD KEGEL, INTERNATIONALES PRIVATRECHT: EIN STUDIENBUCH 80–81, 90 (6th ed. 1987); see also JAN KROPHOLLER, INTERNATIONALES PRIVATRECHT: EINSCHLIESSLICH DER GRUNDBEGRIFFE DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS 24 (6th ed. 2006).

with a problem or an issue.⁴ If conflicts law performs the latter function according to its own internal system, it will be true to itself—achieve “Conflicts Justice”—but, at the same time, may fail to achieve *substantive* justice, i.e. the goal that the rules of substantive contract, tort law, and so forth seek to achieve. The American conflicts revolution, in contrast, rejected rigid conflicts rules; in performing its ordering function, conflicts law was to do so with substantive justice in mind. As Weintraub advocated, choice-of-law decisions should be “consequences-based.”⁵ If pushed to the extreme, a focus on substantive justice becomes *ad hoc* decision-making, there is then really no conflicts law as such anymore, and the revolution against the old ways will once again have overreacted.⁶

European conflicts law never did ignore substantive justice. Its rules were formulated with the aim to achieve it. But the rules were rigid, and the emphasis on the integrity of the conflicts “system” could then be at the expense of substantive justice. Today, European law emphasizes substantive justice in a variety of ways. At times, this may mean individualization in the decision-making process. But individualization, in the sense of adjusting a result because of something special that distinguishes a case from the usual norm, is not *ad hoc* decision-making. European approaches to choice of law and the structures in which the decision-making process operates are still quite different, mainly because traditional structures have been adapted, albeit sometimes even significantly, but have not been jettisoned.

The European changes occurred later than in the United States, especially in contract and tort choice of law, and they did so against the background and with knowledge of what had occurred here.⁷ As Kegel (and others) might have said, in changing and adapting their conflicts law, Europeans could “pick the raisins”⁸ out of what the American experience had to offer. Their new conflicts law did not just evolve from with-

4. See Peter Hay, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1644, 1662 (1981).

5. RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 396–97 (6th ed. 2010); see PETER HAY ET AL., CONFLICT OF LAWS 47–51 (5th ed. 2010); see also Paul Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1216 (1946).

6. See also Lea Brilmayer, *The Role of Substantive and Choice of Law Policies in the Formation and Application of Choice of Law Rules*, 252 RECUEIL DES COURS 19, 111 (1995–I) (“[T]he pendulum has swung a bit too far.”).

7. For some of the early contributions, see generally Kurt Siehr, *Ehrenzweigs Lex-Fori-Theorie und ihre Bedeutung für das Amerikanische und Deutsche Kollisionsrecht*, 34 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELSZ] 585 (1970); David F. Cavers, *Legislative Choice of Law: Some European Examples*, 44 S. CAL. L. REV. 340 (1971); Erik Jayme, *The American Conflicts Revolution and the Impact on European Private International Law*, in FORTY YEARS ON: THE EVOLUTION OF POSTWAR PRIVATE INTERNATIONAL LAW IN EUROPE 15 (1990).

8. He actually referred to the “raisin theory” in another context, viz, in rejecting a choice-of-law approach that picks rules favorable to a party, while ignoring others. See Gerhard Kegel, *Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers*, 27 AM. J. COMP. L. 615, 621–22 (1979), for a classic, spirited early critique of the American conflicts revolution, shortly after the adoption of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). For an earlier criticism, especially of Currie and Ehrenzweig’s theories, see generally Gerhard Kegel, *The Crisis of Conflict of Laws*, 112 RECUEIL DES COURS 91 (1964–II). For an extensive bibliography of comments critical of the American conflicts revolution, see JUENGER, *supra* note 1, at 127 nn.791–801.

in; a good part of the development resulted from what antitrust lawyers might call “conscious parallelism.” Incidentally, this “conscious parallelism” “goes both ways today, as Professor Symeonides’ successful efforts to codify part of the conflicts law of Louisiana and Oregon” demonstrate. Such “conscious parallelism” did not always exist; there is nothing to suggest, for instance, that the New York Court of Appeals was aware in deciding *Babcock*¹⁰ that other legal systems had departed from the place-of-tort rule much earlier when the parties had the same nationality or domicile.¹¹ The New York court adapted the traditional choice-of-law reference to the law of the place of injury by reevaluating its own law. Evolution led to revolution, or the other way around, if you will.

II. VALUE-BASED CHOICE OF LAW

A. *The Conceptual Difference in European Conflicts Law*

Perhaps the principal, or at least a starting structural difference between European and American conflicts law is that the European court does not ask why a law other than the *lex fori* should perhaps be applied. In fact, the American court does not even ask this question; it proceeds on the basis of forum law, unless a party “invokes” another (foreign) law. For the civil law (Continental European) court, foreign law is “law” the same as is its own. The court therefore asks quite generally, and does so *ex officio*, “what law should be applied?,”¹² to which statutory or case law

9. LA. CIV. CODE ANN. arts. 3515–56 (1992) (conflict of laws); OR. REV. STAT. §§ 15.300–80 (2001) (contracts); OR. REV. STAT. §§ 15.400–60 (2009) (torts). For discussion of the last of these, see Symeon C. Symeonides, *Codifying Choice of Law for Tort Conflicts: The Oregon Experience in Comparative Perspective*, YEARBOOK OF PRIVATE INTERNATIONAL LAW 201 (Andrea Bonomi & Gian Paolo Romano eds., 2010). For both codifications, see also James A.R. Nafziger, *The Louisiana and Oregon Codifications of Choice-of-Law Rules in Context*, 58 AM. J. COMP. L. 165 (2010).

10. *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963).

11. For example, in Germany, a war-time Directive provided for the application of German law for torts committed by Germans against Germans abroad, a principle advocated also for claims arising from unfair competition. See LEO RAAPE, DEUTSCHES INTERNATIONALES PRIVATRECHT: ANWENDUNG FREMDEN RECHTS - EIN GRUNDRIS 365, 368 (2d ed. 1945). Prior to the Rome II Regulation, Germany codified the rule in Article 40(2) of its Conflicts Statute (EGBGB). Einführungsgesetz zum Bürgerlichen Gesetzbuch [EGBGB] [Introductory Act to the German Civil Code], Sept. 21, 1994, BUNDESGESETZBLATT [BGB] I at 2494, art. 40(1) (Ger.). The common-domicile exception is now very widespread. SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS 72 *passim* (2014).

12. These questions illustrate the fundamental difference between the traditional European conception of the equality of legal systems and the American view that “law” is what emanates from one’s own sovereign and that there must therefore be a reason for its displacement. For examples of the European *ex officio* rule, see ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Dec. 5, 2005, BUNDESGESETZBLATT [BGB] I, § 293 (Ger.), and REINHOLD GEIMER, INTERNATIONALES ZIVILPROZESSRECHT annos. 2585–86 (6th ed. 2009). For a forceful American statement and criticism of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS for “substitut[ing] a presumption of foreign governance . . . and [for being] disrespectful of the positive commands of a sovereign in its own courts,” see Louise Weinberg, *A Structural Revision of the Conflicts Restatement*, 75 IND. L.J. 475, 485 (2000). That the European conception is not neutral in practical application is demonstrated by the various ways that allow a court to apply home law after all. See *infra* note 30 *et seq.*; see also, KROPHOLLER, *supra* note 3, at 42 *et seq.* The American view has had supporters, for example, in Germany, who advocate the use of the *lex fori*, unless a party invokes foreign law. But, this view has not

will often provide a concrete answer or at least indicate the direction to be followed.

The answer, in the end, may be the *lex fori*, but it is not the starting point. It follows from this that it is not relevant for a civil law court to ask, at least initially, whether there is a “true” or “false conflict” between one’s own and another law, as in Brainerd Currie’s methodology. This part of Currie’s system might become relevant—perhaps!—when it comes to individualization of the decision in a particular case. But this occurs usually at the end of an analysis, for instance, when it comes perhaps to invoke an escape clause.¹³

B. The “Closest Connection”—Rule or Escape?

The universal escape clause in European conflicts law—apart from the public policy exception, to be discussed briefly later—is the displacement of the otherwise applicable law by a “more closely connected” law. One finds this throughout the statutory EU law, for instance in the Rome I and II Regulations relating to choice of law in contract and tort, respectively.¹⁴ Here, one sees parallel developments and also corrections on the basis of experience. Example: The (then) European Community’s Rome Convention on Contracts Conflicts of 1980 adopted the closest connection test and followed this by presumptions.¹⁵ A forerunner was Swiss case law going back to 1934,¹⁶ later incorporated as Article 117(1)

prevailed. *See generally* Axel Flessner, *Fakultatives Kollisionsrecht*, 34 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELSZ] 547 (1970); Peter Hay, *Book Review*, 39 AM. J. COMP. L. 437 (1991) (reviewing AXEL FLESSNER, INTERESSENJURISPRUDENZ IM INTERNATIONALEN PRIVATRECHT (1990)).

13. *See also infra* text accompanying note 29 and after note 48.

14. The European Union legislates by way of “Regulations” which have the force of law (like federal law in the United States). Consolidated Version of the Treaty on European Union art. 288(2), May 9, 2008, 2008 O.J. (C 115) 1 [hereinafter TEU]. For present purposes, two regulations are of special interest. *See* Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6 [hereinafter Rome I Regulation]; Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L 199) 40 [hereinafter Rome II Regulation].

15. Convention 80/934/ECC on the Law Applicable to Contractual Obligations art. 4, *opened for signature* June 19, 1980, 1980 O.J. (L 266) 1 [hereinafter Rome Convention]; Convention on the Law Applicable to Contractual Obligations (Consolidated Version) art. 4, 1998 O.J. (C 27) 34.

16. Bundesgericht [BGer] [Federal Supreme Court], Sept. 18, 1934, 60 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 294, 301 (Switz.); *see also* Bundesgericht [BGer] [Federal Supreme Court], June 10, 1935, 61 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 181, 182 (Switz.); Bundesgericht [BGer] [Federal Supreme Court], Feb. 24, 1939, 65 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 66, 80 (Switz.). The Federal Supreme Court of Switzerland (German: *Bundesgericht*; French: *Tribunal fédéral*; Italian: *Tribunale federale*) at that time used the fiction that the law of the state of the closest connection to the contract represented the parties’ “hypothetical intention.” It has been suggested that this construction bore some resemblance to Savigny’s thought that every legal relationship has a “seat” and is subject to the law in force there. Max Keller & Jolanta Kren Kostkiewicz, in ANTON HEINI ET AL. (eds.), IPRG KOMMENTAR: KOMMENTAR ZUM BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT (IPRG) [COMMENTARY ON THE SWISS CONFLICTS STATUTE OF 1989], art. 117, annos. 7–8 (1993), with reference to 8 CARL FRIEDRICH VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 28, 108 (1849). The difference lies in Savigny’s a prior abstract formulation and the closest-connection test’s

into the Swiss codification of 1989.¹⁷ The presumptions, in Swiss law and later in the Rome Convention, focused on the law of the habitual residence of the party that had to perform the “characteristic obligation” of the contract in question,¹⁸ but they were presumptions only—overcome by a more closely connected law.¹⁹ Since that time, a great many codifications have adopted the “closest connection” test, some in combination with other references, some as an escape clause (such as, in the main, the Rome I Regulation), and it is the principal test in at least four codifications.²⁰

A general reference to closest connection, however, is as unhelpful as are the connecting factors for tort and contract which the *Restatement (Second) of Conflicts* later adopted for the determination of the “most significant relationship” of a tort or contractual issue to a law (§§ 145 and 188). *Currie* was critical of the “grouping of contacts” approach of the New York courts because the approach provided no standards for what

focus on the particular case. See KROPHOLLER, *supra* note 3, at 26. The Court abandoned the “hypothetical intention of the parties” in Bundesgericht [BGer] [Federal Supreme Court], Feb. 12, 1952, 78 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 74, 78–79 (Switz.), and adopted the reference to the law of the party that was to perform the characteristic obligation, *infra* note 18. German law also first worked with the idea of the “hypothetical intention of the parties,” then focused on the “closest-connection,” Swiss-style its 1986 codification (Article 28 EGBG), with the latter now replaced by the Rome I Regulation. In England, the “closest connection” reference had a forerunner in Westlake’s “most real connection.” JOHN WESTLAKE, A TREATISE ON PRIVATE INTERNATIONAL LAW: WITH PRINCIPAL REFERENCE TO ITS PRACTICE IN ENGLAND 288 (Norman Bentwich ed., 6th ed. 1922).

17. BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [IPRG] [FEDERAL LAW ON PRIVATE INTERNATIONAL LAW] Dec. 18 1987, SR 291 (Switz.).

18. Article 117(3) of the Swiss statute identifies the law of the characteristic performance for five types of contracts; the European Convention identified only two (for contracts involving rights in immovable and for the carriage of goods). *Id.* art. 117(3). The “characteristic obligation” test was used earlier in the European Community’s jurisdictional convention (for specific jurisdiction in contract) and resulted in such unworkable decisions as Case 12/76, *Industrie Tessili Italiana Como v. Dunlap AG*, 1976 E.C.R. 1473, requiring a national court to determine, by choice-of-law analysis, what law applied to the contract, then ask where the place of performance of the characteristic obligation was under that law, and to reject the case for want of jurisdiction if it turned out that its state was not that place. The characteristic obligation test has now largely been abandoned by the Rome I Regulation, *supra* note 14 (for contract choice of law), and by the Brussels I (“Recast”) jurisdictional Regulation for specific personal jurisdiction in contracts for the sale of goods and for the rendition of services. Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) art. 7(1)(b), 2012 O.J. (L 351) 1 [hereinafter Brussels I Recast Regulation] (entered into force on January 15, 2015). For a discussion of the new Regulation, see generally Peter Hay, *Notes on the European Union’s Brussels-I “Recast” Regulation – An American Perspective*, 13 EUR. LEGAL F. 1 (2013).

19. Keller & Kren Kotkiewski, in HEINI ET AL. (eds.), *supra* note 16, at anno. 37; Rome Convention, *supra* note 15, art. 4(5).

20. See SYMEONIDES, *supra* note 11, at 176–77 (citing as the four: Austria, Bulgaria, Burkina Faso, and China). While not a codification, the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) falls into this group as well. The “contacts” it suggests for consideration in the determination of the “most significant relationship” for choice of law in tort and contract (§§ 145 and 188, respectively) are nonprioritized and nonexclusive, they are not prescriptive as are, e.g., the provisions of article 4(1)(a) of the EU Rome I Regulation. Compare RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 188 (1971), with Rome I Regulation, *supra* note 14, art. 4(1)(a).

is significant.²¹ The *Restatement (Second) of Conflicts* does no better because the connecting factors it lists are expressly nonexclusive and not prioritized, indeed the decision-maker is to evaluate them according to their “relative” importance (§ 145(2)),²² i.e., by the subjective judgment of the beholder. Nor do the “General Principles” of § 6, intended to provide guidance, help for precisely the same reasons. As a result, anyone—however traditional minded, forum favoring, “better law” fan, or governmental-interest advocate—can claim to be applying the *Restatement (Second) of Conflicts*: it provides a home, or hiding place, for all comers.²³

The addition of presumptions to the basic rule or orientation (as in Swiss law or the former Rome Convention) does not necessarily help. They are too easily ignored in favor of a law thought to be “more closely connected.”²⁴ The Rome I Regulation, which replaced the earlier Convention and now is the Contracts-Conflicts Law throughout the European Union²⁵ (except Denmark), provides eight concrete choice-of-law rules, followed by an escape clause in favor of a law “manifestly more closely connected” to the contract.²⁶ The difference in earlier law is that the “closest connection” is not pervasive, but only an escape for the unusual specific case. The list of what law applies to identified cases is prescriptive (“shall”), not only one of presumptions. The “manifestly” closer connection functions as a corrective, it is not the beginning of the analysis.²⁷

21. BRAINERD CURRIE, *Conflict, Crisis and Confusion in New York*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 690, 727 (1963). The “grouping of contacts” approach is usually associated with cases like *Auten v. Auten*, 124 N.E.2d 99 (N.Y. 1954). *Id.* at 160–61; see also Albert A. Ehrenzweig, *A Counter-Revolution in Conflicts Law: From Beale to Cavers*, 80 HARV. L. REV. 377, 381–82 (1966) (referring to “nonrules”).

22. The place of injury is the first contact listed for consideration in § 145(2)(a). *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 145(2)(a) (1971). However, that does not give it greater weight in view of the subsection’s introductory statement that the following contacts (merely) “include” the place of injury, etc., and in view of subsection (2) mentioned in the text. *Id.* The same applies to § 6 (immediately following). *Id.* § 6 cmt. (c).

23. For all of the foregoing, see also Peter Hay, *Flexibility versus Predictability and Uniformity in Choice of Law: Reflections on Current European and United States Conflicts Law*, 226 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 281, 358–74 (1991). See also JUENGER, *supra* note 1, at 105–06 (“[T]he Second Restatement became a mixture of discordant approaches.”).

24. Rome Convention, *supra* note 15, art. 4(5); Keller & Kren Kotkiewski, *supra* note 16.

25. See *supra* note 23 and accompanying text. Protocols Nos. 21 and 22 to the Treaty on European Union allowed Denmark, Ireland, and the United Kingdom not to participate in this and other such private law and procedure unifying legislation. As to the Rome I Regulation, Denmark exercised this right, Ireland and the United Kingdom did not. See Rome I Regulation, *supra* note 14, pmbl. ¶ 46.

26. Rome I Regulation, *supra* note 14, art. 4(3). The characteristic obligation test is retained in article 4(2) when none of the eight stated case situations in article 4(1) apply. *Id.* at art. 4(1)–4(2). The Regulation and therefore these rules are of “[u]niversal application:” a national court in the European Union applies these rules without regard to who the parties are and whether the contract is connected to the forum (or, for that matter, to the European Union). *Id.* at art. 2.

27. But see SYMEONIDES, *supra* note 11, at 182. Professor Symeonides considers Article 4(1) to provide “presumptive rules” and, in light of subsections (3) and (4), considers the closest-connection factor to “remain[] omnipresent.” *Id.* Displacement of the otherwise applicable law by one “manifestly more closely connected” appears also in Article 8(3) of the Hague Convention on the International Sale of Goods of 1986. *Id.*; Convention on the Law Applicable to Contracts for the International Sale of Goods art. 8(3), Dec. 22, 1986, 24 I.L.M. 1573 [hereinafter Hague Convention on the International

For contract in Swiss law, the closer-connection test identifies the law to be applied. But the test still has another, more general escape function, i.e., one not limited to contract choice of law. When conflicts law refers to a law that has only a limited connection to the facts of the case, while another law is much more closely related, the former law shall not be applied. The closest connection then defeats the application of an otherwise applicable law.²⁸ What is intended resembles the General Principle of § 6(2)(a) of the *Restatement (Second) of Conflicts*, the smooth functioning of the international legal system. The escape clause seeks an objective balance, but is not intended as a vehicle to provide relief for hardship; it is not concerned with “substantive justice.”²⁹

III. ACCOMODATING INTERESTS

A. *Mandatory Norms and Public Policy*

Forum interests, “governmental interests,” become relevant in European law in at least three ways. First, so-called “mandatory rules” (rules of “immediate application,” in the translation of the original French formulation)³⁰ remove a case or issue from any conflicts analysis upfront. The mandatory rule, as an expression of overriding public policy, applies. To the extent that it is a mandatory rule of *forum law* that prevails, such a unilateral approach to choice of law seems strange, even inappropriate in a unified (EU-wide) conflicts system. Therefore, former Rome Convention provided for the possible recognition of mandatory norms of another state, an extension which Germany and some other states rejected by way of a reservation. The Rome I Regulation now gives limited recognition to another state’s concerns: another state’s mandatory norm *may* be given effect if it is the state of the performance of the obligation (Article 9(3)).³¹ Swiss law goes further by extending the discretionary application to *any* other state’s mandatory rules.³² The

Sale of Goods]. “Whether formulae of this nature serve a useful function in international compacts is open to question.” JUENGER, *supra* note 1, at 186.

28. BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [IPRG] [FEDERAL LAW ON PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, SR 291, art. 15 (Switz.).

29. Keller & Girsberger, in HEINI ET AL., *supra* note 16, art. 15 anno. 88. Generally, in the context of the “closest connection” exception, as well as with respect to governmental interest analysis, the interests at stake are said to be those of a *country* (the forum or another country) as such. It is the law of that country that provides the solution for the case at hand according to *its* conception of substantive justice. Thus, to Europeans, interest considerations do not directly seek to determine substantive results. Schurig, *supra* note 2, at 11 (citing an early statement by Gerhard Kegel, *Begriffs- und Interessenjurisprudenz im Internationalen Privatrecht*, in BASELER JURISTISCHE FAKULTÄT, FESTSCHRIFT FÜR HANS LEWALD 259 (1953)). For a statement of the traditional view, differentiating strictly between rules of substantive law and of conflicts law (while conceding that there are cases of overlap), see RAAPE, *supra* note 11, at 2–6; see also *supra* notes 5–6.

30. For the history of mandatory rules, see SYMEONIDES, *supra* note 11, at 299–310.

31. For criticism, see Schurig, *supra* note 2, at 20.

32. Frank Vischer, in HEINI ET AL., *supra* note 16, art. 19 with annos. For the obligatory application of Swiss (forum) mandatory rules, see *id.* at art. 18 with annos. For discussion of mandatory rules of third countries, see Michael Bogdan, *Private International Law as Component of the Law of the Fo-*

Rome II Regulation (choice of law for non-contractual obligations) reverts in Article 16 to the original forum-focused formulation. If the mandatory rule is one of EU law itself, these exceptions of course make sense; in fact, they are superfluous because the (federal) EU law preempts national law.³³ As instruments available to national courts to depart from results indicated by EU choice-of-law rules on the basis of national law, these provisions might be a problem; while rules of EU law and their application themselves are subject to review by the European Court of Justice (thereby assuring uniformity), the definition and invocation of national mandatory rules are much less so.³⁴

A second way in which forum interests are effectuated, or safeguarded, is the traditional public policy exception, both to the application of a foreign law and the recognition of a foreign judgment. It allows disregard of a result that, *after* analysis, is unpalatable. The infamous Oregon decision in *Lilienthal v. Kaufman*³⁵ asserted Oregon's public policy to defeat application of California law, almost quoting *Currie* verbatim.³⁶ A European court might have reached a similar result even earlier by holding its (hypothetical) spendthrift statute to represent an overriding mandatory norm of national law; the statute therefore applies, no conflicts analysis is needed, indeed it is not even appropriate. The public policy exception would not be reached. When public policy (of the forum) is invoked in the applicable-law context, it is as little subject to effective review by the European Court of Justice as is the application of national mandatory norms, as noted.³⁷

rum, in 348 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 245–50 (2010).

33. See *infra* note 67. For an application, see Case C-381/98, *Ingmar GB Ltd. v. Eaton Leonard Techs. Inc.*, 2000 E.C.R. I-9325.

34. The statement is overbroad; even getting to the Court on a question of EU law is not easy because it takes a reference from a national court—there is no *certiorari*-like petition procedure.

35. 395 P.2d 543 (Or. 1964). For the suggestion that the decision violated due process see HAY, ET AL., *supra* note 5, § 3.28, at 195. For a discussion of *Lilienthal* from another vantage point, see Lea Brilmayer, *Hard Cases, Single Factor Theories, and a Second Look at the Restatement 2d of Conflicts*, 2015 U. ILL. L. REV. 1969, 1978 (discussing *Lilienthal* at Part II.A.2). For a recent assessment of *Currie*, see Symeon C. Symeonides, *The Choice-of-Law-Revolution Fifty Years After Currie: An End and A Beginning*, 2015 U. ILL. L. REV. 1850–1867, 1885–1903 (discussing *Currie* at Parts I and III); Ralf Michaels, *Post-Critical Private International Law: From Politics to Technique*, in PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE 54 (2014) (Horatia Muir Watt & Diego P. Fernández Arroyo eds.).

36. “Courts are instruments of state policy.” *Lilienthal*, 395 P.2d at 549; see also Weinberg, *supra* note 12, at 496.

37. The matter is somewhat different with respect to procedure. In the context of the original Brussels I Regulation on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, the Court twice addressed whether a member state court had properly invoked the public policy exception in refusing to recognize a judgment, for instance by considering the rendering court's exercise of jurisdiction to have denied access to justice, or otherwise to have violated a fundamental right: both national courts and the European Court of Justice are bound by the procedural safeguards of Article 6 of the European Convention of Human Rights. Council Regulation (EC) No. 44/2001, of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 012) 1 [hereinafter Brussels I Regulation]. For discussion, see JAN KROPHOLLER & JAN VON HEIN, *EUROPÄISCHES ZIVILPROZESSRECHT* 561–74 (9th ed. 2011). For the public policy exception in the choice-of-law context, see Bogdan, *supra* note 32, at 222–39. In the con-

B. Value Judgments Incorporated in Rules or Made by Decision?

Third, and in between these two poles, is conflicts analysis that considers, sometimes evaluates and weighs, interests, values, substantive results. This might take place *ad hoc*, which is the predominant American approach as represented, for instance by the *Second Restatement of Conflicts*. It can also be part of predetermined rules that were drafted with particular substantive objectives in mind,³⁸ as distinguished from neutral rules, such as a mechanical application of the place-of-injury rule in tort. An early example of a purposive rule is the plaintiff-favoring rule of the former German national tort law (allowing the plaintiff to elect either the law of the place of conduct or injury, thereby enabling him or her to maximize compensation).³⁹ A number of states adopted this rule. In the European Union, it survives for cases seeking compensation for environmental damage.⁴⁰ In the European Union, the rule not only maximizes the plaintiff's recovery, it also embodies the policy that "the polluter pays."⁴¹ For other tort claims, EU law adopts the place-of-injury rule in tort, but modifies it by the escape clauses already noted—common domicile of the parties, a more closely connected other law, overriding mandatory norms, and the public policy exception. It also protects the traffic victim injured away from home by instructing the court (which is to apply place-of-injury law, including for damages, characterized as "substantive" under EU law), "to take into account all the relevant circumstances of the specific victim, including in particular actual losses and costs of after-care and medical attention [back home]."⁴² In contract, special chapters of the Rome I Regulation deal with special protection of weaker parties (consumers, insureds, and employees). With respect to maintenance, for which the applicable is, in the main, the law of the habitual residence of the maintenance creditor, Hague Convention law, now in force in the

text of the Rome II Regulation, see also Russell J. Weintraub, *Rome II and the Tension Between Predictability and Flexibility*, in *BALANCING OF INTERESTS—LIBER AMICORUM PETER HAY* 451, 461 (Hans-Eric Rasmussen-Bonne et al. eds., 2005) ("[Invocation] of public policy to reject the law selected by the Regulation should not permit application of forum law . . . [T]he forum may employ . . . universal standards . . . [otherwise, it] should dismiss the case and not reach the merits.").

38. For comprehensive discussion, see SYMEONIDES, *supra* note 11, at 250–87.

39. This was Article 40(1) of the Introductory Law to the German Civil Code (EGBGB) before the EU Rome I Regulation replaced it. For discussion of the former German rule, see Peter Hay, *From Rule-Oriented to "Approach" in German Conflicts Law: The Effect of the 1986 and 1999 Codifications*, 47 AM. J. COMP. L. 633 (1999). As Jan von Hein has shown, plaintiff-favoring rules are not new in European conflicts law. JAN VON HEIN, *DAS GÜNSTIGKEITSPRINZIP IM INTERNATIONALEN DELIKTSRECHT [THE PRINCIPLE OF THE MORE FAVORABLE LAW IN THE INTERNATIONAL LAW OF TORTS]* (1999).

40. Rome II Regulation, *supra* note 14, art. 7. For a more limited adoption of this plaintiff option in Oregon, see SYMEONIDES, *supra* note 11, at 61; see also OR. REV. STAT. ANN. § 15.440(3)(c) (West 2015).

41. Rome II Regulation, *supra* note 14, pmbl. ¶ 25.

42. *Id.* ¶ 33. For criticism, see Peter Hay, *Contemporary Approaches to Non-Contractual Obligations in Private International Law (Conflict of Laws) and the European Community's "Rome II" Regulation*, 4 EUR. LEGAL F. 137, 144–45 (2007).

European Union, requires consideration both of the needs of the claimant and the means of the debtor in the assessment of the amount owed.⁴³

The foregoing are examples of *a priori* rules with built-in value judgments. This is different from a “better law” approach that bases the choice-of-law determination in the individual case, i.e. *ad hoc*, on what the court considers to be the better law, to bring about the better substantive result.

As Professor Singer notes, everyone likes to apply the law that is better, to bring about a result that is just and, therefore, better than any alternative.⁴⁴ That is what courts do in domestic cases (again, perhaps with greater leeway to individualize in the common law than in the civil law).⁴⁵ It does not surprise that home law is often the better law. Because, as J.H.C. Morris wrote in 1973, what judge would consider forum law to be “a drag on the coat-tails of civilization?”⁴⁶ A forum bias is built in. It is perhaps a leap of faith to assume that the problem could be solved with “a selection-based process based on the qualitative evaluation of conflicting rules of decision.”⁴⁷ If courts make the evaluation, this will still be done *ad hoc* and from the perspective of the beholder: what would be the difference, in the United States, from what the *Second Restatement* provides today and many courts profess to follow? At the risk of overstating: what, then, distinguishes the domestic case (in which the court seeks to achieve justice) from the multistate, conflicts case? If nothing does, why not give up the idea that there is some mystical branch of the law, called conflicts law that exercises some kind of ordering function which might,

43. Hague Protocol on the Law Applicable to Maintenance Obligations arts. 3, 7, 2009 O.J. (L 331) 19 [hereinafter Hague 2007 Protocol on Maintenance Obligation] (in force since August 1, 2013, on the basis of Council Regulation (EC) No. 4/2009, of 18 December 2008 on Jurisdiction, Applicable Law, and the Recognition and Enforcement of Decisions Relating to Maintenance art. 15, 2009 O.J. (L 7) 1).

44. See Joseph William Singer, *Facing Real Conflicts*, 24 CORNELL INT’L L.J. 197, 198–206 (1991); Joseph William Singer, *Multistate Justice: Better Law, Comity, and Fairness in the Conflict of Laws*, 2015 U. ILL. L. REV. 1923, 1949–55.

45. Except for the more pervasive force of the ubiquitous “good faith” provisions in European codes (e.g., §§ 157 and 242 of the German Civil Code (BGB)) that have far greater impact and application than, for instance, provisions like UCC §§ 1-304 (general good faith provision), 2-302 (unconscionability), and 2-615 (failure of presupposed condition). See BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, REICHSGESETZBLATT [RGL.] 195, as amended, §§ 157, 242 (Ger.); U.C.C. § 1-304 (1977); *id.* § 2-302; *id.* § 2-615.

46. J.H.C. Morris, *Law and Reason Triumphant or How Not to Review a Restatement*, 21 AM. J. COMP. L. 322, 324 (1973) (quoting *Clark v. Clark*, 222 A.2d 205, 209 (N.H. 1966), which used the phrase in reference to *foreign*, not forum, law; Morris ingeniously turns it around). The opinion in *Clark* refers to Freund, *supra* note 5, at 1216, where, however, the phrase is not used. The context is the same as in *Clark*: anachronistic foreign law. As Freund points out, however, an early (pre-*Erie*) United States Supreme Court decision approved the rejection of a “geographical test in favor of a teleological one in choice of law.” *Id.* at 1214 (citing *Seeman v. Phila. Warehouse Co.*, 274 U.S. 403 (1927)). In contrast to modern “consequences-based” approaches, *supra* note 5, or general most-significant-contacts or “better law” approaches, Freund emphasized that a “more favorable law” (e.g., in *Seeman*, for upholding a contract) should be applied only “where the relations to several states are fairly equally distributed.” Freund, *supra* note 5, at 1215.

47. JUENGER, *supra* note 1, at 236.

in result, differ from what the forum would have applied in a domestic case?⁴⁸

The European answers, as outlined earlier, are to make substantive law-oriented decisions in the formulation of rules, provide for additional adjustment possibilities through a variety of escape clauses, but to avoid a general *ad hoc* approach for the determination of the applicable law. In a given case, this may then involve a difficult analytic process, wading through a plethora of rules, special rules, and exceptions. But the process is objective, “principled,” not *ad hoc*, except when escape clauses are invoked which, however, also contain preformulated criteria for their use. It is when resorting to escape clauses that European courts can exercise some American-type leeway.

IV. THE ROLE OF *RENOI*

While hardly used in American practice,⁴⁹ *renvoi* actually could perform a very useful function. If the conflicts law of the foreign state, to which forum law looks, would refer to a third state or back to the forum, that says something about the foreign state’s view of itself as (not) being significantly related in *Restatement (Second) of Conflicts* terms. Likewise, if the reference is back to the forum, *Currie*-type analysis would suggest the presence of a “false conflict,” in the sense that the foreign law does not mean to apply, only forum law remains.⁵⁰ At least one American jurisdiction—Maryland—used *renvoi* for the second of these reasons. Maryland adhered then, and still does now,⁵¹ to the traditional reference to the *lex loci contractus* in contract, but used *renvoi* as an escape from that law (returning to its own) when that law would have applied Maryland law.⁵²

It follows from the earlier discussion that, contrary to older traditions,⁵³ most of the new European conflicts law no longer use *renvoi*. With value judgments (reflecting governmental-societal, as well as private interests) built in the general or the occasional specific-issue-related

48. See *supra* notes 5–6.

49. HAY, ET AL., *supra* note 5, § 3.13, at 163 n.4.

50. See *id.* at 164–68.

51. Symeon C. Symeonides, *Choice of Law in the American Courts in 2014: Twenty-Eighth Annual Survey*, 63 AM. J. COMP. L., III.D (forthcoming 2015).

52. Am. Motorists Ins. Co. v. ARTRA Group, Inc., 659 A.2d 1295, 1304 (Md. 1995). The decision is noted in *Francis v. Allstate Ins. Co.*, 709 F.3d 362, 369–70 n.6 (4th Cir. 2013). Arguably, the same result (law of the place where the insured risk was located) would also follow in Europe from the Rome I Regulation. See Rome I Regulation, *supra* note 14, arts. 3, 4(d)–(e).

53. For example, in Germany, the Conflicts Statute (EGBGB) provided generally for the consideration of foreign conflicts law until the reform of 1986 limited this to cases other than contractual and non-contractual obligations. Einführungsgesetz zum Bürgerlichen Gesetzbuch [EGBGB] [Introductory Act to the German Civil Code], Sept. 21, 1994, BUNDESGESETZBLATT [BGBl.] at I 2494, arts. 3(1), 4 (Ger.). For a review of the development, see Kegel, *supra* note 3, § 10, at 236–54. Similarly, and still current law, Article 14 of the Swiss Conflicts statute provides for a limited use of *renvoi*. BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [IPRG] [FEDERAL LAW ON PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, SR 291, art. 14 (Switz.). For discussion of the exceptional cases to which this applies, see Hein, *in* HEINI ET AL., *supra* note 16, art. 14, at 114.

choice-of-law norms, “interests”—to the extent they are relevant—are predetermined, there can be neither “true” nor “false” conflicts within the European Union. Therefore, there is no recourse to *renvoi* with respect to choice of law in contract, tort, and maintenance.⁵⁴ With limitations, the use of *renvoi* is retained with respect to choice of law in succession.⁵⁵ The exceptional case, in which a “manifestly closer connection” exists to the law of a state other than the one previously identified, the “interest” of that state might be an element in arriving at the conclusion that it is indeed more closely connected.

While EU conflicts law presents a uniform conflicts law for the Union, reflecting shared value judgments, “true” and “false” conflict can of course still arise with respect to a non-EU state, or it may have the manifestly closer connection to the case. The EU conflicts rules are of “universal application,” meaning that a national EU court applies them in non-EU cases as well as in those arising in or from a member state. The *renvoi* exclusions therefore also apply, and it will be the value judgment(s) contained in the EU forum’s rules that prevail, just as do forum values in an American court (no *renvoi*) in *both* interstate and international cases.

V. DÉPEÇAGE: GOAL OR RESULT?

Dépeçage describes the separate treatment, for choice-of-law purposes, of one issue or part of a case, while another law applies to the rest or to other separable parts. Much in contrast to European law, *dépeçage* is at the heart of modern American conflicts theory and practice. The Second Restatement directs courts to determine the applicable law to the “particular issue” in a tort or contract case⁵⁶ on the basis of its “most significant relationship” test.⁵⁷ One might add to the earlier critical observations⁵⁸ that, if a court inclines toward the “better law” approach in its determination of the most significantly related law,⁵⁹ then the issue-by-issue

54. Rome I Regulation, *supra* note 14, art. 20 (contracts); Rome II Regulation, *supra* note 14, art. 24 (torts); Hague 2007 Protocol on Maintenance Obligation, *supra* note 43, art. 12. The last of these therefore supersedes the contrary provision of German law, *supra* note 53, arts. 3(1), 4.

55. Regulation (EU) No. 650/2012, of the European Parliament and of the Council of 4 July 2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession pmbl. ¶ 57, art. 34, 2012 O.J. (L 201) 107 [hereinafter Succession Regulation].

56. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145(2), 188(2) (1971). This language clarifies the slightly more general reference in subsection (1) (“[W]ith respect to an issue . . .”).

57. *Supra* notes 21–23.

58. *Supra* note 23.

59. The “better law” approach, like other orientations, also has a home in § 6 of the General Principles of the RESTATEMENT (SECOND) OF CONFLICTS. Hay, *supra* note 23, at 371–74. In 2014, five states still followed the “better law” approach in tort and two of them in contract as well. Symeonides, *supra* note 51, at III.D.

process indeed invites “raisin picking.”⁶⁰ For this reason, *Currie*, an advocate of the issue-by-issue approach, warned of its possible abuse.⁶¹

The use of escape devices described earlier in the European context, such as application of a mandatory norm, rejection of a foreign measure of damages as excessive,⁶² the characterization of an issue as “procedural,” or even the use of *renvoi* also may lead to *dépeçage* in an individual case. But European law does not follow the Second Restatement’s general issue-by-issue approach. Its rules provide for the law applicable to “THE contract”⁶³ or to “THE tort.” Exceptional issues or problems are dealt with specifically—thereby resulting in *dépeçage*—and direction for their resolution is given: they are cases of “principled” *dépeçage*.

VI. CONCEPTUAL DIFFERENCES AND THE GOALS OF CERTAINTY AND FLEXIBILITY

A. *In General*

There are indeed noticeable parallels between American thinking, including *Currie*’s views, and modern European conflicts law. To speak of any direct influence would probably overstate; the problems courts face, after all, are the same and need solutions. Awareness of American conflicts thinking, however, has always been very high in Europe, until recently much in contrast to the other way around.⁶⁴

60. See Kegel, *supra* note 8, at 621.

61. DAVID F. CAVERS, *THE CHOICE OF LAW PROCESS* 38 (1965); SYMEONIDES, *supra* note 11, at 222 n.5.

62. As noted earlier, the definition of mandatory rules and of public policy are largely left to national law in EU law. *Supra* notes 34, 37. There is at least one exception: Pmbl. ¶ 32 of the Rome II Regulation, *supra* note 14, states that a state may consider “noncompensatory exemplary or punitive damages,” for which the applicable law provides (damages being “substantive” for applicable-law purposes, Article 15(c)), to be against its public policy. This statement takes account of the general European disapproval of American-type punitive damages as well as of the English desire not to ban such awards outright, since English law also provides for exemplary damages, albeit on a much more limited scale.

63. A limited exception is the second sentence of Article 3(1) of the Rome I Regulation, *supra* note 14. It permits the parties (in the exercise of party autonomy, not as a matter of a splitting by mandated rule) to “select the law applicable to the whole or to part only of the contract.” *Id.* It is generally assumed that the provision addresses the designation of a law different from the law otherwise applicable for only a single part of the contract. Apart from the difficulty of dealing with multiple applicable laws, it is assumed “that the parties generally do not want their contractual relationship to be split into legal parts.” KROPHOLLER, *supra* note 3, § 52 II, at 462–63 (author’s trans.). But see BEA VERSCHRAEGEN, *INTERNATIONALES PRIVATRECHT – EIN SYSTEMATISCHER ÜBERBLICK* No. 413, 86 (2012), who believes that the parties may “split the contract and subject different parts to different laws, respectively . . .” (author’s trans.).

64. Two recent judicial opinions, both involving judicial jurisdiction, are particularly noteworthy in this context—one in invoking European law in dissent, the other in aligning American law to some extent, but without articulation, with European practice. In *J. McIntyre Machinery, Ltd. v. Nicaastro*, 131 S. Ct. 2780, 2794–804 (2011), Justice Ginsburg, dissenting, objected to the plurality’s narrow view of specific jurisdiction over the EU defendant in the American state of injury, when the defendant would have been subject to jurisdiction away from home under the Brussels I Regulation, *supra* note 37; the defendant fared better in the United States than it would have in Europe. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2857 (2011), Justice Ginsburg narrowed the exercise of

Conceptually and structurally, Europeans adhere to their conflicts methodology, and this will not change. Their conflicts law is statutory, therefore rule based, and principally spatially/geographically oriented.⁶⁵ At the same time, Europeans have departed from rigid rules, as they existed both there and in the United States at the time of the American First Restatement, and have built into it many devices and concepts for problem solution that American courts also use, except that they lump them together in general “approaches.”

What seems like the *ad hoc* nature of American approaches is antithetical to Europeans.⁶⁶ From today’s perspective, this may be an overreaction. While American approaches (except those favoring or resulting in straight forum preferences) may seem unprincipled, the large body of American case law, in the common law’s system of precedent, has brought about a certain stability and predictability over time. Nonetheless, because it is the law of the individual states, American conflicts law remains fragmented; it does not speak with one voice internationally, indeed not even in interstate cases.

B. Federalizing Conflicts Law in the European Union

The “federalizing”⁶⁷ of conflicts law in the European Union has been a major achievement. While the Regulations on jurisdiction and judgment enforcement federalize these subjects primarily within the Union (“interstate”),⁶⁸ the Regulations on choice of law in contract, tort, di-

general jurisdiction to cases when the foreign corporation did not only engage in “continuous and systematic business” in the forum, but was virtually “at home” there, a test repeated in *Daimler A.G. v. Bauman*, 134 S. Ct. 746, 751, 769 (2014), and by Justice Sotomayor (concurring), and followed in *Gucci Am. v. Bank of China*, 768 F.3d 122, 134–38 (2d Cir. 2014). The “at home” test for general jurisdiction now resembles the general-jurisdiction rules in the EU (for forum-unrelated claims) over companies of Member States: general jurisdiction over them exists only at their domicile, Articles 4 and 5, Brussels I Recast Regulation, *supra* note 18, defined as either their statutory seat, central administration, or principal place of business. *Id.* art. 63. Exceptions favor insured persons, consumers, and employees: they may sue an out-of-state company at its in-state branch, but only for “disputes arising out of the operations of the branch . . .” *Id.* arts. 11(2), 17(2), 20(2), respectively. For general jurisdiction over non-EU companies (often more far-reaching) national law continues to apply. *Id.* art. 6.

65. See *infra* text accompanying notes 78–83.

66. See Mathias Reimann, *Harmony and Chaos in Products Liability: The Divergent Paths of Europe and the United States*, in BEYOND BORDERS: PERSPECTIVES ON INTERNATIONAL AND COMPARATIVE LAW—SYMPOSIUM IN HONOUR OF HEIN KÖTZ 91, 108 (Florian Faust & Gregor Thüsing eds., 2006); see also Kegel, *supra* note 8, at 617.

67. HAY, WEINTRAUB & BORCHERS, CONFLICT OF LAWS: CASES AND MATERIALS 1023–24 (14th ed. 2013); Michaels, *supra* note 1, at 1620. In the law of procedure, “federalizing” began with two landmark decisions: Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1 (direct effect of Community law in national law); Case 6/64 *Costa v. ENEL*, 1964 E.C.R. 585 (supremacy of Community law). For early comment on *Van Gend*, see Peter Hay, *Federal Jurisdiction of the Common Market Court*, 12 AM. J. COMP. L. 21, 36 (1963); for a recent re-assessment, see HÉLÈNE RUIZ FABRI ET AL., REVISITING *VAN GEND EN LOOS* (2014). See also *infra* text accompanying notes 84–93.

68. See Brussels I Recast, *supra* note 18, arts. 4, 6, 36–44. In Council Regulation (EC) NO. 2201/2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, 2003 O.J. (L 338) 1 (EC) [hereinafter Brussels Iia Regulation], divorce and custody jurisdiction is based on the affiliation of the parties (in divorce) or the child (in custody) with the forum, but recognition of non-member state decrees in divorce remains

voice, and succession have “universal application,”⁶⁹ meaning that they also apply, in an EU national court, in non-EU cases pending there. In achieving the required harmonization, concessions had to be made.

The Succession Regulation⁷⁰ serves to illustrate. Choice of law in succession may follow the monist approach—treating the decedent’s estate as a whole for purposes of jurisdiction and applicable law—or distinguish between succession to movables and immovables (dualist approach). The latter approach is followed generally in the common law⁷¹ and in some Continental countries: *situs* law applies to immovables, the law of the decedent’s nationality, habitual residence at death or another personal connection factor, to succession to movables. The majority of EU member states, however, follows the monist approach: a single law applies to the succession to the whole of the estate.⁷² Two questions then arise: first, what connecting factor identifies the (single) applicable law? And, second, since non-*situs* law may thus apply to succession to *situs* immovables, what happens to possible mandatory rules of the forum as *situs*, and how should the forum proceed when the applicable non-*situs* law provides for an interest in real property unknown to the *situs* (for instance, a common-law future interest or a surviving spouse’s life estate)? The new Regulation adopts the monist approach, selects, with a number of nuances, the decedent’s habitual residence at death as the connecting factor, recognizes the overriding effect of forum mandatory rules (as does all of EU conflicts law), and provides for “adaptation” of forum rules to achieve the same functional results as contemplated by the applicable when the exact counterpart is unknown to the *situs*.⁷³ For the mon-

a matter of national law. See *id.* arts. 8, 14. For the violation of non-member state custody decrees, the Regulation adopts, in adapted form, the provisions of the Hague Convention of October 25, 1980, on the Civil Aspects of International Child Abduction, in force in the United States since July 1, 1988, 42 U.S.C. §§ 11601–10 (2013).

69. Rome I Regulation, *supra* note 14, art. 2; Rome II Regulation, *supra* note 14, art. 3; Succession Regulation, *supra* note 55, art. 20.

70. Succession Regulation, *supra* note 55.

71. HAY, ET AL., *supra* note 5, §§ 20.2–20.3.

72. Jürgen Basedow et al., *Comments on the European Commission’s Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Authentic Instruments in Matters of Succession and the Creation of a European Certificate of Succession*, 74 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT (RABELSZ) 62–63 cmts. 128–29 (2010).

73. Succession Regulation, *supra* note 55, pmbl. ¶ 3, arts. 10(1), 20, 23 (monist approach); *id.* arts. 21, 22 (application of the law of the decedent’s habitual residence, subject to a manifestly more closely related other law and to a limited ability to choose the applicable law in the will); *id.* pmbl. ¶¶ (15)–(16), art. 31 (treating limited types property rights—*numerus clausus* of property interests: *situs* law prevails, but the *situs* should “adapt” its law to achieve the result intended by the applicable law). Like most modern conventions and conflicts statutes, the Regulation makes provision for selecting an applicable law when the reference is to a state with more than one internal law: if the reference is to “the United States,” this will mean a reference to the decedent’s residence in a state within the United States, art. 36(2)(a). For a comparative discussion of the limitation of types of property interests in several civil law countries, see ASTRID STADLER, GESTALTUNGSFREIHEIT UND VERKEHRSSCHUTZ DURCH ABSTRAKTION: EINE RECHTSVERGLEICHENDE STUDIE ZUR ABSTRAKTEN UND KAUSALEN GESTALTUNG RECHTSGESCHÄFTLICHER ZUWENDUNGEN ANHAND DES DEUTSCHEN, SCHWEIZERISCHEN, ÖSTERREICHISCHEN, FRANZÖSISCHEN UND US-AMERIKANISCHEN RECHTS 110 (1996); for German law, see WOLFGANG LÜKE, SACHENRECHT 11–12 nos. 28–32 (3d ed. 2014).

ist approach to work, the uniform law applicable to the entire estate should preferably be administered by a single court, and the Succession Regulation so provides.⁷⁴

Obviously, and despite the most careful consideration and drafting,⁷⁵ unforeseen problems will surface over time as courts apply these Regulations to cases before them, especially also those not involving EU-related disputes. All three Regulations discussed above therefore contain “Review Clauses,”⁷⁶ obligating the European Commission to report on the experience with the implementation of the Regulations and to suggest revisions.

Given the premises that Continental law takes a systemic view of conflicts law, which the United Kingdom and Ireland have accepted as part of their EU membership,⁷⁷ that a systemic view must necessarily reject the *ad hoc* approach that issue-by-issue problem analysis invites, and that its law is grounded on legislation (with a judicial overlay, but not the other way around),⁷⁸ the harmonization of (statutory) conflicts law that the EU has achieved is quite remarkable. Even before a formal review takes place, many will find fault with details.⁷⁹ But criticism, especially when based on the American experience, should not be directed against matters that inhere in the system:⁸⁰ to change the latter would export American ideas, implant them in a strange habitat, and possibly create a hybrid.

74. Succession Regulation, *supra* note 55, arts. 4–5 (law of member state of decedent’s habitual residence, subject to a choice of court stipulation in favor of another member state court), art. 10(1) (law of member state court of nationality or last habitual residence if not a resident at death), art. 10(2) (limiting jurisdiction to local assets if there is no jurisdiction over the whole estate on the basis of the foregoing).

75. The comprehensive review and report by the Hamburg, Germany Max-Planck-Institute for Foreign and International Private Law, Basedow, et al., *supra* note 72, is an excellent example.

76. Rome I Regulation, *supra* note 14, art. 27; Rome II Regulation, *supra* note 14, art. 30; Succession Regulation, *supra* note 55, art. 82.

77. See *supra* note 25.

78. The doctrine of *forum non conveniens* is a good example: It is generally unknown in Continental law, and the European Court of Justice therefore held that the United Kingdom could not use the doctrine to dismiss a case when its courts had jurisdiction under the applicable EU Regulation. Case C-281/02, Owusu v. Jackson, 2005 E.C.R. I-1445. At the same time, it is often desirable to have a matter heard by a court better suited to hear the case than the one designated by law. However, in a statute-based system, the authority to make such a shift must come by statute. This was done, with limits clearly defined, in the Succession Regulation, *supra* note 55, art. 6(a), and, with respect to child custody, in the Brussels IIa Regulation, *supra* note 68, art. 15.

79. See, for example, with respect to the Rome II Regulation, *supra* note 14, Hay, *supra* note 42, at 145–47 (questioning whether the plaintiff-favoring rules of art. 7 and pmb. ¶ 33 achieve much, expressing disappointment that no agreement was reached on choice of law for reputational torts, and finding the characterization of damages less than clear).

80. See Symeon C. Symeonides, *Rome II and Tort Conflicts: A Missed Opportunity*, 56 AM. J. COMP. L. 173 (2008), who regrets, *inter alia*, that the Rome II Regulation continues to define the “closer connection” for the determination of a possibly alternatively applicable law in geographic, and not issue-related, terms, and therefore does not provide for *dépeçage*. See also Weintraub, *supra* note 37, at 458, 460 (urging greater attention to the consequences of a choice of law). For the consequences-based to choice of law, see WEINTRAUB, *supra* note 5, § 6.2. Professor Juenger was critical of the Rome Convention, *supra* note 15, predecessor of the Rome I Regulation, *supra* note 14. For comment, see Peter Hay, *Review Essay: Friedrich Juenger and U.S. Conflicts Law*, 6 UNIF. L. REV. 691, 693–94 n.17 (2001).

The same holds true in reverse, of course. While some oppose legislation for conflicts law altogether,⁸¹ the Louisiana and Oregon codifications⁸² show that the desire for more certainty can be achieved by legislating conflicts rules without necessarily giving up flexibility. That the American system might call for a different balance than the European and, like the European, must also take into account the historical growth of its own system in doing so (including issue-orientation and *dépeçage*) also follows. Here, a criticism might be directed at the way the balance is struck—for instance, that the Oregon statute is too homeward oriented.⁸³

VII. CONCLUDING OBSERVATIONS – OUTLOOK

In the European Union, the institutions (Parliament and Council) harmonize conflicts law by legislating in the exercise of their interstate commerce power.⁸⁴ All three of the choice-of-law regulations discussed earlier preface their provisions with a statement similar to that in the Succession Regulation: “The proper functioning of the internal market should be facilitated by removing the obstacles to the free movement of persons who . . . face difficulties . . . in the context of a succession having cross-border implications.”⁸⁵ Facilitating the functioning of the internal market, particularly with respect to the movement of persons and to the transaction of cross-border business, so far has meant uniform legislation

81. Donald T. Trautman, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L. J. 1612, 1620 (1981); see also David E. Engdahl, *The Classic Rule of Full Faith and Credit*, 118 YALE L.J. 1584, 1657–58 (2009). But see Peter Hay, *Full Faith and Credit and Federalism in Choice of Law*, 34 MERCER L. REV. 709, 721–22 (1983), with particular reference to Justice Jackson’s Cardozo Lecture: Robert H. Jackson, *Full Faith and Credit—The Lawyer’s Clause of the Constitution*, 45 COLUM. L. REV. 1, 27, 34 (1945); Larry Kramer, *On the Need for a Uniform Choice of Law Code*, 89 MICH. L. REV. 2134 (1991).

82. *Supra* note 9.

83. Hans Stoll, *Die Kodifikation des Internationalen Privatrechts der Außervertraglichen Haftung im Staate Oregon*, 2009 [translating to The Codification of Private International Law for Non-Contractual Liability in the State of Oregon, 2009], in GRENZEN ÜBERWINDEN – PRINZIPIEN BEWAHREN: FESTSCHRIFT FÜR BERND VON HOFFMANN 448, 457–58 (Herbert Kronke & Karsten Thorn eds., 2011). For the Oregon statute, see OR. REV. STAT. §§ 15.400–60 (2009) (torts). Compare Symeon C. Symeonides, *Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should*, 61 HASTINGS L.J. 337 (2009), with *supra* notes 39–41 and accompanying text.

84. The Treaty on the Functioning of the European Union (TFEU) provides that these institutions “shall adopt measures . . . necessary for the proper functioning of the internal market . . . [to ensure] compatibility of the rules . . . [of] the Member States concerning conflict of laws and of jurisdiction.” Treaty on the Functioning of the European Union, 2012 O.J. (C 326) 1 (consolidated version), art. 81(2)(c) [hereinafter TFEU]. The “internal market” comprises “the free movement of goods, persons, services and capital . . .” *Id.* art. 26(2).

85. Succession Regulation, *supra* note 55, pmbl. ¶ 8. Similar language is found in the Rome I and II Regulations, *supra* note 14, pmbls. ¶ 6. The Treaty on European Union limits the institutions in the exercise of powers held concurrently with the member states to those cases in which a uniform result cannot be achieved by the latter acting alone (“subsidiarity” principle). The Treaty on European Union, 2012 O.J. (C 326) 1 (consolidated version), art. 5(3) [hereinafter TEU]. All three Regulations reviewed above contain recitals that the rules adopted by them comply with the subsidiary principle, i.e. are required because the desired result cannot be achieved by the member states alone. Rome I Regulation, *supra* note 14, pmbl. ¶ 43; Rome II Regulations, *supra* note 14, pmbl. ¶ 38; Succession Regulation, *supra* note 55, pmbl. ¶ 80.

with respect to jurisdiction and judgment recognition in civil and commercial matters⁸⁶ and the same with respect to divorce and custody.⁸⁷

With respect to choice of law, in addition to the three Regulations discussed in some detail above, there are harmonized choice-of-law rules for maintenance obligations,⁸⁸ and, for some member states, for divorce.⁸⁹ A jurisdiction and applicable law Regulation on insolvency dates back to 2000.⁹⁰ Proposals for similar legislation with respect to matrimonial property for married couples as well as for members of registered partnerships⁹¹ (same-sex relationships⁹²) are pending, and the Commission is reported to have far-reaching plans for further conflicts law harmonization.⁹³

In the United States, the federal Constitution's Interstate Commerce Clause has not been used to create a uniform national conflicts law, neither for interstate nor for international cases. The federal treaty power has been used sparingly to address international problems, and thereby to create uniform law within the United States.⁹⁴ Two very successful exceptions stand out: the Vienna Convention for the International-

86. See *supra* note 18 and accompanying text.

87. See *supra* note 68 and accompanying text.

88. Hague 2007 Protocol on Maintenance Obligation, *supra* note 43.

89. Council Regulation (EU) No. 1259/2010 of 20 December 2010 implemented enhanced cooperation in the area of applicable law to divorce and legal separation. 2010 O.J. (L 343) 10, pmb. ¶ 9 [hereinafter Rome III Regulations]. The Treaty on European Union provides a procedure for the adoption of a regulation that will be in force in some, but not all member states, when a number of them, with Council approval, wish to proceed faster than all members are prepared to do. TEU, *supra* note 85, art. 81; see also TFEU, *supra* note 84, art. 328. This procedure was used for the Rome III Regulation. It is currently in force in 15 states (16 as of July 29, 2015, when it entered into force in Greece).

90. Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings, 2000 O.J. (L 160) 1. Unlike American federal bankruptcy law, this Regulation does not contain rules of substantive law, but, the Insolvency Regulation, like the other regulations discussed herein, applies to jurisdiction and enforcement of decisions and contains choice of law rules for the determination of the applicable substantive law.

91. See Proposal for a Council Regulation on Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions in Matters of Matrimonial Property Regimes, 2011 Eur. Comm'n 126. For such a Regulation regarding the property consequences of registered partnerships, see 2011 Eur. Comm'n 127.

92. A number of EU member states provide for same-sex marriage, while some others provide for registered partnerships. The Brussels IIa Regulation, *supra* note 68, contains no definition of marriage (for purposes of divorce jurisdiction); neither does the Rome III Regulations, *supra* note 89. Until there is more uniformity with respect to the legal status of same-sex relationships, it seems desirable to provide at least for the property consequences of such relationships upon their termination.

93. See Gilles Cuniberti, posting on a contribution by Matthias Weller, *Enhancing Trust – Codification of the European Conflict of Laws Rules: Some of the EU Commission's Visions for the Future of EU Justice Policy*, <http://conflictoflaws.net> (Mar. 19, 2014).

94. Of the thirty conventions sponsored by the Hague Conference on Private International Law, the United States had adopted only five as of February 15, 2015. *United States of America*, HCCH: HAGUE CONVENTION ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?act=states.details&sid=76 (last visited Sept. 24, 2015). Three of these concern procedural matters (Legalization of documents, T.I.A.S. 10072, FED. R. CIV. P. 44; service abroad of documents, 20 U.S.T. 361, FED. R. CIV. P. 4; taking evidence abroad, 37 U.N.T.S. 1976). Two substantively important ones are the Child Abduction Convention, see *infra* note 95, and the Intercountry Adoption Convention (32 I.L.M. 1139); however, with respect to the latter convention, the United States has deposited a declaration that the conventions arts. 1–39 are non-self-executing.

al Sale of Goods⁹⁵ (providing substantive law) and the Hague Child Abduction Convention.⁹⁶ But, the treaty power has not been used to harmonize state conflicts law in international contexts.

The case law has not done so either.⁹⁷ The Full Faith and Credit Clause remains mainly restricted to judgments,⁹⁸ and the *Erie* doctrine was unnecessarily extended to conflicts law, so that the latter therefore remains state law, even when relevant in federal court.⁹⁹ On the state level, uniform statutes assure a measure of uniformity for recognition and enforcement of judgments,¹⁰⁰ but do not help with choice of law.¹⁰¹

American state conflicts law has indeed revolutionized American theory and practice. The past fifty years have seen a variety of approaches proposed and some of them adopted. Many, if not most, modern American approaches are reflected in the *Restatement (Second) of Conflict of Laws* and invoke some kind of closer connection test, interest analysis, seasoned with better law, and, on closer look, often mix them together, all in non-uniform ways.¹⁰²

As one assessment of American conflicts case law concludes, there “have long ceased to [be reports on] big methodological developments, largely because there are none.”¹⁰³ In this regard, there is more vitality and experimentation in the ongoing European harmonization process. At the time of its adoption, the *Restatement (Second) of Conflict of Laws* did not just restate, it also attempted to chart new ways and there-

95. 52 Fed. Reg. 6262, 6264–80 (1987).

96. See 42 U.S.C. §§ 11601–10 (1988) (implementing the Convention).

97. Somewhat uniform case law does exist with regard to some venerable historic rules, such as the reference to *situs* law for immovable and the decedent’s domicile at death for succession to movable property. Cf. STADLER, *supra* note 73.

98. HAY, BORCHERS & SYMEONIDES, *supra* note 5, §§ 3.24, 3.30. See also Hay, *supra* note 81.

99. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); *Day & Zimmerman Inc. v. Challoner*, 423 U.S. 3 (1975). For criticism, see Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79 (1993); HAY, ET AL., *supra* note 5, § 3.36; HAY, WEINTRAUB & BORCHERS, *supra* note 67, at 686–88.

100. On uniform acts for the recognition of interstate judgments (providing procedures alternative to a suit for recognition based on the Full Faith and Credit Clause) and for foreign-country judgments in civil and commercial matters, see Peter Hay, *Comments on Public Policy in Current American Conflicts Law*, in BAETGE, *supra* note 2, at 89, 90 *et seq.* For the Uniform Child Custody Jurisdiction and Enforcement Act and the Uniform Interstate Family Support Act, see HAY, WEINTRAUB & BORCHERS, *supra* note 67, at 902–05 and 916–19, respectively.

101. Both the RESTATEMENT (SECOND) ON CONFLICT OF LAWS § 187 and the Uniform Commercial Code provide for very limited freedom for the parties to choose the applicable law by agreement, requiring, in essence, that the chosen law be connected to the transaction. An attempt to free parties from the limitation by replacing former UCC § 1-105 with a new § 1-301 which would have permitted a choice-of-law stipulation “whether or not the transaction bears a relation to” the state or country designated, failed for want of adoptions (except by the Virgin Islands). As a result, the old restrictive wording was retained, now renumbered § 1-301. In contrast, European law permits the choice of an unrelated law for contracts (even within limits for purely domestic transactions) and, again within limits, for torts: Rome I and II Regulations, *supra* note 14, arts. 3 and 14, respectively, in both cases with provisions protective of weaker parties. In general, party autonomy is far greater abroad than under the provisions of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS and the UCC. See SYMEONIDES, *supra* note 11, at 119 *et seq.*

102. See *supra* notes 23, 48 and accompanying text.

103. Symeonides, *supra* note 51, at 56 n.287 (quoting Ralf Michaels, *After the Revolution – Decline and Return of U.S. Conflict of Laws*, 11 YBK. PRIV. INT’L L. 11, 13 (2009)).

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by contributed to the American “revolution.” It succeeded in the latter, but the way it was conceived and structured prevented it to be a force for harmonization. The American Law Institute has now embarked on a project for a Restatement (Third). Work on it may now well reflect on developments abroad in the last fifty years so that learning from each other may go both ways.

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