

# The New European Choice-of-Law Revolution

## Lessons for the United States?

*A Conference at Duke Law School*

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European conflict-of-laws scholars have long been fascinated by studied developments in the United States, where a veritable conflict-of-laws revolution has taken place. Now, Europeans have enough to study at home, as conflict of laws is rapidly being Europeanized. Do these developments constitute a new, now European, revolution? And can they inspire the United States, where the field is in disarray? On 9 February 2008, Duke University School of Law assembled experts from Europe and the United States to address these questions. Entitled “The New European Choice-of-Law Revolution: Lessons for the United States?” and sponsored by Duke’s Center for International & Comparative Law in collaboration with the *Tulane Law Review*, the conference reinvigorated a dialogue between Europe and the United States that has too long been dormant in choice of law (and relatively hostile in international civil procedure). The contributions have now been published in the *Tulane Law Review*.<sup>1</sup>

The first panel was devoted to the core areas of the US conflicts revolution: tort and contract law. Speaking on tort law, Jan von Hein (Trier) questioned the idea of a European revolution, arguing instead that the Rome Regulations are actually the product of a long-run evolution in domestic laws of member states.<sup>2</sup> To him, the Rome II Convention reflects the heritage of Savigny, and the Rome Regulations are successful precisely because their rules were tested in member states’ courts and analyzed by European academics. Symeon Symeonides (Willamette) seconded many of these views and suggested the US could learn how to reform choice-of-law rules in a long-run evolution, rather than in a short-run revolution.<sup>3</sup> However, he also offered lessons for Europe and recommended a move towards issue-by-issue analysis and an acknowledgement of states’ interest in the outcomes of cases.<sup>4</sup> Subsequent discussions

highlighted a related element that is often neglected: Since US and EU tort law serve different functions, a full comparison may require extra-legal considerations.

Next, Dennis Solomon (Tübingen/Passau) offered lessons for the US from European choice of law in contract law.<sup>5</sup> Solomon noted that the European model may teach the US that a rule-based approach can balance flexibility and predictability, and that public policies may be protected by mandatory override rules that require the application of forum law or the home law of the weaker party. In the US context, such override can disadvantage consumers, as subsequent discussion made clear: Override clauses may lead to differences between the law applicable to the cases of plaintiffs injured by the same instrument, therefore hindering the formation class action lawsuits because class certification requires common issues of fact and law.<sup>6</sup> Patrick Borchers (Creighton) agreed on the desirability of rules, indicating that the US could definitely learn from the European experience.<sup>7</sup> He noted that after Louisiana codified its choice of law principles, the affirmance rate of the state's trial court decisions increased from 47% to 85%. Borchers also noted that, though American courts acknowledge the need for exceptions to party autonomy in choice-of-law clauses of contracts, recent cases indicate uncertainty about the scope of such exceptions. Generally, Borchers stated that American courts are seeking certainty in this area, and certainty could be provided by codification.

Two other panels focused on the two areas in which the most important European developments have occurred: corporate law and family law. Larry Backer (Penn State/Tulane) addressed a rather unusual conflict of laws: that between private and public law, especially in the case law of the European Court of Justice on golden shares.<sup>8</sup> This conflict emerges, he argued, because, in the corporate context, states sometimes act like corporations and corporations sometimes act like states. Jens Dammann (Texas) looked at the impact of the seat doctrine on the law of jurisdiction.<sup>9</sup> His starting point was the US tradition, now copied in part in Europe, according to which corporations can effectively choose the applicable law under the internal affairs doctrine, which provides that the affairs of a corporation are governed by the law of the state of incorporation. A plausible consequence would be that corporations could always be sued at their place of incorporation. Dammann rejected this solution as both unnecessary and undesirable. Finally, Onnig Dombalagian (Tulane) discussed conflict of laws in the regulation of

capital markets.<sup>10</sup> He pointed out that unification within the EU and the US has not resolved US-EU trading problems where the two capital market regimes differ, such as in insider trading regulations, the role of independent auditors and directors, and the appropriate conduct of takeovers. Dombalagian suggested that globally regulated stock exchanges should be governed by a single choice-of-law mechanism, that is, transactions should be governed by the law of the state in which security is listed on a stock exchange.

The next three presentations dealt with family law. Marta Pertegás (Antwerp) discussed European proposals that resolve choice-of-law problems in family law using a global approach that considers several factors in determining applicable law. In addition, recent European proposals have acknowledged the importance of respecting the justified expectations by allowing parties to choose the applicable law in some aspects of family law. Katharina Boele-Woelki (Utrecht) focused on a theme of great current interest in the US: the treatment of same-sex couples.<sup>11</sup> She noted the differences between the substantive laws of EU member states, some of which recognize same-sex marriages, while others do not even grant registered partnerships or civil pacts. Though the free movement of persons principle could be interpreted to require recognition of same-sex relationships solemnized in other member states, EU law has not yet developed in that direction. Based on the EU experience, Boele-Woelki noted that US legislation on same-sex couples must address the mobility of persons by including private international law provisions; the end goal, however, must be universal recognition for same-sex relationships. Linda Silberman (New York) spoke briefly about the same topic and argued that European rules that use the parties' significant connections to determine the law applicable to marriage provide a helpful model for American attempts to distinguish "evasion" from "mobile" marriages, especially same-sex marriages.<sup>12</sup> In addition, she addressed rules for divorce, finding that choice-of-law rules are far less important than than jurisdictional rules in the United States; although the new European regime distinguishes between jurisdictional and choice-of-law rules, Silberman did not predict a greater role for choice-of-law rules in divorce. Silberman then discussed international conventions on custody and support and thus addressed the global framework within which Americans and Europeans interact and within which comparison takes place.

Moving from specific areas to general questions, a third panel was devoted to questions of method. Richard Fentiman (Cambridge) noted that UK choice-of-law rules differ significantly from their US counterparts, and in some ways the UK's approach is closer to that of Europe. Nonetheless, he found the new European rules problematic.<sup>13</sup> For example, in Fentiman's view, the Rome Regulations' use of the "close connection", as opposed to the common law's "significant relationship" test, reflects the limited role of European judges: Whereas the "close connection" formula relies on territoriality, therefore limiting judicial discretion, the "significant relationship" test allows judges to take an active role in discovering interests behind the laws in question. Ralf Michaels (Duke) argued that Europe is undergoing a veritable choice-of-law revolution comparable in importance to that in the US, even though its characteristics are quite different.<sup>14</sup> Three core elements of European choice of law—its private character, its focus on national laws, and its combination of an internationalist perspective and domestic regulation—are all coming under attack. The new constitutionalized regime, he argued, is federalized, denationalized, and mixed, both in terms of its method and in the differences between intra-EU conflicts and conflicts with third states. Bill Reppy (Duke), finally, distinguished three ways in which methodological approaches can be mixed.<sup>15</sup> In what he calls *dépeçage*, a case is primarily resolved under one theory, but another theory is used in individual issues. In multi-look eclecticism, a court examines the result of resolving the case under one theory, then applies another theory if that result is undesirable. Finally, a court applies big mix eclecticism when it combines all theories to resolve a case. Reppy suggested that both European and US courts apply eclecticism with differing degrees of success.

The final panel discussed constitutionalization and federalization. Jürgen Basedow (Hamburg) focused on the federalization of EU choice of law.<sup>16</sup> Although Europe does not have a constitution in the narrow sense, constitutional law plays a much more prominent role there than in the US, where the Supreme Court has largely abandoned choice of law. This development, together with the growing number of European regulations, means that federalization of choice of law is much stronger now in Europe than in the US. Mathias Reimann (Michigan) responded that federal codification of choice of law will likely remain unsuccessful in the US. According to Reimann, uniform

choice-of-law rules are unnecessary in the US because most contracts include choice-of-law clauses and because transboundary torts are relatively uncommon. In addition, uniform rules might not enhance predictability or prevent forum shopping due to the breadth of judicial discretion in the US. Finally, the US Congress lacks the political will to address a field as technical as choice of law. The last two panelists, Erin O'Hara (Vanderbilt) and Larry Ribstein (Illinois / New York), addressed regulatory competition in choice of law and thus looked at Europe and the US as potential markets for law.<sup>17</sup> They argued that law markets are desirable because they allow parties to use exit as an alternative to voice, facilitate law reform, and achieve better fit between law and the needs of diverse parties. However, law markets may cause third party externalities or result in the unconscionable use of contract power if states cannot protect weaker parties due to exit. Choice-of-law rules should therefore facilitate party autonomy, but also allow states to override parties' choices through mandatory norms. Federal law could serve as a backstop, generally enforcing state choice-of-law, but preventing overly aggressive policies. Greater mobility due to language and cultural factors, contributed to a more dynamic law market in the US as opposed to Europe. Generally, the systematic approach in the Europe might increase predictability for a law market, but the speakers also praised the somewhat chaotic approach in the United States because it causes less interference with party autonomy.

Generally, conference discussions indicated that the US can learn from the EU experience, even if the lesson learned is that European solutions would prove unworkable in the US. As demonstrated in the first three panels, the EU and the US confront several similar goals in specific areas of law—achieving predictable results in contracts and torts, facilitating cross-border transactions in the corporate context, and allowing free movement of persons in family law. Nonetheless, the discussions also showed that the conditions of choice of law in Europe and the United States are vastly different: Specifically, the different roles of the law and of legal institutions in Europe and the US make simple transplants unlikely. The greatest success of the conference, then, was not the suggestion or refusal of a fully fledged transplant, but the insight that both sides can learn a great deal from a renewed dialogue. Several participants mentioned their

eagerness to continue this dialogue, fueling hope that the current respective isolation of European and of US choice of law can be overcome.

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<sup>1</sup> 82 TUL. L. REV. 1607-2198. The issue includes contributions from two scholars who had to cancel in the last minute: Horatia Muir Watt, *European Federalism and the “New Unilateralism,”* 82 TUL. L. REV. 1983-1998 (2008); William A. Richman, *A New Breed of Smart Empirically Derived Conflicts Rules: Better Law than “Better Law” in the Post-Tort Reform Era* (Reviewing SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST AND FUTURE*, 2006), 82 TUL. L. REV. 2181-2198 (2008).

<sup>2</sup> Jan v. Hein, *Something Old and Something Borrowed, but Nothing New? Rome II and the European Choice-of-Law Evolution*, 82 TUL. L. REV. 1663-1707 (2008).

<sup>3</sup> Symeon C. Symeonides, *The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons*, 82 TUL. L. REV. 1741-1799 (2008).

<sup>4</sup> See also Symeon C. Symeonides, *Rome II and Tort Conflicts: A Missed Opportunity*, 56 AM. J. COMP. L. 173-218 (2008).

<sup>5</sup> Dennis Solomon, *The Private International Law of Contracts in Europe: Advances and Retreats*, 82 TUL. L. REV. 1709-1740 (2008).

<sup>6</sup> See also Linda J. Silberman, 156 PENN. L. REV. (forthcoming 2008).

<sup>7</sup> Patrick J. Borchers, *Categorical Exceptions to Party Autonomy in Private International Law*, 82 TUL. L. REV. 1645-1661 (2008).

<sup>8</sup> Larry Catá Backer, *The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element in Private Choice of Law*, 82 TUL. L. REV. 1801-1868 (2008).

<sup>9</sup> Jens Dammann, *Adjudicative Jurisdiction and the Market for Corporate Charters*, 82 TUL. L. REV. 1869-1901 (2008).

<sup>10</sup> Onnig H. Dombalagian, *Choice of Law and Capital Markets Regulation*, 82 TUL. L. REV. 1903-1947 (2008).

<sup>11</sup> Katharina Boele-Woelki, *The Legal Recognition of Same-Sex Relationships Within the European Union*, 82 TUL. L. REV. 1949-1981 (2008).

<sup>12</sup> Linda J. Silberman, *Rethinking Rules of Conflict of Laws in Marriage and Divorce in the United States: What Can We Learn from Europe?* 82 TUL. L. REV. 1999-2020 (2008).

<sup>13</sup> Richard Fentiman, *Choice of Law in Europe: Uniformity and Integration*, 82 TUL. L. REV. 2021-2051 (2008).

<sup>14</sup> Ralf Michaels, *The New European Choice-of-Law*, 82 TUL. L. REV. 1607-1644 (2008). The article is a slightly altered translation of Ralf Michaels, *Die europäische IPR-Revolution: Regulierung, Europäisierung, Mediatisierung*, in *Dietmar Baetge, Jan v. Hein & Michael von Hinden* (Hg.), *Die richtige Ordnung*. Festschrift für Jan Kropholler zum 70. Geburtstag (2008).

<sup>15</sup> William A. Reppy, Jr., *Eclecticism in Methods for Resolving Tort and Contract Conflict of Laws: The United States and the European Union*, 82 TUL. L. REV. 2053-2117 (2008). Reppy's remarks were presented by his research assistant, James Healy. Cf. Reppy, *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645 (1983).

<sup>16</sup> Jürgen Basedow, *Federal Choice of Law in Europe and the United States—A Comparative Account of Interstate Conflicts*, 82 TUL. L. REV. 2119-2146 (2008).

<sup>17</sup> Erin Ann O'Hara & Larry E. Ribstein, *Rules and Institutions in Developing a Law Market: Views from the United States and Europe*, 82 TUL. L. REV. 2147 (2008); see also ERIN ANN O'HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* (forth. 2008).