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THE GLOBALIZATION ERA AND THE CONFLICT OF LAWS: WHAT EUROPE COULD LEARN FROM THE UNITED STATES AND VICE VERSA

*Milena Sterio**

I. INTRODUCTION

The conflict of laws, or private international law,¹ has always been an area of scholarly disagreement. Choice of law rules tend to differ from state to state and often tend to encompass differing methodologies for different fields of law, such as tort law or contracts. In Europe, traditional bilateral rules as developed by the great Savigny² in the 19th century tends to persist. In the United States (“U.S.”), on the contrary, scholars have long since abandoned the bilateral approach and have, since Currie’s revolutionary writings in the 1960’s,³ attempted to come up with “better,” more substantive-law oriented, approaches. While the two continents seemed to have increasingly diverging points of view on the conflict of laws, two recent phenomena might bring them back together.

First, Europe has been under the increasing influence of European Union (“E.U.”) lawmakers, who have undertaken a harmonization movement attempting to somewhat unify member states’ laws. The conflict of laws area has not escaped the harmonization movement and will become increasingly subject to Brussels’s regulations and directives. Thus, traditional bilateral rules will have to adapt themselves in light of the new political reality in Europe. Second, the conflicts field in general, be it in Europe or in the U.S., has been transformed under today’s globalization trend. In other

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¹ The terms “conflict of laws,” “choice of law,” and “private international law” will be used interchangeably throughout this article. While the first two terms are more commonly used in the U.S., the latter is frequently used in Europe and delineates conflict of both adjudicative and of prescriptive jurisdiction together.

² F. VON SAVIGNY, *SYSTEM DES HEUTIGEN ROMISCHEN RECHTS* (1849).

³ CURRIE, *SELECTED ESSAYS* (1963).

words, with the rise of international commerce, traditional private law conflicts are being replaced by public regulations clashes involving different states' economic or regulatory interests.⁴ Thus, the conflicts field might have to adapt itself both by trying to adopt universal rules, applicable on all continents, and by trying to adopt new methodologies capable of dealing with the complex conflicts situation of the global village. European bilateral rules are not likely to furnish interesting models, as they are already under attack in Europe itself, and because they do not provide a basis for the application of foreign public law. However, two American choice of law models, one developed by Lea Brilmayer, and the other by Andrew Guzman, might provide some needed solutions.

In order to address these issues, Part I of this Article will briefly discuss both Brilmayer's and Guzman's theories. Part II will then address the harmonization movement in Europe, and Part III will concentrate on the "publicization" of conflicts of law. Both Parts II and III will also discuss the possibility of adopting Brilmayer's and Guzman's theories in Europe as well as the U.S. as universal conflicts models capable of resolving modern-day legal system collisions. Finally, Part IV will discuss conflicts of economic regulations and the disappearing taboo of public law conflicts rules.

I. MODERN SOLUTIONS: LEA BRILMAYER AND ANDREW GUZMAN

American choice-of-law remains a largely incoherent field with different state rules and differing scholarly opinions and theories. However, two recent models present novel ideas and distance themselves from the Currie model or from any Currie-derived methodologies. These two models include Lea Brilmayer's political rights theory and Andrew Guzman's economic law approach.

A. *Lea Brilmayer's Model*

Lea Brilmayer's political theory of the conflict of laws is a vigorous critique of Currie's governmental interests ideas. Brilmayer proposes a new model based on fairness.⁵ First, regarding her cri-

⁴ This second phenomenon will be interchangeably described herein as "publicization" of private international law or disappearance of the public law taboo. The latter expression, "public law taboo," traditionally signified that in areas of public law, one country could not apply another country's public law. Thus, public law was "taboo" in terms of choosing the applicable public law.

⁵ Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 *YALE L.J.* 1277 (1989).

tique of Currie, Lea Brilmayer underlines several problems in his methodology. According to Brilmayer, interests are impossible to ascertain and the whole process is unconstitutional. In fact, if one were to adopt one of the methodologies suggested by Currie's successors, which consists of finding a state interest each time that a law specifies its own territorial domain, and if the notion of interest contains constitutional limits on the states' exercise of extraterritorial jurisdiction, then all of the above laws would be unconstitutional.⁶ Furthermore, according to Brilmayer, it is not always desirable to favor a substantial law policy over a conflict of law policy. A legislator could have very well chosen to apply a foreign law over his own law in order to foster conflict of law justice or procedural economy.⁷ Brilmayer further illustrates her point according to which conflict rules should be as important as substantive rules. She gives as an example, procedural rules, which can in themselves sometimes determine the outcome of a dispute. For example, jurisdiction-selection or statute of limitation rules can sometimes prevent a claim from being introduced in a certain forum. These outcomes, although they may seem unjust in certain cases, are tolerated because procedural rules are deemed to be as important as substantive rules.⁸ According to Brilmayer, conflict of law rules are as important as procedural rules, and, relative to substantive rules, there is no need to systematically favor the latter.

Lea Brilmayer then suggests an alternative. According to her political theory, a state cannot impose its authority and apply its laws to an individual unless the individual has consented to the state's authority either expressly or implicitly, or unless the application of the state's laws is territorial, implying a tie between the state and the dispute.⁹ In other words, the individual waives his or

⁶ Lea Brilmayer, 252 COLLECTED COURSES 9-252, at 11 (1995). Brilmayer refers to the definition of "interest" proposed by H.H. Kay, which implies a constitutional standard of limitation on the territorial application of each state's laws. Brilmayer then cites a paragraph from Currie's writings, which seems to suggest that the legislator should specify the territorial reach of his own laws. From the two above remarks, Brilmayer draws a constitutional critique – if the legislator specifies the territorial reach of his own laws, but if at the same time there should be a constitutional limit on those laws' reach, then Currie was trying to incite the legislator to adopt anti-constitutional laws. However, this critique is somewhat tempered by Brilmayer herself, as the definition of "interest" is proposed by Kay and not by Currie. For Kay's theory, see H.H. Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 COLLECTED COURSES 9-204, at 13 (1989).

⁷ Brilmayer, *supra* note 6, at 12.

⁸ *Id.* at 13.

⁹ See Brilmayer, *Rights, Fairness, supra* note 5, at 1298-1308.

her subjective rights. Instead of examining the privilege resulting from the application of a state's laws toward an individual, Brilmayer looks at the detrimental effects in order to examine the burden that application of the same laws can have on the other party. The authority and the foundation for the application of a state's laws lie exclusively within the individual's willingness, explicit or implicit, to subject himself to that authority. However, in order to make sure that this choice of law model remains fair, and to preserve distributive justice,¹⁰ Brilmayer introduces an additional test of mutuality designed to balance choice of law outcomes so as to avoid placing the burden systemically on the local party.¹¹ Although Brilmayer herself admits that traditional bilateral rules and the governmental interests model conform to the mutuality test,¹² she discards those theories founded on states' interests in order to re-position the debate in terms of subjective rights of individuals.¹³

Thus, Lea Brilmayer's political rights model embraces a new perspective on the choice of law and sheds new light on traditional conflicts ideas.

B. *Andrew Guzman's Model*

The modern American debate regarding the conflict of laws seems to have encompassed the rising globalization movement and the development of international commerce. In fact, the modern hypothetical situation examined by scholars no longer entails vehicular accidents or spousal privileges. Instead, the current paradigm focuses on economic disputes, on class actions in tort, or on consumer protection laws – all of which imply both international relations and extraterritorial application of a country's laws. In order to provide an adequate solution to these new conflicts, modern

¹⁰ The goal here is to establish a conflicts model that presents a burden to party A while according a benefit to party B. See Dirk H. Bliessener, *Fairness and Choice of Law: A Critique of the Political Rights-Based Approach to the Conflict of Laws*, 42 AM. J. COMP. L. 687, 696 (1994).

¹¹ *Id.* at 697. ("To implement actuarial fairness in a choice of law model, Brilmayer proposes an additional test of 'mutuality.' The mutuality test is even more restrictive than actuarial fairness in that it requires a choice of law rule to be 'balanced on a case-by-case basis.'").

¹² *Id.*

¹³ See *id.* For a European approach oriented toward individual subjective rights, see QUADRI, *infra* note 86. For an implication of Brilmayer's theory on the modern debate regarding the conflict of law, see *infra* Parts II and III.

scholars have focused their attention on economic aspects: *grosso modo*, how to efficiently allocate the territorial application of national laws to optimize the global welfare. In other words, scholars have focused on how to obtain economic efficiency through choice of law rules in order to maximize global wealth.

The Law and Economics movement, developed mainly at the University of Chicago under Richard Posner's remarkable influence, seems to have implemented itself in conflict of laws theories. Notably, Andrew Guzman from the University of Berkeley,¹⁴ has developed such a school of thought. According to Guzman, different states' interests need to be paralleled with those of the global community in order to provide for an optimal repartition of national laws for each international litigious situation. Because lawsuits are increasingly becoming international, it has become impossible to ignore the need for adapted choice of law rules.

Without a better understanding of how international choice of law issues impact international business, the legal regime that governs such transactions will stand in the way of economic development and growth rather than promote them.¹⁵

Guzman's theory, founded on the quest for the optimization of global resources, adopts a new methodology based on the legislative effect on individual welfare. Thus, the only relevant considerations in the choice of law calculus are the ones having effects on such welfare.

Adopting maximization of global welfare as the objective immediately leads to the conclusion that the only basis of jurisdiction to be considered is the impact of rules on the welfare of individuals. That is, factors that have no effect on human well-being are ignored.¹⁶

Guzman thus develops a new conflicts model. First, he seeks to determine which substantive law is the most economically efficient, or the "global optimum."¹⁷ Then, he analyzes different states' behavior, as each state adopts a certain substantive policy seeking to maximize its own fortune. In particular, Guzman exam-

¹⁴ Andrew Guzman, *Choice of Law: New Foundations*, School of Law, Boalt Hall, U.C. Berkely Public Law and Legal Theory, Research Paper No. 28 (1998), available at <http://www.ssrn.com> (last modified on November 8, 2000).

¹⁵ *Id.* at 7.

¹⁶ *Id.* at 14.

¹⁷ *Id.* at 19. ("This is the set of substantive policies that would exist if a single benevolent and well-informed global policy maker were able to establish laws.")

ines the relationship between the global optimum and different national laws in order to establish that only the application of the former would lead toward a satisfactory result in terms of maximizing the global welfare. This model somewhat resembles Brilmayer's quest for distributive justice: both authors strive to avoid potentially negative effects of a national law while seeking to balance the negative and the positive sides. In other words, the application of a particular law is justified even if it is prejudicial toward one party, if another party would benefit from it. The two authors' points of view differ, however, as Brilmayer looks more toward individual rights, whereas Guzman focuses on the economic aspect and global welfare.

The Law and Economics movement's influence on American choice of law theory has been significant over the last decade, and scholarly enthusiasm over new models has recently blossomed. The American conflicts revolution has also had considerable influence on European choice of law scholars. However, traditional European rules are still in place, despite their inability to adapt to the new economic reality. In particular, two modern phenomena have been threatening the European equilibrium in the conflict of laws field. First, the E.U. has led a strong harmonization and unification movement over national laws, seeking to create a federal union. The choice of law field might be obligated to follow the same harmonization logic. Second, conflicts of law are becoming increasingly public in nature. Thus, states' interests are increasingly more involved in this new type of litigation. The traditional Savigny-developed model might be forced to adapt itself in light of the publicization of private international law.

According to Lea Brilmayer, a state cannot exercise its adjudicative or legislative authority unless the individual implied in the litigation has consented explicitly or implicitly to this state's authority. The territorial reaches of different states' laws implied in a proceeding should be determined based on political fairness examined from the individual's point of view. Furthermore, according to Andrew Guzman, the quest for the applicable law has to encompass global interests, in order to find the most economically efficient law and in order to foster global welfare. These new conflict of law theories could possibly find their place in the new Europe, harmonized and liberated of the public law taboo.

III. THE "UNITED STATES OF EUROPE:" HARMONIZATION AND CENTRALIZATION

Niboyet, an influential European scholar in the field of conflict of laws from the beginning of the 20th century, advertised the development of a certain federal union in Europe.¹⁸ Europe should have developed pursuant to a territorial principle according to Niboyet. Countries should have abstained from applying their national laws extraterritorially in order to respect other countries' sovereignty. While the idea of constructing a federalized Europe does not seem novel to the modern-day E.U. authorities, the way that the latter have chosen to go about it differs significantly from Niboyet's territorial ideas. In fact, current E.U. leaders are pressing for a harmonization of national legal systems, a tendency that has equally affected the conflict of laws area. Examples of such harmonization include regulation of jurisdiction-selecting rules, mandatory laws, and enforcement proceedings.

A. *Adjudicative Jurisdiction or Jurisdiction-Selecting Rules*

First, with regard to adjudicative jurisdiction or jurisdiction-selecting rules, E.U. regulation has replaced the existing treaty law in this field. The "Brussels I" Council Regulation of December 22, 2000, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("Brussels I Regulation"),¹⁹ which entered into force on March 1, 2002, among member states of the European Union,²⁰ has effectively replaced the Brussels Convention of September 27, 1968, on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ("Brussels Convention"),²¹ Europeanizing thereby a previously treaty-based field of law.²² The Brussels I Regulation is applicable in both civil and commercial matters, as long as the defendant is

¹⁸ J.-P. Niboyet, *L'universalite des regles de solutions des conflits est-elle realizable sur la base de la territorialite?*, 1950 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE [R.C.D.I.P.] 509 (1950).

¹⁹ Council Regulation No. 44/2001, 2001 J.O. (L 012).

²⁰ Denmark has not ratified the Brussels I Regulation. The Brussels Convention thus remains applicable for Denmark.

²¹ 11 O.J. EUR. COMM. 32 (No. L 299) (1968); for the text of the amended version, see 21 O.J. EUR. COMM. 77 (No. L 304) (1978).

²² For a discussion of the "Europeanization" of the Brussels Convention, see Droz & Gaudemet-Tallon, *La transformation de la Convention de Bruxelles du 27 septembre 1968 en Reglement du Conseil concernant la competence judiciaire, la reconnaissance et l'execution des decisions en matiere civile et commerciale*, 2001 R.C.D.I.P. 601 (2001).

domiciled within the E.U.²³ In other words, a dispute becomes "European" in nature if the party being sued is domiciled in E.U. territory, despite the fact that both plaintiff and defendant could be nationals of non-E.U. countries. The Brussels I Regulation effectively eliminates the need for forum shopping by harmonizing jurisdictional grounds among all E.U. countries. In fact, any E.U. tribunal should come to the same conclusion regarding its own assumption of jurisdiction over a particular defendant if the dispute is "European" in nature. National jurisdictional grounds are thus superseded by the Brussels I Regulation.

It should be noted, however, that the Brussels Convention, in force among E.U. member states before the adoption of the Brussels I Regulation, had already harmonized jurisdictional grounds to some extent. Furthermore, under a 1971 Additional Protocol, the European Court of Justice ("ECJ") had been granted jurisdiction over all disputes arising under the Brussels Convention.²⁴ The harmonization movement, through the adoption of the above Brussels I Regulation, expands the ECJ's jurisdiction even further because this court now has automatic jurisdiction over all disputes in the field of adjudicative jurisdiction as this area of law has become "European."²⁵ The adoption of new regulations in other areas of law might similarly expand the ECJ's jurisdiction, rendering its role comparable to that of the U.S. Supreme Court.²⁶

The role of the European Court of Justice, I take it, was inspired in large part by the experience of the United States Supreme Court . . . [T]he basic function of the Court of Justice to see that member states do not impair the flow of goods and persons as mandated by the Treaty of Rome is consciously modeled on the jurisdiction of the United States Supreme Court to review ac-

²³ A dispute can also become "European" through the parties' intentions (see Article 23), or through one of the situations mentioned in Article 22, which provides for exclusive jurisdiction. See Brussels I Regulation, *supra* note 19.

²⁴ See Brussels Convention, *supra* note 21.

²⁵ The ECJ's new jurisdiction has been instituted under Article 68 of the Amsterdam Treaty. It has effectively taken away the national courts' right to ask for a preliminary ruling from the ECJ, a right that such courts had under the 1971 Additional Protocol. For a more detailed discussion on the change in the ECJ's jurisdiction powers since the entry into force of the Brussels I Regulation, see Droz & Gaudemet-Tallon, *supra* note 22, at 627.

²⁶ Regarding adjudicative jurisdiction, for example, nationality-based types of state jurisdiction have been eliminated for all disputes arising under the Brussels I Regulation. For example, in France, Article 14 can no longer be invoked against a defendant domiciled in the E.U.

tions that may interfere with the flow of interstate commerce²⁷

If the ECJ's jurisdiction is further expanded to include interpretation of all regulated areas of law, such as adjudicative jurisdiction, above and beyond its initial duties of supervising the free movement of goods and persons established in the Treaty Establishing the European Economic Community of 1957 ("Treaty of Rome"), then this court's similarity with the U.S. Supreme Court will become even more striking.²⁸ A harmonized Europe operating under the supervision of a Supreme Court clearly parallels the U.S. federation, begging the question of whether such harmonization is also needed in the area of prescriptive jurisdiction or conflict of laws.

B. *Mandatory Laws or "Lois de Police"*

Second, the harmonization movement has already been undertaken in other areas of law, such as mandatory laws. The ECJ has started to build a European regime of mandatory laws, or "lois de police," stemming from its interpretation of Article 7 of the Convention on the law applicable to contractual obligations of 1980 ("Rome Convention").²⁹ In a non-E.U. dispute, a judge is free not to consider foreign countries' mandatory laws in light of the foreign law's purpose and of the dispute's nature. Furthermore, such a judge is also free to apply his own country's mandatory laws as he pleases. In a European proceeding, however, the ECJ mandates a proportionality requirement since its *Arblade*³⁰ ruling: the forum's mandatory law, if it is neither *lex contractus* nor *lex causae* and if it wants itself applicable, has to nonetheless conform to certain E.U.

²⁷ Andreas Lowenfeld, *Renvoi Among the Law Professors: An American's View of the European View of American Conflict of Laws*, 30 AM. J. COMP. L. 99, 108 (1982).

²⁸ It should be noted, though, that the U.S. Supreme Court does not have jurisdiction over conflict of law issues. This area of law belongs to the common law of each state. Since the famous decision of *Erie RR., Co. v. Tompkins*, 304 U.S. 64 (1938), federal courts apply state law for all common law questions. The only possibility of acquiring Supreme Court jurisdiction in a conflict of law issue would be to allege a violation of the Due Process Clause. See JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 110-112 (1993).

²⁹ 23 O.J. EUR. COMM. (No. L 266) (1980). The ECJ does not have jurisdiction to interpret the Rome Convention because two 1988 protocols (C-27, 1988 O.J. 47 (1988)), providing for this possibility, never became effective. The issue nonetheless remains important in the conflicts arena regarding contractual matters, as long as the ECJ is competent to decide on the applicability of E.U. laws and regulations, which also affect international contracts.

³⁰ Joined Cases C-369/96 and C-376/98, *Arblade*, 1999 ECR I-8453 (1999).

standards.³¹ Under the *Arblade* holding, the applicability of a national mandatory law could prove to be harmful to the free exchange of goods as defined in E.U. law. In order for such a mandatory law to be applied, its purpose has to be one of general interest and its means have to be proportional to the goal that it seeks to accomplish.

The proportionality criterion relates to the following scenario: an economic operator is subject to two different regulations which both have the same purpose; one in his home country and the other in his host country. The ECJ suggests the idea of mutual recognition as a solution to this situation. In other words, a host country should not be allowed to apply its national law if its purpose is already being fulfilled by the application of the home country rule. Thus, the applicability of mandatory laws changes drastically when the E.U.'s interior market is concerned. While a judge does not have to justify the application of his own country's mandatory rules in a non-E.U. dispute, the same outcome is not true for E.U. proceedings. The free movement of goods goal inherent in the Treaty of Rome trumps, to an extent, the application of the 1980 Rome Convention.³²

This new regime of mandatory laws is further detailed in the *Mazzoleni*³³ decision, rendered by the ECJ on March 15, 2001. The issue in this decision centered around the comparison methods

³¹ This case involved the posting of French workers to a work site in Belgium. The conflict of laws involved mandatory workers' protection laws of France and Belgium. Under Article 6 of the Rome Convention, a worker cannot be deprived of minimum standards, which are imposed under the laws governing their working contracts. The law governing the working contract is, under Article 6-2, the law of the place of performance, despite a temporary posting elsewhere. In this particular case, the workers were "protected" under French laws, as France was the regular place of performance under Article 6. The mandatory Belgian law, however, seemed applicable under Article 7-2. It should be noted that Directive 96/71/EC of the European Parliament and of the Council of December 16, 1996, concerning the posting of workers in the framework of the provision of services was not applicable to this particular case, but that this fact did not have any importance on the case's outcome. *See id.*

³² For another E.U. case discussing mandatory laws as they relate to commercial representation, see Case C-381/98, *Ingmar*, 2000 ECR I-9305 (2000). In the *Ingmar* decision, the ECJ decided on the applicability of mandatory laws derived from the Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (OJ 1986 L 382, p. 17). According to the ECJ, such mandatory rules are applicable whenever the case in chief has close ties to the Community [E.U.]. *Id.* Thus, agent-protective E.U. laws become mandatory laws or "lois de police" under Articles 7 and 16 respectively of the Rome Convention and the Convention on the Law Applicable to Agency of March 14, 1978 ("Hague Convention").

³³ Case reprinted in 2 R.C.D.I.P. 495 (2001).

of national mandatory rules that clash in an *Arblade*-type scenario. The ECJ decided in *Mazzoleni* that the comparison should be global: in harmonized areas of law, minor disparities in national laws can no longer justify the non-applicability of a mandatory law that is globally equivalent to another law.³⁴

Following the above two decisions, the European Group for Private International Law³⁵ suggested that a third paragraph be added to Article 7 of the Rome Convention in order to reflect this new mandatory laws regime. According to this proposition, Article 7-3 would read as follows:

Effect may only be given to the mandatory rules of a Member State to the extent that their application does not constitute an unjustified restriction on the principles of freedom of movement provided for in the treaty.

However, the latter proposition could prove to be insufficient because the *Arblade* and *Mazzoleni* holdings undermine the very purpose of conflict of law rules.³⁶ In other words, the respect of E.U.'s free movement of goods principles might necessitate the elaboration of new conflict rules for relations among E.U. countries, while the already existing ones could remain applicable to relations with non-E.U. countries.³⁷ The Rome Convention might have to be Europeanized as well in order to reflect the creation of a new European regime in the field of contracts. Other choice of

³⁴ The *Mazzoleni* case involved a conflict between a mandatory French law and mandatory Belgian law, which were both workers' protection laws. The events took place before the entry into force of the E.U. directive of December 16, 1996, concerning the posting of workers in the framework of the provision of services. It should thus be noted that this type of mandatory law will be covered by E.U. laws and regulations in the future.

³⁵ The European Group for Private International Law is a European-based think-tank in the area of private international law. For more information on this group, see their website at <http://www.drt.ucl.ac.be/gedip/default.html> (last visited on Mar. 22, 2005).

³⁶ According to some authors, the ECJ reasoning in the *Arblade*, *Ingmar* and *Mazzoleni* decisions is dangerous because the goals of protecting the free market relied on in these decisions are over-broad, and because "to invoke such broad goals could render the notion of mandatory laws too vague, as all European regulations could somehow become linked to the E.U. Treaty goals." See Pataut (discussion of the *Mazzoleni* decision) (author's translation), 3 R.C.D.I.P. 495; see also, Idot, *Les bases communautaires d'un droit prive europeen*, reprinted in LE DROIT PRIVE EUROPEEN 22 (Vareilles-Sommieres ed., 1998).

³⁷ Pataut, *supra* note 36, at 495 (Pataut trans.) (According to Pataut, "we should now acknowledge that our substantive law encompasses mandatory laws of different sorts ('a geometrie variable'), the applicability of which will vary depending on whether the discarded law is the law of a non-E.U. country or the law of an E.U. member state.")

law theories might have to be examined in order to meet the needs of a harmonized Europe.

C. *Recognition and Enforcement of Judgments*

Third, European harmonization might also threaten existing choice of law rules in other fields, such as the recognition and enforcement of judgments. The 1968 Brussels Convention had already adopted a lighter enforcement regime for member countries in its Article 27.³⁸ In fact, enforcement of a foreign judgment can only be challenged by fraud and/or disrespect of public policy, whereas the judgment's substantive merits are no longer reviewed.³⁹ While Article 6 of the European Convention of Human Rights served until now as an additional control mechanism on the recognition and enforcement of foreign judgments in Europe,⁴⁰ the new harmonization movement might make the entire contradiction moot.

In other words, Article 41 of the Brussels I Regulation procedurally changes the enforcement regime of foreign judgments within the E.U. Under Article 27 of the Brussels Convention, the enforcement judge would automatically subject the foreign judgment to fraud and public policy reviews. However, under Article 41, such preliminary reviews no longer exist;⁴¹ if the judgment's enforcement is disputed, only then will such a judgment be reviewed by the enforcement judge under Article 33 of the Regulation.⁴²

³⁸ Brussels Convention, *supra* note 21.

³⁹ It should be noted however that for certain types of jurisdiction, such as those stemming from Article 16 or from articles destined to protect the weaker party, an automatic review of the foreign judgment by the enforcement judge is established under Article 28 of the Brussels Convention. See Droz & Gaudemet-Tallon, *supra* note 22, at 644.

⁴⁰ See Kromback (dec.), no. C-7/98, March 28, 2000. This case involved a German judgment which should have been enforceable in other countries under Article 27 of the Brussels Convention, but which was nonetheless denied recognition because it was contrary to public policy under Article 6 of the European Convention on Human Rights.

⁴¹ According to Article 41 of the Brussels I Regulation, "[t]he judgment shall be declared enforceable immediately on completion of the formalities in Article 53 without any review under Articles 34 and 35." According to Droz and Gaudemet-Tallon, *supra* note 22, at 644, "there is no more substantive review of the presented decision, just a formal regularity check." (Author's trans.).

⁴² The wording of Article 33 of the Regulation is almost identical to Article 27 of the Brussels Convention. However, under Article 33, "[a] judgment given in a Member State shall be recognized in the other Member States without any special procedure being required. Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgment be recognized."

This procedural change demonstrates the European orientation toward the suppression of enforcement procedures altogether.⁴³ The Brussels Commission had initially elaborated a project on the European Enforcement Order, which was approved by the European Parliament on April 8, 2003, and then adopted by the European Commission on June 11, 2003.⁴⁴ Under this project, the competent judge's decision could be executed anywhere within the E.U. without further enforcement proceedings.⁴⁵ The competent judge would thus do away with enforcement as well, which would in itself harmonize such proceedings in Europe by eliminating them altogether.

D. *E.U. Checks and Balances Over Member States' Choice of Law Rules*

The harmonization of national laws within the E.U. in the fields of adjudicative jurisdiction, mandatory laws, and enforcement proceedings, demonstrates the current orientation of European decision-makers toward the federalization of European states. Traditional conflict of law rules might no longer work in this new federal model. Thus, conflict rules might have to be harmonized themselves, supervised by a European authority, and made uniform within E.U. member states. Marc Fallon has said:

As long as a disparity among national private laws can, the same as in the public law sector, prejudice free exchange, or as long as the Community has received the normative power to protect precise interests, such as those of the consumers, the elaboration of a Community-based private law becomes possible.⁴⁶

European authors have suggested different checks and balances mechanisms regarding the harmonization of national choice

⁴³ See Droz & Gaudemet-Tallon, *supra* note 22, at 646 (“[M]aybe there is a remnant of the idea of a ‘European enforcement order,’ with the only difference that within the Regulation’s reach any national judgment will become a European enforcement order.”) (Author’s trans.).

⁴⁴ The original proposal was first sent to the European Parliament for its opinion on April 18, 2002. The European Parliament approved the European Commission’s proposal subject to certain amendments on April 8, 2003, and the Commission adopted the amended proposal incorporating the uncontested amendments on June 11, 2003. See <http://europa.eu.int/scadplus/leg/en/lvb/l33190.htm> (last visited on Oct. 12, 2004).

⁴⁵ This procedure will only be available for certain types of uncontested claims. For a complete wording of this proposal, see <http://europa.eu.int/cj/index.htm> (last visited on Oct. 12, 2004).

⁴⁶ Marc Fallon, *Les conflits de lois et de juridictions dans un espace économique intégré*, 253 COLLECTED COURSES 9-282, at 15 (1996).

of law rules. According to Marc Fallon, a national rule has to respect four different conditions in order to be compatible with the European regime of free movement of goods, persons, and services. Such a national rule has to remain subsidiary to any derived European regulations and has to have a legitimate purpose that is of a general interest. In addition, the national rule cannot be discriminatory and must be proportional. Marc Fallon bases these four conditions on his interpretation of a famous ECJ holding in *Cassis de Dijon*, which instituted the home-country rule in the field of free movement of goods.⁴⁷ Furthermore, according to Fallon, each national rule has to respect the principles of subsidiarity and non-discrimination, whereas the verification of the two other conditions (legitimate purpose and proportionality) would only take place in particular cases, such as if a national rule is discriminatory or if a national rule affects product importation and relates only to product composition, but not to its sales particularities.⁴⁸

Regardless of the above discussion, any distinction between public and private law rules would be futile according to this author, as “the qualification of a rule as belonging to public law or to private law is irrelevant, as long as there is a threat to free exchanges under the European Community Treaty.”⁴⁹ The above-mentioned regime of E.U.-imposed checks and balances should therefore remain applicable to private choice of law rules because this regime is indifferent to the public-private law division.⁵⁰ Finally, according to Fallon, this control mechanism over national choice of law rules would enhance and strengthen substantive values, underlying private international law, such as the encouragement of the international movement of judgments and the protection of the “weak” party. The main goal should be, according to this author, the “enhancement of fundamental rights of the

⁴⁷ Case 120/78, “*Cassis de Dijon*,” 1979 E.C.R. 649 (1979). According to Mr. Fallon, this case holding has been extended to the free movement of services in Case C-76/90, *Sager*, 1991 E.C.R. I-4221 (1991), and to the free movement of persons in Case C-106/91, *Ramrath*, 1992 E.C.R. I-3351 (1992). See Fallon, *supra* note 46, at 120.

⁴⁸ According to Fallon, the above conclusion stems from the *Keck* case holding by the ECJ. See Fallon, *supra* note 46, at 15; see also *infra* note 75.

⁴⁹ Fallon, *supra* note 46, at 119. However, the same reasoning is not followed by other authors, who argue that overbroad interpretation of the *Cassis de Dijon* holding might lead toward the application of public law rules and standards to private law, which is unwarranted. See Vincent Heuze, I J.C.P. 152 (2002). However, in light of the public law taboo disappearance, this debate becomes somewhat mooted. See *infra* Part III.

⁵⁰ For problems regarding the application of the home country rule to conflict of laws, see Fallon, *supra* note 46, at 140-148.

individual, rights to conduct economic activities or rights to a better quality of life.”⁵¹

Second, regarding the elaboration of uniform choice of law rules, according to Fallon, this approach remains workable as well, subject to certain institutional constraints, such as proof of necessity for an E.U.-based initiative and choice of an appropriate instrument. Furthermore, according to Fallon, the E.U. zone should be delineated with precision, for both harmonized areas of regulation and for the territorial reach of harmonized rules. Thus, E.U.-derived choice of law rules could lead toward the elaboration of an interior market. For example, Fallon evokes recognition of judgments inside the E.U. - an area of law largely influenced by E.U.-led harmonization, as mentioned above.

According to Fallon, a certain degree of differentiation among national substantive rules could also lead toward the realization of the interior market. That is, because the E.U. would never be able to develop a complete body of uniform substantive rules, the E.U. has limited itself since the “new approach”⁵² of the Single European Act⁵³ to those different rules that could avoid ECJ censure. Such differences are “those related to national rules that have a legitimate purpose, are of general interest and are proportional.”⁵⁴ The proportionality principle entails an equivalency test that imposes the application of the home country rule whenever two conflicting national rules are equivalent. Thus, the need to harmonize becomes almost moot as long as national rules are equivalent.

In terms of private international law, the new approach could thus be defined as a limitation on the harmonization of substantial law rules to the minimum/core, while leaving the rest to choice of law rules, as long as the designation of applicable law contributes to the goal of interior market realization. In other words, the EC legislator has been constrained, based on experi-

⁵¹ *Id.* at 148. The same type of considerations characterizes the thought process of Lea Brilmayer and her political theory of conflict of law. Brilmayer’s ideas about individual consent as a basis of legislative jurisdiction are somewhat parallel to Fallon’s E.U. checks and balances mechanism over national choice of law rules. Finally, the idea of E.U.-imposed control resembles the constitutional supervisory role played by the U.S. Supreme Court.

⁵² Council Resolution of May 7, 1985, 1985 O.J. (C 136).

⁵³ Single European Act, 1997 O.J. (L 169).

⁵⁴ Fallon, *supra* note 46, at 212.

ence, to come back to a better method of reconciling jurisdictional legal systems.⁵⁵

Fallon claims that the elaboration of a “European” private international law is completely achievable through a European checks and balances mechanism over national choice of law rules and through harmonization of member countries’ choice of law rules. Fallon has thus identified two significant contributions of European private international law to the general discipline of private international law. First, in terms of the latter’s content, European rules are applicable and exert control over both adjudicative and legislative jurisdiction rules. Second, European rules lead toward the application of substantive or direct rules, and not choice of law rules.⁵⁶ “The analysis of the ‘*acquis communautaire*’⁵⁷ shows that the possibility of establishing a European private international law is achievable, and the multitude of EC regulations would already allow for the elaboration of a European code.”⁵⁸

One can only wonder about the similarities between the E.U. and the U.S. federation; the two “unions” are composed of different states each having different private law rules. As different state laws cannot - or should not - be truly harmonized, only certain core areas of law are unified and the remaining rules are simply controlled by federal bodies and courts. In Europe, certain fields have been harmonized, such as jurisdiction-selecting rules, mandatory laws, and recognition and enforcement of judgments. Furthermore, the ECJ has been given the power and authority to control national rules with regard to the principles of proportionality and non-discrimination. In the United States, federal law exists in certain areas of law, and constitutional norms, such as the Full Faith and Credit Clause and the Due Process Clause, act as checks and balances mechanisms throughout the Supreme Court’s interpretation of state laws.

⁵⁵ *Id.*

⁵⁶ *Id.* at 229-230. It should be noted that other scholars are actively debating the possibility of establishing a European Civil Code. See e.g. Fauvarque-Causson, *Code civil europeen*, 2002 REVUE INTERNATIONALE DE DROIT COMPARE [R.I.D.C.] 403, Pierre Legrand, *Le sens et non-sens d’un Code civil europeen*, 1996 R.I.D.C. 5319, Marc Fallon, 493 MELANGES COLBERT 1993, Commentary of September 13, 2001, of the European Commission available at the European Commission website http://europa.eu.int/institutions/comm/index_en.htm (last visited on March 22, 2005).

⁵⁷ “*Acquis communautaire*” is a French term that designates all of the already established progress within the E.U., encompassing legislation promulgated by E.U. lawmakers.

⁵⁸ Fallon, *supra* note 46, at 229 (author’s trans.).

The parallel between the European and American systems remains schematic. However, the increased harmonization of national laws in the E.U. might diminish the differences between these two systems. Thus, Lea Brilmayer's or Andrew Guzman's "American" choice of law models might turn out useful in a harmonized Europe. In other words, in order to harmonize and unify national choice of law rules within the E.U., one might look to one of these two models for appropriate solutions. If one were to follow Lea Brilmayer, the conflicts solution in the E.U. context would entail focusing on the individual party to determine to which state's authority the individual has explicitly or implicitly consented. If one were to follow Andrew Guzman, the proper solution would be to find the optimal national law from the E.U. perspective, rather than from the perspective of any particular state. Regardless of the chosen model, the goal of harmonization would remain fulfilled.

IV. CONFLICTS OF ECONOMIC REGULATIONS AND THE PUBLIC LAW TABOO

Despite the harmonization trend within the E.U., certain authors have noted a tendency to maintain traditional bilateral choice of law rules in certain areas, such as public law economic regulations.⁵⁹ However, the border between private and public law has been greatly diminished in light of the massive development of economic regulations in the 20th century.

The assumption that the legal framework of international transactions, investments, and markets can exhaustively be explained by the rules of private international law and some minimum standards of public international law has clearly shown to be erroneous.⁶⁰

Furthermore, according to Kurt Siehr, the European tendency to follow American authors, such as Currie or one of his successors, is even greater in the economic regulation domain.⁶¹ In light of the disappearance of the public law taboo in general, one could conclude that the choice of law rules of the two continents might become increasingly similar. As European scholars tend to tolerate functional choice of law theories in the field of economic regulations, and as this field will certainly require elaborate and unified

⁵⁹ Jurgen Basedow, *Conflicts of Economic Regulation*, 42 AM. J. COMP. L. 423 (1994).

⁶⁰ *Id.* at 423.

⁶¹ Kurt Siehr, *Domestic Relations in Europe: European Equivalents to American Revolutions*, 30 AM. J. COMP. L. 37, 55 (1982).

choice of law rules, one might also conclude that traditional bilateral choice of law rules will have to adapt themselves to this new globalized area of law. The choice of law rules' adaptation might be undertaken in the ways suggested by Lea Brilmayer or by Andrew Guzman in their choice of law theories.⁶²

A. *Conflict of Public Laws Paradigm*

A classical private international law scenario involves a car accident with victims coming from two or more different countries.⁶³ This scenario has been somewhat surpassed. The orientation of modern private international law is focused on conflicts of public law regulations and on a basis that would allow a judge to apply his own - and presumably foreign - laws extraterritorially. This type of conflict of laws is not novel in the United States and is being increasingly developed in Europe.

In the United States, conflicts of law that oppose American "public" law and foreign law are resolved under the Restatement of Foreign Relations Law, and not under the Restatement of Conflict of Laws.⁶⁴ Public law conflicts were first experienced in the U.S. in the area of antitrust law at the beginning of the 20th century. The U.S. Supreme Court first addressed this issue in the *American Banana v. United Fruit Co.* decision,⁶⁵ where it stated that U.S. laws should apply territorially, even if the effects of foreign wrongdoing were experienced on U.S. territory. The shy approach of the U.S. Supreme Court was abandoned in the *Alcoa*⁶⁶ holding, as territorial application of American laws no longer corresponded to the economic reality. Thus, the *Alcoa* decision provided for extraterritorial application of U.S. laws so long as two

⁶² See *supra* Part I.

⁶³ For example, this fact pattern was involved in the *Lautour* case in France, Civ. May 25, 1948, 1949 R.C.D.I.P. 89, note Battifol, and in the *Babcock v. Jackson* case in the U.S., 12 N.Y. 2d 473, 240 N.Y.S. 2d 743, 191 N.E. 2d 279 (1963).

⁶⁴ The mere existence of two Restatements demonstrates the traditional ideas according to which the same criteria could not be used to resolve public and private law conflicts. However, the distinction between private and public law is less important in common law countries than in civil law countries. For example, in the U.S., this distinction has been greatly diminished through the Legal Realism movement at the beginning of the 20th century. Furthermore, a conflict paradigm involving American public law regulations and foreign public law is analyzed under the concept of extraterritorial application of U.S. law, and not as a traditional conflict of laws situation.

⁶⁵ *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

⁶⁶ *United States v. Aluminum Co. of America*, 148 F.2d 416 (2nd Cir. 1945) [hereinafter *Alcoa*].

conditions were met. First, the alleged wrongdoing which took place abroad had to have taken place with the intention to burden U.S. interests. Second, the same wrongdoing had to produce a direct effect in the U.S. The *Alcoa* holding gave birth to the so-called effects doctrine, as the affected market obtained the judicial green light to apply its laws to conduct situated abroad.⁶⁷

In order to temper the aggressive application of the *lex fori*, the U.S. Supreme Court further held in its *Aramco*⁶⁸ decision that extraterritorial application of American laws should be limited to situations where the legislative intent behind the relevant law clearly pointed to extraterritorial application of the same law. Finally, in its famous holding in *Hartford Fire*,⁶⁹ the Supreme Court avoided this issue and decided to apply American law extraterritorially because, according to the majority, there was no real conflict at stake.⁷⁰ In other words, only U.S. law was restrictive in this case and was not in conflict with a merely permissive British law. Implicitly, the U.S. Supreme Court went back to the effects doctrine, as in *Hartford Fire* where the foreign wrongdoing clearly targeted the U.S. market. Finally, Sections 415 and 403(2) of the Third Restatement on the Foreign Relations Law⁷¹ recognize a list of scenarios where a judge can apply his own laws extraterritorially, under the guise of “reasonableness,” which is applicable to each hypothe-

⁶⁷ It could be argued that the *Alcoa* reasoning is nationalist, as it looks only to American interests in order to justify the application of U.S. law, without examining other countries' interests implied in the litigation. Thus, it might be preferable to use the “reasonableness” test of the Third Restatement on Foreign Relations Law. See *infra* note 71, for an explanation of the reasonableness test.

⁶⁸ EEOC v. Arabian American Oil Company, 499 U.S. 244 (1991).

⁶⁹ Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

⁷⁰ Justice Scalia's dissenting opinion in *Hartford Fire* argues against this approach. According to Justice Scalia, the real issue was whether the U.S. Congress had the intent to apply U.S. law, in this case the Sherman Act, extraterritorially. Congress acts in respect of public international law. Thus, according to Justice Scalia, there are two rules of interpretation regarding national law: one stemming from ARAMCO implying a presumption against extraterritoriality, and the other stemming from public international law, according to which national law should be interpreted in respect of public international law. According to Justice Scalia, public international law allows for the extraterritorial application of a national law if this is reasonable. The second interpretation rule points in this case against the extraterritorial application of the Sherman Act, as this would not be reasonable and as it would violate public international law, which would be contrary to the second rule of interpretation. For another example of case law referring to “comity” under public international law with regard to the extraterritorial application of the Sherman Act, see *Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 549 F. 2d 597 (9th Cir. 1976).

⁷¹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 415, 403(2) (1987).

sis, including the effects doctrine.⁷² The Restatement's approach is thus more moderate than American case law, as the Restatement's approach recognizes the effects doctrine only if other countries' interests are respected, that is, through its acceptance of the reasonableness test inherent in public international law.

In Europe, the effects doctrine has never been officially recognized, but it has been used in case law. Most notably, it was used in the ECJ's *Woodpulp*⁷³ case. In *Woodpulp*, the ECJ recognized the possibility of applying European law to conduct located abroad which clearly targeted the European market. The narrow holding by the ECJ might be explained by the fact that the ECJ sought to avoid ruling on a public choice of law issue as public law traditionally stands for territorial application of one country's laws. Nonetheless, both the ECJ's ruling in the *Woodpulp* case and the Third Restatement demonstrate that the effects doctrine has soundly embedded itself in the field of public law conflicts. Thus, the public law domain seems to provide similar choice of law solutions on both continents, a phenomenon which might lead toward a certain unification of choice of law rules in this area.

The *opinio iuris* as reflected by national legislation obviously shifts towards the recognition of the effects doctrine, and this cannot go unnoticed when rules of customary international law are discussed.⁷⁴

⁷² "Reasonableness" implies a notion of fairness in public international law. In other words, a state can only assert extraterritorial jurisdiction if this is "reasonable" and justified, and if this doesn't interfere with other states' interests in a disproportionate manner. The list of considerations to take into account in deciding whether exercising jurisdiction is reasonable for a state includes:

the extent to which the activity takes place within the territory [of the regulating state]; the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated; the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; the extent to which another state may have an interest in regulating the activity; the likelihood of conflict with regulation by another state.

RESTATEMENT (THIRD), § 403 (1987). It should be noted that the above list is not exhaustive.

⁷³ Joined cases 89/85, *Woodpulp*, 1988 E.C.R. 5193, 5233, 5246 (1988).

⁷⁴ Basedow, *supra* note 59, at 432.

B. *The Necessity for Different Choice of Law Rules*

The choice of law rules used to adjudicate economic regulations' conflicts is thus different from the traditional Savigny-developed rules. The inconvenience created for economic operators from this paradigm stems from the cumulative application of many potential laws. In other words, because the effects doctrine dictates a unilateral application of one country's laws, it puts the economic operator at the mercy of that country's laws as long as his conduct somehow affects that country. Thus, economic operators are potentially subject to several countries' regulations and laws. Within the E.U., the ECJ has somewhat moderated this approach through the adoption of the home country rule. However, this solution remains contentious both with European scholars and within the same court.⁷⁵ Furthermore, it should be noted that relations between E.U. countries and non-E.U. countries are not subject to the home-country rule. Thus, certain authors have suggested the establishment of bilateral choice of law rules in the field of economic regulations.

For example, Andreas Bucher suggests reconsidering the purpose and the content of bilateral rules in order to adapt them to socio-economic needs.⁷⁶ According to this author, an example of such rules would be Article 137 of Swiss Private International Law, under which, in antitrust law, a damages claim based on conduct which occurred abroad should be resolved under the foreign country's laws. In the same manner, Articles 5 and 6 of the Rome Convention reflect the same idea of integrating the law's final purpose in the choice of law mechanism. However, the establishment of such bilateral rules is not desirable in all areas of law.⁷⁷ For example, in the field of economic regulations a judge applies his own law as an agent of the state. Private interests, on the contrary, dictate the application of foreign law. In fact, bilateral rules in this area of

⁷⁵ Some European scholars, such as Vincent Heuze in France, are generally hostile to the idea of expanding the Cassis de Dijon holding to the area of conflict of laws. Furthermore, the holding in Joined Cases C-267/91 and C-268-91, Keck, 1993 E.C.R. I-6097, has modified the holding of Cassis de Dijon according to the same author.

⁷⁶ See Andreas Bucher, *L'ordre public et le but social des lois en droit international prive*, II COLLECTED COURSES 19, The Hague, (1993).

⁷⁷ Basedow recognizes two types of situations where bilateral rules persist: first, if the substantive policy behind a regulation can be fulfilled if the regulation's domain is limited to intra-state situations, such as in the case of consumer and worker protection laws; second, in situations where states have accepted the political economy of other states, such as in the context of a treaty or a union, like the E.U. Basedow, *supra* note 59, at 443-444.

law do not provide for a basis for the application of foreign law. "In a more practical sense the theory of bilateralisation cannot explain why the foreign anti-trust law indicates an intention to be applied should be decisive" ⁷⁸

According to Basedow, the solution to economic regulations conflicts can be found in the adaptation of unilateral rules so that they can also provide for the application of foreign economic laws. For example, Article 7-1 of the Rome Convention allows a judge to take into account foreign laws. Under a similar logic, according to Basedow, Article 7-1 reasoning should be applied to economic regulations that are the *lex causae*.⁷⁹ Furthermore, the Third Restatement of Foreign Relations Law allows the competent judge to examine other laws' applicability, including foreign economic laws and the legislative interest behind those laws. Because bilateral rules are ill-suited for public law conflicts and because there is a need to find clear solutions in order to foster international commerce, public law conflicts should be analyzed separately from private law ones. In order to develop a new system of conflict of law rules for public law clashes, several solutions are possible. According to Basedow, already existing unilateral rules should be adapted. However, the solutions suggested by Lea Brilmayer and Andrew Guzman look appealing too.

First, Lea Brilmayer's model might become appropriate for several reasons. In public law conflicts, the application of the *lex fori* tends to promote the state's interests. On the other hand, the application of foreign law tends to promote individual justice and parties' foreseeability, both of which are goals of private conflict of law rules.

The same goal of individual justice and legal certainty prevails when it comes to the application of foreign economic law; its primary function is the harmony of decisions, the avoidance of conflicts of obligations for the parties concerned, and the respect for the parties' expectations with regard to the applicable law.⁸⁰

If one were to follow the above logic, it would seem more appropriate to look to the economic operators' expectations to determine where they could have foreseen being sued. According to Brilmayer, the application of a certain law toward an individual can

⁷⁸ *Id.* at 440.

⁷⁹ *Id.* at 442.

⁸⁰ *Id.* at 438.

be justified either by the individual's consent or by territoriality.⁸¹ The individual is supposed to have consented to the legislative authority of a certain country through an express accord or through certain types of conduct from which such consent can be implied. Under Brilmayer's terminology, an individual thus waives his or his subjective rights.⁸² In the economic arena, where the effects doctrine already operates, one could thus imagine subjecting economic operators to laws to which they have availed themselves voluntarily. In other words, one could consider that parties to an illegal pricing scheme have renounced their subjective rights to be left alone⁸³ and that they implicitly consented to the legislative authority of all countries that are affected by their illegal conduct. Instead of looking at the effects, one would thus look at the intention of the alleged wrongdoing; instead of looking at the damages, one would look at the cause of the same wrongdoing.

It should be noted however that Ms. Brilmayer's theory implies a reciprocity test, which is meant to assure a certain fairness in the application of different states' laws. The reciprocity requirement somewhat resembles the reasonableness requirement inherent in the Third Restatement and in some case law.⁸⁴ This logic, already present in the U.S., seems fully exportable to Europe, at least in the economic domain.⁸⁵ In light of the disappearance of the public law taboo, nothing stands in the way of extending the

⁸¹ See Brilmayer, *supra* note 5, at 1298-1308.

⁸² Another basis of jurisdiction is territoriality, implying a connection between the regulating state and the victim in a litigation proceeding. See Bliessener, *supra* note 10, at 696.

⁸³ According to Brilmayer, there is a negative political right to be "left alone," which imposes a limit on the state's exercise of its substantive legislative policy. Bliessener, *supra* note 10, at 693.

⁸⁴ See, e.g., *Alcoa v. U.S.*, 148 F.2d at 416; and *Timberlane*, 549 F.2d at 597; see also *Hartford Fire*, 509 U.S. at 764.

⁸⁵ According to German scholars, the ECJ's Centros holding of March 9, 1999, case C-212/97, reasons in terms of individual rights. This case involved the possibility for a Danish couple to open a subsidiary of their United Kingdom-based company in Denmark. The couple's company was based in the United Kingdom solely to avoid heavy taxation imposed in Denmark. Denmark refused the registration of the couple's subsidiary because the mother company's activities were going to be exercised in Denmark and because the scheme constituted fraud under Danish law. This refusal was deemed incompatible with articles 52 and 58 of the Rome Treaty according to the ECJ because of liberty of establishment. According to German scholars, the case involved a right to "justification" for the parties. See Christian Joerges, *On the Legitimacy of Europeanising Europe's Private Law: Considerations on a Law of Justification for the E.U. Multi-Level System*, Symposium, European University Institute (2002). The same reasoning that looks to individual rights is similar to Brilmayer's theory of "waivers" and of the right to be left alone.

same logic to the choice of law field, as some European authors had suggested decades ago.⁸⁶

Some authors disagree with Brilmayer's ideas. In particular, Bliessener underlines the contradiction between the systematic allocation of burdens to the local party in order to protect the foreign party's right to be left alone and the reciprocity requirement, which is meant to accomplish a goal of distributive justice, but which is contrary to the burden allocation system. According to Bliessener, this model, which is based on privileges accorded to the foreign party in the name of respect of his or her negative rights, implies a rule-selecting methodology, whereas the reciprocity requirement elaborated to correct the same model implies a jurisdiction-selecting methodology. Because the two methodologies are incompatible, Brilmayer's model is incoherent and contradictory. Bliessener critiques as follows:

The so-called 'negative rights' or 'rights to be left alone' play a pivotal role in her theory of political obligation for choice of law. She concedes the rule-selecting nature and, accordingly, the redistributive result of the negative rights-based approach . . . One part of her model suggest a rule-selecting, the other takes a jurisdiction-selecting, approach to choice of law. One part leads to redistributive result to the disadvantage of the local party, the other pretends to cure this result and so turn it upside down. One part of her model asserts a political fairness standard, the other denies this very standard on behalf of fairness.⁸⁷

The above critique by Bliessener seems coherent. However, Bliessener positions himself in an entirely private law logic, which takes into account individual claimants but not the states' interests. Negative rights presented by Brilmayer and critiqued by Mr. Bliessener are about individual equality and fairness from a personal perspective. From a public law perspective, however, the negative right to be left alone relates not only to the economic operator but also to his home country. Furthermore, Bliessener's critique is confined to an internal logic, or in other words, to American intra-state conflicts. In the context of publicized private international law, however, conflicts occur among international economic regu-

⁸⁶ Rolando Quadri had suggested an expectations theory, under which one looks to the individual's expectations to see whether the individual could have reasonably foreseen the applicability of a certain country's laws toward him. *See generally* ROLANDO QUADRI, *LEZIONI DI DIRITTO INTERNAZIONALE PRIVATO* (1965).

⁸⁷ Bliessener, *supra* note 10, at 698.

lations. This type of conflict implies both states' interests and the inevitable influence of public international law. Thus, the reciprocity requirement underlines the necessity to respect other countries' sovereignty and to impose one's own legislation only if it is reasonable from a global perspective, as the Third Restatement suggests.⁸⁸ The two considerations - the respect of negative rights and the reciprocity requirement among countries - are no longer contradictory in a public law conflict situation. Lea Brilmayer's theory thus becomes more important in the modern conflict of law area, as it is universal and as it permits a "rapprochement" between the European and the American continents.

Second, Andrew Guzman's theory is equally important. Modern conflicts of public law often involve antitrust laws and other types of economic and financial regulations. The type of interest involved is often economic and focuses on the affected market or country. This paradigm is exactly the one in which Andrew Guzman develops his economic theory.⁸⁹ In other words, Guzman's theory is aimed at resolving such conflicts in order to obtain the global optimum, by explaining to the affected country that its own laws might not be the most efficient globally. Guzman might not call this "reasonableness" as does the Third Restatement on Foreign Laws, but his quest for the global optimum underlies an economic reasonableness. Guzman's reasoning works at its best in a public law setting, where interests are governmental or economic, and where relations are international and no longer domestic.

Furthermore, the effects doctrine has somewhat embedded itself in this field both in Europe and in the United States. Guzman's model would correct the effects doctrine by embracing an economic reasonableness into it and by focusing on global, and not national, effects. As Europe has been more willing to abandon traditional bilateral rules in the public law context, and as the U.S. has somewhat accepted this type of reasoning regarding public law conflicts,⁹⁰ Guzman's model might be more easily accepted in modern-day conflict of laws on both continents. Thus, Andrew Guzman's theory might unify European and American conflicts of law

⁸⁸ See RESTATEMENT (THIRD), *supra* note 71, at § 403.

⁸⁹ See *supra* Part I. B.

⁹⁰ In the antitrust area, American case law has already embraced the effects doctrine. See, e.g., *Hartford Fire*, 509 U.S. at 764; see also *Alcoa v. U.S.*, 148 F.2d at 416. Furthermore, reasonableness is already inherent in the American RESTATEMENT (THIRD), see *supra* note 71, and in some case law, see *Timberlane*, 549 F.2d at 597.

in order to address the need for new conflict rules in a publicized private international law arena.

V. CONCLUSION

As a general matter, American influence in Europe in the field of conflict of laws is more than evident in both traditional private international law as well as in the more modern, E.U.-influenced and publicized one. According to Siehr, three European tendencies have been developed under American influence: a case-by-case approach allowing distinctions between each individual situation; a notion of material justice through the restrained better-law approach present in certain European treaties; and a predominance accorded to domestic law if this law has important ties to the relevant dispute.⁹¹ It seems logical to conclude that the two transatlantic methodologies have been mutually beneficial to one another.

We Americans could profit from your conceptual prowess, your ability to turn thoughts into statutes, your penchant for elegant simplicity. We, in turn, can offer an emporium of hard-won empirical lessons. You Europeans call law a science. Let us then proceed in the spirit of scientific inquiry rather than to keep reciting the mantras learned from old masters.⁹²

Will choice of law ideas become more similar in the U.S. and in Europe over time? Certain authors are hesitant to embrace this notion.⁹³ However, such an evolution seems inevitable in light of the evolution of modern private international law. Most notable is the harmonization within the E.U. and the disappearance of the public law taboo. Traditional bilateral rules, as described above, are not likely to furnish helpful solutions because of both their vulnerability in front of Brussels lawmakers and because of their inability to justify the application of foreign public law. Thus, Lea

⁹¹ See Siehr, *supra* note 61, at 71.

⁹² JUENGER, *supra* note 28, at 133.

⁹³ See Lowenfeld, *supra* note 27, at 115 ("It seems to me that choice of law is an interesting but not an orderly field, and I like it that way. I am quite prepared to live without a unified system, provided there is a scope for imagination, subtlety, advocacy and persuasion. If we conflicts lawyers can share those aptitudes across the ocean that unites us, I think we have nothing to be ashamed of."). See also Bernard Hanotiau, *The American Conflicts Revolution and European Tort Choice of Law Thinking*, 30 AM. J. COMP. L. 73, 96-97 (1982). Hanotiau concludes that the theory of governmental interests is an American product and cannot be exported in Europe. However, the same conclusion does not necessarily apply to other theories or to Lea Brilmayer's and Andrew Guzman's models.

Brilmayer's and Andrew Guzman's choice of law models might provide useful ideas in the quest for more unified and universally-accepted solutions.



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