

## Most Significant Relationship, Governmental Interests, Cultural Identity, Integration : “Rules” at Will and the Case for Principles of Conflict of Laws

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### I. – THE STATE OF AFFAIRS

In his Hague lectures of 1995, Erik JAYME, in evaluating the impact doctrinal writing – and in particular Brainerd Currie’s governmental interest analysis – has on the evolution of the conflict of laws, notes: “*L’âge d’or de la théorie américaine semble être aujourd’hui révolu*”.<sup>1</sup> He then adds: “*Il est pourtant ... étonnant de constater l’influence décisive qu’a la doctrine sur la pratique*”. While the former observation ought to be taken as a snapshot of just one point in time, the latter certainly encourages an in-depth inquiry into what the courts are actually doing in applying codified or judge-made rules or in following doctrinal approaches. No less important would appear to be gauging with rigour what commentators are doing in interpreting judicial opinions. And the material analysed in the “*Cours général*” leaves no doubt that such inquiry is urgently needed not only with respect to conflict of laws “in action” in the United States but also in other parts of the world.

In Europe, apart from more or less solid and refined positivist construction of domestic or treaty rules, we have in recent years been witnessing an astonishing degree of subjectivism which, at times, borders rather questionable individual judicial activism, in particular in areas such as family law (matrimonial property, child abduction) and consumer protection. A significant amount of scholarly interest is currently devoted to the broader issues of “communitarisation” of the conflict of laws, *i.e.* the large-scale transfer of sovereign law-making competences from States to a Regional Economic Integration Organisation, mandated by the Amsterdam Treaty of 2 October 1997.<sup>2</sup> These resources are therefore not available for taking general conflicts theory forward. In the United States, renewed interest in the field by a younger generation of scholars as well as three Hague lectures delivered by towering figures in the conflict of laws community, Professors Herma Hill Kay, Peter Hay and Arthur von

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<sup>1</sup> Erik JAYME, “Identité culturelle et intégration: le droit international privé postmoderne”, in: *Recueil des cours* 251 (1995), 10, 80.

<sup>2</sup> *Official Journal C* 340, 10 November 1997, 79.

Mehren,<sup>3</sup> have unearthed the foundations of US conflicts theory and identified more clearly what we may have in common and what separates us.

Not surprisingly, it is in specific areas with a high level of interventionist or regulatory content such as antitrust law and securities law that approaches seem to be converging.<sup>4</sup> In the United States, §§ 402, 403, 416 of the *Restatement (Third) of Foreign Relations Law*<sup>5</sup> reflect the awareness of the need to accommodate both the forum's and foreign regulatory interests.

On the international stage, there are both breathtakingly successful negotiations and international instruments (such as the *Hague Intercountry Adoption Convention* of 29 May 1993, the *Protection of Children Convention* of 19 October 1996, and the *Indirectly held Securities Convention* adopted on 13 December 2002) and outright failures (such as the proposed *Hague Convention on Jurisdiction and Recognition of Foreign Judgements*<sup>6</sup>). The latter at times suggest that the various "camps" have lost their ability to even communicate and openly discuss factual assumptions.

## II. – NEED TO REFLECT – NEED TO ACT ?

### 1. Starting point

The inability to communicate can be contagious and may affect other areas of private (international) law where most of us believe to be walking on solid ground and where we take the very bases of trans-border transactions, such as unfettered party autonomy, for granted. A significant measure of discretionary – or even arbitrary – handling of conflict rules, subjective definition of legislative policies and other expressions of "post-modernism" at one end and sharp awareness of economic and political implications of the development of conflict rules at the other end generate risks which one may wish to avoid or at least to mitigate. More high-level scientific exchange, rigorous yet unexcited, and less political spotlight might be the framework for reassuring ourselves of objective needs and shared values in the trans-border administration of justice. Might it not be useful to work on a lexicon-instrument, designed as a vehicle capable of circumnavigating potentially damaging analytical

<sup>3</sup> Herma HILL KAY, "A Defense of Currie's Governmental Interest Analysis", in: *Recueil des cours* 215 (1990), 9-204; Peter HAY, "Flexibility Versus Predictability and Uniformity in Choice of Law", in: *Recueil des cours* 226 (1991), 281-412; Arthur T. VON MEHREN, "Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common- and Civil-Law-Systems", in: *Recueil des Cours* 295 (2002), 9-432.

<sup>4</sup> Herbert KRONKE, "Capital Markets and Conflict of Laws", in: *Recueil des cours* 286 (2001) 245, 274-291. See also Anton K. SCHNYDER, *Wirtschaftskollisionsrecht* (Zürich 1990); Jürgen BASEDOW, "Souveraineté territoriale et globalisation des marchés: le domaine d'application des lois contre les restrictions de la concurrence", in: *Recueil des cours* 264 (1997) 9, 153-163; Robert W. HILLMANN, "Cross-Border Investment, Conflict of Laws, and the Privatisation of Securities Law", 55 *Law & Contemporary Problems* (1992), 331.

<sup>5</sup> American Law Institute, *Restatement (Third) of Foreign Relations Law* (1987).

<sup>6</sup> It remains to be seen whether a "second round" of negotiations is a realistic perspective and more likely to bear fruit. Successful completion of work on a forum-selection convention would obviously deserve praise but pale, in terms of innovation, if compared with the original project.

doldrums, spaces of incommunicability? It would be absurd if, in times when the number of trans-border situations and transactions is dramatically increasing, there should be less exchange, less transplantability, less predictability, less harmony than in Joseph Story's days.

## **2. Are governmental interests relevant ?**

### *(a) General*

No one can seriously dispute that governmental interests determine private international law both at the moments of the rule's conception and its interpretation and application. It is true that "[q]uand un enfant naturel roumain recherche un Français en déclaration de paternité, l'objet final du litige est une question de filiation, et non un conflit entre l'Etat français et l'Etat roumain".<sup>7</sup> But it is equally true that the doing-business rule as a basis for assuming jurisdiction or the parties' free choice to determine the law applicable to proprietary rights in indirectly held securities do not enjoy support and do, in principle, not encounter hostility from individuals but from Governments acting in the more or less openly disclosed interest of their constituencies. Moreover, the identifiability of such interests is not a phenomenon confined to commercial law. Suffice it to reflect upon a certain Central American State's intention to ratify the Hague Intercountry Adoption Convention of 1993 and the Contracting States' eagerness, in light of the nature of that country's flourishing adoption industry, to prevent that from happening. Both success and failure of inter-governmentally negotiated conflict of laws instruments are owed to irreconcilable or reconcilable governmental interests, which are expressed or implied in any negotiating party's domestic substantive law and which that party or its constituencies may view as imperilled by this or that conflicts solution. At a more abstract level, the – to European eyes – most basic conflicts operation, the legislative or judicial selection of the proper connecting factor by defining a legal relationship's "seat", has always been and is based on discerning relevant interests and on weighing those individual or party interests *and* community or state interests and policies.<sup>8</sup>

### *(b) An Atlantic divide ?*

Both in the United States and in Europe, the proposition that the law applicable to a tort or a contract might not always and exclusively be determined by hard-and-fast *rules* but also – be it in an ancillary or supplementary fashion – by policy considerations has drawn both hostile rhetoric and principled and detailed criticism. However, reality has certainly not changed its course under the impact of the former, while the protagonists of the latter were the more successful in disciplining free-wheeling interest-based judicial reasoning the more detailed, multi-layered and subtle

<sup>7</sup> Henri BATIFFOL / Paul LAGARDE, *Traité de droit international privé*, vol. I (8<sup>th</sup> ed. 1993), 32.

<sup>8</sup> Gerhard KEGEL / Klaus SCHURIG, *Internationales Privatrecht* (8<sup>th</sup> ed. 2000), 117-127; Bernard AUDIT, "A Continental Lawyer Looks at Contemporary American Choice-of-Law Principles", 27 *American Journal of Comparative Law*, 589, 590 (1979).

the new rules were designed. As Professor Herma Hill Kay in an effort to find common ground for taking Currie's method forward<sup>9</sup> rightly points out, it is the modern development of conflict of laws in tort, brilliantly analysed by Ted de Boer in his seminal book of 1987,<sup>10</sup> where such convergencies are most readily identified. Recent reforms, e.g. in Germany, confirmed this tendency.<sup>11</sup> And, bold as it might seem, even the "semi-open" Article 4 of the *Rome Convention of 1980 on the law applicable to contractual obligations* may legitimately be read as the legislator's attempt to straddle rules and interest approaches.<sup>12</sup> Obviously, not only politically sensitive areas with a high level of regulatory or interventionist content have proven to be receptive to interests analysis considerations<sup>13</sup> but the very heartland of the realm of conflict of laws has too.

In conclusion, while there may be – common – dangers flowing from the use and abuse of the approach – as from arbitrary use of supposedly unambiguous rules –, there is certainly no Atlantic divide.

(c) *Integration*

Traditionally, the private international law discourse referred to "integration" in the sense of an individual's or a family's integration into a specific society as one of the potential objectives (interests) that legislators and judges had in mind when a conflicts rule was being designed. For example, a legal system might opt for quickly integrating immigrants into the receiving country's society, an objective which would tend to be aimed at by choosing the habitual residence as the prime connecting factor for conflicts rules on personal and family matters. In recent years, "integration" is more frequently used in the context of regional (economic, and in certain cases political) integration. One may think of South America (MERCOSUR),<sup>14</sup> to a lesser extent of North America (NAFTA), but, of course, primarily of Europe where private law and specifically conflict of laws rules have become a consciously and vigorously employed vehicle for bringing about greater and deeper economic – and arguably

<sup>9</sup> *Supra*, note 3, 189 *et seq.* For a recent and thorough comparative analysis, see Paolo PICONE, "Les méthodes de coordination entre ordres juridiques en droit international privé", in: *Recueil des cours* 276 (1999), 9-296, at 69 *et seq.*

<sup>10</sup> Th. M. DE BOER, *Beyond Lex Loci Delicti. Conflicts, Methodology and Multistate Torts in American Case Law*, Deventer et al. (1987).

<sup>11</sup> The decision not to formulate specific rules on specific categories of delictual conduct but to opt for a basic rule (*ex loci delicti*) and a catch-all exit clause ("significantly closer connection") reflects that tendency, *cf.* the text of the Law of 21 May 1999 on Private International Law of Non-contractual Obligations and Property, *Praxis des Internationalen Privat- und Verfahrensrechts* 1999, 285 and comment by Rolf WAGNER at 210.

<sup>12</sup> KAY, *supra* note 3, 194.

<sup>13</sup> As was shown in the 1970s for unfair competition and, more recently, in the areas of antitrust and securities regulation. For a summary, see KRONKE, *supra* note 4, 284 *et seq.*

<sup>14</sup> For detailed analysis and a most impressive attempt to develop a framework of general principles, see most recently Diego P. Fernández Arroyo (ed.), *Derecho internacional privado de los Estados del MERCOSUR*, Buenos Aires (2003).

political – integration of the region.<sup>15</sup> Suffice it to mention the rule common to many Community instruments that the parties' choice of the applicable law may not lead to a lesser standard of protection for a consumer than provided for by Community law. It is difficult to imagine any clearer expression of governmental interests.

### 3. Other relevant interests – conflicts of interests : the over-burdened "meta law"

No one would ever contest that individuals' interests play a pivotal role in *private* international law. The parties to a contract usually wish that their respective law be applicable. A married person in the vast majority of cases wishes his or her personal law to govern matrimonial causes. It is fair to say that, at the outset, the justification of conflict of laws' very existence was that it implements the reasonable and legitimate expectations of the parties to a transaction or an occurrence.<sup>16</sup> Erik Jayme in many of his recent publications has raised our awareness for ingredients in a person's biography, background and self-perception which add up to his or her cultural identity. Not only are personal interests of this kind regarded highly as a matter of principle. Frequently the law provides additional dignity and clout by dressing them up as common (or governmental). Examples are the predictability and the – domestic or international – harmony of judicial decisions conflict rules ought to be aiming at. One does not have to venture into the higher spheres of theory on the evolution of human knowledge and scientific categories ("change of paradigms") to observe that, what at face value may be characterised as "personal" or "private" is not only politically relevant but actually shaping collective reflection, judgement and action. In times when vanishing political, economic and cultural frontiers (euphemistically called "globalisation") are perceived as presenting both opportunities *and* threat, legislators and the courts will ever more frequently be called upon to identify and protect politically relevant private values and to mediate between conflicting values and expectations, not primarily but significantly through private international law. Arguably the number, the nature and the variety of such conflicts is continually increasing because the underlying interests and expectations which are claiming recognition and status are increasing as well. If religious belief, scientific zeal,

<sup>15</sup> The scholarly analysis is abundant. For many others, see Erik JAYME, *Ein Internationales Privatrecht für Europa*, Heidelberg (1991); Christian von Bar (ed.), *Europäisches Gemeinschaftsrecht und Internationales Privatrecht*, Köln et al. (1991); Eckard BRÖDERMANN / Holger MERSEN, *Europäisches Gemeinschaftsrecht und Internationales Privatrecht*, Tübingen (1994); Paul LAGARDE / Bernd VON HOFFMANN, *L'européanisation du droit international privé*, Köln (1996); Bernd von Hoffmann, (ed.), *European Private International Law*, Nijmegen (1998); Christian KOHLER, "Interrogations sur les sources du droit international privé après le traité d'Amsterdam", *Revue critique de droit international privé* (1999), 1 *et seq.*; Alegría BORRAS, "Derecho internacional privado y Tratado de Amsterdam", *Revista española de derecho internacional privado* 51 (1999), 383; Hans Ulrich JESSURUN D'OLIVEIRA, "The EU and a metamorphosis of private international law", in: *Essays in Honour of Sir Peter North*, Oxford (2002), 111; Jürgen F. Baur / Heinz-Peter Mansel (eds.), *Systemwechsel im europäischen Kollisionsrecht*, München (2002); Christian KOHLER, "Der europäische Justizraum für Zivilsachen und das Gemeinschaftskollisionsrecht", *Praxis des Internationalen Privat- und Verfahrensrecht* 2003, 401 *et seq.*

<sup>16</sup> A.E. ANTON, *Private International Law*, 2<sup>nd</sup> ed., Edinburgh et al. (1990), 40; DICEY / MORRIS, *The Conflict of Laws*, vol. I, 13<sup>th</sup> ed., London (2000), sec. 1-006.

“communication”, “life style” and “sentiments”<sup>17</sup> were to gain force in pushing the development of conflict of laws theory and practice or even become connecting factors on a wider scale the state of emergency may have to be declared. And there are indeed indications that we are approaching that point. A decision rendered by the District Court of Mainz (Germany)<sup>18</sup> may have been an early harbinger: A Serb-Croat couple had married in Bosnia under the local matrimonial property regime of community of gains. Having established their domicile in Germany and acquired immoveables there, they petitioned to have their matrimonial regime changed, and the highly controversial issue was raised whether it was possible to choose the property regime only as applicable to property in one country and, more specifically, to only one immovable in that country. The court, boldly and arguably not in accordance with Article 15 of the Introductory Law to the Civil Code (EGBGB), decided it was because, as regards the remainder of their property, the couple was “sentimentally attached to the law of their country of origin [*Heimat*]”.

One need not look into the politicised, emotionally loaded and headline-grabbing child abduction cases in the United States, France or Germany as well as countless consumer protection cases decided by the courts throughout Europe to conclude that, under the pressure of economic, social, cultural and political considerations, conflict-of-laws provisions may be viewed by many as a menu rather than the expression of the legislator’s commands. Rules at will – to avoid the unpleasant images of arbitrariness or *gouvernement des juges*.

#### 4. Directions of reflection

As stated earlier, as regards basic orientations, there is much less of an Atlantic divide than some would make us believe. Specificities of the US situation – *i.e.* the predominance of inter-State conflicts rather than international conflicts – aside, the American revolutionaries never suggested to not look for the most significant relationship in order to identify the law best suited to govern a legal relationship. What they contested was, on the one hand, that the most significant relationship was capable of being in any predictable way encapsulated in rules hinging on a one-tiered connecting factor and, on the other hand, that it was wise to turn a blind eye on the courts’ special regard for the *lex fori*. For our purposes, it is useful to recall that the Restatement Second contains a Section 6 which enumerates “Choice of Law Principles” intended to bridge the differences between those whose starting point is “most-significant-contact rules” and those who prefer weighing contacts and relevant policy considerations.

Another encouraging observation is that there is no juxtaposition of continental scholarly zeal versus Anglo-American pragmatism. Europeans take note of the

<sup>17</sup> JAYME, *supra* note 1, 171, 235 *et seq.*, 246 *et seq.*

<sup>18</sup> Landgericht Mainz, 14 December 1994, *Neue Juristische Wochenschrift – RechtsprechungsReport* 1994, at 73.

numerous conflicts of interests,<sup>19</sup> contradictions among solutions and the lack of proper analysis of linkages and trade-offs, and most seem quite content to approach problems piecemeal. On the other hand, influential voices in the United States have gone as far as proposing a holistic approach ("codification").<sup>20</sup> All of this makes for a potentially fruitful laboratory atmosphere.

### III. – OBJECTIVES AND BENEFICIARIES OF ACTION

It is submitted that a forum ought to be created where the most distinguished scholars and practitioners are convened to analyse in depth, under no time pressure and shielded from the special interest lobbying typical of intergovernmental negotiations, the basic unresolved problems, the current doctrinal trends and the underlying policy considerations in the various fields of private international law. One might start, for example, with contracts. Deeper understanding is a *condicio sine qua non* for building trust. And truly scientific rigour of comparative conflicts analysis will in all likelihood provide a basis for overcoming the rigidity and the provincialism of certain *rules* as well as the amorphousness of certain *approaches* (or: of the courts' handling of those approaches).<sup>21</sup> The ultimate goal would be an "International Restatement (and Pre-Statement) of the Conflict of Laws". Ambitious as it may sound, it should not be impossible considering that, in general, harmonising substantive law is far more difficult than reaching agreement on conflicts rules and that, in 1994, a similarly structured process gave birth to the *UNIDROIT Principles of International Commercial Contracts* which, in 2004, are to be enlarged<sup>22</sup> so as to constitute an almost complete Re- (and Pre-) Statement of the substantive law of contractual obligations. The felicitous term "Pre-Statement", coined by one of the most distinguished international arbitrators,<sup>23</sup> reminds us that a soft-law instrument of this nature does not necessarily "deep-freeze"<sup>24</sup> the state of analysis on the day of the instrument's entering the scene.

There would be a wide range of potential beneficiaries and users of such "Principles". Firstly, legislators in countries embarking on conflicts law reform. Secondly, and from the experience of such Organisations most importantly, governmental negotiators in other fora (UNIDROIT, UNCITRAL, ICAO, IMO, WIPO and many others) where conflict of laws issues come up for discussion as incidental or preliminary questions during negotiations of substantive-law instruments and where

19 JAYME, *supra* note 1, 170 *et seq.*

20 Lea BRILMAYER, *Conflict of Laws* (2<sup>nd</sup> ed., Boston et al., 1995) 209 *et seq.*

21 BRILMAYER, *supra* note 20, 216 *et seq.*; KAY, *supra* note 3, 92 *et seq.*, 182 *et seq.*

22 *Uniform Law Review Editors' note*: A new edition of these Principles was approved by the Governing Council of UNIDROIT at its 2004 session and has now been published. The text of the black letter rules was reproduced in *Unif. L. Rev. / Rev. dr. unif.*, 2004, 124, and is available on the UNIDROIT internet website: [www.unidroit.org](http://www.unidroit.org).

23 Pierre A. KARRER, in: Heinrich Honsell / Nedim Peter Vogt / Anton K. Schnyder (eds.), *Kommentar zum Schweizerischen Privatrecht – Internationales Privatrecht*, Basel et al. (1996), Art. 186, note 71.

24 On Brainerd Currie's concern in this respect KAY, *supra* note 3, 37.

lack of up-to-date conflicts expertise frequently leads to lengthy and fruitless discussions at the sidelines of the subject matter to be negotiated. Thirdly, contract drafters. Fourthly, arbitrators from different legal systems and sitting in international arbitrations where neither the parties to the dispute nor the applicable regulations of the administering arbitral organisation have made sufficiently clear provision as to how the applicable law is to be determined. Fifthly, academic users wishing to develop their thoughts in a comparative rather than a purely domestic conflict-of-laws perspective.

#### IV. – BACKDROP : EXPERIENCE WITH HARMONISING SUBSTANTIVE LAW

##### 1. Contract law

The *UNIDROIT Principles of International Commercial Contracts*, arguably the most successful instrument of its kind, have been and continue to be the subject of academic analysis and practical application by legislators, contract draftsmen and arbitrators<sup>25</sup> to such an extent that there is no need to describe them any further. Suffice it to recall the most distinctive features of the Contract Principles' genesis and their status as a universally recognised persuasive authority.

Firstly, both Working Groups, the one set up for the preparation of the 1994 version and the one which has just finalised the enlarged 2004 version, encompassed all major legal families and geographic regions represented by some of the most distinguished scholars and practitioners in the field of contract law. Secondly, neither time pressure nor governmental insistence on the sanctity of any particular legal system's solution hampered the free flow of discussion and, without exception, the agreement on the functionally "best" solution (Professor Allan Farnsworth, member of both groups, has described the working method and confronted this with his experience as a member of his Government's delegation to the Diplomatic Conference on the CISG<sup>26</sup>). Thirdly, the objectives identified in the work programme – in particular of the group which prepared, from 1998 to 2003, the 2004 version – were reached within a predictable time frame. Fourthly, while the group enjoyed unfettered intellectual freedom, the work process and the product bear the trade mark, and are

<sup>25</sup> It is impossible to present a fair selection of the countless books and articles from all four corners of the world. But *cf.* Joachim BONELL, *An International Restatement of Contract Law*, 2<sup>nd</sup> ed. Inverton-on-Hudson (1997); Roy GOODE, "International Restatements of Contract and English Contract Law", *Unif. L. Rev. / Rev. dr. unif.*, 1997, 231; E. Allan FARNSWORTH, "The American Provenance of the UNIDROIT Principles", *Tulane Law Review* 1985 (1998), 72; *cf.* also contributions to the session on contract law of UNIDROIT's anniversary congress in 2002 by HARTKAMP, BONELL, FARNSWORTH, HUANG DAHAN, VILKOVA, LANDO, BÉRAUDO, WILHELMSSON, CALUS, VILUS, in: *Unif. L. Rev. / Rev. dr. unif.*, 2003, 81-170; Joachim Bonell (ed.), *The UNIDROIT Principles in Practice*, Ardsley, N.Y. (2002); *UNIDROIT Principles of International Commercial Contracts – Reflections on their Use in International Commercial Arbitration*, Special Supplement – ICC International Court of Arbitration Bulletin 2002; UNIDROIT has recently been entrusted with the development of a uniform contract Act for the Member States of OHADA: *cf.* report in *Unif. L. Rev. / Rev. dr. unif.*, 2003, 682-685.

<sup>26</sup> FARNSWORTH, *supra* note 25.

rooted in the guarantees of intrinsic quality and impartiality of an intergovernmental Organisation. The level of trust and authority accorded to the instrument is reflected in Article 9(2) of the *Inter-American Convention on the Law Applicable to International Contracts* of 1994 as well as persuasive proposals regarding the conversion of the Rome Convention of 1980 into a Community instrument and its modernisation.<sup>27</sup> In both cases, the UNIDROIT Contracts Principles figure prominently in respect of the identification of such non-State law rules which may, in the commentators' view, be applied to international contracts.

## 2. Civil procedure

It is expected that the UNIDROIT Governing Council and the American Law Institute (ALI)'s governing bodies will, in the spring of 2004, approve the "Principles of Transnational Civil Procedure", an ALI/UNIDROIT joint venture instrument which was essentially developed along the same lines as the Contracts Principles.<sup>28</sup>

## 3. Indirectly held securities

The UNIDROIT Study Group for the preparation of harmonised substantive rules regarding indirectly held securities,<sup>29</sup> in its position paper issued in August 2003, indicates that one way of dealing with the complexity of the matter, political sensitivities, time pressure and other factors may be combining a minimalist ("hard law") convention and a ("soft law") instrument (benchmark principles). This idea has been welcomed by a number of Governments, central banks and the private financial sector.

# V. – INSTITUTIONAL FRAMEWORK – PROCESS – ARCHITECTURE OF INSTRUMENTS

## 1. Areas and functions of the conflict of laws : distinctions to be made

Prudent use of resources would obviously make it advisable to steer clear, for the time being, of areas such as tort law with its ramifications into products and mass-disaster liability, punitive damages etc. where economic, social or political, but also genuinely legal implications put the bar too high. By contrast, contract law, given its solid and converging regional bases (Rome, Mexico, Restatements), would appear to be

<sup>27</sup> Wulf-Henning ROTH, *Gutachten für den Deutschen Rat für Internationales Privatrecht* (2003); see also *IDEM*, "Zur Wählbarkeit nichtstaatlichen Rechts", in: *Festschrift für Erik Jayme*, *supra* note \*, 757; Max Planck Institute for Foreign Private and Private International Law, "Comments on the European Commission's Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation", in: *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 68 (2004), 4, 30 *et seq.* and proposed new Article 3, at 100 *et seq.*

<sup>28</sup> For comments on objectives, working methods and earlier drafts, see 21 contributions in a special issue of *Unif. L. Rev. / Rev. dr. unif.*, 2001, 739-1144, and the contributions to the civil procedure session of the UNIDROIT anniversary congress in 2002 by FERRAND, HAZARD, KERAMEUS, TELL, ELMER, LIMA MARQUES, GLENN, PROKHORENKO and TRAEST in *Unif. L. Rev. / Rev. dr. unif.*, 2003, 397-499. *Uniform Law Review Editors' note*: The ALI/UNIDROIT Principles of Transnational Civil Procedure were approved both by the Governing Council of UNIDROIT in April 2004 and by ALI at its annual session in May 2004.

<sup>29</sup> *Cfr.* report in *Unif. L. Rev. / Rev. dr. unif.*, 2003, 686-691 and at [www.unidroit.org](http://www.unidroit.org).

sufficiently mature to permit a positive prognosis as to the outcome of the exercise. Secondly, there may be merit in identifying those areas of contract law where the harmonisation of conflict rules is thought to be considerably easier to achieve than the harmonisation of substantive law and/or where harmonised private international law stands a fair chance of substituting harmonised – or unified – substantive contract law.<sup>30</sup>

It is, furthermore, submitted that a principal source and reason for overburdening conflicts rules with policy objectives might be removed if we distinguished clearly between the various functions that private international law, in our time, is called upon to perform.<sup>31</sup> Where mere *co-ordination* is the objective, the classic, multi-lateral conflicts rule, unpretentious and mechanically determining the law applicable to a set of facts, may continue to be both sufficient and appropriate. Conversely, where private international law aspires to be a vehicle for *co-operation*<sup>32</sup> among States, as is the case in the areas of child protection, intercountry adoption and the like, the situation is quite different, and that difference is reflected in the relevant international instruments' structure and the content of their key provisions. Again, where economic, social or political *integration* is the name of the game, conflict-of-laws rules are obviously and legitimately pregnant with policy considerations. Acknowledging these functional distinctions should entail acceptance of the fact that, with respect to identifying the forum where discussions as the ones envisaged here are likely to bear fruit, there is probably no one-stop shop solution.

## 2. Appropriate fora

Assuming that the task of re-stating and pre-stating conflicts principles would appropriately be taken by way of instituting a multi-layered and de-centralised process, the only candidate for providing the institutional framework at the *worldwide* level would be the Hague Conference on Private International Law. It is there that Governments and the universal academic conflicts community, for more than a century, have accumulated expertise and where intergovernmentally certified scholarly debate could be organised in such a way as to ensure that any proposals would command trust and respect. It is submitted that it is the more abstract principles and the more mature areas of the law which would most usefully be discussed at this level.

On the other hand, areas that are more culture-specific, more closely linked to the social and economic conditions of a region – *e.g.* consumer contracts, general aspects of property law – would appear to be more appropriately dealt with at the regional level (*e.g.* EC, MERCOSUR, the Organisation of American States and its

<sup>30</sup> Jürgen BASEDOW, "Conflicts of Economic Regulation", 42 *American Journal of Comparative Law* 423 (1994), at 445 on insurance contracts.

<sup>31</sup> For the impact of constitutional guarantees on the conflict of laws, see Herbert KRONKE, "Die Wirkungskraft der Grundrechte bei Fällen mit Auslandsbezug", in: Dagmar Coester-Waltjen / Herbert Kronke / Juliane Kokott (Eds.), *Die Wirkungskraft der Grundrechte bei Fällen mit Auslandsbezug*, Heidelberg (1997) 33, at 63 *et seq.*

<sup>32</sup> The terminology is mine. Professor Lea Brilmayer, for example, uses the term 'co-operation' much in the sense of what is here characterised as mere 'co-ordination', *cf.* BRILMAYER, *supra* note 20, 208 *et seq.*

Special Conferences on Private International Law – CIDIP, OHADA, SADC and others). At this – regional – level, conflicts principles (and rules) would also receive a more carefully calibrated dose of – e.g. integration oriented – policy content.

#### **VI. – CONCLUSIONS**

At the outset, the American “conflicts revolution” could be viewed as the common lawyers’ rebellion against a – surprisingly successful but definitely not congenial – Restatement First. The revolutionaries’ theories were, however, more: the reflection of disputes being generated by an increasingly complex society whose values, expectations, orientations and objectives (including individual or ‘private’ ones) demanded recognition in the cloak of judicially identified and certified governmental interests (*Gemeininteressen*). The rest of the world is rapidly catching up. The number, complexity, variety and assertiveness of interests and policy considerations conflict-of-laws rules – both codified and judge made – have to cater for or, at least, to be aware of is steadily growing. This happens to the detriment of clarity, predictability and persuasiveness both within national and regional legal systems and internationally. At the same time, we are witnessing to no insignificant extent exegetic subjectivism on the one hand and, on the other hand, tendencies towards juridical neo-provincialism. The pendulum, set in motion in the 1970s and taken to its extreme by rather naïve enthusiasm for developments of the world’s economic architecture (“globalisation”), is swinging back. Ironically, serious congestion and centrifugal force need to be countered contemporaneously. An effort ought to be made to broaden common ground and to raise the level of truly international and interregional understanding by identifying areas where rigorous scholarly analysis may be capable of producing, step by step and treading carefully, instruments which are both restatements and forward looking pre-statements and which would be building blocks for a benchmark instrument “International Principles of Conflict of Laws”.