

## SYMPOSIUM ON THE THIRD RESTATEMENT OF CONFLICT OF LAWS

### THE CONFLICTS RESTATEMENT AND THE WORLD

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Some sixteen years ago, on the occasion one of many symposia on the possibility of a new Restatement on Conflict of Laws to replace the much-derided Second Restatement, Mathias Reimann suggested that a new Restatement should focus on the requirements of what he called “the international age.”<sup>1</sup> Conflict of laws is increasingly international, he pointed out. This remains true today—just recall that three of the four recent U.S. Supreme Court decisions on personal jurisdiction concerned international conflicts.<sup>2</sup> A new Restatement must take that into account. Reimann formulated three very sensible wishes for drafters of a new Restatement: they should consider every rule and principle they formulate with international disputes in mind; they should work comparatively; and they should include foreign advisers.<sup>3</sup>

Now that a Third Restatement is underway, we can see that the third of Reimann’s wishes, the one for foreign advisers, has been ignored completely by the American Law Institute (ALI). Not a single member of the Advisers group is situated outside the United States (though some have a foreign educational background). Within the (self-selected) members consultative group, only four scholars are based abroad.<sup>4</sup> This is in sharp contrast to the Foreign Relations Restatement, which can rely on an international advisory panel with twenty-one members from all around the world. It is to be feared, therefore, that Reimann’s first two wishes also can be fulfilled only incompletely—even though the current draft displays in some sections ample comparative and international materials.<sup>5</sup>

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<sup>1</sup> Mathias Reimann, *A New Restatement—For the International Age*, 75 IND. L.J. 575 (2000). Similarly, Symeon Symeonides, *A New Conflicts Restatement: Why Not?*, 5 J. PRIV. INT’L L. 383, 401-03 (2009).

<sup>2</sup> *J. McIntyre Machinery, Ltd. v. Nicaastro*, 131 S.Ct. 2780 (2011) (English defendant with a U.S. distributor); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011) (foreign defendants; accident in France); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). The fourth, domestic, case was *Walden v. Fiore*, 134 S. Ct. 1115 (2014).

<sup>3</sup> Reimann, *supra* note 1, at 583-88.

<sup>4</sup> Andrea Bjorklund (Montreal); Richard Garnett (Melbourne); Catherine Kessedjian (Paris); Bea Verschraegen (Vienna).

<sup>5</sup> See, e.g., RESTATEMENT (THIRD) OF CONFLICT OF LAWS, PRELIMINARY DRAFT NO. 2 (Aug. 12, 2016) (hereinafter “Draft”) § 1.04 cmt. a (“Consideration has also been given to foreign codifications, particularly choice-of-law codes, and the practice of foreign courts”), § 2.01 Reporter’s note 1 (“For example, the concept of habitual residence has gained significant acceptance throughout U.S. law as well as international and supranational law and the law of other countries”); § 5.01 cmt. e (listing recent codifications worldwide). Concrete comparative references are spread around the current draft. Cf., by contrast, RESTATEMENT OF THE LAW (SECOND) CONFLICT OF LAWS § 10 cmt. 1 (AM. LAW INST. 1971) (“The rules in the Restatement of this Subject are derived, unless otherwise indicated, from cases with elements in one or more sister States. These interstate cases provide most of the relevant authority”); Reimann, *supra* note 1, at 576-77.

In what follows, I address some general themes in this regard, to supplement Reimann's proposals. I address why the rest of the world matters for a Conflicts Restatement. I discuss challenges for the current draft's method, in view of the subject's internationalization. I mention some concrete areas in which an internationalist perspective could be instructive. And I make two concrete proposals for how to address internationalization in the Restatement.

### *The Importance of the Rest of the World*

Why should the rest of the world matter for a Restatement? The Restatement, one might suggest, restates U.S. law, not foreign law. And U.S. courts have, by and large, employed the same methods in addressing conflicts with foreign law that they have to interstate conflicts. Moreover, specific problems concerning international conflicts are dealt with in the Restatement of the Law on Foreign Relations, which is also currently the subject of a new ALI project.

The reporters reject such parochialism in the current draft, at least in principle.<sup>6</sup> They are right to do so for at least five reasons. The first concerns the nature of Restatements in general. Restatements have three functions: to describe the law as it is, to suggest the best rules for adoption, and to prescribe actually applicable law.<sup>7</sup> For the latter two functions—the determination of the best law—a comparative perspective seems almost indispensable. Other Restatements, like the one on agency, have used comparative law, too.<sup>8</sup> One might have a different view regarding the descriptive function. But, even here, a comparison seems helpful, if only to show what is truly peculiar about U.S. law. More importantly, the descriptive function has always played a slightly lesser role for Restatements in conflict of laws than in other areas, and for a good reason: Courts, left to their own devices, tend to favor their own law over that of other states. Such a preference for home law is suspicious from a broader perspective, at least to some degree. It is for these reasons that the Second Restatement ignored the homeward trend that was discoverable in existing case law and instead formulated “the needs of the interstate and international systems” as the first of its choice of law principles—precisely because these needs were underappreciated in existing case law.

A second reason is that the form of a Restatement—a quasi-codification—can draw on ample experience from foreign codifications of conflict of laws, which Symeon Symeonides discusses in his recent invaluable book.<sup>9</sup> U.S. conflict of laws has, apart from its earlier Restatements, relatively little experience with codification, with the exception of codifications in Louisiana and Oregon (and the unenacted code for Puerto Rico). If only for technical drafting issues, foreign law can here be of immense value.

A third reason, this one peculiar to the discipline, is that conflict of laws, perhaps more than other disciplines, has always developed as through interchange between different countries. U.S. conflict of laws in the nineteenth century was deliberately comparative, beginning with Livermore's and Joseph Story's engagement with European sources, and going on at least until Joseph Beale, the reporter for the First Restatement. It was only during legal realism and the so-called conflict-of-laws revolution that U.S. conflicts law became inward-looking. At the same time, the rest of the world keenly observed the U.S. conflicts revolution and adapted its own approaches

<sup>6</sup> Draft, *supra* note 5, § 1.04; for a list of factors, see *id.* cmt. d. The promise, *id.* that “differences have been accommodated, where necessary, by the explicit articulation of different rules for the interstate and international context” has not yet, as far as I can see, been implemented. Some Reporters' notes do make clear distinctions, however. See, e.g., § 5.08 Reporters' note 2, p. 164 (certification of questions of foreign law beyond U.S. State and federal courts); § 5.09 Reporters' note 2 (discussing comparatively European approaches to insufficient information about foreign law).

<sup>7</sup> Ralf Michaels, *Restatements*, in MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW 1466 (Basedow et al. eds, 2012).

<sup>8</sup> *RESTATEMENT (THIRD) OF THE LAW OF AGENCY* 7 (Introduction—Common Law and Statutes), 11-12 (Reporter's Notes) (AM. LAW INST. 2006).

<sup>9</sup> See SYMEON C. SYMEONIDES, *CODIFYING CHOICE OF LAW AROUND THE WORLD* (2014). The draft draws on this book frequently.

to the field in light of the experience.<sup>10</sup> There is much to learn from these developments. And the reporters should, where possible, take into account that the Restatement provides guidance not just for U.S. lawyers but for lawyers around the world dealing with U.S. conflict of laws.

Fourthly, and relatedly, U.S. conflict of laws necessarily interacts with foreign conflict of laws in a way different from that in which, say, U.S. tort law interacts with foreign tort law. Even if *renvoi* is rejected (as it is, mostly, in the current draft),<sup>11</sup> foreign conflict-of-laws rules play an important role for parties' agreements on choice of law, on their strategic behavior (for example forum shopping),<sup>12</sup> and so on.

Finally, interstate transactions are importantly different from international transactions. Differences between state and foreign nation laws are greater than differences between sister state laws. The Constitution applies only in part to such conflicts. On the other hand, only international transactions are influenced by international law and by foreign relations and foreign commerce considerations.<sup>13</sup> Greater geographical distances influence relevant policy considerations. Specific problems—of differences in language or currency, for example—occur only in international conflicts.

### *Method*

What follows from internationalization for the method of the Restatement? Conflict of laws in the United States has long been keenly interested—one might say obsessed—with issues of method. That this has not always served the field well can be gleaned from the earlier Restatements of the field. The First Restatement relied on a method—the vested rights theory—that had, at the time of its adoption, already been shown to be circular and unwieldy, and that led to results that were in accordance with neither existing case law nor interests and policies.<sup>14</sup> However, if the problem of the First Restatement was the over-determinacy of a questionable method, the Second Restatement suffered from the opposite problem. Drafted in the midst of the conflict-of-laws revolution, the Restatement attempted to combine many of the existing methods, including both territoriality and interest analysis, in a Section 6(2) entitled “Choice-of-Law Principles,”<sup>15</sup> and asked courts, explicitly, to take these considerations into account when applying each of its specific provisions. The resulting “mish-mash”<sup>16</sup> left the courts without clear guidance, even though some of the specific provisions in the Second Restatement are better than its reputation.

It is against this experience that the drafters of the new Restatement attempt to take a pragmatic and methodologically modest approach, which seems very welcome.<sup>17</sup> Indeed, what judges need from a Restatement are operational rules, not deep jurisprudential theories or a selection of broad and vague factors to be considered. At the same time, rules are impossible without an underlying foundation. The current draft chooses as such grounding an approach to choice of law that is widespread in the United States (though not anywhere else):

<sup>10</sup> For Europe, see Peter Hay, *European Conflicts Law After the American “Revolution”—Comparative Notes*, 2015 U. ILL. L. REV. 2053.

<sup>11</sup> Draft, *supra* note 5, § 5.04.

<sup>12</sup> Ralph U. Witten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 TEX. INT'L L.J. 559 (2002).

<sup>13</sup> The current draft does not, unfortunately, contain a provision on international law limits on choice of law. See Draft, *supra* note 5, at xxvii. It does suggest, though without discussion, that its rules comply with international law. See *id.* § 1.01, cmt. e. See also, Christopher A. Whytock, *Toward a New Dialogue Between Conflict of Laws and International Law*, 110 AJIL UNBOUND 150 (2016).

<sup>14</sup> Symeon C. Symeonides, *The First Conflicts Restatement through the Eyes of Old: As Bad as its Reputation?*, 32 SO. ILL. L. REV. 39 (2007).

<sup>15</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (AM. LAW INST. 1971).

<sup>16</sup> William A. Reppy, *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645 (1983).

<sup>17</sup> But see, for a contrary view, Louise Weinberg, *A Radically Transformed Restatement for Conflicts*, 2015 U. OF ILL. L. REV. 1999, 2001 n. 3 and *passim*.

interest analysis (though it also points out that other considerations than governmental interests are relevant).<sup>18</sup> The Restatement adopts a “two step test” advocated earlier by its main reporter:<sup>19</sup> In a first step, the scope of application of each state’s law must be determined on the basis of each state’s interests in application in the concrete case. In a second step, eventual conflicts between overlapping laws must be resolved through “rules of priority.” After the method was introduced in the first draft almost in passing,<sup>20</sup> the current draft now contains a more elaborate discussion of its methodological approach. Although the test is not explicitly mandated in a specific rule, the draft suggests that its rules “have been derived through the two-step process . . . by positing the likely scope of state laws in light of their likely or generally accepted purposes and then attempting to determine the most appropriate law by identifying the state with the dominant interest.”<sup>21</sup>

In my view, interest analysis creates several problems as the basis for a Restatement. Here, I want to focus only on those having to do with internationalization. First, interest analysis works badly with foreign nation laws, which frequently do not give any guidance as to their scope of application, whether explicitly or implicitly. The scope is, in foreign nation laws, frequently expressed only through choice of law rules, which the current draft rejects as criteria for determining scope.<sup>22</sup> This is a consequence not just of different approaches to choice of law but also, relatedly, different ideas about the role of private law. The idea that private laws express governmental interests remains relatively alien to many foreign nations. The distinction between loss-allocating and conduct-regulating tort rules for example, central not only to interest analysis but also to the current draft,<sup>23</sup> is mostly anathema to European thinking, which essentially treats all tort rules as loss-allocating and only provides a small area of application for “rules of safety and conduct.”<sup>24</sup> As a consequence, an approach focused on such interests must, in view of foreign nation laws, frequently remain hypothetical.

A second problem exacerbates the first one. Historically, interest analysis emerged from the U.S. Constitution. Even after it was translated into a choice-of-law approach, its main proponents—from Brainerd Currie and Herma Hill Kay through William Baxter and Larry Kramer to Louise Weinberg and Kermit Roosevelt—assign an important role to the U.S. Constitution, if not as basis for conflict of laws then at least to remedy excesses of the theory. But the Constitution cannot play this role well in international cases, because its most important provisions for conflict of laws, including the Full Faith and Credit Clause, are inapplicable. Should comity, that vague doctrine, be expected to play a similar role?<sup>25</sup> Or should excesses in international conflicts remain unremedied?

<sup>18</sup> Draft, *supra* note 5, § 5.01 (“The process of formulation and reexamination of [rules of choice of law] requires consideration not only of the specific policies of the relevant internal law rules but also of the general policies relating to multistate occurrences and policies relating to the predictable and efficient conduct of litigation and the structuring of out-of-court behavior.”)

<sup>19</sup> Draft, *supra* note 5, at xiv-xxi, § 5.01 Reporter’s note on cmt. b; § 5.02 cmt. a, c; KERMIT ROOSEVELT, CONFLICT OF LAWS 1-2 (2010).

<sup>20</sup> RESTATEMENT OF THE LAW (THIRD) CONFLICT OF LAWS, PRELIMINARY DRAFT NO. 1, (AM. LAW INST., Oct. 1, 2015), § 5.01 cmt. b and Reporter’s note to cmt. b.

<sup>21</sup> Draft, *supra* note 5, § 5.02 cmt. c.

<sup>22</sup> *Id.* at xvii-xviii.

<sup>23</sup> *Id.* § 6.01 cmt. a, § 6.04 cmt. a.

<sup>24</sup> See Commission Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (“Rome II”), at 12, COM (2003) 427 final (July 22, 2003) (“Article 3(1), which establishes an objective link between the damage and the applicable law, further reflects the modern concept of the law of civil liability which is no longer, as it was in the first half of the last century, oriented towards punishing for fault-based conduct: nowadays, it is the compensation function that dominates, as can be seen from the proliferation of no-fault strict liability schemes.”); Parliament and Council Regulation 864/2007 of July 11 2007, on the law applicable to non-contractual obligations (Rome II), art. 17, 2007 O.J. (L 199), 40, (“In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability”).

<sup>25</sup> Donald Childress III, Comity as Conflict: Resituating International Comity as Conflict of Laws, 44 U.C. DAVIS L. REV. 11 (2010).

It should not be forgotten that Currie, the first proponent of interest analysis, opposed the formulation of abstract choice-of-law rules for a good reason: interest analysis is quite anathema to such rules.<sup>26</sup> It is too early to tell how the draft will resolve possible tensions between the method based on concrete subjective state interests and the desire for objective generalized rules. Here, it will be helpful to use comparisons with foreign codes (in addition to those of Louisiana and Oregon). Internationally, some foreign lawmakers have translated experiences from the U.S. conflicts revolution into their own respective approaches. Some (not all) foreign codifications incorporate considerations of policy (both domestic and international) without adopting a fully-fledged interest analysis. This should be instructive.

### *Concrete Areas*

What does internationalization mean for specific areas? Ultimately, this can be determined only by following Reimann's first wish, namely to answer this question for each individual rule and principle. In what follows, I list some issues in which such inquiry could be fruitful.

A first step is to ask, concretely to what extent differences in actually applicable background rules and principles between the international context, as compared to the interstate context make a difference. On the one hand, treaties govern areas of conflict of laws especially in family matters; these treaties are inapplicable as between states. On the other hand, international conflicts are not under the same umbrella of constitutional and federal law as domestic cases. The recognition and enforcement of foreign nation judgments, for example, occurs under comity; the Full Faith and Credit Clause of the U.S. Constitution applies only to U.S. judgments. Consequently, requirements and functioning are very different in the international and interstate contexts. *Forum non conveniens* operates differently in the international realm, in large part because transfer is possible only between federal courts, not between a U.S. court and a foreign nation court. Questions on foreign law cannot be certified to a foreign nation court because no such mechanism exists yet on an international level, except for individual memoranda of understanding like the one between New York and New South Wales.<sup>27</sup>

But there may be subtler differences. A first set concerns considerations of foreign relations. Take, for example, the law of personal jurisdiction. For jurisdiction to be constitutional, the U.S. Supreme Court had once essentially required only minimum contacts and fairness. In *Asahi*, an international case, the Court added the requirement that jurisdiction be reasonable.<sup>28</sup> That requirement was justified at least in part by foreign relations considerations.<sup>29</sup> Maybe this reasonableness requirement should therefore, as Linda Silberman has suggested, be confined to international conflicts?<sup>30</sup> By contrast, if jurisdiction is about horizontal federalism, as some argue (somewhat dubiously),<sup>31</sup> must it not be treated differently in international cases?

A second set of questions are those that occur in international disputes but that find no place in the Restatement of Foreign Relations because, strictly speaking, they are matters of private, not public, international law. For example, how do we deal with parties who negotiate in different languages? What happens when exchange rates change dramatically? Who is responsible to acquire possibly necessary public permissions from agencies in countries without market economy?

<sup>26</sup> *But see*, Louise Weinberg, *A Radically Transformed Restatement for Conflicts*, 2015 U. ILL. L. REV. 1999.

<sup>27</sup> Draft, *supra* note 5, § 5.08 Reporter's note 2, p. 164.

<sup>28</sup> *Asahi Metal Ind. Co. v. Superior Court*, 480 U.S. 102 (1987).

<sup>29</sup> Cf. RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 403 (AM. L. INST. 1987).

<sup>30</sup> See Linda J. Silberman, "Two Cheers" For International Shoe (and None for Asahi): An Essay on the Fiftieth Anniversary of International Shoe, 28 U.C. DAVIS L.J. 755, 760.

<sup>31</sup> Allan Erbsen, *Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather Than Liberty After Walden v. Fiore*, 19 LEWIS & CLARK L. REV. 769 (2015).

A third set of questions concerns situations in which international experience is richer from interstate experience. Here, we can learn a lot. Take, for example, party autonomy for choice of forum and choice of law agreements. In the United States, discussions still often revolve only around the fundamental question whether, and under what circumstances, such agreements are enforceable at all.<sup>32</sup> Internationally, it appears that we see far more sophisticated instruments and discussions: asymmetric agreements, enforcement agreements, penalty clauses for breach of agreements, choice of nonstate law, and so on.<sup>33</sup>

Fourthly, foreign nation laws contain institutions that are unfamiliar in U.S. law. Foreign nations have a number of types of family relations—polygamous marriages, weak adoption (*kafala*), and the like—that need to be properly addressed. Institutions in foreign law perform functions that fall between those known in U.S. law. Take only, for example, the *mahr*—the money an Islamic husband has to pay (or promise) his wife. The *mahr* concerns validity requirements of marriage, questions of marital property, questions of succession law, and questions of postdivorce support. Courts should find guidance on how to address such institutions in the conflict of laws.

Finally, the mere geographic and cultural differences between different nations make international conflicts different from interstate conflicts, which may have concrete consequences. For example, determining the content of foreign nation law creates bigger problems than that of sister states.<sup>34</sup> In many countries, official and unofficial law differ widely. Civil wars, like the one in Syria, mean that the official state law is no longer applied in areas of the law. The law applicable to a political refugee establishes a problem greater than choosing between the country of origin and the country of destination as domicile:<sup>35</sup> he may not want to stay in the new country, but the old country that persecuted him may often be unattractive, too.

### *Conclusion*

The new Conflict of Laws Restatement provides an exciting opportunity to provide courts with much-needed guidance in conflict of laws. This would be done best in the Restatement in two ways. First, each concrete provision in the Restatement should contain at least one comment that discusses whether the rule applies differently to international conflicts. Where differences are substantive enough, they should be listed in the rule itself. Second, in light of these detailed analyses, the comments to Section 1.04 (Interstate and International Conflict of Laws) should be much more detailed than they currently are. They should provide guidance to judges who are indeed confronted with international conflicts and need to know how to handle them.

The reporters seem eager to rectify the existing parochialism of conflict of laws in the United States, and the current draft shows great promise in this regard. They will need assistance for this. Those among us, whether in the United States or abroad, who are able to provide such assistance, should stop complaining about a perceived U.S. parochialism and come to help.<sup>36</sup> In this way, the Third Restatement will help U.S. conflict of laws to reengage again with the World.

<sup>32</sup> RESTATEMENT OF THE LAW (SECOND) CONFLICT OF LAWS §§ 32, 43, 187 (AM. LAW INST. 1971).

<sup>33</sup> For English law (which may be leading in this area), see only ADRIAN BRIGGS, AGREEMENTS ON JURISDICTION AND CHOICE OF LAW (2008); RICHARD FENTIMAN, INTERNATIONAL COMMERCIAL LITIGATION (2d ed. 2015).

<sup>34</sup> For discussion, see especially the concurrent opinions by JJ. Posner and Wood in Bodum USA, Inc. v. La Cafetière, Inc., 621 F.3d 624, 628 (7th Cir. 2010).

<sup>35</sup> Draft, *supra* note 5, § 2.08 Reporter's note 3.

<sup>36</sup> The Duke Journal of Comparative and International Law will organize, on November 4-5, a conference on the topic of "Internationalizing the Conflict of Laws Restatement." Participants will include all three reporters as well as Patrick Borchers, Hannah Buxbaum, Donald Earl Childress III, Ann Laquer Estin, Richard Fentiman, Horatia Muir Watt, Mathias Reimann, Linda Silberman, Symeon Symeonides, Louise Ellen Teitz, and myself.