**Internationalizing the Conflict of Laws Restatement – Symposium concerning the Restatement 3rd of Conflict of Laws at Duke Law School**

From November 4 to November 5, 2016, the *Duke Journal of Comparative & International Law* (DJCIL) hosted a symposium, cosponsored by the American Law Institute, at Duke Law School under the title “Internationalizing the Conflicts of Laws Restatement”. The Restatement Second of Conflict of Laws was concerned with the relationship of the different US states to each other but largely ignored the international perspective. Accordingly, Ralf Michaels (Duke University), in his introduction, voiced the concern that the new Restatement, undergoing drafting since 2014, should take greater account of the international perspective, and should also turn an eye towards comparative law. This was the objective of the symposium. The three reporters, Kermit Roosevelt III (University of Pennsylvania), Laura Little (Temple University) and Chris Whytock (University of California, Irvine), made the journey to Durham to give insight into the current state of work and to record the outcomes of the discussions.

The topic of the first panel was “Comparative Law and International Law in the New Restatement”. Symeon C. Symeonides (Willamette/New York University) provided an overview of the nearly 200 PIL codifications and conventions adopted in the last 50 years. He described how they strive to find the optimum equilibrium between certainty and flexibility and how they temper the pursuit of conflicts justice with considerations of material justice. Symeonides suggested that the new Restatement should draw from the rich European experience in rule drafting, such as by adopting rules protecting consumers and employees. He also suggested, however, that the Restatement should continue to police party autonomy through the public policy limits of the *lex causae* rather than the *lex fori* in contract conflicts, and should retain the distinction between conduct-regulation and loss-allocation issues in tort conflicts.

Thereafter, Donald Earl Childress III (Pepperdine University) concentrated on the topic “International Law and International Conflict of Laws”. He began by discussing the impact that international law has had on judicial decisionmaking. He explained that U.S. courts mainly take account of international law through the doctrine of international comity, and focus by the Restatement on this area may improve the law. He next examined how courts deal with international conflicts that may arise under federal and state law. While, in the application of federal law, rules will only be applied extraterritorially if there is a clear congressional intent, extraterritoriality becomes more ambiguous when state law is involved. When applying rules, US courts in the past have struggled with the issue, mainly because they lacked sufficient guidance. The new Restatement could offer guidance in this area. Childress also suggested differentiating between small and big conflicts – the latter involving regulatory interests of different countries while the former lacking the need to balance these interests. He further suggested that the new Restatement might undertake more comparative analyses in each of its sections.

Hannah Buxbaum (Indiana University) and Horatia Muir Watt (SciencesPo) approached the topics “Unilateralism versus Multilateralism in International Cases“ and “Conflict of Laws in Supranational and Federal Systems“ under the heading “International versus Interstate Conflicts” in the second panel. Hannah Buxbaum clarified at the beginning of her presentation that choice-of-law analysis involves two separate inquiries: First, the scope of the laws in question must be determined, usually by interpretation. Second, in the event of multiple applicable laws, rules of priority determine which law will actually be applied. Buxbaum explained that in current practice the delineation between these two inquiries is often blurry. Nevertheless, rules of priority are dominant. She then discussed the current draft’s on a mandatory two-step approach, and analyzed the role of the “presumption against extraterritoriality” in determining the scope of legal rules. Buxbaum differentiated between three groups of cases: conflicts between federal law and foreign law; conflicts between state law and foreign law; and conflicts between state laws, and showed the different conflicts of interest afterwards.

Hoartia Muir Watt continued by discussing the role of federalism for European conflict of laws. She emphasized that, in Europe, conflict of laws is regulated by supranational instruments and that the Court of Justice of the European Union (CJEU) has produced significant case law interpreting those instruments. The development of choice of law in Europe felt strong US influence. She mentioned not only the influence of the Hague Convention but also consultations with US experts while drafting EU regulations on the other –e.g., Symeon C. Symeonides was involved in the drafting process of the Rome II Regulation. Additionally, she highlighted that there is a recent development in Europe to split conflict of laws into intra-EU conflicts and international conflicts. The driving force behind this development are Regulations governing international jurisdiction, with the Brussels II bis Regulation taking the lead. The European Union managed to keep the diversity of its Member States’ national laws by harmonizing choice of law, and thereby preserved its federalist character.

Panel 3 addressed several specific conflict of laws issues in the context of transnational cases: jurisdiction, party autonomy, and tort and contract. Professor Silberman (in her paper with Nathan Yaffe) identified two areas where the “transnational case” might deserve special consideration: judicial jurisdiction over foreign defendants and party autonomy in choosing the applicable law. On the question of judicial jurisdiction, Professor Silberman pointed out that the modern two-step constitutional test for specific jurisdiction articulated in *Asahi Metal Industry Co., Ltd. V. Superior Court*(480 U.S. 102 [1987]) – “minimum contacts” and then “reasonableness”— involved a foreign defendant. Although the lower courts appear to embrace that same standard with respect to both domestic and foreign defendants, she suggested that the factors identified by the Court in the “reasonableness” analysis best reflect comity concerns that are most relevant when the case is against a foreign defendant. To that end, the authors sampled 400 cases since 2000 that showed that courts effectively only dismiss for lack of jurisdiction on “reasonableness” grounds when the defendant is foreign. As for general jurisdiction, Professor Silberman pointed out that Justice Ginsburg in her opinion in *Daimler AG v. Bauman* (134 S.Ct. 746 ([2014])rejected as unnecessary any role for “reasonableness” in light of the “at home” standard now required for general jurisdiction over corporations. She noted an irony in that Justice Ginsburg discussed concerns about comity and foreign relations in articulating the new standard but explicitly referenced “sister-state” as well as “foreign-country “ corporations in the opinion. [[1]](#footnote-1) On the question of party autonomy and choice of law in contracts, Professor Silberman highlighted the Supreme Court’s emphasis on party autonomy in the international context and argued that more leeway should be given to the parties to choose the applicable law in an international commercial contract.

Afterwards, Richard Fentiman (University of Cambridge) concentrated on questions of party autonomy. Drawing from an English background, he argued that cross-border disputes that go to litigation usually involve either major commercial disputes or substantial class actions. According to his view, smaller disputes are rarely found at this stage because cross-border disputes are too expensive to efficiently litigate smaller cases. Correspondingly, he was of the opinion that agreements by the parties regarding forum and applicable law are beneficial and should be enforced because they provide certainty. The same holds true if consumers are involved in the contract because the higher level of certainty for the business will translate to lower prices for consumers. He suggested that, for the Third Restatement, a choice of forum or law by the parties should be enforced even if there is no other connection to the dispute. Again, he used England as an example and explained that parties often choose English law or English fora because of the reputation even if there is otherwise no connection to the transaction.

As the last speaker of the third panel, Patrick Borchers (Creighton University) addressed conflict of laws regarding torts and contracts. He articulated that the essential task of the Third Restatement is to establish legal certainty and predictability. Both were neglected after the conflicts revolution. He observed that the Second Restatement contained many presumptive rules. However, courts in applying the Second Restatement preferred its general rules. The benefit of the Third Restatement is, according to his view, that it starts out with specific rules and thereby creates more predictability. However, courts might use the residual rule in § 6.07 to get creative and move away from predictability again. Accordingly, it should be rephrased for more precision.

The fourth panel was dedicated to family matters. Ann Laquer Estin (University of Iowa) started by discussing marriage and divorce in the context of conflict of laws. This field of law has been substantially affected by the introduction of non-fault divorce. In the wake of this introduction, conflict of laws has seen fewer public policy problems in cross-border contexts. Furthermore, as more couples decide in favor of non-marital cohabitation, more children are raised in non-marital relationships. Additionally, the number of same-sex relationships is increasing. According to her, it is important to note that more and more couples are frequently changing their country of residence. Correspondingly, the Third Restatement should, in contrast to the Second Restatement, contain rules that take cultural particularities into account in the recognition of marriages. It should also contain similar rules for the recognition of civil unions and their equivalents. Especially important for civil unions are rules regulating recognition, status, and proprietary relations. In reverse, these areas also need regulation on the recognition of foreign divorces.

Louise Ellen Teitz (Roger Williams University) continued by presenting conflict-of-laws issues relating to children. She stressed that the domestic law relating to children is often shaped by international treaties, regional instruments, and in the U.S., uniform state law and some federal statutes. For example, the 1996 Hague Child Protection Convention, which has been signed but not ratified by the US, will when implemented (by amendments to the UCCJEA) require recognition of foreign judgments ("measures of protection") and cross-border cooperation. She pointed out that, in the international context, specific problems arise because matters relating to children are often significantly influenced by differences in religion, culture, and morals. This has been especially visible with the interaction between Western legal traditions and Islamic personal law. In the United States, state anti-foreign law statutes (which are often mainly intended to target “Sharia Law”) could have significant impact on family law and conflict with international instruments.

In the US, international treaties and domestic uniform law have harmonized this area of law to a certain extent. However, problems can arise because the civil law and private international law outside the US rely on habitual residence, whereas US law commonly refers to domicile. She explained the need to acknowledge the differences in wholly domestic and cross-border cases and that embracing that difference will produce more consistent results that will support harmonization in this critical area, helping to allow children to move seamlessly from one country to another without raising significant issues of private international law.

At the end of the symposium, Mathias Reimann (University of Michigan) summarized his impressions in a short closing statement.

The majority of the contributions will be published in a forthcoming issue of the Duke Journal of Comparative and International Law.

**By Marc Dietrich and Austin Pierce, current students at Duke Law School**

1. One state supreme court decision, *Tyrrell v. BNSF Railway Co*., 373 P.3d 1 (S.Ct. Mont. 2016) held that the *Daimler* rule did not apply to a U.S. corporate defendant, but the Supreme Court of the United States has granted certiorari to review that holding, 2017 U.S.Lexis 686 (Jan. 13, 2017). [↑](#footnote-ref-1)