Massimo Benedettelli on EU Private International Law of Companies

Professor *Massimo Benedettelli* (University of Bari "Aldo Moro") has just published a highly noteworthy article entitled "Five Lay Commandments for the EU Private International Law of Companies" in the 17th Volume of the Yearbook of Private International Law (2015/2016).

The author has kindly provided us with the following abstract:

*'While praising European company law as a "cornerstone of the internal market", the EU institutions have devoted limited attention to issues of competent jurisdiction, applicable law and recognition of judgments which necessarily arise when companies carry out their business on a cross-border basis. This is a paradox, especially if one considers that in this area the EU often follows a policy of "minimal harmonization" of the laws of the Member States and that this policy leads to the co-existence of a variety of different rules and institutions directly or indirectly impinging on the regulation of companies, thus to possible conflicts of jurisdictions and/or laws. The European Court of Justice's "*Centros *doctrine" fills this gap only partially: this is due not only to the inherent limits of its case-law origin, but also to various hidden assumptions and corollaries on which it appears to be grounded and which still need to be unearthed. Hence, time has come for a better coordination of the legal systems of the Member States in the field of company law, possibly through the enactment of an ad hoc instrument. To be properly carried out, however, such coordination requires a preliminary clarification of what the EU private international law of companies really is and how it should be handled at the current stage of the European integration. This article tries to contribute to such clarification by proposing five main guidelines, in the form of "commandments" for the European legislator, courts and practitioners. It is submitted that, first, one should understand the different scope of the three legal disciplines (EU law, private international law and company law) which interact in this field so as to assess when and to what extent the lack of coordination of the Member States' domestic laws may affect the achievement of the objectives pursued by the EU. As a second analytical step, the impact that the*

EU constitutional principles of subsidiarity and proportionality may have on the scope of the relevant regulatory powers of the EU and of the Member States should be determined. Third, the issue of "characterization" should be addressed so that the boundaries of company law vis-à-vis neighbouring disciplines (capital markets law, insolvency law, contract law, tort law) are fixed throughout the entire EU legal space in a uniform and consistent way. Fourth, the Member States' legal systems should be coordinated on the basis of the "jurisdictional approach" method (which de facto *inspires the ECJ in* Centros *and its progenies) by granting a role of prominence to the Member State under the laws of which a company has been incorporated. Fifth, any residual conflict which may still arise among different Member States in the regulation of a given company should be resolved, in principle, by respecting the will of the parties to the corporate contract and the rights "to incorporate" and "to re-incorporate" which they enjoy under EU law. In the author's opinion, an EU private international law of companies developed on the basis of these guidelines not only would achieve a fair balance between the needs of the integration and the Member States' sovereignty, but would also create a framework for a European "market of company law" where a "virtuous" forum and law shopping could be performed in a predictable and regulated way.'*