


Guest Editorial: Muir-Watt on Reshaping Private International Law in a Changing World

April's Guest Editorial is by Professor Horatia Muir-Watt: **Reshaping Private International Law in a Changing World**.

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Reshaping Private International Law in a Changing World

The past few decades have witnessed profound changes in the world order – changes affecting the nature of sovereignty or the significance of territory – which require measuring the methodological impact of political and technological transformations on traditional ways of thinking about allocation of prescriptive

and adjudicatory authority as between states. Myriads of issues arise in this respect within the new global environment, such as the extraterritorial reach of regulatory law, the decline of the private/public divide in the international field, the renewed foundations of adjudicatory jurisdiction (particularly in cyberspace), the implications of individual and collective access to justice in the international sphere, the impact of fundamental rights on choice of law, the ability of parties to cross regulatory frontiers and the subsequent transformation of the relationship between law and market. Indeed, one of the most important issues raised by globalization from a private international law perspective is the extent to which private economic actors are now achieving “lift-off” ((As Robert Wai has so aptly put it, in “Transnational lift-off and Juridical Touchdown: The Regulatory Function of Private International Law in a Global Age”, 40 *Colum. J. Transnat. L* 209 (2002).)) from the sway of territorial legal systems. To some extent, traditional rules on jurisdiction, choice of law and recognition/enforcement of judgments and arbitral awards have favored the undermining of law’s (geographical) empire, which is already threatened by the increasing transparency of national barriers to cross-border trade and investment. Party mobility through choice of law and forum induces a worldwide supply and demand for legal products. When such a market is unregulated, the consequences of such legislative competition may be disastrous.

An excellent illustration of the way in which rules on choice of law and forum, combined with a liberal regime relating to enforcement of foreign judgments, allow private confiscation of the governing law can be found in the circumstances which gave rise to the notorious Lloyd’s litigation. ((Among many: *Bonny v. Society of Lloyd’s* (3 F.3d 156, 7th Circuit, 1993) ; *The Society of Lloyd’s v. Ashenden* (233 F.3d 473, 7th Circuit 2000).)) Here, securities offerings accompanied by inadequate disclosure on the American market managed to slip through the net of the federal Securities Acts. This example shows how “barrier-crossing” - escaping the sway of mandatory provisions by opting out of a legal system, and *de facto* redefining jurisdictional boundaries to suit oneself ((W. Bratton & J. McCahery, “The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second Best World”, 86 *Georgetown L J* 201 (1997).)) - through the mobility conferred by unfettered choice of forum alters the status of *lois de police* or internationally mandatory laws, which become merely “semi-mandatory” ((L. Radicati di Brozolo, “Mondialisation, jurisdiction, arbitrage: vers des règles d’application semi-nécessaires?”, *Rev crit DIP* 2003.1.))

before the chosen foreign forum. Other well-known examples can be found in the field of tort, where the use of *forum non conveniens* to prevent access by the victims of accidents linked to delocalized industrial activities, to justice in the country of the (parent) corporate defendant, seals the downward spiral in which developing countries are trapped when economically dependent upon versatile foreign capital; lowering the cost of security, environmental protection, or social legislation will attract investment, but will maintain any liability incurred within the limits designed by the low standards of the *lex loci delicti* as applied by local courts. ((As the *Nike* case shows, the powerful market leverage of consumer arbitrage in the defendant's home country may contribute to remedy the problem through consumer refusal to buy products manufactured by means of child labour, etc: see *Nike Inc. v. Kasky* 539 US 654 (2003).)) Here, rules of jurisdiction and choice of law contribute to the "global tragedy of the commons", where in the absence of a central regulator or universally accepted standards of conduct, nothing prevents a state from abetting the exportation by its private sector of industrial costs (pollution, economies on social protection, etc) in the direction of the global community.

Insofar that it is felt desirable to ensure the "touch-down" of economic actors in this context, private international methodology may require considerable reshaping, so as to harness it to the new need for strong yet adjusted regulation of the consequences of private mobility and the inter-jurisdictional competition which it inevitably generates. Approaches developed in a world where the prescriptive authority of State was coextensive with territory are clearly no longer adapted to this function; this is particularly true of the methods inspired by the private interest paradigm on which continental Europe doctrine thrived throughout the second half of the twentieth century and is loath even today to abandon. ((On this point, I express courteous disagreement with Pierre Mayer, who has devoted a chapter of his excellent Hague lectures to challenging the relevance of the changes discussed here: "Le phénomène de la coordination des ordres juridiques étatiques en droit privé", RCADI t327 (2007).)) The message of this editorial is to the effect that private international law should adjust to the stakes involved in real world conflicts of laws, which do not, or do no longer, implicate purely private interests playing out on a closed field, ((This is the "unilateralists' complaint": see P. Gothot, "Le renouveau de la tendance unilatéraliste", *Rev crit DIP* 1971.1; D. Boden, *L'ordre public : limite et condition de la tolérance (essai sur le pluralisme juridique)*.) but involve strong state

policies or substantive values perceived as fundamental by the global community; in turn, it is mistaken and indeed harmful to continue to represent the rules designed to respond to these conflicts as being “neutral”, since this leads to underestimate the needs generated by the novel ways in which national laws inter-relate in a global setting and prevents private international law from being fully invested with an appropriate regulatory function. ((There is nothing particularly surprising in the emergence of new needs in this field, insofar as they mirror those which increasingly affect the role and content of private law as a whole: see Cafaggi & Muir Watt, “The making of European Private Law: Regulatory Strategies and Governance”, Sellier, forthcoming 2008.)) Just three examples (among many more) will serve to draw attention to the tectonic upheavals currently occurring and to the pressing need to devote further thought to the reshaping of traditional methods and approaches.

1. Choice of law and economic due process.

Within the European Union, the appearance of a market for law is not of course a mere and perverse side-effect of other policies geared to enhancing party autonomy. Carefully designed regulatory competition in the field of goods and services ((Jukka Snell, *Goods and Services in EC Law, A Study of the relationships between the Freedoms*, OUP 2002.)) has been shown to - deliberately - overturn the very concept of “monopolistic states”, even in the field of public law and services. ((Ch. Kerber, *Interjurisdictional Competition within the European Union*”, 23 *Fordham Int’l L J.* 217 (2000).)) Indeed, inter-jurisdictional mobility of firms, products and services is once again the means by which law is made to appear as offering on a competitive market, designed in turn to stimulate legislative reactivity and creativity. As illustrated in the global context, one of the market failures to be feared in the context of unregulated competition is the exporting of costs or externalities linked to legislative choices of which the consequences may affect other communities. However, in an integrated legal system, these risks are restricted by the existence of a central regulator, armed with tools such as approximation of substantive rules, or, where diversity is deemed to be desirable, constitutional instruments designed to discipline the various States in their mutual dealings. ((In the US, these are the Commerce Clause, Due Process, Full Faith and Credit)) Here, as recent conflicts of laws

implicating both economic freedoms and workers' rights have shown, the Court of justice is invested with an important balancing function which clearly overflows into the political sphere. ((*Viking* aff. C-438/05, *Laval* aff. C-341/05))

This is where uniform choice of law rules come in, as tools of governance designed to fulfill the requirements of economic due process on a Community level. Economic due process, which is now thought to explain the requirements of the Commerce Clause in the US federal Constitution, ((In the field of cyber torts, see J. Goldsmith & A Sykes, "The Internet and the Dormant Commerce Clause", 110 *Yale L J* 785 (2001).)) ensures that a given community does not impose costs on out of state interests which were not represented in its decision-making process. Thus, for instance, the cost of a law providing for lax standards of environmental protection should not be exported towards a neighbouring state with different priorities: in cases of cross-border pollution, environmental damage caused in the the latter state by firms legally using low standards of protection on the other side of the frontier must be internalized by application of the more protective rule. Posting workers employed under lax labor standards to a host state with higher social protection in order to benefit from the competitive advantage of low cost labor requires application of local law for the duration of the posting in order to avoid unhealthy distortions of competition between firms. To a large extent, recent choice of law provisions have integrated this change. ((See article 7 of the new Rome II Regulation for environmental torts and, in the field of employment relationships, the conflict of law provisions of the 1996 Posted Workers Directive.)) Typically, the recitals introducing Rome II attribute virtues to the determination of the applicable law which are far removed from the traditional private interest paradigm. There is still room for further improvement, however. Scrutinizing Rome II through the lenses governmental interest analysis, Symeon Symeonides has shown that in many cases, it would be desirable, as in the field of environmental pollution, to take account of true conduct-regulating conflicts, and to give effect if necessary to the prohibitive rules of the state of the place of conduct if its interest in regulating a given conduct is greater than the that of the state where the harm occurs, when it provides for a laxer standard of care. ((*"Tort Conflicts and Rome II: A View from Across"*, *Festschrift Ehrlich Jayme*, Sellier, Munich, 2004, p. 935.)) For the moment, this result is only possible through article 16. ((Article 17 does not seem intended to be interpreted bilaterally, and the escape clause of article 4-3 does not appear to allow an issue by issue approach.))

2. *The “new unilateralism”*

The requirements of human rights in cross-border cases are also bringing about profound methodological changes whenever the continuity of an enduring personal or family relationship requires the host state to refrain from refusing recognition under its own private international law rules. Thus, the progressive appearance of a “unilateral method of recognition of foreign situations”, implemented both by the European Court of Justice, the European Court of Human Rights, and subsequently by national courts ((See CA Paris, 25th October 2007, not yet published, but a commentary posted by G. Cuniberti is available on this website.)) , ousts traditional bilateral choice of law rules and favors the cross-border validity of what look very like vested rights in fields such as adoption, other parent/child relationships, marriage, same-sex partnerships, etc. Grounds for such change have been discovered in fundamental rights and European citizenship, heralding an adjustment of the philosophical foundations of the conflict of laws to the ideology of recognition and identity which also forms the basis of contemporary European substantive law. ((See for instance, S. Rodota, *Dal soggetto alla persona*, *Editoriale Scientifica*, Rome, 2007))

Although the objective of recognizing existing personal or family relationships in cross-border situations is entirely legitimate, its implementation certainly requires further thought. Indeed, the common thread which seems to run through the case-law is the principle of non-discrimination. This principle appears both as a fundamental value in itself and, in a Community context, as an essential component of European citizenship. The implication of the new recourse to non-discrimination as a foundation for choice of law is that the traditional use of nationality or domicile as connecting factor generates unjustified discrepancies in the field of personal status. This may in itself suggest that non-discrimination as conflict of laws methodology is totally misguided. Among the most notorious illustrations of judicial use of this principle is the European Court of Justice’s judgment in the *Garcia Avello* case. ((ECJ *Garcia Avello*, C-148/02, 2003.)) It was held to be discriminatory for a Belgian court to apply choice of law rules on personal status which lead to the name of a Belgo-Spanish child residing in Belgium being governed by Belgian law, as if he was in the same situation as a child whose parents are both Belgian. The principle of non-discrimination, inherent in the concept of European citizenship, mandates that he benefit from the rules of Spanish law on this point. The Spanish perspective on the

determination of the name of a Spanish child must be recognized in Belgium on the basis of non-discrimination. This reasoning is flawed. The Garcia-Weber child had been born and was still resident in Belgium, which might have provided additional credit to the claim of Belgian law to regulate his family name. By deciding the contrary, and thereby allowing the child to benefit from whichever set of rules he chose to invoke, the Court of justice seems to imply that the sole fact of possessing dual citizenship suffices to differentiate a child from those who possess only the nationality of the country of his or her domicile. Of course, a child with strong personal connections to two different communities may well encounter difficulties in as far as the coherence of his or her personal status is concerned, if each adopts a different stance (whether on name, validity of marriage, adoption, etc). Avoiding limping personal status in this sort of situation is one of the principal policies behind many choice of law rules. But here, the Court's reasoning is distorted because it purported to resolve a difficulty linked to the impact of cross-border mobility on individual status, whereas in fact, there was no such mobility under the facts of the case other than the dual citizenship of the child. It was not unreasonable in the present case that Belgium, which was the country of both citizenship and domicile, sought to regulate the child's name in the same way as that of other purely Belgian children living in Belgium. It would therefore have been far more satisfactory to look towards other principles which, mindful of identity and the protection of persons, have significant implications as far as choice of law is concerned, such as the fundamental right to protection of one's personal and family life under article 8 of the ECHR. Of course, once the proper basis for full faith and credit due to foreign situations is determined, the task for the future will be to define its precise requirements in this respect in practice.

3. Conflicts of public law

Is it still true, that, as is so often asserted, the conflict of laws is limited to the field of private law? It has been apparent for some time that some of the most significant evolutions, for private international law purposes, induced by the new quasi-federal environment in Europe, concern public, administrative or regulatory law. Such law is given extraterritorial effect, through mutual recognition; independent regulatory authorities appear, with a duty to cooperate transnationally; elaborate schemes allocate regulatory authority among the

Member States. In particular, in the field of securities regulation, the 2001 Lamfalussy Report provided considerable impetus for transnational cooperation between regulatory agencies. Thus, borrowing on the Admission Directive, ((Consolidated Directive 2001/34 EC coordinating the conditions for admission of securities to official stock exchange listing.)) which has served as a model for securities regulation as a whole, the Community has established a complete system of decentralised supervision and enforcement of the harmonised regime, supported by cooperation between administrative authorities. ((See Niamh Moloney, *EC Securities regulation Oxford EC Law Library*, 2002, p.100.)) The interesting point is that the administrative duty to cooperate, which justifies negotiation and dialogue when it comes to deciding upon the shared exercise of regulatory authority, may also lead to administrative bodies having to apply foreign regulatory law, which means in turn that conflict of laws principles will need to extend, with certain adjustments, to the field of public law. For an academic discipline which was epistemologically harnessed to the public/private divide - or rather, the public law taboo - this is all something of a landslide. However, it is also remarkable that even before the courts, where traditional approaches tends to linger, there are signs that transnational litigation in regulatory fields is throwing up evidence of shared state interests - so much so that one author has suggested that such litigation, albeit subject to domestic economic law, may bring substantive regulatory benefits to the international community. ((Hannah Buxbaum, *Transnational Regulatory litigation*, 48 *Va J Int'l L* 251 (2006).))

Here again, however, there is room for debate as to the appropriate approach to public or regulatory conflicts. An academic proposal on the regulation of global capital markets through interjurisdictional competition, ((S. Choi & A. Guzman, « Portable reciprocity : Rethinking the International reach of Securities Regulation », 71 *S. Cal. L. Rev.* 903 (1998).)) building on the mutual recognition theme, rejects administrative cooperation as insufficient, time-consuming and overly costly in terms of monitoring compliance. Free choice by issuers and investors as to how, or according to which national rules, they should be regulated (a choice which would then be “mutually” recognised by all states participating in the market according to a system of “portable reciprocity”) would supposedly enhance competition across the board and ensure a wide range of legal products catering for risk-takers and risk averse alike. Although this proposal will no doubt meet some scepticism on this side of the Atlantic, where there is less faith in the

regulatory virtues of party freedom, it is extremely interesting, first, because it emphasises once again the radical change in the relationship (or at least in the perception of this relationship) between law and market in a global environment, where party mobility (whether through free choice or exit from the sway of mandatory rules) is already a reality. Second, because it includes in this reversal the activity of regulatory agencies, which to some extent would be functioning on a delocalised basis. If one links these ideas to equally intriguing recent proposals to delocalise the adjudicatory activity of the courts in order to enhance global efficiency with the cooperative consent of states, ((It has even been suggested that accessing the courts of a chosen jurisdiction can be seen as an “after-sale service” bundled with the choice of the applicable law in the field of contracts or corporate charters, so that such access should also be available extraterritorially in the form of delocalized courts, in the context of a competitive global market for legal services: see H. Hansmann “Extraterritorial Courts for Corporate Law”, *Yale Law School Faculty Scholarship Papers*, 2005, Paper 3.)) the vision of the global world it projects is quite startling. Clearly, private international law needs be ready to meet the challenge of its new regulatory rôle.