CHOICE-OF-LAW CODIFICATION IN MODERN EUROPE: THE COSTS OF MULTI-LEVEL LAW-MAKING

MATHIAS REIMANN†

INTRODUCTION

For U.S.-American scholars (and perhaps even legislators) who consider the codification of conflicts law and are interested in foreign models, it comes almost naturally to look to continental Europe. To be sure, in recent decades there has been a much wider, almost global, trend towards codifying choice-of-law rules.[1] Yet, continental Europe remains the high citadel of codification and that is especially true for conflicts law: in the past 50 years, the region has seen more conflicts codifications than ever before, though some are more comprehensive than others.[2] The result is an ever starker contrast with the United States: on this side of the Atlantic, conflicts codification is still very much the exception, in Europe it has clearly become the rule.

It is tempting, therefore, to regard continental Europe as some kind of conflicts codification paradise—a world where the pertinent rules are comprehensively unified, logically coordinated, and systematically organized. Unfortunately, the reality is much more complicated. There is currently no comprehensive European code on private international law. Instead, there is a growing multitude of particular codifications and, in combination, these codifications have turned European conflicts law as a whole into something of a mess. This is so, mainly for two reasons. First, codification has occurred on several distinct levels—national, international, and supra-national—and the coordination between these levels is often wanting. Second, especially at the level of the European Union, codification has proceeded in a piecemeal fashion, and the pieces do not always fit together very well.

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† Hessel E. Yntema Professor of Law, University of Michigan School of Law.

1. For a comprehensive study, *see* SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD, (Oxford U. Press 2014).

2. The term "codification" can have different meanings. This essay uses it in the sense most common at least in continental Europe: a legislative act that covers a field of law in a comprehensive, systematically organized, and largely self-contained fashion. As we will see, however, European conflicts codifications differ significantly with regard to the size of the fields they cover. Some encompass all of conflicts law, others cover only choice-of-law or only jurisdiction and judgments recognition; some apply to (virtually) all of substantive private law; others, address only particular areas, such as contractual obligations, divorce, or succession.

Thus, European conflicts law as a whole has become frightfully complex as well as partially incoherent.[3]

This article has three main parts. The first part presents a short history of European conflicts codification and chronicles the emergence of the three levels on which it has occurred. The second part shows how the sources on the various levels interact and explains the complexities and problems of multi-level codification. The third part considers how the main problems—excessive complexity and occasional inconsistency—could be remedied but concludes that, at least in the near future, prospects for effective solutions are decidedly limited. The conclusion proffers some possible lessons for conflicts lawyers in the United States.

Three caveats are in order. First, the analysis is limited to choice-of-law as the core of the field; still, much of what follows is true, *mutatis mutandis*, for the procedural aspects of conflicts law (i.e., jurisdiction, judgments recognition, and judicial assistance) as well.[4] Second, the analysis focuses mainly on continental Europe as the cradle of codification; of course, the common law jurisdictions (the United Kingdom and Ireland) and the Scandinavian countries (except Norway) must also be considered when it comes to codification by the European Union, though, as we shall see, they have sometimes defected from the system. Third, even though the presentation and analysis will occasionally seem quite complicated, the picture presented here is heavily simplified for the sake of clarity and brevity; experts in European conflicts law may complain about the omission of many finer points, but outside observers should be thankful.

I. A SHORT HISTORY OF EUROPEAN CONFLICTS LAW: THE EMERGENCE OF THE MULTI-LEVEL SYSTEM

In order to understand the current state of conflicts codification in Europe, an American observer must, first of all, grasp its multi-level nature. In the United States, we take it for granted that choice-of-law

3. The European literature about European private international law is abundant, though most of it addresses particular aspects rather than the general picture. Recently, two German scholars, have published a thorough and thoughtful assessment of the situation as a whole. *See* Giesela Rühl & Jan von Hein, *Toward a European Code of Private International Law?*, 79 Rabels Zeitschrift fur ausländisches und internationales Privatrecht 701 (2015). Their study differs from the present essay in several regards. It is written from a European perspective and primarily for a European audience; it covers not only choice-of-law but procedural aspects, as well; its main goal is to explore options for reform; and it goes into much greater detail than most American readers would want. Still, for readers with a deeper interest in the process and problems of European conflicts codification, the article provides a plethora of valuable information, as well as much food for thought.

4. For a quick overview, *see* Rühl & von Hein, *supra* note 3, at 708-09.

is left almost entirely to the states. By contrast, in Europe, the subject has been codified not only by (nation) states but also in international conventions and, more recently, in the form of supra-national (i.e., European Union) law.

A. National Law: From Civil Codes to Freestanding Statutes

On a national level, codifying choice-of-law rules has a 200-year tradition in continental Europe. It has occurred in two major forms: originally within traditional civil codes and, more recently and increasingly, in freestanding conflicts statutes. Some countries have merged these approaches in one way or another.

Beginning with the French Code civil of 1804,[5] many of the nineteenth and earlier twentieth-century classical civil codes contained conflicts provisions in their introductory parts. At first, these rules were fairly rudimentary as in the Code civil, but when private international law as a discipline came into its own in the late nineteenth and early twentieth-centuries, the rules grew in coverage and detail.[6] Germany presented a somewhat special case because it codified its choice-of-law rules not directly in the Civil Code[7] (Bürgerliches Gesetzbuch, BGB) of 1900, but in an Introductory Act (Einführungsgesetz) to the Civil Code.[8] This semi-separate form of codification foreshadowed later developments.

Starting in the last third of the twentieth century, an increasing number of continental European countries undertook conflicts codification in separate statutes. These statutes were sometimes limited to choice-of-law, as in Poland (1965)[9] and Austria (1978);[10] but more often they also included jurisdiction, judgments, and other matters, as in Switzerland (1987)[11] and Italy (1995).[12] Today, more than a dozen continental European nations have freestanding conflicts codifications of one sort or another.[13] Yet, some countries undertaking modern and comprehensive choice-of-law codification incorporated it as a special

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5. Code civil [C. civ.] art. 3 (Fr. 1804).

6. *See* Code civil [C. civ.] [Civil Code] art. 3 (Fr. 1804); Allgemeines Bürgerliches Gesetzbuch [ABGB] [Civil Code] § 4 (Austria 1811); Art. I:2 para. 5 BW (Neth. 1838); Codice civile art. 17-31 (It. 1865); Codigo civl [Civil Code] tit. IV (Port. 1867).

7. Bürgerliches Gesetzbuch [BGB] [Civil Code] (Ger. 1900).

8. Reichsgestzblatt, *Einführungsgesetz zum Bürgerlichen Gesetzbuch* [*Introductory Act to the Civil Code*], 604, art. 3-38 (Ger. Aug. 18 1896).

9. 2011 Dziennik Ustaw [Dz. U] [Journal of Laws] no. 80, item 432 (replacing 1965 Dziennik Ustaw [Dz. U] [Journal of Laws] no. 46, item 290).

10. Legge 31 maggio 1995, n. 218, G.U. June 3, 1995, n. 128 (It.) (Law No. 218 of 31 May 1995 on the Reform of the Italian System of Private International Law).

11. Schweizerisches Zivil Gesetzbuch [ZGB], Code Civil [CC], Codice Civile [CC] [Civil Code] Dec. 18, 1987, SR 291, art.1-32 (Switz.).

12. L 31 maggio 1995, n. 218, G.U. June 3, 1995, n. 128 (It.).

13. *See* Symeonides, *supra* note 1, at 23-25 (providing an overview).

chapter into their civil codes, such as in the Netherlands[14] and Russia.[15]

If one takes these two forms together (parts of civil codes and separate statutes), by the end of the twentieth century, the national law of virtually all continental European countries contained codified choice-of-law provisions. They range from traditional (usually unilateral) and rudimentary rules to modern (usually multilateral) and comprehensive regimes. Today, it is fair to say that most continental European countries have used codification to put their choice-of-law rules in order.[16]

B. International Law: Conventions from The Hague to Rome

Towards the end of the nineteenth century, European conflicts scholars and lawmakers realized the problem created by codifying choice-of-law rules on the national level: the respective legislatures often enacted significantly different rules. As a result, in different jurisdictions the same case might be decided under different substantive laws, leading to different outcomes. In order to foster greater "decisional harmony," continental European countries began to strive for international unification of conflicts rules.

In 1893, they founded the Hague Conference on Private International Law, an intergovernmental body staffed by experts from the member states. Its main task has been to draft international conflicts conventions on particular topics. Their ratification by the member states would then lead these states to adopt the same rules, thus, unifying areas of private international law. Since its founding, the Hague Conference, whose membership eventually expanded far beyond Europe,[17] has adopted almost fifty conflicts conventions.[18] Many, though not all, contain choice-of-law rules in areas such as agency, sale of

14. Art. 10:1 - 10:17 BW (Neth.).

15. Grazhdanskii Kodeks Rossiiskoi Federatsii [GK RF][Civil Code] art. 1186-1224 (Russ.).

16. Listed below are the dates on which each country codified their choice-of-law provisions: Poland (1965, 2011), Portugal (1967, 2011), Spain (1974), German Democratic Republic (1957), Austria (1979), Hungary (1979), Germany (1986, 1999), Switzerland (1987), Finland (1988), Romania (1992), Latvia (1992), United Kingdom (1995), Italy (1995), Liechtenstein (1996), Slovenia (1999), Lithuania (2000), the Netherlands (2001, 2011), Russia (2002), Belgium (2004), Bulgaria (2005), Ukraine (2005), and the Czech Republic (2012). In 1997, a (bi-lingual) collection of the then existing European conflicts statutes was published, totaling over 400 pages. *See* Wolfgang Riering, Textausgabe in Originalsprachen mit deutschen Übersetzungen, IPR-Gesetze in Europa: [IPR Laws in Europe: Text output in original languages in German translations] (C.H. Beck 1997).

17. The United States became a member in 1964. The Hague Conference currently has eighty members from all over the world.

18. Many of the older, particularly pre-World War II, conventions have been superseded by newer ones. Currently, the Hague Conference's website lists about 40 conven-

goods, maintenance obligations, matrimonial property, and product liability. To be sure, the success of these unification efforts has remained limited; while some conventions were ratified by a large number of states, others have found few followers.

Towards the end of the twentieth century, the nine member states of the European Economic Community ("EEC"), the predecessor of the EU, decided to pursue more complete unification with regard to choice-of-law in contracts as an area of particular practical importance. In 1980, the EEC member states concluded the Rome Convention on the Law Applicable to Contractual Obligations.[19] Entering into force for all EEC member states in 1991, the Rome Convention provided a uniform and fairly comprehensive regime in the form of a regional treaty. This regime governed choice-of-law in contracts cases in the EEC, later the European Community ("EC"), and finally the EU for almost twenty years.[20]

Note that at this point, at the end of the twentieth century, the composition of continental European conflicts law had already become somewhat complex. For the most part, it consisted of national and largely codified rules of varying age, level of detail, and content. In some areas, however, it was also based on (uniform) international rules (i.e., conventions). The respective mix depended on the country and the subject matter, in particular on which conventions (if any) about which topics the forum state had adopted.[21] Still, as Europe entered the twenty-first century, even greater complexity was just around the corner.

C. Supranational Law: The European Union Gets Involved

In the new millennium, the European Union entered the field of conflicts law. In 1997 in the Treaty of Amsterdam, the EU acquired for the first time broad legislative competence in the area of private international law.[22] The EU has since made extensive use of its new

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tions as still active. *See* HCCH, *Conventions, Protocols, and Principles*, www.hcch.net/index_en.php?act=conventions.tex$cit=62 (last visited November 22, 2015).

19. 1980 O.J. (l 266) 1.

20. In 2009, it was superseded by an EU Regulation. *See infra* note 25 and accompanying text.

21. In some countries, it helped that the international rules had been incorporated into the national legislation so that lawyers could work with just one set of provisions. *See, e.g.*, Einführungsgesetzes zum Bürgerlichen Gesetzbuch [Introductory Act to the Civil Code], Sept. 21, 1994, BGBl. I at 719 (Ger.) [hereinafter Introductory Act to the Civil Code (Ger.)] (referencing the Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions of 1961).

22. The Treaty of Amsterdam (amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain related Acts, Oct. 2, 1997, 1997 O.J. (C340)1 (1999), added Articles 61(c) and 65(b), empowering the EU to "harmonize the rules applicable in the member states concerning the conflict of laws and of

powers, both with regard to the procedural aspects (jurisdiction and judgments, judicial assistance, etc.) and choice-of-law.[23] In the latter context, the EU has, so far, enacted six regulations which are directly applicable in the member states. Three of them deal with choice-of-law only; they contain the rules determining the law applicable to:

1) Contractual obligations (this Regulation is based on, and superseded by, the Rome Convention and is known as "Rome I");[24]
2) Non-contractual obligations, mainly torts ("Rome II");[25]
3) Divorce and legal separation ("Rome III").[26]

In addition, three regulations address both choice-of-law and procedural matters; they govern, inter alia, the law applicable to:

1) Insolvency proceedings;[27]
2) Maintenance obligations;[28]
3) Succession (inheritance).[29]

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jurisdiction[.]"). This power was subject to the limitation that such harmonization is "necessary for proper functioning of the internal market." *Id.* at Art. 65 (introductory paragraph). Continuing the insane practice of renumbering treaty articles in subsequent documents, the Treaty of Lisbon now lists these provisions (with slight modifications) as Article 81, sections 2 and 3(c). Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community art. 81, § 2 and 3, Dec. 13, 2007, 2007 O.J. (C306)1. In addition, Article 81 section 3 of the Lisbon Treaty now empowers the EU Council to take "measures concerning family law with cross-border implication . . . in accordance with special legislative procedure." The Treaty thus bifurcates legislative competence in the conflicts field; this has far-reaching consequences especially for the project of a comprehensive EU conflicts code. *See infra* note 50 and accompanying text.

23. *See generally* Michael Bogdan, *Concise Introduction to EU Private International Law* (2d ed. 2012).

24. Commission Regulation 593/2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6 [hereinafter Rome I].

25. Commission Regulation 860/2007 on the Law Applicable to Non-contractual Obligations (Rome II), 2007 O.J (L 199) 40 [hereinafter Rome II].

26. Council Regulation 1259/2010, Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation, 2010 O.J. (L 343) 10 [hereinafter Rome III].

27. Council Regulation 1346/2000 on Insolvency Proceedings, 2000 O.J. (L 160) 1. This regulation is soon to be superseded by a "recast" version. *See* 2000 O.J. (L 141) 19.

28. Council Regulation 4/2009 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations, 2008 O.J. (L 7) 1. This regulation is applicable via Regulation 1107/2009, art. 15, 2009 O.J (L 3069) 1, (EC).

29. Commission Regulation 650/2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions, Acceptance and Enforcement of Authentic Instruments in Matters of Succession, and the Creation of a European Certificate of Succession, 2012 O.J. (L 201) 107.

Further Regulations on marital property regimes and on the property consequences of registered partnerships have been proposed but not yet enacted.[30]

In short, there are now EU choice-of-law rules on contracts, torts (as well as unjust enrichment, negotiorum gestio, and culpa in contrahendo), divorce (and legal separation), insolvency, maintenance, and succession.[31]

Thus, a third layer of choice-of-law rules has been added to the mix; they are now codified on the national, international, and supranational levels. As a result, European conflicts law currently consists of a combination of national codes or special statues, Hague (and occasionally other) Conventions,[32] and EU regulations.

II. INTERACTION BETWEEN THE SOURCES: THE COMPLEXITIES AND COSTS OF MULTI-LEVEL CODIFICATION

Continental European jurists like codified rules. They expect codification to foster qualities they cherish in law: certainty, uniformity, order, and clarity. Can conflicts codification in Europe fulfill these expectations despite its multi-level make-up and its cacophony of sources? The answer depends on whether one looks to individual elements or to the system as a whole.

On the one hand, choice-of-law codification has indeed enhanced certainty, uniformity, and order *within individual fields* (i.e., within certain jurisdictions or subject matter areas). On a national level, many modern codifications provide comprehensive and uniform systems of carefully drafted and workable rules. In so far as Hague conventions have been widely ratified and implemented, they have

30. Commission Proposal for a Council Regulation on Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions in Matters of Matrimonial Property Regimes, COM (2011) 126 final (Mar. 16, 2011); Commission Proposal for a Council Regulation on Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions Regarding the Property Consequences of Registered Partnerships, COM (2011) 127 final (Mar. 16, 2011). The EU Commission has also begun to consider the drafting of choice-of-law rules applicable to companies (corporations). *See* Rühl & von Hein, *supra* note 3, at 725 (providing further references).

31. Specific choice-of-law rules are also scattered throughout various other sources, such as EU directives. *See, e.g.*, European Union Directive 2005/25, 2005 O.J. (L 142) 12 (EC); *see also* Rühl & von Hein, *supra* note 3, at n. 46 (discussing case law created by the Court of Justice of the European Union and derived directly from the EU treaties. This case law governs some areas not covered by any existing regulation; the most important such area is the status of transnational companies, especially when they are incorporated in one member state and operating in another).

32. *See, e.g.*, Cape Town Convention on International Interests in Mobile Equipment, art. 5, § 3, Nov. 16, 2001, S. TREATY DOC. NO. 108-10 (2003), 2307 U.N.T.S. 285. This convention has been in force since 2006 and contains some choice of law provisions, such as Article 5, section 3 cited above.

increased international uniformity and improved decisional harmony, albeit only in their specific areas and only among the ratifying states. Where an EU regulation applies, the member states now have a—by and large[33]—common, uniform, and well-organized set of choice-of-law rules for contracts, torts, and a few other areas. As a result, where an issue falls squarely and exclusively under any of these regimes, the respective codification has decidedly salutary effects: it constitutes a reliable textual basis, which contains many clear answers and provides a useful toolkit even in borderline cases.

On the other hand, the *overall system* has been rendered highly complex and in part incoherent. In Jürgen Basedow's words, European codifiers have "planted a multitude of trees which, however, do not add up to a forest."[34] In particular, the codified European choice-of-law universe is plagued by three problems. First, the coexistence of competing choice-of-law regimes on multiple levels requires constant maneuvering among them. Second, in many cases, codifications from several levels have to be applied side-by-side, which can be very difficult, especially if they are not sufficiently coordinated. Third, even the sources on the same level are not always fully synchronized, which can cause uncertainty and confusion.

A. The Problem of Multiple Levels: Conflicts Rules for Conflicts Rules

Choice-of-law rules about the same issue often exist on multiple (perhaps all three) levels. How does one know which set of provisions applies in a given case? In order to answer that question, we need meta-conflict rules for choosing between EU regulations and national codifications, EU regulations and international conventions, and international conventions and national codifications.

As far as the choice between EU regulations and national codifications is concerned, the basic rule is simple: because EU law takes precedence over national law,[35] EU regulations trump domestic conflicts legislation. Yet, the devil is, as usual, in the details: EU directives, of course, prevail only *if and insofar as* they apply. The problem is that sometimes they do, sometimes they don't. To begin with, EU regulations do not apply everywhere in Europe. Obviously, EU regulations have no force in non-EU countries, such as Norway and Switzerland.

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33. *But see infra* Section I, Subsection A.

34. Jürgen Basedow, *Kodifizierung des Europäischen Privatrechts?*, [Codification of European Private Law], 75 Rabels Zeitschrift 671 (2011) (Ger.).

35. *See* Case 6/64, Costa v. ENEL, 1964 E.C.R. 585 (showing that the supremacy doctrine is a creation of the European Court of Justice). It is generally accepted today even though there is, oddly enough, still no treaty clause requiring it. There is, however, a Declaration concerning primacy of December 13, 2007 (Nr. 17).

Less obviously, they do not even apply in all EU member states. There are several outliers. For reasons too complicated to explain here, none of the regulations mentioned above apply in Denmark, only the Rome I and Rome II Regulations apply in the United Kingdom, and the Regulation on Divorce and Legal Separation applies in only 16 (out of currently 28) member states. Furthermore, even in countries where they do apply, these regulations do not constitute a comprehensive choice-of-law regime. They leave a host of important areas entirely uncovered, such as agency, corporate law, the conclusion and effects of marriage, and trusts. Even in areas they do cover, their scope is restricted in various ways. For example, the Rome I and Rome II Regulations cover, respectively, contractual and non-contractual obligations, but according to Article 1 of Rome I and Article 1 of Rome II, they do not apply to obligations arising out of family relationships, nor to those emanating from negotiable instruments. If, at the end of the day, EU Regulations do not apply for one reason or another, national law continues to govern.

In principle, EU law would also trump international conventions where they have become part of national law (by direct effect or implementation). Yet, since that could put EU member states in breach of their international obligations, EU conflicts regulations expressly preserve the applicability of conventions existing at the time when the respective regulation entered into force. Unfortunately, even that solution is not as simple as it seems at first. The preservation of conventions is limited to the relationship between EU member states and non-member states.[36] In other words, among member states regulations win over conventions, but between member and non-member states conventions win over regulations.

Finally, the relationship between international conventions and national codifications depends on the domestic law of each country. In particular, it depends on whether treaties are considered self-executing (directly applicable in the domestic legal order) and, if so, how they rank compared to statutory law. Since European countries differ widely in both regards, there is no general rule. Fortunately, conventions have often been implemented in national legislation or even incorporated into national codifications; thereby avoiding potential conflict.

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36. *See, e.g.*, Rome I, *supra* note 25, at art. 25; Rome II, *supra* note 26, at art. 28; Rome III, *supra* note 27, at art. 19; Commission Regulation 650/2012, *supra* note 30, at art. 75; *see also* Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter Hague Protocol]. Article 15 of the Council Regulation 4/2009, *supra* note 29, avoids any conflict by simply incorporating the respective convention, the Hague Protocol, by reference.

At the end of the day, figuring out which set of codified provisions governs in a given situation requires not only a thorough understanding of these meta-conflicts rules, but also considerable diligence and effort; for the non-specialist, it is very easy to go completely wrong. Even if all goes according to plan, choice-of-law uniformity among European countries is compromised by the various provisions exempting certain countries or subjects or issues from various codifications under varying circumstances.

B. The Problem of Combined Application of Levels: Inherent Difficulty and the Risk of Vertical Inconsistency

Inevitably, in many situations, several sources from the various levels explained above will apply side by side. For example, if a EU Regulation applies in principle but excludes one of the issues in a case, the excluded issue is then governed by national law or an international convention applicable in the forum state. More specifically, a German court, hearing a divorce proceeding between spouses from different countries and determining their parental responsibilities, will have to apply the Rome III Regulation to certain aspects of the divorce. However, because Article 1 section 2(f) of the Rome III Regulation excludes parental responsibility, the judge must resort to domestic legislation while keeping in mind that Germany has ratified a Hague Convention containing choice-of-law rules on parental responsibility.[37] Fortunately, in this case, there is no conflict between the international and the domestic source: both provide that the law governing parental responsibility is that of the child's habitual residence.[38]

Unfortunately, however, the sources on the various levels are not always in perfect harmony. Instead, there are what may be called vertical inconsistencies. Consider the problem of renvoi. The Rome I, II, and III Regulations (supra-national level) categorically exclude it,[39] but most domestic codifications (national level) allow it.[40] In addition,

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37. *See* Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Oct. 19, 1996, 35 I.L.M. 1391, 2003 O.J (L 48) (prescribing the choice-of-law provisions dealing with parental rights).

38. *Id.* at Art. 16; EGBG Art. 21.

39. *See* Rome I, *supra* note 25, at art. 20; Rome II, *supra* note 26, at art. 24; Rome III, *supra* note 27, at art. 11.

40. *See, e.g.*, Introductory Act to the Civil Code (Ger.), *supra* note 22, at 4; Schweizerisches Zivil Gesetzbuch [ZGB], Code Civil [CC], Codice Civile [CC] [Civil Code] Dec. 18, 1987, SR 291, art. 14 (Switz.). Even on the national level, however, the picture is not uniform because sometimes, renvoi is excluded. *See e.g.*, Burgerlijk Wetbek [BW], Code Civil [C.Civ.] art. 16 (Belg.).

Hague conventions (international level) vary.[41] As a result, when an issue in a case is simultaneously governed by sources from different levels, renvoi will apply with regard to some choice-of-law rules but not others; even where it applies, it may be subject to varying modifications and restrictions.[42] Needless to say, determining the substantive rules applicable to the various elements of the case is tricky business. It is also far from clear that once properly determined these rules will ultimately all fit together.[43]

C. The Problem of Insufficient Harmony on Each Level: Horizontal Inconsistencies

To make matters worse, the codifications on each level are not completely in harmony with each other either. On the national level, this is to be expected as well as normal. Domestic legislatures may have different preferences and may thus codify different choice-of-law rules. Although, there has been considerable convergence among the various national conflicts codifications, differences remain, albeit rarely of a fundamental sort. Note that this is not a problem *within* any single jurisdiction because local courts will simply look to their own domestic codification, not to that of another state. The differences can, however, lead to potentially different outcomes in different jurisdictions; this raises the well-known fairness concerns, and it can invite forum-shopping.

On the international level, one might assume that the various Hague Conventions are consistent with one another since they are all products of the same institution. Yet, they sometimes reflect different approaches and contain different rules on the same issue. Again, look at their respective provisions about renvoi. The reason for multiple divergences is often that the conventions were drafted at different times (often decades apart) and, thus, at different stages of development and by different teams and generations of experts. At least with

41. Some conventions expressly allow renvoi. *See, e.g.*, Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons, art. 4, 28 I.L.M. 146, 150 (1989) [hereinafter Hague Convention]. Many others are silent on the matter.

42. *See, e.g.*, Rome III, *supra* note 27, at art. 11 (specifically mandating the exclusion of renovi); Introductory Act to the Civil Code (Ger.), *supra* note 22, at art. 4, § 1 (permitting renovi); Hague Convention, *supra* note 41, at art. 21 (providing qualified permission for renvoi).

43. In one particular instance, the EU managed to avoid a conflict between different levels and sources of law: the choice-of-law provision of the Rome III Regulation, dealing with maintenance obligations, simply incorporated the Hague Protocol on the law applicable to maintenance obligations of November 23, 2007. *See* Rome III, *supra* note 27, at art. 15; *see also* Hague Protocol on the Law Applicable to Maintenance Obligations, 2009 O.J. (L 331) 19 [hereinafter Hague 2007 Protocol on Maintenance Obligations].

regard to conventions, states have the option to avoid such inconsistencies by refusing to ratify some or any of these instruments.

The most disconcerting situation exists on the supra-national level. Since all EU regulations were created by the same government, drafted by largely the same bureaucracy, and put into force within a relatively short time period (less than 15 years so far), one should expect them to be fully synchronized. However, they are not. For example, one regulation could address a general issue that another leaves open; while other regulations are redundant or are simply incoherent.[44] Such lack of coordination is especially troublesome because uniformity within the EU is the very point of enacting such regulations.[45] These problems are very difficult for the member states to escape because regulations are imposed top-down as directly applicable supreme law.

III. COMPLEXITY AND INCOHERENCE: POSSIBLE REMEDIES AND THEIR PROSPECTS

As a result of codifying rules on three competing levels, often taking a piecemeal approach, and proceeding with insufficient attention to overall consistency, today European choice-of-law suffers from systemic complexity and disconcerting incoherence. The problem is not merely theoretical but eminently practical. Solving choice-of-law problems correctly often requires a degree of knowledge, an access to resources, and an amount of time that judges sitting on general (civil) courts, the majority of attorneys in private practice, and most corporate counsel do not have and cannot afford. A system that is indispensible to resolving transnational disputes, but mastered by at best a few hundred specialists in all of Europe, is in need of fixing. One can envisage a variety of remedies, but at least in the short- to medium-term, prospects for most of them are dubious. For present purposes, a brief outline of the major options, promises and problems must suffice.[46]

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44. For purposes of this essay, it is not necessary to go into the nitty-gritty. For a presentation and analysis of the details, *see* Rühl & von Hein, *supra* note 3, at 713-15 (explaining gaps); *id* at 717-18 (displaying redundancies); *id.* at 718-20 (demonstrating the incoherencies). Even concepts consistently used in the various regulations do not necessarily have the same meaning everywhere: while "habitual residence" is used in virtually every EU conflicts regulation, the European Court of Justice has pointed out in two landmark decisions that its authoritative interpretation of the concept must not be used in contexts other than those before the Court. *See* Case C-523/07, A, 2009 E.C.R. I-2805; Reference for a preliminary ruling from the Korkein hallinto-oikeus, 2009 E.C.R. 225 (Fin); Mercredi v. Chaffe Case C-497/10, 2010 E.C.R. I-14309.

45. We leave aside here the inconsistencies between the Regulations on choice-of-law and regulations on procedural matters. *See* Rühl & von Hein, *supra* note 3, at 704.

46. For a much more in-depth discussion, *see id.* at 721-38.

A. Going all the Way: A European Choice-of-Law Code?

The most effective solution would be a comprehensive codification of choice-of-law rules on the EU level–a European Code of Private International Law. Such a code would not only consolidate and synchronize the existing regulations, but would also cover the areas currently still left to national law and, where applicable, international conventions. It would then provide uniform and directly applicable choice-of-law rules for all member states in all important areas. This would greatly decrease the overall complexity of the system, improve its coherence, and thus render it more workable for practitioners. This option has been extensively discussed among academics in the last few years,[47] and the European parliament has expressed its hope that such a code will eventually become reality.[48]

Yet, at least under current conditions, such a comprehensive European codification is not a realistic option. The main problem is not even technical. To be sure, drafting a European conflicts code would be a challenging undertaking, even if it were limited to choice-of-law, but codes in several European countries show that it can be done. Of course, the job may well be more difficult for the whole EU, but the existing regulations prove that choice-of-law rules can be drafted on the supranational level as well. A bigger problem is that, currently, the EU lacks comprehensive lawmaking power in private international law. For reasons too complicated to explain here, the creation of a full-fledged European choice-of-law code would have to proceed under different treaty provisions entailing different legislative procedures, depending on the subject matter involved.[49] To make matters worse, not all EU member states have agreed to participate in all procedures and projects.[50] To overcome these hurdles requires amending EU treaty law, which is politically out of the question at the moment. This is particularly true since several states on Europe's geographic periphery, especially the common law jurisdictions and also the Scan-

47. *See id.* at 704-05 (providing an overview with ample further references to the literature); *see also* M. Fallon, P. Lagarde, S. Poillot-Peruzzetto, *Quelle architecture pour un code européen de droit international privé?* [What architecture for code of European private international law] (2011).

48. European Parliament Resolution of 7 Sept. 2010 on the Implementation and Review of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2010 O.J. (C 308) E/36; *see also* Rühl & von Hein, *supra* note 3, n. 6.

49. *Compare* Consolidated Version of the Treaty on the Functioning of the European Union art. 81, §§ 1-2, 2008 O.J. (C 115) 47 (providing choice-of-law directions for general issues), *with id.* at art. 81, § 3 (establishing choice-of-law rules for family law matters).

50. The reasons are well-nigh incomprehensible to non EU-specialists and, in any event, far too complicated to explain here. *See* Rühl & von Hein, *supra* note 3, at 733-35.

dinavian countries, generally lack enthusiasm for comprehensive codification to begin with.

B. Closing Gaps: Further Piecemeal EU Legislation

A less ambitious—but also less effective—option is to continue with piecemeal legislation on the European level and, thus, at least to close the big gaps on the supra-national level. This could include both broadening the scope of existing regulations (i.e. getting rid of the many exclusions of subjects) and enacting new regulations covering the remaining terrain. It is indeed likely that, as time goes on, there will be further piecemeal EU choice-of-law codification.[51] Within the areas addressed, this will create more uniformity.

Such a piecemeal course is easier to pursue because it is not necessarily blocked either by the EU's split legislative competence or by the non-participation of certain member states. Yet, continuing the piecemeal approach will only at best alleviate, but not nearly eliminate, the problems inherent in a regime with multiple sources on multiple levels.

C. Overcoming Incoherence: A "Rome 0" Regulation?

An even narrower option is to tackle at least the current problems on the supra-national level, for example among the existing and planned EU regulations. In pursuit of that goal, scholars have proposed addressing all questions common to the various regulations, such as reference to multi-unit systems, renvoi, mandatory rules, and public policy—in single and separate codification. Such a "Rome 0" Regulation would codify the general principles applicable to all other regulations in a uniform fashion and, thus, eliminate redundancies, fill in gaps, and avoid incoherence.[52]

Again, however, a project of such general scope raises serious issues of legislative competence and member-state participation.[53] In addition, many general questions have traditionally been so hotly contested that creating a pan-European consensus would be difficult, to

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51. *See supra* note 31 and accompanying text.

52. Stefan Leible & Hannes Unberath, Brauchen wir eine Rom 0-Verordnung?: Überlegungen zu einem Allgemeinen Teil des europäischen IPR [Do we need a Rome 0 Regulation?: Reflections on a general part of the European IPR] (Stefan Leible & Hannes Unberath eds. 2013) (Ger.); *see also* Felix M. Wilke, Brauchen wir eine Rom 0-Verordnung?: eine Skizze anlässlich einer Bayreuther Tagung [Do we need a Rome 0 Regulation?: A sketch on the occasion of a conference on Bayreuth], 9 Zeitschrift für Gemeinschafsprivatrecht [GPR] [J. of Communities Priv. L.] 334 (2012) (Ger.); Stefan Leible & Michael Mueller, *A general part of European Private International Law? The idea of a "Rome 0 Regulation"*, 14 Y.B. of Priv. Int'l L. 137 (2012-2013) (providing a discussion in English).

53. *See* Symeonides, *supra* note 1.

put it mildly. This is true, for example, with regard to the sense or non-sense of renvoi. In any event, at least so far, the idea of such a "Rome 0" Regulation has remained an academic pursuit.[54] Whether it will ever find favor with the EU's legislative apparatus is far from clear.

In summary, there is no quick and easy way out of the current situation. Solving the problems of complexity and incoherence will probably require incremental steps, a combination of legislative measures and institutional reforms, and endurance.[55] In the meantime, European lawyers will have to contend with the multitude of competing conflicts codifications as best they can.

IV. LESSONS FOR THE UNITED STATES?

In conclusion, let me proffer three lessons for an U.S.-American audience. The first is addressed to the advocates and drafters of codifications; the second to legal practitioners; the third to both.

The lesson for U.S.-American advocates and drafters of codifications—including those engaged in the project of a Restatement (Third) of Conflicts—is straightforward: if you are looking for guidance from the European codification experience, look at the parts of the regime but stay clear of the whole. The individual conflicts codifications produced in Europe over the last half-century proffer valuable models not only on the national level, but also on the international and supranational levels. Most domestic legislation, Hague (and some other) conventions, and also most EU regulations are competently drafted. They provide rules that are easily ascertainable, reasonably clear, and, at least by and large, practically workable. U.S.-American conflicts lawyers drafting (quasi-) legislative provisions would be foolish not to consult them. Fortunately, there is little need for U.S.-American jurists to agonize over how these pieces fit, or do not fit, together.

The lesson for U.S.-American practitioners is even simpler: if you must handle disputes involving European conflicts law, be aware that you are entering extremely treacherous terrain. Never assume that the codification you look at applies simply because it was created by

54. It is no accident that the majority of proponents has consisted of German scholars whose legal training makes the concept of a "general part" seem almost natural. Such a "general part" is one of the characteristic features of the German civil code. A French contribution is the preliminary draft by Paul Lagarde, Embryon de Règlement portant Code européen de droit international privé: Titre I. - Partie générale [Embryonic Regulation on European Private International Law Code: Title I. - General Part], 75 Rabels Zeitschrift Fuer Ausländisches und Internationales Privatrecht [RabelsZ] [Rabel J. of Comp. & Priv. Int'l L.] 673 (2010) (Ger.). It covers not only basic choice-of-law principles but also jurisdiction and judgments recognition. *Id.*

55. A detailed step-by-step program is suggested by Rühl & von Hein, *supra* note 3, at 738-50.

the forum state or, for that matter, by the EU. In fact, never even assume that the average European lawyer can provide reliable advice on whether it applies—or not. Get help from a true expert in the field.

The lesson for all U.S.-American lawyers dealing with choice-of-law problems is actually cheerful: appreciate the relative simplicity of your domestic conflicts system! It is true, of course, that the U.S.-American system is messy with every state having its own regime; with few codified rules to provide firm guidance; and even the Second Restatement is often interpreted to mean very different things in different courts.[56] Yet, at least you do not have to struggle with the complexities and incoherencies of a multi-level system. In the United States, once you know the forum (i.e., once jurisdiction is settled), you deal with one set of choice-of-law rules. In Europe, that simplicity has now been lost.

56. Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232 (1997).