CHOICE OF LAW IN INTEGRATED AND INTERCONNECTED MARKETS: A Matter of Political Economy

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1. A case of lost innocence: Shifts in the public/private divide. Describing the conflict of laws as an issue of political economy can be seen as a response to the tectonic shifts currently wrought by globalisation in respect of the public/private law divide, which shapes traditional thinking in this field. A new generation of ‘collisions of economic regulation’ linked to unprecedented transnational mobility of firms, goods, services and capital, challenges mainstream Continental European conceptions of choice of law as a tool geared to the resolution of purely private disputes. Unchallenged throughout the major part of the


2 The phrase was coined by Herbert Kronke in his excellent account of ‘Capital Markets and the Conflict of Laws’, Rec Cours Acad La Haye, t 286, 249-385, 378.

3 Defined, according to Black’s Law Dictionary, 7th edn, 1999, as ‘a social science dealing with the economic problems of government and the relationship between political policies and economic processes’.

4 Outside the Roman tradition, such a divide has of course been more easily dismantled. Among an abundant literature, see Duncan Kennedy, ‘The Stages of Decline of the Public/Private Distinction’, 130 U Pa L Rev 1423 (1982); Mary Anne Glendon, ‘The Sources of Law in a Changing Legal order’, 17 Creighton L Rev 663 (1983).

5 The public/private divide has served an important purpose within the Continental European tradition in insulating private international law from political concerns. This is less true in the US, where the relationship between law and politics has been monitored by comity in the international arena, even serving as a rhetorical ‘bridge’ in this context (see Joel R Paul, ‘Comity in International Law’, Harv Int’l L J 1 (1991)), while federalism concerns have coloured the conflict of laws with political and public interest. The divide is, of course, constantly shifting (see H Muir Watt, ‘Droit public et droit privé dans les rapports internationaux (Vers la publicisation des conflits de lois)’, Arch philo droit, t 41, 207).

6 The expression was coined by Jurgen Basedow, ‘Conflicts of Economic Regulation’, Am J Comp L 423 (1994); comp by the same author on this theme, ‘Souveraineté territoriale et globalisation des marchés. Le domaine d’application des lois contre les restrictions de concurrence’, 264 Rec Cours Acad La Haye 9 (1997).

7 One reads with interest the following passage in Andreas D Lowenfeld’s work on International Litigation and the Quest for Reasonableness, Clarendon Press, 1996, which provides excellent food for comparative thought on this point: ‘I do believe that Story was right to think of the conflict of laws as part of the law of nations, and that the term he introduced and that has gained currency in Great Britain and throughout Europe is misunderstood by those who regard private international law as sharply distinct from public law or public international law. Thus my definition and approach are very different from those of Batiffol and Lagarde, who define private international law as the collection of rules applicable solely to private persons in their international relations’ (3).
twentieth century,⁸ the private interest paradigm which constitutes the foundations of the conflict of laws can no longer cope with the increasing interference of state policies in the field of transnational litigation. Of course, European legal theory has been more loath than American scholarship to embrace the idea that private law can also serve as a regulatory tool,⁹ which explains the poor reception of governmental interests analysis this side of the Atlantic.¹⁰ But, as it has been pointed out, fields such as antitrust, securities, banking law, export controls, products liability or environmental regulation, which can all affect private transactions, directly or indirectly, involve interests of an undeniably different order from those premised by traditional conflicts methodology,¹¹ introducing concerns previously identified as belonging to the field of public interests and as such beyond the pale of choice of law. In its strictest expression, the latter has been shielded from political concerns by the ‘public law taboo’,¹² which led courts to decline to adjudicate other states’ interests, at least when they give rise to the direct enforcement of foreign public rights.¹³ The progressive emergence of an intermediate category of semi-public, internationally mandatory provisions, or ‘lois de police’, has contributed somewhat to bridge the methodological gap; while remaining subject to specific unilateral methodology, foreign economic regulation has become amenable to application in domestic courts in private law litigation.¹⁴

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⁸ The idea that the conflict of laws is a ‘recipe’ for achieving private law policies was expressed in Francescakis’ seminal Théorie du renvoi in 1957 and characterises mainstream thinking to the present day (see, for example, in France, the Preface to Grands arrêts de la jurisprudence de droit international privé, by B Ancel and Y Lequette, rejecting as corrosive the instrumentalisation of private international law by European Community law or human rights ideology). However, even prior to this clear challenge to sovereignty-based theories of multilateralism, of which the most characteristic is to be found in the work of Etienne Bartin (Principes de droit international privé selon la loi et la jurisprudence françaises, 3 vols, Paris, 1930, 1932, 1935), the conflict of laws was, paradoxically, considered to be limited to private relationships. This is clearly a legacy of Von Savigny’s Treatise of Roman Law (vol VIII).

⁹ That tort law for products liability, for instance, can be used to serve state interests (for instance, in protecting manufacturers or victims) is as banal in the US (see Hay, ‘Conflicts of Laws and State Competition in the Product Liability System’, 80 Geo L R 617) as it is recent in the EU (see, for example, Jane Stapleton, ‘Three Problems with the New Products Liability’, Essays for Patrick Atiyah, Cane and Stapleton 1991, 291). Newer still is the idea that the private law of contract can be used to regulate markets, through consumer protection, for example (see Hugh Collins, Regulating Contracts, OUP 1999).

¹⁰ A characteristic expression of the refusal to accept that state interests can be found in private law can be found in Gerhard’s Kegel’s ‘The Crisis of the Conflict of Laws’, Rec Cours Acad La Haye, 1964, t 112, 91.


¹⁴ The stimulus has been article 7 § 1 of the Rome Convention, which provides for the operation of foreign mandatory laws which override party choice of law. A similar provision is made in the Hague Agency Convention, 1978, article 16. But these texts concern claims initially framed in contract, so that the interference of foreign public law could arguably be considered a case of incidental application (as both the United Kingdom and Germany argue, in opting out of article 7 § 1). On such incidental application of foreign public law, see H Baade, ‘The Operation of Foreign Public Law’, 30 Tex Int’l L J 429 (1995).
concession, however, the conflict of laws deals exclusively with ‘private law relationships’; governments, it is thought, do not care directly about outcomes. The belief widely held in Europe that governments do not have a direct stake in outcomes in conflicts cases does not mean that legislators do not show concern for the implementation of substantive policies in private law. This gives rise to alternative choice of law rules, such as those designed to promote the interest of the child in the field of family relationships (for example, articles 311-16 to 311-18 of the French civil code).

Thus, mutual recognition and the home country rule tend to frame choice of law as a political issue, as is apparent from the study by Jukka Snell, Goods and Services in EC Law: A Study of the Relationships between the Freedoms, OUP 2002.

Fundamental rights ideology will no doubt be the vehicle of such an approach within Europe. For an example of the way in which various rights impact on the conflict of laws in the field of family law, see A Bucher, ‘La famille en droit international privé’, 283 Rec Cours Acad La Haye 9-186 (2000). It may be, on the other hand, that a political theory of negative rights, such as the one proposed by Lea Brilmayer (‘Rights, Fairness and Choice of Law’, 98 Yale LJ 1277 (1989)) is unnecessary in the European Union, because of guarantees built into European conflict of laws or judicial jurisdiction to ensure freedom from unfair surprise or interference. Fundamental freedoms and the principle of proportionality may serve a similar end.

At present, this system is particularly complex as decision-making in both these fields is multi-level. Not all the choice of law rules of the Member States in fields which might affect the working of the internal market are harmonised as yet, and conflicts with third states are subject to community law only to the extent that it prohibits opting-out of harmonised protection. See on this last aspect, P Lagarde, ‘Heurs et malheurs de la protection internationale du consommateur dans l’Union européenne, in Le contrat au début du XXIème siècle. Etudes offertes à Jacques Ghestin’, LGDJ 2000, 511.

Lea Brilmayer (‘The Extraterritorial Application of American Law’, 50 Law & Contemp Probs 11) explains that the real distinction between the Second Restatement on the Conflict of Laws and the Third Restatement on Foreign Relations lies in the existence or not of federal regulation. Thus, some international conflicts are subject to choice of law under the Second Restatement, when they arise in a field such as tort,
the former being to a certain degree constitutionalised.21 The latter, formulated in terms of ‘prescriptive jurisdiction’, are subject to the supposed constraints of public international law or comity;22 they involve defining the international reach of federal economic legislation, and, when a claim is not supported by the latter, leave no room for the enforcement of foreign public law.23

3. New perspectives: Economic theory of choice of law in a market setting. Thus, the European perspective on the conflict of laws is being reshaped by the pressures wrought by globalisation and by internal market integration, which both, for different reasons, challenge the private law model and focus attention on the political importance of ensuring the proper allocation of regulatory authority. The thesis of this paper is, very simply, that an economic analysis of the relationship between law and the market might be used to clarify the function of choice of law in both a global and an internal market setting, and highlight some of the transformations to which the new economic and institutional environment transforms traditional theory. It draws on recent US scholarship, which has suggested that economic analysis could provide renewed foundations for choice of law,24 although its conclusions may differ from these proposals in many respects.25 In common with them, however, it relies on

which is not subject to federal legislation. On the other hand, when a claim is governed by federal regulation, federal courts have subject-matter jurisdiction, and approach conflict of laws situations in terms of ‘prescriptive jurisdiction’.


22 See Third Restatement on Foreign Relations Law, 1987, Sect 403 and Andreas F Lowenfeld, International Litigation and the Quest for Reasonableness, 17. For a critique of the way in which comity rhetoric has been used by the courts, sometimes as a bridge between law and politics and sometimes as a wall, see again Joel R Paul, ‘Comity in International Law’.

23 Indeed, in the absence of a federal question arising from the applicability of federal legislation, the federal courts lack subject-matter jurisdiction.


25 Particularly as far as it seems to encourage excessive deregulation and ‘privatisation’ of the conflict of laws. There is, however, disagreement within this new movement as to the extent to which deregulation and ‘privatisation’ should be encouraged. See, on the one hand, Erin O’Hara & Larry Ribstein, ‘From Politics to
Efficiency’, Michael Whincop & Mary Keyes, ‘Putting the Private Back’, and on the other hand, critical of excessive privatisation, Andrew Guzman, ‘Choice of Law’ and Joel P Trachtman, ‘Economic Analysis of Prescriptive Jurisdiction’. In many cases, too, economic analysis appears to reinvent the wheel, through insufficient attention to traditional conflicts theory. On the benefit the law and economics movement in choice of law might gain from comparative analysis, see Jan Kropholler & Jan von Hein, ‘From Approach to Rule-Orientation in American Tort Conflicts’, Law and Justice in a Multi-state World: Essays in Honor of Arthur T. von Mehren, 317. This applies, in particular, to the idea that the welfare of individuals, not sovereignty, is the right yardstick for the conflict of laws.

26 Hugh Collins, Regulating Contracts, 70.

27 Ibid. Thus appears a traditional division of functions between private law, which supports self-interested action, and public law, which compels market participants to take social costs into account and thus protects preferences which are not adequately protected through the market. However, not only do labels shift (private law may appear as a regulatory tool), but incentives to internalise social costs may be achieved through an allocation of property rights or liability rules, which are traditionally private law. For an interesting analogy between property rights and regulatory jurisdiction, see Joel P Trachtman, ‘Economic Analysis of Prescriptive Jurisdiction’.

28 See again Joel P Trachtman, ‘Economic Analysis of Prescriptive Jurisdiction’.

29 Market theory views regulation itself as a public good, subject to inter-jurisdictional competition. On the theory of inter-jurisdictional competition, developed in the context of the economics of federalism, see below fn 39, 41.

30 See, for example, articles 3, 5-6, 7 and 16 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations.

31 The European reader who wonders how far economic concepts are merely a change in lawyers’ conversational repertoire should read Bruce Ackerman, ‘Law, Economics and the Problem of Legal Culture’, Duke Law Journal 929 (1986).
international arena.  In the absence of a central authority, the extent to which public interest concerns interfere with party choice is left to the unilateral decision of each state, which then defines independently the scope of its own legislation and pursues its own conception of the best way of dealing with social costs in an international setting. Risks of under- or over-regulation are thus endemic to the global market and surely unconducive to general well-being, which would seem to require, at the very least, a coherent allocation of regulatory authority. Secondly, understanding the relationship between law and the market in the context of a structured regulatory framework, such as can be found in an integrated or federal structure, may help suggest ways in which this can be achieved. In such a context, cross-border externalities and market breakdowns are dealt with by the central legislative authority, through harmonised substantive rules. Whereas they take the form of minimum standards for internal market transactions, they are also projected into the world market in the form of internationally mandatory rules, in cases where the European legislator has decided that the connection with the Community is sufficient to justify its interest. In both instances, they are designed to provide an effective regulatory framework within which party choice of law can operate effectively. However, whereas harmonised substantive legislation can obviously project a coherent view of the requirements of collective welfare within the internal market, this is clearly not the case in a global setting. The new wine thus resides in the idea that conflicts of economic regulation should be fitted into a larger picture of coherent market regulation, with a clear focus on global welfare. More than a change in vocabulary, it implies redefining the scope and function of the conflicts of laws.

5. The dual function of choice of law in the global market. The transformation in perspective highlighted by economic analysis is evidenced by the increasing pressure to include public regulation within the scope of conflicts of laws. Firstly, when desirable, inter-jurisdictional competition is not perceived as being restricted to fields traditionally bearing the label of ‘private law’, but also extends to the regulation of public goods on offer in different locations to mobile firms and capital. Secondly, absent a central authority or international agreement to

32 Concluding, similarly, that analysis of choice of law in efficiency terms draws attention to concerns of global welfare, see Paul B Stephan, ‘The Political Economy of Choice of Law’.

33 Inconsistencies leading to over-regulation are obviously particularly intolerable each of the regulations involved provide for criminal sanctions. See the dilemma in the Nippon Paper case, Dorsey J Ellis Jr, ‘Projecting the Long Arm of the Law: Extraterritorial Criminal Enforcement of US Antitrust Laws in the Global Economy’, 1 Wash U Global Stud L Rev 477 (2002). But of course, regulatory gaps and overlaps are a well-known feature of the unilateralist and monopolistic methodologies by which states define the scope of their economic regulation (see text below, § 13).

34 These may either provide for consumer/investor protection (essentially designed to cure information asymmetries, see below, fn 49), or ensure against restrictions to competition. On the scope of ‘European contract law’, which extends to fields such as competition law not generally included in the category of private contract law, see Stefan Grundmann, ‘The Structure of European Contract Law’, 4 European Review of Private Law, 505-526 (2001).

35 A ‘close connection’ with the territory of a Member State is usually required for consumer legislation (see P Lagarde, ‘Heurs et malheurs’). The reach of Community competition law is measured by a test resembling the US ‘effects’ test (see below, fn 124).
deal with third-party effects, the only - albeit second-best\textsuperscript{36} - means to reduce the discrepancy between national laws and global markets\textsuperscript{37} would be to extend the scope of the conflict of laws to fields currently bearing a ‘public law’ label, in order to design appropriate tests with which to allocate economic regulatory authority. Here, then, is the political economy of choice of law in a market setting. Fostering legislative competition through party choice as long as social and private costs coincide (I), the conflict of laws should also be relied upon to assert a regulatory function in cases of cross-border externalities (II).

I Choice of law as an instrument of inter-jurisdictional competition

6. Reversal of perspectives. Traditional ‘conflicts’ rhetoric suggests that choice of law has a peace-keeping function between rival, mutually exclusive regulatory claims. The various theoretical models reinforce this impression: multilateralism carries a policy of alignment in order to produce decisional harmony out of chaos, whereas neo-statutist theories tend to pursue an agenda of political deference designed to induce reciprocity. Contemporary economic analysis offers a reverse perspective, in which the idea that diversity is a source of disorder to be smoothed out wherever possible, is superseded by the conviction that competition between national legislators is basically salutary.\textsuperscript{38} Far removed from its traditional justifications, party choice in cross-border transactions is viewed through economic lenses as instrumental in stimulating such competition, both in a federal context, where it promotes market integration (A) and, more controversially, on a global level, where it can contribute to efficient horizontal allocation of regulatory authority (B).

I.A Choice of law and the economics of federalism

7. Three new uses for choice of law. In a federal or vertically integrated structure, inter-jurisdictional competition appears an alternative to centralized regulation. The theme of regulatory competition, with the correlative question of the optimal level at which regulation should take place, has only recently begun to appear as a subject for debate in the European Union,\textsuperscript{39} where it is more common to think of legal diversity as being at odds with the very

\textsuperscript{36} There is considerable debate as to the desirability and feasibility of international agreement on conflicts of economic regulation (for instance, under the aegis of the WTO); see Eleanor M Fox, ‘Antitrust and Regulatory Federalism: Races Up, Down and Sideways’, NUY L R 1781 (2000). It is also true - and this is the risk inherent in any second-best solution such as that proposed by this paper - that in the absence of agreement, if courts attempt to mimic what international agreement might achieve, prisoner’s dilemma dynamics may also set in (see Dodge, ‘Extraterritoriality and Conflict-of-Laws Theory’).

\textsuperscript{37} On this discrepancy, see Eleanor Fox, ‘National Law, Global Markets and Hartford Fire: Eyes Wide Shut’, 68 Antitrust LJ 73 (2000).

\textsuperscript{38} While emphasising the importance of the conflict of laws, this perspective also reinstates comparative law as a source of informed choice.

idea of an internal market.\textsuperscript{40} Borrowed from US scholarship,\textsuperscript{41} the economics of federalism now raises new issues both as to the ways in which legislative authority should be allocated vertically within the EU, emphasising the importance of subsidiarity,\textsuperscript{42} and, paradoxically, as to the importance of emulation between national legislators as a factor of integration.\textsuperscript{43} Desire for deregulation is linked to the perceived dangers of centralisation as giving rise to rent-seeking and problems of public choice, excessive bureaucratisation and an inability to respond to individual preferences.\textsuperscript{44} Lowering the level at which regulation takes place in order to introduce more market pressure on legislators implies reintroducing the conflict of laws in fields which might have been mapped out for unification. However, as an economic tool of federalism, the conflict of laws has to fit into a sophisticated, multi-level scheme, which affects its traditional function in several ways. Firstly, by maintaining a field of free regulatory competition between national laws, it is an important instrument in the vertical allocation of competences within the Union (a). Secondly, under the pressure of market integration, it has simultaneously to promote fundamental market freedoms (b). Finally, extending its scope to the market for public goods, it must ensure that competition between national economic policies remains undistorted (c).

8. (a) Setting the vertical allocation of competences. European contract law\textsuperscript{45} rests upon the distinction between centrally harmonised regulation, designed to cure market failures,\textsuperscript{46} on the

\textsuperscript{40} Indeed, until recently, a strong trend towards centralisation of regulatory authority within the EU tended to make diversity suspect; integration seemed to imply harmonisation at the highest level, and the attendant ‘death’ of conflicts and comparative law (see, for the latter, Ch von Bar, ‘From Principles to Codification: Prospects for European Private Law’, 8 Colum J Eur L 379 (2002); Symposium on Methodology and Epistemology of Comparative Law, Brussels, October 2002, to be published by Hart Publishing).

\textsuperscript{41} The volume of literature on this subject is impressive. See, in particular, the special issue of the Journal of International Economic Law (2000), devoted to ‘Regulatory Competition in Focus’, with contributions by Daniel C Esty, Richard L Revesz, Damien Gerardin, Jonathan R Macey, Alan O Sykes and Joel P Trachtman, concerning a wide range of different substantive fields. See also Ulen, ‘Economic and Public Choice Forces in Federalism’, 6 Geo Mason L Rev 921; Frank H Easterbrook, ‘Federalism and European Business Law’, 14 Int'l Rev L & Econ 125.


\textsuperscript{44} Kerber, ‘Interjurisdictional Competition’, 218.

\textsuperscript{45} This distinction is central to the 1980 Rome Convention on the Law Applicable to Contractual Obligations, where it appears in article 3 (party freedom) and articles 5 to 7 (international mandatory rules).

\textsuperscript{46} The regulation of market failures is designed essentially to remedy informational asymmetries, through mandatory disclosure rules (on the priority given by the ECJ as from its Cassis de Dijon ruling in 1979 to mandatory disclosure over substantive protection, see Grundmann, ‘The Structure of European Contract Law’, 513). Market failures are also addressed through Community rules against restriction of competition, caught by article 7. State failure, as opposed to market breakdown, is addressed through subsidiarity.
one hand, and national choice-facilitating rules\textsuperscript{47} which remain amenable to the conflict of laws, and in particular to free party choice, on the other.\textsuperscript{48} Party autonomy thus operates within a centralised regulatory framework which cures informational asymmetries and restrictions of competition.\textsuperscript{49} However, ensuring the full cross-border effect of party autonomy\textsuperscript{50} also requires the removal of national regulatory barriers which interfere with the access to national markets. Regulation of market failure doubles up as a market integration issue.\textsuperscript{51} Community law therefore imposes a second, parallel, series of constraints on Member States, which must refrain from applying measures which will lead to over-regulation or multiple burdens which restrict access to foreign markets. Scrutiny under market freedoms may apply to any form of mandatory state regulation which is internationally enforceable under articles 5 to 7 of the Rome Convention, including measures implementing Community directives,\textsuperscript{52} but does not apply to the choice-facilitating rules which fall within the scope of article 3 of the Rome Convention. Thus, the conflict rule governing transactions on the internal market draws a double dividing line: it demarcates internationally mandatory regulation from the scope of free choice, while simultaneously ensuring the vertical allocation of competence between Community law, imposing minimum (consumer protection) or maximum standards (market freedoms), and regulation at the lower, Member State level, of the garden variety of contract law. If the double line admittedly lacks clarity in some cases, it may be due to fluctuations in the case-law of the European Court of Justice as to the desirable extent of state competition.\textsuperscript{53} However, the encounter between the economic dynamics of

\textsuperscript{47} These are essentially the rules of classical contract law pertaining to the formation and performance of the contract, and designed to help parties use their market freedom.

\textsuperscript{48} National rules of this category are not subject to scrutiny under fundamental freedoms: \textit{ECJ Alsthom Atlantique}, 24 Jan 1991, C-339/89.

\textsuperscript{49} Protective legislation applicable to cross-border consumer contracts or international securities transactions, such as those adopted by European Community secondary legislation, are designed to eradicate informational asymmetries, which might otherwise lead to faulty choice - including choice of the applicable law. On the focus of Community law on disclosure rather than on substantive rules of consumer protection (mandated as far as national measures are concerned by the Court of Justice in \textit{Cassis de Dijon} and as far as concerns the Community legislator by fundamental freedoms and proportionality), see Stefan Grundman, \textit{The Structure of European Contract Law}. On similar developments in the field of securities regulation, see Niamh Moloney, \textit{EC Securities Regulation}, Oxford EC Law Library, 2002.

\textsuperscript{50} Such is the primary function of internal market freedoms under the EU Treaty; see Grundmann, \textit{The Structure of European Contract Law}, 510.

\textsuperscript{51} On the fact that the integration issue sometimes eclipses substantive policies, in particular investor protection in the field of securities regulation, see Niamh Moloney, \textit{EC Securities Regulation}.

\textsuperscript{52} See, for example, CJCE C-369/96 & C376/96, 23 November 1999, \textit{Arblade}; 15 March 2001, \textit{Mazzoleni}, extending the scrutiny to rules providing for internationally mandatory rules of the forum-host state providing for minimum salary; see also below, under (b). The scrutinised measures may include rules not traditionally seen as contract law, including rules of public law; see Grundmann, \textit{The Structure of European Contract Law}, 515.

\textsuperscript{53} See Jukka Snell, \textit{Goods and Services in EC Law}. In implementing the economic freedoms, the Court of Justice seems to hesitate between a model which fosters state competition, towards a more centralised model, in which EC scrutiny encroaches on cases in which there is no protectionist intent or effect, pre-empting choice of law and restricting party autonomy. Thus, the 1995 \textit{Bosman} case implements a very expansive reading of the Treaty, based on the idea of market access, in which, practically, the very existence of a conflict of laws seems to generate EC competence. On the extent to which it may be necessary to distinguish the different freedoms, see
Community law and the more traditional private law concerns of the conflict of laws inevitably brings about shifts in traditional categories, which may also require time to settle. Thus, pre-emptive law under market freedoms is not necessarily internationally mandatory within the traditional meaning of article 7 of the Rome Convention, whereas national public economic regulation may similarly be disqualified as such and subjected to party choice.

9. (b) Ensuring the full extent of economic freedoms. Indeed, harmonisation of Member State legislation designed to remedy market failure does not preclude regulatory competition entirely, as national legislators are often free to adopt measures more stringent than those required by Community directives. Here, however, the application of more stringent national measures to cross-border situations justifies scrutiny under fundamental freedoms, in order to avoid reconstitution of regulatory barriers. Such scrutiny has given rise to the well-known distribution of Member State regulatory authority under Keck and its progeny, in the form of mutual recognition. The home country may apply its regulation in relation to the product itself, whereas host country law prevails as far as selling arrangements are concerned. A similar division can be found, for example, in the field of financial services, where the host country may impose rules of conduct, while the service itself is shaped through prudential and supervisory requirements according to home country provisions. Interestingly, such a design gives rise to the formulation of a new generation of choice of law rules, which raise familiar issues of characterisation and definition of connecting factors.

Jukka Snell, Goods and Services in EC Law.


The allocation of regulatory competence between the home and host countries in the areas subject to scrutiny under the economic freedoms concerns points of both public and private law; a given determination of the applicable law may be pre-empted under the home country principle if it gives rise to a multiple burden for the importer, for example, whether or not it is technically a nationally imperative rule under article 7. Moreover, under the home country principle, according to which domestic consumers benefit from goods and services shaped by foreign regulation, national measures reinforcing the minimum requirements of directives lose their mandatory character, since those consumers will always be able to opt out of the scope of domestic regulation if they prefer a foreign offer. At the same time, regulatory competition among states may well extend to public goods.

This is far from being true in all cases, however, particularly as far as information rules are concerned; see, for example, the 1993 Investment Services Directive or the new 2002 Distance Marketing of Consumer Financial Services Directive.

An alternative approach is present in the 2002 Financial Distance Marketing Directive and the E-Commerce Directive (2000/31). The latter provides for the law of the Member State from which the service is provided and allocates authority and jurisdiction to ensure compliance to the Member State of the suppliers’ home. However, it does not indicate that it does not provide rules of private international law. On this ambiguity, see Michael Wildespin & Xavier Lewis, ‘Les relations entre le droit communautaire et les règles de conflit de lois’, 1 Rev crit Dip 299 (2002); Corcoran & Hart, ‘The Regulation of Cross-Border Financial Services in the EU Internal Market’ 8 Colum J Eur L 221 at 246.

As in more traditional cases, these are not without difficulty, and require reflection upon the specific aims of division of regulatory competences (on the two possible readings of the Treaty on this point - the one decentralised and anti-protectionist, the other a more intrusive ‘economic freedom’ reading - see Jukka Snell,
Designed to prevent discrimination in the form of a double regulatory burden imposed on goods or services entering a foreign market, the new rules pre-empt divergent national conflicts solutions, and apply whatever the nature of the measures involved (public/private; mandatory/default). On these controversial ‘occult’ conflict rules, see among abundant literature the recent study by Michael Wildespin & Xavier Lewis, ‘Les relations entre le droit communautaire et les règles de conflit de lois’.

The case-law concerning the extent of these supervisory powers shows that ‘eyes are on the prize’ and the outcome is far from leaving states indifferent. See Snell, Goods and Services in EC Law.

For a complete account, see Kerber, ‘Interjurisdictional Competition’.

The ECJ’s 1999 Centros case (case C-212/97, Rec 1999, I-1459, concl La Pergola) has to a certain extent remedied the problem of the high cost of mobility for firms within the European Union. On the debate sparked by this decision in respect of regulatory competition, see text below, § 11.

Defined as efficient allocation of resources as factors of production move to their place of highest productivity.

Kerber, ‘Interjurisdictional Competition’.

On this point, see Snell, Goods and Services in EC Law.

For a different, interesting example of the formulation of a conflict of laws rule relating to takeovers, on cross-border bids, see Moloney, EC Securities Regulation, 836.
really responds to citizens’ preferences. An important difficulty arises, however, insofar as the ‘playing-field’ made up of divergent economic policies is not level, and competition between Member States could thus be seen to be distorted; clearly, rules of public law may create competitive advantages which are not subject to competition law between firms. However, the effects of an uneven playing field on competition can easily be corrected by allowing firms free choice of relevant provisions of public law. At this point, it has been shown that the home-country rule, which at present ensures consumer choice of goods or services produced under foreign laws, is not necessarily optimal, as it cannot ensure undistorted regulatory competition unless it also allows for choice by producers. The conflict of laws, expanding its scope beyond the traditional field of ‘private law’, thereby has an important corrective or levelling function to play here, in order to ensure that state competition for public goods remains undistorted. Thus, built into a framework of mandatory requirements which ensure against market failure, choice of law appears as an important deregulatory tool in the integrated market. The question is whether similar use of inter-jurisdictional competition is sustainable in a global context, where there is no centralised authority to monitor externalities or remedy market failure through minimum requirements.

I.B ‘Portable reciprocity’ in a global market?

11. ‘Empowering investors’ or racing to the bottom? Recent American scholarship has raised the issue of party choice in the field of economic law, such as in capital markets. The extent to which such competition is desirable remains controversial, however. Does regulatory competition really ‘empower investors’ or does it generate harmful externalities with which the market itself cannot deal satisfactorily? Despite the seductiveness of the

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69 The Treaty prohibits state aids, but this issue here is occult advantages which could not be eliminated without centralisation of Member States’ economic policies.

70 Kerber, ‘Interjurisdictional Competition’.

71 As Wolfgang Kerber explains, ibid, 241, at present, the home country principle entails a distortion. States must allow consumer choice under the home country principle in cases of cross-border sales or providing of services. Thus, consumers always have a choice between different regulations, since foreign manufacturers may offer products under home country regulations. These regulations are aimed at consumer protection. They lose their mandatory character under the home country rule, precisely because consumers may choose, and become mere standards. However, domestic producers do not have a similar choice of regulations, and remain governed by domestic rules. Mutual recognition thus entails the risk that national regulations for consumer protection actually subsidise national producers. This consequence could be avoided if producers could choose between different national regulations; for example, French firms could produce according to Italian standards without having to relocate to Italy.

72 This phrase was coined by Stephen J Choi and Andrew T Guzman, ‘Portable Recognition: Rethinking the International Reach of Securities Regulation’, 71 S Cal L Rev 903 (1998).

73 This phrase was coined by Roberta Romano, ‘Empowering Investors: A Market Approach to Securities Regulation’, 107 Yale LJ 2359 (1998).

74 Choi & Guzman, ‘Portable Recognition’; Romano, ibid.

global competition thesis, the desirability of entrusting market failures to party choice is not entirely clear (a). This does not mean, however, that party choice has no place in economic regulation. It is probable that the public law label, signalling regulatory responses to externalities, is at present over-inclusive (b).

12. (a) The controversial case for efficient regulatory differentiation. The idea of introducing regulatory competition into areas of economic regulation, at least in an interstate context, is not new in the United States. However, a second generation debate seems to have been sparked off recently by empirical findings in the field of corporate law, according to which the ‘Delaware effect’ does not necessarily signify a degenerative race to the bottom involving the sacrifice of shareholder interests, but may lead to greater sophistication of legislative offer. Within the European Union, the recent Centros decision has drawn attention to a similar debate. Significantly, the battle-horse of global competition is spurred on in this and other fields by law and economics scholars, whose agenda is geared to ‘putting the “private” back into international law’ by means of party choice. Thus, it is suggested that regulatory competition through exit (or party choice of foreign law) could be to be the optimal mode of global governance in such fields as securities, anti-trust, insolvency, banking or environmental protection. The case has been put most strongly in the field of securities, in favour of a system of ‘portable reciprocity’ involving free choice of law by the issuer, thus delinking the applicable regulatory regime and the location at which the securities transactions take place. It is argued that because there is a considerable array of distinct preferences among investors and issuers alike, greater competition will lead to more efficient differentiation of regulatory regimes across the global market, each catering to different needs. For example, high-quality issuers will opt for strong anti-fraud and disclosure provisions and will attract risk-averse investors. Other issuers may prefer a weaker, less costly protective regime, capable of raising cheap capital quickly, and investors will discount the difference in the price. Management will thus sort itself out into different categories

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76 See Merritt B Fox, ‘Retaining Mandatory Securities Disclosure’, 1339, on the heated debate which broke out in the mid-60s about the desirability of leaving the regulation of disclosure levels to market forces. A ‘rough consensus’ seemed then to emerge, including among economic-oriented legal academics such as Professors Easterbrook, Coffee and Fischel, that mandatory disclosure should be retained.

77 Roberta Romano, ‘Empowering Investors’, note 64.


79 Whincop & Keyes, ‘Putting the Private Back’.


82 Choi & Guzman, ‘Portable Recognition’.
according to the type of regime chosen, which will in turn act as a form of brand or trademark alerting shareholders to possible agency problems. Such a regime is presented as a more efficient alternative to the over-extensive reach of securities regulation in present US court practice, which fails to maximise potential profits from competition and encourages issuers to avoid the US market, in view of the notoriously stringent content of federal legislation. Such a thesis is undoubtedly seductive and seems likely to be influential across the Atlantic. The case for pure regulatory competition remains highly controversial, however. While the very concept of a race to the bottom has been challenged as an intellectual fallacy, at the same time, party choice does not seem adequately to address the double issue of market and social costs on a global level. Under the Tiebout model of competition for public goods, which inspires contemporary theories of regulatory federalism, prerequisites for undistorted locational competition are informed choice and the absence of externalities. Critics remain skeptical as to whether the first can be achieved, but focus more particularly on the danger of detrimental pressure on national legislators to bargain away higher standards in order to attract business, thereby externalising harmful effects through under-regulation. The field of environmental protection offers clear empirical evidence that unbridled competition leads to sub-optimal regulation whenever there are important cross-border externalities, and similar demonstrations have been made in such areas as banking, antitrust and arbitration. At best, such evidence may indicate that it is unrealistic to generalize, and that the benefits to be gained from regulatory competition are field-specific. However, even in the area of

83 For a similar example of the interesting ‘brand function’ of choice of law, see Snell, Goods and Services in EC Law, 43, explaining the ECJ’s Centros case in this way.


85 See Moloney, EC Securities Regulation, 12, fn 27, referring directly to Choi & Guzman’s deregulatory thesis.


88 Despite admittedly convincing attempts to attenuate the problem of information overload or ‘potential Tower of Babel’ which unlimited choice of the applicable law would seem to entail (see Choi & Guzman, ‘Portable Recognition’, 924).


90 Butler & Macey, ‘The Myth of Competition’.

91 Eleanor M Fox, ‘Antitrust and Regulatory Federalism’.

92 For evidence of such competition, W Michael Reisman, book review, 80 Am JIL 268.

securities regulation, where third-party effects are arguably less important,\textsuperscript{94} it is not clear that pure party autonomy would be feasible or necessarily bring desirable results. Even setting aside the problem of flawed choices due to breakdowns in information, it has been pointed out that benefits from competition could be reaped only if all legislators were ready to extend recognition to the chosen regime; if recognition is not universal, then prisoner’s dilemma dynamics would enter into play.\textsuperscript{95} However, universal reciprocity is highly unlikely, since party choice will not be allowed by a given regulator unless the focus of securities regulation is indeed the protection of private interests and not the market itself. Although this is arguably the case in the US,\textsuperscript{96} European legislation seems to have a stronger concern for investor protection,\textsuperscript{97} and party choice is perceived to be insufficiently attentive to third-party effects.\textsuperscript{98} The same observation can obviously be made in the field of anti-trust or insolvency. Similar demonstrations of the varying focus of economic regulation and its consequences on the desirability of free legislative competition become more forceful still with respect to the policies of developing countries, where antitrust regulation may be designed to ‘grow competition’\textsuperscript{99} and where environmental concerns may conflict with more basic economic needs.\textsuperscript{100}

13. (b) The need for balance: The present public law label is over-inclusive. It would be excessive to conclude, however, that regulatory competition through party choice has no place in the global market. Indeed, much of contemporary scholarship in the field of economic federalism is devoted to designing the optimal dosage between competition and cooperation.\textsuperscript{101} The European Union model inspires the idea that a prerequisite for competition would be prior agreement on essential harmonisation in order to give rise to ‘managed recognition’.\textsuperscript{102} Failing that, recognition of foreign regimes could be restricted to the choice of certain jurisdictions, or predicated on certain quality requirements, along lines

\begin{footnotes}{\footnotesize
\textsuperscript{94} On this point, see text below § 12. However, hostile to the idea that securities disclosure regulation does not involve third-party effects, Merritt B Fox, ‘Retaining Mandatory Securities Disclosure’; Robert W Hillman, ‘Cross-Border Investment, Conflict of Laws, and the Privatization of Securities Law’, \textit{L \& Contemp Probs} \textbf{331} (1992); Joel P Trachtman, ‘Economic Analysis of Prescriptive Jurisdiction’. The Exchange Act itself states that transactions commonly conducted on exchanges are ‘affected with national public interest’, while it is generally considered that article 10 b was designed to ensure plenary power of the SEC over markets (see Steve Thele, ‘The Original Conception of Section 10(b) of the Securities Exchange Act’, \textit{42 Stan L Rev} \textbf{385} (1990)).

\textsuperscript{95} Merritt B Fox, \textit{ibid.}

\textsuperscript{96} Roberta Romano, ‘Empowering Investors’, 2423, arguing that it is unclear what disclosure requirements externalities actually mandate; comp Choi & Guzman, arguing that securities regulation is transaction-based. One might also add that large stock exchanges are relying increasingly on self-regulatory techniques.

\textsuperscript{97} See Moloney, \textit{EC Securities Regulation}, chapter III, showing, however, that proactive investor protection policy is sometimes superseded by market integration aims within the EU.

\textsuperscript{98} \textit{Ibid.}

\textsuperscript{99} See Eleanor Fox, ‘Antitrust and Regulatory Federalism’.

\textsuperscript{100} Revesz, ‘Federalism and Regulation’.

\textsuperscript{101} Or ‘coopetion’, a term used to describe this balance by Esty & Geradin, \textit{op cit.}

\textsuperscript{102} See Joel P Trachtman, ‘Regulatory Competition’.
\end{footnotes}
similar to alternative or conditional choice of law rules. In the field of securities regulation, partial reciprocity may also be an option, according to which a state might be ready to extend recognition to foreign regimes in certain areas rather than others (such as insider trading), or to certain types of sophisticated investors. Two lessons seem to emerge. Firstly, the desirability of freedom of choice is tributary to the objectives and policies of economic regulation, which means that conclusions will necessarily vary across the board. Secondly, present methods practised by the courts to determine the scope of economic regulation in the global market are insufficiently flexible; in particular, the public law label remains over-inclusive. Indeed, the field of economic regulation suffers from a very extensive public law label. On the basis of the correct but somewhat indiscriminate premise that public economic law involves governmental interests, US practice, followed by the European Union, has traditionally reasoned in terms of prescriptive jurisdiction in antitrust claims and in the field of securities regulation. Before the US courts, the anti-fraud provisions of the Securities Exchange Act have been characterised traditionally as ‘public law’. However, it might be time to take the lead from recent case-law, which seems to evidence a ‘turn of the tides’. Such a label may need to be lifted, in order to sift through the complex objectives of economic regulation and identify the fields in which the primary focus is on private interests rather than on effectuating the public good. Debate was sparked recently, in the spectacular Lloyd’s litigation, when the federal courts unanimously upheld party

103 In cases where the risk of externalities is particularly high, such as environmental pollution, host countries could legitimately apply countervailing duties. A difficult issue then arises as to the threshold beyond which such countermeasures are justifiable; see Revesz, ‘Federalism and Regulation’.

104 Choi & Guzman, ‘Portable Recognition’, 943.

105 This is a familiar issue under traditional conflict of laws theory, according to which the choice of connecting factor must not betray the underlying policies of the relevant legal category. It also explains why conflict rules vary necessarily across the board.


107 The ECJ’s case-law indicates that similar reasoning in terms of prescriptive jurisdiction is adopted in the field of antitrust. European Securities regulation is still in its infancy, so many of the issues raised in US practice as to the extraterritorial reach of securities regulation have not been addressed (on national practice of Member States, see Kronke, ‘Capital Markets and the Conflict of Laws’, chapter 2).

108 Most recently, in Hartford Fire, 113 S Ct 2891 (1993).

109 See, for example, Zoelsch v Arthur Andersen, 824 F 2d 27 (DC Cir 1987), dismissing the case for lack of subject-matter jurisdiction.

110 Kronke, ‘Capital Markets and the Conflict of Laws’, 272, and above fn 94.

111 Kronke, ‘Capital Markets and the Conflict of Laws’, 276; see also Kelly, ‘Let There Be Fraud (Abroad)’, 28 Law & Pol’y Int’l Bus 477.


113 Riley v Kingsley Underwriting Agencies Ltd, 969 F 2d 953 (10th Cir 1992); Roby v Corporation of Lloyd’s, 996 F 2d 1353 (2nd Cir 1993); Shell v R.W. Sturge, Ltd, 55 F 3d 1227 (6th Cir 1995); Allen v Lloyd’s of London, 94 F 3d 923 (4th Cir 1996), Lipcon v Underwriters at Lloyd’s, 148 F 3d 1285 (11th Cir 1998); Bonny v
choice of English law and forum, despite the adverse effects suffered in the United States by investors who had been induced there by Lloyd’s agents to sign away their personal fortune at a level of disclosure clearly inferior than the - apparently - mandatory requirements of article 10 b of the Securities Exchange Act. When the English court gave judgment for Lloyd’s, recognition and enforcement was extended without a suspicion of a ‘second look’ in the name of American public policy.114 Was this not proof enough of the dangers of relaxing the public law taboo?115 The result was all the more controversial that discrepancies appeared to exist between cases of enforcement of public law by regulatory agencies, those where suit is brought by a private attorney general, and those in which public law is invoked to prevent enforcement of a choice of law or forum clause.116 In the latter case, an important enforcement function seemed to have been bargained away in a degenerative regulatory race to the bottom, to the detriment of American public interests as expressed in federal mandatory disclosure requirements. Lloyd’s, it has been said, will not survive Hartford Fire.117 However, it has also been argued that the Lloyd’s decisions may well be no accident.118 Several precedents would in fact suggest that the real reason for upholding party choice lay in the private nature of the placements, negotiated at arms-length and exempted as such from the mandatory disclosure regime;119 their admittedly harmful effects can be considered as concerning individual private investors, not the American market as a whole.120 Recent analysis of the changing aims of securities regulation lends credit to this explanation. It seems that article 10 b disclosure requirements can now be justified solely by efficiency considerations, and not by wider attention to investor protection with which they are more frequently associated.121 There is no reason, therefore, why the conflict of laws should not be called upon to express similar concerns in a transnational context, in particular in allowing party choice of law in arms-length transactions, thereby fostering regulatory competition. On

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114 233 F 3d 473 (7th Cir 2000).
117 McConnaughy, ‘Reviving the “Public Law Taboo”:’, 299.
118 Kronke, ‘Capital Markets and the Conflict of Laws’, 281, arguing that the turn of the tides was already foreseeable in litigation involving private placements.
119 Section 4 (2) Securities Act. See, for example, Leasco Data Processing Equipment Corp v Maxwell, 468 F 2d 1326 (2nd Cir 1972).
120 Indeed, comparative law shows that investor protection may frequently be dealt with through ordinary private law devices.
121 Hillman, ‘Cross-Border Investment’, 344. Thus, the SEC no longer sees investor protection as its main goal (Choi & Guzman, op cit).
the other hand, where the public good is directly involved, the public law label is obviously justified and the interests it protects should be represented in the international arena. This is where the conflict of laws could be called upon to assert a significant regulatory function.

II The regulatory function of the conflict of laws

14. How best, then, to coordinate regulation across the global market, while allowing sufficient flexibility to accommodate different conceptions of the reach of national laws designed to implement the public good? Presently, actions brought before forum courts based on foreign public law are subject only to a unilateral, monopolistic approach, which aims to ensure that forum courts will not serve foreign state interests. This is true with respect to the implementation of foreign economic regulation both in the United States and in the European Union; an approach defined in terms of ‘prescriptive jurisdiction’ requires dismissal of a claim when it is not subject to the scope of federal or Community legislation, unilaterally defined - usually by reference to the ‘effects’ suffered on the domestic market. It is no doubt a truism to say that self-interested behaviour of states is at odds with global efficiency in that it generates inconsistencies, aggressive protectionist policies by states

122 This term appears in the title of an excellent article by Robert Wai, ‘Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalisation’, Column Journal of Transnat’l L 209 (2002). It was the theme of the present author’s doctoral thesis on ‘La fonction de la règle de conflit de lois’, Univ Paris 2, in 1985, though admittedly the meaning of such a term has much changed since then!

123 On the unilateralism of current approaches, see above, § 1. On their justification by reference to the idea that state courts are not designed to be the instrumentalities of foreign public interests, see, for example, F A Mann, ‘L’exécution internationale des droits publics’, Rev crit DIP 1 (1988).

124 On the three different tests (conducts, effects and balancing of interests) which appear in US practice and their relationship to tests uses in choice of law, see William Dodge, ‘Extraterritoriality and Conflict-of-Laws Theory’. While the balancing test proposed by the Third Restatement on Foreign Relations, § 403 (on which see Andreas F Lowenfeld, International Litigation and the Quest for Reasonable}, in particular chapters 2 and 3) was not rejected in the Supreme Court’s most recent ruling (Hartford Fire, 113 S Ct 2891, 1993), it is clear that the way in which the test was implemented comes very close to reinstating the ‘effects’ test. The latter seems to have been adopted in fact if not explicitly by the Court of Luxembourg in the Woodpulp case (Case 89/85, 1988, ECR 5193).

125 But for a sophisticated economic demonstration, see Andrew Guzman, ‘Choice of Law’.

126 The difficulty is all too familiar: unilateralism (including neo-statutist modes such as governmental interests analysis), has never succeeded in coming up with a satisfactory solution to gaps and overlaps, true conflicts and unprovided-for cases.
anxious to protect forum jurisdiction to adjudicate,127 duplication of procedures,128 costs129 and fraud,130 which all cry out for international coordination.131 Of course, absent an international agreement, there is unlikely to be any ideal solution and certainly no greater likelihood of achieving international harmony than in the context of more traditional, less sensitive, conflicts in private law. However, awareness that any proposal can only be second-best should not deter attempts to define ways in which a regulatory framework, albeit imperfect, might be achieved. Indeed, interaction between the rapidly increasing number of national economic regulations132 is likely to become the primary challenge for the global market in the coming years. The real question is how far monopolistic or purely ‘horizontal’133 approaches, which focus on the scope of forum law and pay little attention to global welfare, are inevitable. Renewal could be achieved by recognising that economic regulation is amenable to conflict of laws methodology, traditionally restricted to the field of private interests. This would imply opening domestic courts to the enforcement of foreign law bearing a ‘public’ label (A). It would then involve building a workable test in which the more traditional mediating function of the conflict of laws would also leave room for considerations linked to the harmonious working of the global market (B).

II.A Extending choice of law to conflicts of public interests

15. Overcoming the public law taboo. The first step forward would be to bury the idea that public law as such is never amenable to a conflict of laws approach because foreign law is

127 The notorious Laker litigation (see US Court of Appeals District of DC 1984, DC 577 F Supp 348; House of Lords 1985, AC 58) is ample evidence of the way in which unilateral definition of prescriptive jurisdiction creates a need to protect judicial jurisdiction (through anti-suit injunctions): see Lowenfeld, International Litigation and the Quest for Reasonableness.


129 Duplication of enforcement procedures obviously generate particularly high costs when the relevant regulations provide for civil and criminal sanctions (see Dorsey Ellis, ‘Protecting the Long Arm of the Law’).


132 On the spectacular growth of national antitrust regulation, with which more than eighty states are now equipped, see Eleanor M Fox, ‘Antitrust and Regulatory Federalism’; a similar description applies to the regulation of capital markets (see W Kronke, ‘Capital Markets and the Conflict of Laws’, in particular chapter 5). For instance, the African intergovernmental organisation, OHADA, now has a securities regulation.

133 As defined by Eleanor Fox, such an approach acknowledges other states’ interests solely on a ‘nation-to-nation plane, as if the problem were that territorial boundaries had not been sufficiently regarded’. As illustrated by Justice Scalia’s approach in Hartford Fire, it tends to lead to: ‘Don’t touch my export cartels and I won’t touch yours’ (Fox, ‘National Law, Global Markets and Hartford Fire’, 81).
unenforceable before domestic courts.\textsuperscript{134} It would obviously be unrealistic to deny the existence of sensitive state interests in the outcome of disputes in the field of economic regulation.\textsuperscript{135} However, it does not follow that such domestic courts should never extend their jurisdiction to claims framed in foreign public law. It is a strange comparative paradox that Continental European practice has come closer to such a result than its American counterpart, despite the far stronger attachment of the former to the private interest paradigm in private international law.\textsuperscript{136} However, whatever the differences across the board, the reasons for which the public law taboo seems bound to disappear are clearly universal. Change seems as inevitable now as, a century ago, the gradual acceptance by courts still labouring under territorial conceptions, that they could ignore the ‘foreign law taboo’ and apply the law of other jurisdictions as such.\textsuperscript{137} Now, just as then, two sorts of reasons justify relaxing any

\textsuperscript{134} ‘Public law as such’ covers claims based directly on public law, such as a claim based on the violation of antitrust legislation, as opposed to the incidental application of foreign public law, whether as part of the law governing the contract or as datum. On the distinction, see Hans Baade, ‘The Operation of Foreign Public Law’.

\textsuperscript{135} Court practice reveals curious attempts to deny the presence of state interest (contrast, in the \textit{Laker} litigation, the observations of Lord Diplock, for whom the litigation was within the field of private law - see 1985 \textit{AC} at 85 - with the analysis of the American Judge Wilkey, who saw ‘at root a clear clash of governmental policies’, 731 F 2d 909, at 955). It has been shown very convincingly that the reference to comity, recurrent in this and similar litigation, can act alternatively as a bridge or a wall between private law and politics; Joel R Paul, ‘Comity in International Law’.

\textsuperscript{136} Curiously, European practice is at present far closer to such a result than are American courts and scholarship, although it has traditionally opposed any suggestion that choice of law should be concerned with state interests. Significantly, when Gerhard Kegel dealt what is generally thought to be the death-blow to Currie’s potential influence in Europe (‘The Crisis of the Conflict of Laws’, t 112, 91, and see above, § 1 and fn 10), he did it precisely through the demonstration that conflicts of laws do not involve governmental policies, or, to state the same idea differently, that governments are not interested in the outcome of private law litigation. Indeed, when, in the post-war world it became increasingly apparent that internationally mandatory economic regulation of the forum state frequently interfered with party choice of law, efforts culminating in the theory of \textit{lois de police} made these appear as a unilateralist exception to the general methodological principle of multilateralism. However, while maintaining their exceptional status in relation to the principle of party choice, article 7 § 1 of the Rome Convention was to provide specifically that the mandatory provisions of a third state which claimed to regulate a given transaction might also be applied by the forum courts where appropriate. Thus, without extending a common treatment to conflicts of public and private interests, this important provision would seem to set aside jurisdictional obstacles to the enforcement of foreign public regulation relevant to a contractual dispute. Efforts have since been directed in refining analysis of the different types of mandatory provisions caught by article 7. Admittedly, it has been only relatively successful: Germany and the United Kingdom have opted out of this provision, and concrete applications remain decidedly elusive. Moreover, when European Community authorities, not bound by the Rome Convention, have been called upon to define the reach of Community economic regulation, they adopted an approach framed in terms of prescriptive jurisdiction, which leads to the dismissal of any claim not supported by forum law. The American scene, which has long been auspicious to political analyses of the conflict of laws, might seem to provide a more favourable setting for a theory of conflicts of economic regulation. However, outside the federal setting, which clearly absorbed the energy of conflicts scholarship, the power paradigm inherent in the common law tradition has persisted, and has led to dealing with the international reach of federal economic regulation in terms of ‘prescriptive jurisdiction’. This approach has been compounded by the issue of subject-matter jurisdiction of federal courts: if there is no federal question, then the federal courts lack jurisdiction to decide the dispute.

\textsuperscript{137} That is, without the intermediation of the vested rights or other similar doctrines (such as the Italian theory of incorporation of foreign law).
exclusionary approach.\footnote{At the time, the multiplication of private international relations, due in particular to the new ease of transport and communication was seen as having normative implications for states, which could no longer ignore foreign law without unfairness to private litigants. At the same time, foreign institutions were invoked as the basis of claims before forum courts, which had therefore to refer to them as a practical matter. Both normative and pragmatic considerations equally apply today as far as the public law taboo is concerned.}

16. \textit{(a) The normative implications of globalisation.} The first is linked to the postulate which lies at the heart of the ‘power paradigm’ underlying the prescriptive jurisdiction perspective, and sees the state as a regulatory citadel.\footnote{Kronke, ‘Capital Markets and the Conflict of Laws’, 288; Eleanor M Fox, ‘National Law, Global Markets and Hartford Fire’.} Such a monopolistic view is hardly sustainable in a global context; interconnected markets clearly require a truly international framework.\footnote{See Kenichi Ohmae, \textit{The Borderless World}, 1990: ‘On a political map, the boundaries between countries are as clear as ever. But on a competitive map, a map showing the real flows of financial and industrial activity, those boundaries have largely disappeared’ (10).} Territorial boundaries are no longer (if they have ever been) a screen against the economic effects of activities originating in other jurisdictions.\footnote{See J Basedow, ‘Souveraineté territoriale et globalisation des marchés’.} Economic interdependency between national markets thus becomes a normative argument in favour of the duty of each legislator to contribute to global regulation.\footnote{Robert W Hillman, ‘Cross-Border Investment’; for a similar idea, see Kronke, ‘Capital Markets and the Conflict of Laws’, 285.} Professor Robert Hillman argues that, by opening their markets, states actually renounce claims to exclusive regulatory authority over cross-border transactions.\footnote{Several decisions, handed down in 1998 (see BG 125, I, 65 and 79), have extended cooperation to foreign regulatory agencies, such as the Hong Kong Securities and Futures Commission, and the Spanish Comisión Nacional del Mercado de Valores. See Kronke, ‘Capital Markets and the Conflict of Laws’, 270. Interconnectedness may now be sufficiently established to counteract the risk of generating prisoner’s dilemma dynamics. Another interesting example of the readiness to adopt more open methodology under the pressure of globalisation is the decision of the Supreme Court of Canada in the 1990 \textit{Morguard Investments} case (3 SCR 1077 Can). Various instances can be found in which courts are ready to enforce foreign judgments awarded on the basis of hybrid public legislation in environmental issues (see on this point Robert Wai, ‘Transnational Liftoff and Juridical Touchdown’, and the text accompanying fn 203).} Signs of the link between changing global economic conditions and the consequential need for coordination in the field of economic regulation can be found in national practice. For example, the Swiss federal court has held that in view of the increasing internationalisation of capital markets, extending spontaneous assistance to foreign authorities is desirable in Switzerland’s own national interests,\footnote{Article 137 of the Swiss law on private international law. Under this provision, the Swiss courts will decide a claim for compensation based on exclusionary conduct in the American market, but will not provide remedies (such as punitives) which are not available under Swiss law (see Basedow, ‘Souveraineté territoriale et globalisation des marchés’).} while the recent Swiss codification of private international law provides for a multilateral rule in the field of antitrust torts.\footnote{These signs are compounded by the fact that tests used to define prescriptive exclusionary approach.}
globalisation des marchés’, 440).

1. For example, while the rule of reason implemented in the United States’ Third Restatement on Foreign Relations Law (§ 403) will lead only to a decision not to apply forum law if the interests involved do not weigh in favour of its application, nevertheless, such a test implies a readiness to envisage foreign public interests in a way similar to the ‘significant relation’ approach of the Second Restatement on the Conflict of Laws. Indeed, it appears that the traditional idea, famously voiced by Lord Wilberforce in the Westinghouse case, according to which giving effect to foreign public law necessarily implies enforcing hostile foreign interests, is actually waning; it may well be that regulation in the field of securities, antitrust, environment or the protection of cultural heritage fall into categories where ‘typical’ interests may be identified as a necessary prerequisite to coordination. However, recent pleas in the United States for the revival of the public law taboo clearly rest on the different fear that introducing choice of law will lead to subordinating the public good to purely private schemes, rather than to foreign interests. These fears are entirely misplaced. They stem in many cases from reactions to the results achieved in the recent Lloyd’s litigation, in which it seemed that private parties were being allowed to opt out of federal public law; but as we have seen, such a label was probably inappropriate in the first place. Nevertheless, in fields where public interests do authentically call for protection, it may be time to abandon the idea that it would necessarily be contrary to the forum state’s interest to serve a foreign sovereign’s own aims by applying its public law.

17. (b) Intermingling of interests, in fact. More pragmatically, the conclusion that public law could be subjected to a choice of law methodology is related to the intermingling of private and public interests which already exists in practice and which makes any attempt to exclude the latter from the conflict of laws very difficult. Indeed, a brief glance at recent case-law in


This is arguably true of the effects test, to the extent that foreign interests might be considered in cases of true conflict. Although, admittedly, effects jurisdiction remains concurrent, a minimal form of comparison may be required if effects are to be characterised as substantial in order to justify prescriptive jurisdiction.

‘It is axiomatic that in anti-trust matters, the policy of one state may be to defend what it is the policy of another to attack’ (1978 AC at 616-617). This position is borne out by a considerable number of trans-Atlantic conflicts, which have led to aggressive judicial involvement, in particular through the use of anti-suit injunctions, with a view to protect prescriptive jurisdiction. While the political nature of these conflicts is undeniable, a more enlightened view may be that it is the non-application of foreign public law, in cases where its implementation is necessary to effectuate a strong state policy, which is hostile (see P Mayer, ‘Les lois de polices étrangères’, JDI 277 (1981)).

See the Oslo Resolution of the Institut de Droit international, 1975, Annuaire, vol 57 t II, 2 and 166.


See above, fn 113.

See the impressive array of WTO agreements including references to competition law described by Eleanor M Fox, ‘Antitrust and Regulatory Federalism’, 1787.


Once again, the notorious Laker litigation is an excellent example (see above, fn 127).


See text above, § 1.

The trend was set by the US Supreme Court’s 1985 Mitsubishi decision (105 S Ct 3346).


II.B Coordinating conflicting regulations

18. Focusing on global welfare. Recent scholarship invites considering a world-view of
economic regulation,\textsuperscript{162} rising above a ‘horizontal’ outlook,\textsuperscript{163} to embrace a ‘cosmopolitan’ account of transnational governance.\textsuperscript{164} In such a perspective, according to which ‘our old nation-state paradigm is no longer sufficient to the task’,\textsuperscript{165} the challenge is to see how the conflict of laws could best serve not merely the public good as seen through domestic lenses, but the requirements of global welfare. To do so, it would have to focus on providing a neutral framework for coordination rather than on the implementation of specific state interests (a). Lessons both from traditional conflicts and from governmental interest-type approaches seem to indicate that the ‘effects’ test makes the most sense in both political\textsuperscript{166} and economic terms.\textsuperscript{167} However, it clearly requires greater determinacy, which could be achieved incrementally by building principles of preference out of comparative field study (b).

\textbf{19. (a) Global welfare as coordination.} Obviously, definitional problems arise at this point. There may indeed be debate as to the appropriate yardstick to measure global welfare.\textsuperscript{168} Recent economic analysis focusing on the choice of yardstick has reinstated individual values such as protecting party expectations, reducing costs of legal information and avoidance of forum shopping as the appropriate goals of choice of law, rather than the furthering of

\item[163] Eleanor Fox, ‘National Law, Global Markets and Hartford Fire’. Since a prisoner’s dilemma arises, however, when courts imitate hypothetical global agreements, the author wishes for ‘responsible countries’ to take the lead in this new approach, perhaps under the auspices of the WTO.
\item[164] Robert Wai, ‘Transnational Liftoff and Juridical Touchdown’.
\item[166] For example, the secondary boycott imposed extraterritorially by the United States under the Helms-Burton Act is considered an illegal exercise of prescriptive jurisdiction to the extent that it has no basis under the effects doctrine; see A Lowenfeld, ‘Congress and Cuba: The Helms-Burton Act’, 90 \textit{Am J Int’l L} 419; Fidler, ‘Libertad v Liberalism: An Analysis of the Helms-Burton Act from within the Liberal International Relations Theory’, 4 \textit{IJGLS} 297.
\item[168] Drawing attention to this point, Paul B Stephan, ‘The Political Economy of Choice of Law’, 957.\end{footnotes}
governmental interests. Such a position hardly comes as a surprise to the European observer, where ‘conflicts justice’ has always served such interests, at least in traditional fields. Two problems arise with this point of view, however. On the one hand, it is undeniable that in the field of public law, state mandatory economic regulations express various conceptions of the public good, whose implementation may override considerations of private fairness and convenience. On the other hand, the pursuit of global welfare cannot mean giving a collective expression to given substantive values, such as investor protection or free competition, since state policies behind economic regulation are inevitably divergent. Practically, this double constraint can only mean that if the conflict of laws is to rise above a parochial or ‘horizontal’ approach, its contribution to global welfare must reside exclusively in an optimal coordination of divergent expressions of regulatory authority, geared to nothing more than avoiding under- and over-regulation in cases of cross-border externalities and eradicating discrimination. The conflict of laws would retrieve its lost ‘neutrality’ in this respect, and the somewhat obscure traditional objectives such as the ‘smooth functioning of the international system’ or the ‘coordination of systems’, could find a renewed significance.

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171 This is one of the reasons for which the creation of private causes of action to enforce public economic law may not be the best solution. Private incentives do not necessarily optimise global welfare; see Paul B Stephan, ‘The Political Economy of Choice of Law’, 986.

172 On the array of potentially different policies behind antitrust regulation, see Eleanor Fox, ‘Antitrust and Regulatory Federalism’.


174 ‘Mere’ coordination is a deceptively ambitious task. Beyond the impossibility, described above, of discovering universally shared policies, is the complex nature of economic regulation, which calls upon very different sources and instruments (regulatory agencies) that classical theory had not imagined. See on this point Kronke, ‘Capital Markets and the Conflict of Laws’, 291, emphasising that the risks of inconsistency are all the greater that the tools of regulation are heterogeneous or ‘uncommon’.

175 To take an example from US practice, a state which visits criminal sanctions on foreign firms for engaging in export cartels cannot expect international deference in respect of its own policy exempting domestic firms from similar conduct. The Webb-Pomerene Act, 1918, provides for an exemption to export cartels, which was broadened by the Export Trading Act, 1982.

176 See above. On the concept of ‘conflicts efficiency’ as opposed to ‘substantive efficiency’, see Trachtman, ‘Economic Analysis of Prescriptive Jurisdiction’. It is certainly interesting than an American author should be proposing a distinction similar to the long-maligned idea, central to the European tradition (see G Kegel, ‘The Crisis of the Conflict of Laws’), that there might be a difference between conflicts and substantive justice!


178 Batiffol, Aspects philosophiques du droit international privé, 1957.
20. (b) Principles of preference. One might therefore be tempted to formulate a simple multilateral ‘effects’ test, under which legislative authority would be assigned to the community suffering the most extensive adverse effects of a given activity, and therefore with the strongest incentive to regulate it optimally. However, although such an idea is certainly sound, it is also somewhat simplistic, thus stated, and would require addressing the problem of indeterminacy. Indeed, where effects are widespread, the difficult issue of concurrent regulatory claims must be dealt with; it may even be necessary to disperse jurisdiction in such a case. Similarly, when the protection of the domestic market is not the focus of a given state’s legislation, it makes little sense to apply its legislation on the basis of the effects test alone. It would therefore be necessary to refine the rule. Principles of preference built on careful analysis of the nature and source of the externalities with which conflicting legislations seek to deal might help to provide guidance in cases of concurrent interests; comparative field studies could contribute on this basis to the elaboration of connecting factors believed to be most generally acceptable, while the content of bilateral agreements already reached should be considered. Thus, using the example of antitrust, Eleanor Fox has suggested that when effects are targeted into the forum state, it seems legitimate to leave it paramount regulatory authority; on the other hand, where there are spillovers or ‘ripple effects’ from conduct essentially designed to respond to conditions in the domestic market, regulation would best be left to the host country, which would have the strongest incentive to internalise the effects of anti-competitive conduct. Where the focus of domestic legislation is not the market but individual actors, the long-maligned renvoi principle might help achieve optimal coordination.

21. Conclusion. Global markets and universalism. It may well seem naïve to wish for globally acceptable, ‘universal’ solutions to conflicts of economic regulation, as if the previous turns of the methodological wheel had delivered no lessons. Indeed, in the field of private law, previous efforts to present the conflict of laws as ‘neutral’ have been

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180 On this point, see Joel Trachtman, ‘Economic Analysis of Prescriptive Jurisdiction’, pointing out that such a solution would not ordinarily be achieved through a simple comparative impairment test.

181 On the inadequacy of the affected market as an exclusive connecting factor, see Kronke, ‘Capital Markets and the Conflict of Laws’, 291 and 368.

182 Herbert Kronke’s comparative study of practice in the field of securities regulation is an excellent illustration of the type of analysis which could be undertaken. See in particular the very detailed suggestions provided in chapter III of his Hague lectures.

183 Such as in the Woodpulp or Hartford Fire cases.

184 Such as in the Nippon Paper case (109 F 3d 1; on the latter as a ‘cautionary tale’, in view of the criminal sanctions also attendant on the finding of an antitrust violation, see Dorsey D Ellis, ‘Projecting the Long Arm of the Law, 492).

185 Joel Trachtman develops the concept of ‘contingent hegemony’, according to which the most interested government to whom regulatory authority is primarily allocated could then unbundle such allocation and, subject to agency fees, delegate to other regulators. Good old renvoi is decidedly revamped! It is, in fact periodically reinstated in new contexts (see Larry Kramer, ‘Return of the Renvoi’, 66 NYU L R 979 (1991); Adrian Briggs, ‘In Praise and Defense of Renvoi’, 47 ICLQ 877 (1998); Paolo Picone, ‘La méthode de référence à l’ordre juridique compétent en droit international privé’, Rec Acad La HayeII, 229 (1986)).
unsuccessful, while governmental interests analysis, which might seem more appropriate in the field of conflicts of public law, carries the double stigma of discrimination or *lex forism*. But it may be that, however divergent regulatory policies might be, a shared need born of participation in the world market creates sufficient common ground between state economic laws for a global approach to be sustainable. Based on coordination, such an approach would have the double advantage of being applicable by international arbitrators, increasingly called upon to participate in the smooth working of the global market, and of improving accountability of regulatory agencies.\(^\text{186}\) Taking the lead from shifts already taking place within the European Union itself, the price to pay for European legal doctrine\(^\text{187}\) would be to accept the conflict of laws as a tool of political economy.

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\(^{186}\) Calling for such accountability, Anne-Marie Slaughter, ‘The Accountability of Governmental networks’, *8 Ind J Global Legal Stud* 347 (2000).

\(^{187}\) As Joel R Paul’s article on ‘Comity in International Law’ demonstrates, the real contribution of American interdisciplinary scholarship to this field has been to emphasise the importance of context. Choice of law can thus be invested with economic and political functions which are far beyond the pale of the private law paradigm.