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— Public Interests in Private International Law —

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PARTY AUTONOMY IN CONTEMPORARY PRIVATE INTERNATIONAL LAW: PART TWO

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Stéphanie Francq*

Introduction

Discussing the relationship between party autonomy and regulation is challenging on two fronts. On the one hand, party autonomy, as other contributions in this prestigious journal have already indicated, is an elusive notion of conflict of laws: its exact function and its theoretical underpinnings are properly evanescent.[1] Regulation, on the other hand, is one of these fashionable expressions, which despite its widespread use, eludes any systematic definition.[2] Making sense of two notions that both suffer of an identity crisis is thus a risky task.

The goal of this contribution, however, is not to provide definitive answers as to the meaning of the two notions, but to explore the shape of their potential relation, based on the most common representations offered in scholarship. How are the concepts of party autonomy and regulation positioned in the intellectual landscape of law and of conflict of laws in particular? Do we see interaction, exclusion,

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[1] See in this journal: Horatia Muir Watt, "Party Autonomy in Global Context: The Political Economy of a Self-Constituting Regime," *Japanese Yearbook of International Law*, Vol. 58 (2015), p. 175; Keisuke Takeshita, "Critical Analysis of Party Autonomy: From a Theoretical Perspective," *Japanese Yearbook of International Law*, Vol. 58 (2015), p. 196.

[2] See part I.

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confrontation or collaboration between them? Is there a sense and purpose in their relationship?

The first part of this paper focuses on analyzing the notions of regulation and party autonomy. When trying to understand the reasons why regulation and party autonomy are so heavily discussed in their respective field, the observer is struck by the existence of a similar challenge in the two fields: for conflict of laws scholarship, as for regulation scholarship, a great deal of the conversation turns around the concept of private law versus public law, and actually on the concept of law itself. It appears that part of the scholarship on each side settles on a vision of law — at least of private law — as a rather neutral and abstract concept (I). This conception of law, and more precisely of private law, serves to distinguish regulation from law (as a normative concept), on the one hand, and to justify party autonomy (and more generally, the multilateral system of conflict of laws) on the other. The second part of the paper analyzes how the concept of regulation penetrates the conflict of laws landscape and interacts with that of party autonomy, and how much party autonomy plays a role in the regulation scholarship. Their relation appears at first as one of contradiction. Regulation is arguably set to prevent or correct market failures and ensure the protection of the public interest. It thus naturally excludes party autonomy and the potential evasion from public policies (II.1.). But regulation and party autonomy also meet in collaborative terms: party autonomy is itself sometimes regarded as a mode of regulation (II.2.). Normative competition and regulation by private actors are two illustrations for this. They result from the choice of private parties, as these select or create the preferable "legal" system or regime as applicable to them and their transactions.[3]

A closer look at these collaborative or contradictory relationships between regulation and party autonomy raises a series of critiques and concerns about the protection of public interests, which unsettle the classic picture of the theory of conflict of laws and the usual distinction between law and regulation. The analytical picture of the relationship existing between party autonomy and the various forms of regulation reveals indeed a second story that unfolds at a more theoretical level. The foundational representation of private law as neutral and abstract is deeply challenged when observing the interplay between regulation and party autonomy. Be this relationship one of contradiction or one of collaboration, it always points at the public interests and policies which are at stake in the background of private arrangements. In the field of regulation, as in the conflict of laws field, the rhetoric and theoretical construction largely denies this dynamic between public and private interests and thus obliterates part of the social and political reality of law, a reality which had long ago been clearly identified by the American Legal

[3] The term "legal" is here put in inverted commas as the question whether private regulation is still a legal phenomenon is far from settled (*infra* II).

Realists. Surprisingly, the observation of the dynamic between regulation and party autonomy leads to reconsidering the "philosophical" foundations upon which the scholarship in the two field is largely based.

Three points of caution should be made from the start of this contribution. First, this paper is limited to party autonomy and regulation. It does not offer a full picture of the ways in which regulation and conflict of laws interact beyond party autonomy, nor does it offer a full discussion of party autonomy in conflict of laws.[4] That said, occasional references or comments on the larger picture of conflict of laws are inevitable, mainly because the reasons for accepting party autonomy are deeply rooted in the theoretical basis of the conflict of laws system (see Part I.2).

Second, many of the references and examples adopted here relate, and are limited, to the European Union (hereafter, the EU), but not only because of the author's provenance. The EU is a vivid laboratory for both the expanding role of party autonomy in conflict of laws[5] and of regulation in the private sphere.[6] The limitation to the EU matters because conflict of laws in the EU is based on a set of premises, some of which are not universally shared. For instance, in the EU there is no "popular instrumentalist conception of the choice of law as a tool for promoting states' interests," quite the contrary, nor is conflict of laws grounded "on the principle of states' sovereignty."[7] As will be discussed below, the EU conflict of laws system is based on a conception of private law, and thus of *private* international law, under the widespread terminology on the European continent, as dealing chiefly with the relations between private individuals. As a consequence,

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[4] For instance, this contribution does not discuss how far conflict of laws rules have a regulatory function. See for instance: Oliveira Boskovic, "The Law Applicable to Violations of the Environment — Regulatory Strategies," in Fabrizio Cafaggi and Horatia Muir Watt eds., *The Regulatory Function of European Private Law* (2009), p. 188; Sandrine Clavel, "The Regulatory Function of Choice of Law Rules Applying to Contracts for Services in the European Union," in *ibid.*, p. 62.

[5] See for instance: Felix Maultzsch, "Parteiautonomie im Internationalen Privat- und Zivilverfahrensrecht," in Jan von Hein and Giesela Rühl eds., *Kohärenz im Internationalen Privat- und Verfahrensrecht der Europäischen Union* (2015), p. 153; Hans-Peter Mansel, "Parteiautonomie, Rechtsgeschäftslehre der Rechtswahl und Allgemeinen Teil des europäischen Kollisionsrechts," in Stefan Leible and Hans Unberath eds., *Brauchen wir eine Rom 0-Verordnung?* (2013), p. 241; Giesela Rühl, "Rechtswahlfreiheit im europäischen Kollisionsrecht," in Dietmar Baetge *et al.*, eds., *Die richtige Ordnung: Festschrift für Jan Kropholler zum 70. Geburtstag* (2008), p. 187.

[6] See the project of Hans Micklitz, *European Regulatory Private Law Project: The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation* (working papers *available at* <https://blogs.eui.eu/erc-erpl/working-papers-2/> (last visit: June 30, 2016).

[7] Sagi Peari, "The Choice-Based Perspective of Choice-of-Law," *Duke Journal of Comparative & International Law*, Vol. 23 (2013), p. 479.

the US and the EU conflict of laws approach on topics like regulation and party autonomy may differ significantly.[8]

A last point should be stressed in regard to the context of this contribution. Party autonomy and regulation share a contemporary common point: their importance seems to increase proportionally to the acceleration of globalization. In fact (or rather: in the respective literature), party autonomy and regulation are presented as the only possible answer to globalization. On the one hand, party autonomy supposedly offers the sole chance for legal certainty and coherence of individual situations (personal status, contracts, family relationships) in an era of multi-layered regulatory power and of increased mobility.[9] On the other hand, regulation supposedly incarnates the new governance method apt for coping with the complex and sometimes contradictory demands of individuals in a globalized society: inclusion of the civil society, flexibility, but also, security, risk prevention, preservation of local traditions, etc. Globalization and its governance implications are thus the wind pushing the boat of regulation and party autonomy.[10] The wind

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[8] See for instance Peari, *ibid*., drawing from Kantian legal philosophy, the author proposes an understanding of conflict of laws as based on individual rights and individual interests, something he considers new and deeply "lacking in traditional and contemporary choice-of-law literature" (p. 479). As mentioned, in his view, traditional conflict of laws is rooted in a debate about sovereignty. From a European perspective, the consideration of individuals' interest as a basis for conflict of laws is definitively not lacking (as this paper argues) and correspondingly, consideration for state interests is not the basis of the conflict of laws system. In addition, conflicts of laws are not considered as conflicts of sovereignty, even if this perspective has long prevailed in history; see Bernard Audit, "Le droit international privé en quête d'universalité," *Recueil des cours de l'Académie de droit international*, Vol. 305 (2003), pp. 161-190. For an emphasis on conflict of laws focusing on state law, rather than on states' interests, Matthias Lehmann, "Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws," *Vanderbilt Journal of Transnational Law*, Vol. 41 (2008), p. 381; Despite these divergences in the background, party autonomy is widely accepted on both side of the Atlantic (see for instance, for the field of contract where party autonomy is most obvious, Gisela Rühl, "Party Autonomy in the Private International Law of Contracts — Transatlantic Convergence and Economic Efficiency," in Eckart Gottschalk *et al.* eds., *Conflict of Laws in a Globalized World* (2007), pp. 155-158. Beyond the acceptance of party autonomy, some points of convergence could be found in the discussion on "regulation," for instance regarding "rules of conduct": see, Article 17 Rome II Regulation (Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *Official Journal of the European Union* (2007), L 199/40) and John T. Cross, "The Conduct-Regulating Exception in Modern United States Choice-of-Law," *Creighton Law Review*, Vol. 36 (2003), p. 425.

[9] Robert Wai, "Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization," *Columbia Journal of Transnational Law*, Vol. 40 (2002), pp. 212-232; see also Part II. 1 of this paper.

[10] See *infra* II.

might also unveil that part of the boat deserves reconsideration.[11]

I. Regulation, Conflict of Laws and Law

The first point of encounter between regulation and party autonomy lies in the on-going academic questioning they generate. Both concepts seem submitted to a perpetual discussion concerning their very reason for being and the delimitation of the space they legitimately occupy. A closer look reveals how the two concepts actually generate a conversation about the concept of law, the distinctive feature of private law versus public law and the corresponding conception of legal systems. As it turns out, both the legitimacy of party autonomy in the realm of conflict of laws (2.) and the distinctiveness of regulation in its own field of operation (1.) suppose a specific conception of law, or more precisely of private law: private law is then pictured as neutral and abstract.

1. Regulation and (Private) Law

Regulation is a complex concept. It is by now recognized as a field of study, but even the most prominent scholars in the field admit that providing a definition of the concept is difficult; and that the boundaries of what regulation is and thus of the field itself are uncertain.[12] As Julia Black pointed out, "definitional chaos is almost seen as an occupational hazard by those who write about regulation."[13] Many of those writers identify categories of regulation — focusing thus on the various forms of regulation — rather than providing a conceptual and general definition.[14] The categories presented are themselves as diverse as the authors, and are often unclear. For the sake of simplicity, it is useful to divide the subject into three major categories, which also help illustrating the larger discussion concerning the

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[11] For a discussion of some of the recent challenges brought by globalization to conflict of laws: Dai Yokomizo, "Conflict of Laws in the Era of Globalization," *Japanese Yearbook of International Law*, Vol. 57 (2014), p. 179 (reviewing recent academic work in order to assess how far conflict of laws as a doctrine should adapt to globalization).

[12] Robert Baldwin, Martin Cave and Martin Lodge, "Introduction: Regulation — The Field and the Developing Agenda," in Robert Baldwin, Martin Cave and Martin Lodge eds., *The Oxford Handbook of Regulation* (2010), p. 4 (regulation as a field), p. 12 (on the difficulty to provide a definition), pp. 6-10 (on the delimitation of the field).

[13] Julia Black, "Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World," *Current Legal Problems*, Vol. 54, Issue 1 (2001), p. 128.

[14] For instance, Barry M. Mitnick, *The Political Economy of Regulation: Creating, Designing and Removing Regulatory Forms* (1980) (proposing a catalogue and classification of the various readings of the term "regulation").

evolving representations of normativity and of governance strategies.[15]

The first category seems clearly identified: regulations in a command or command-and-control style, adopted by public authorities (regulatory agencies, public administrations or legislative instances) in fulfilment of their mandate to protect and foster public interests. Regulation scholarship seems to place into this category most of the public authorities' answers to market failure imposing obligations on market actors. This explains why the regulatory domains that are usually cited in this context relate to specific economic activities that are most affected by market failure and risk, such as financial services, telecommunications, pharmaceutical industries, network industries.[16] In these specific sectors, regulation does not only aim at organizing or ensuring the fairness of a market, but often at creating the market, *i.e.* liberalizing a market that was previously the object of a (public) monopoly (postal services and electricity supply for instance).[17] Alternatively, the public authority intervenes to prevent or compensate for market failures affecting typically cross sector activities, such as the protection of the environment. Even this command or command-and-control category can be more or less broadly conceived. The question whether and how far consumer protection, for instance, falls into this category could be debated.[18] Also, the question whether control implies criminal sanctions or any type of sanction is open for discussion.

At the opposite side of the spectrum lies private regulation. Generally speaking, private regulation or self-regulation designates the creation of rules by the market actors that they decide to submit themselves to.[19] Private regulation,

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[15] The categories proposed in this paper are inspired (without perfectly overlapping) by the categories identified by Gérard Timsit, "La régulation — La notion et le phénomène," *Revue française d'administration publique*, Vol. 1, No. 109 (2004/1), pp. 8-10.

[16] Those are the economic sectors cited in *The Oxford Handbook of Regulation* in the chapter on regulatory domain (as from *supra* note 12, p. 437).

[17] This is the first category of regulation identified by Timsit as answering the market failures. For him, this type of regulation presents 3 aspects; i) introducing competition in economic sectors previously controlled by the public authority; ii) introducing surveillance mechanisms for compensating the free market risks such as abuse of dominant position and securing access to infrastructure; iii) creation of specific authorities in charge of monitoring, controlling and complementing the system. Timsit, *supra* note 15.

[18] Anthony Ogus, *Regulation — Legal Form and Economic Theory* (1994), pp. 257-258 argues that consumer protection would be conceived as regulation only as far as it concerns inalienable rights. But even in such a case, he admits that "private regulation" would lack one of the identifying characteristics of what he calls regulation because the state takes no direct initiative to ensure compliance with the specific goal enshrined in the consumer protective legislation (p. 258) and that its merits as a regulatory method should therefore not be overestimated (p. 261).

[19] Timsit, *supra* note 15, p. 10; Ogus, *supra* note 18, pp. 107-111 (even if his analysis seems at first based on a rather narrow understanding of regulation limited to public law, see pp.

contrary to this first command-and-control type, is made by non-public bodies or the civil society generally speaking, such as NGO's, corporations, arbitrators, professional associations, and takes various forms: codes of conduct, charters, quality declaration, etc. Private regulation is regarded as regulation rather than a mere declaration of intent or fact because it entails a constraining aspect and is therefore constitutive for the community generating it.[20] Private regulation can also derive from, or be mandated by, public authority.[21]

In between is a gray zone with various forms of governance mechanisms or strategies such as information gathering and distribution, reflexive regulation, co-operation infrastructures (between experts of the field, be they public or private bodies), open method of coordination or practical applications of the nudging theory. This "other" category encompasses all sorts of governance figures where the public authority is involved at some level but does not intervene as a law-maker or as a regulatory agency with a power of command, rather as a facilitator.

To be sure, these categories are in no way clearly delineated or representative of a general agreement among scholars writing on regulation. The vocabulary and understandings of the term regulation vary greatly and this wide diversity in understandings renders any discussion of regulation as a single and clearly identified category moot. In the EU for instance, "regulation" is often used as a synonymous for all forms of law-making or even all forms of governance.[22] In contrast, regu-

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2-3). Julia Black, "Constitutionalising Self-Regulation," *Modern Law Review*, Vol. 59, Issue 1 (1996), p. 27, distinguishes self-regulation ("situation of a group of persons or bodies, acting together, performing a regulatory function in respect of themselves or others who accept their authority") from individualized regulation ("tailored to the individual firm").

[20] Timsit, *supra* note 15, p. 10 (talking about endogenous normativity).

[21] Black, *supra* note 19, p. 27 (drawing various categories of self-regulation depending on the degree of involvement of the state or government: self-regulation can be "mandated," "sanctioned," "coerced" or "voluntary").

[22] See for instance: Kenneth Armstrong, *Regulation, Deregulation and Re-Regulation* (2000) (concerned with the legitimation of multi-level governance within and "beyond the traditional processes for creating legislation" in the EU, p. xiii); Brigitte Egelund Olsen and Karsten Engsig Sørensen, "Regulation in the EU — an Introduction," in Brigitte Egelund Olsen and Karsten Engsig Sørensen eds., *Regulation in the EU* (2006), p. 19 (the contribution describes the scope of the book as dealing broadly speaking with EU legislation, including EU soft law, self-regulation, co-regulation and so on and places a focus on "new legislative instruments and methods as alternatives or supplements to the traditional forms of legislation such as directives and regulations," p. 25). The use of the term "regulation" as covering all types of rule-making strategies seems to me quite widespread in the EU. See also, the OECD definition of regulation as "the full range of legal instruments by which governing institutions, at all levels of government, impose obligations and constraints on the private sector" (Recommendation of the Council of the OECD on Improving the Quality of Government Regulation, Adopted on 9 March 1995, OCDE/GD (95) 95, note 1).

lation is sometimes limited to the designation of rules promulgated by the government (as opposed to parliamentary legislation).[23] Regulation is sometimes referred to as an all-encompassing term for designating all forms of social control.[24] Criteria used to characterize regulation operate at various levels and therefore the categories identified in scholarship often reflect different types of concern.[25] For instance, those criteria can relate to the source of the regulation such as government, administrative authority, experts, members of a professional association. Or they relate to the type of sanction; whether a sanction is necessary; what types of sanction are acceptable; the need for regulation to be mandatory. Others focus on implementation procedures and their actors; or on the nature of the problem to be addressed, be it market failures, public interests, or private interests.

It is therefore no surprise that the definitions proposed in scholarship present an open texture aimed at capturing a wide range of phenomena. Julia Black, for instance, defines regulation as "the intentional use of authority to affect behavior of a different party according to set standards, involving instruments of information gathering and behavior modification."[26] This definition is a way of delimiting her sphere of analysis: focusing on intentional strategies for controlling behaviors allows for a basis large enough to "uncouple" this form of control from governmental authorities but narrow enough for not encompassing "all questions of social and political science."[27] Even this definition is obviously extremely broad and triggers, in line with Black's explicit intent, other more fundamental questions as to "the nature and understanding of regulation, the consequent role of the state, and our understanding of law."[28]

The concept of "regulation" presents indeed an interesting challenge for the theory of law. Within the space occupied by legal normativity (as opposed to social or religious normativity), is there a space for something else than law, something

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[23] See for instance: Arie Freiberg, *The Tools of Regulation* (2010), pp. 4-5 (the book focuses on government regulation, it acknowledges from the start that regulation can also be done by other bodies than government and that "government regulation can also be done *through* non-government bodies," p. 5, emphasis in the original); also Ogus, *supra* note 18, see preface and p. 2; comp. *ibid.*, pp. 3 and 107-111.

[24] Baldwin, Cave and Lodge, *supra* note 12, pp. 3 and 12; Freiberg, *supra* note 23, p. 3. These scholars consider such a definition of regulation as over-encompassing and therefore of little use.

[25] See for instance: Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation — Theory, Strategy and Practice* (2nd ed., 2012), p. 3, proposing 3 approaches to regulation that are based on different criteria; one refers to the content ("a command"), one refers to the author ("state"), one refers to the method ("all forms of social or economic influence").

[26] Black, *supra* note 13, p.142.

[27] *Ibid.*

[28] *Ibid.*, p. 146.

that could be called regulation? Or is regulation a non-legal normativity, similar to another type of social norm? Or is it just a sub-category of the law? Or is it conceptually the same thing as law? And what is law in the end? The debate raised by regulation is thus of interest not only for those who study the various methods of governance, but also for legal philosophers. As for the latter, the positioning of regulation obviously depends on their own conception of what law is. For instance, the French legal philosopher Timsit reproaches Dworkin for conflating law and regulation in his theory of law as interpretive.[29] Timsit himself locates regulation next to the law, as an alternative form of normativity that cannot be reduced to interpretation (the application of law), or to law as a general and abstract norm. What seems to oppose legal philosophers in regard to regulation is their very conception of law; the more law is considered as an abstract, general and neutral phenomenon, the more clearly it is distinguished from regulation (as in Timisit's identification of regulation); the more law is considered as a sociological and practical reality, that can be individualized and conceptualized as a strategy to influence behaviors, the more difficult it seems to distinguish law and regulation.[30]

This discussion is even more complicated when one considers the purpose of regulation. Among the many understandings of regulation, one point of agreement seems to surface as to its purpose: regulation is ultimately there to achieve the public interest, a concept obviously subject to various understandings.[31] Because regulation has been "discovered" by economic analysis of law, it is largely identified in scholarship as a way of addressing market failures and sometimes as a more efficient way of regulating the market than what public authorities would do.[32] But even the economists' claim is not that the specific organization of society that results from regulation concerns only the individual interests of the specific market actors whose behavior is regulated. As such, regulation is conceived as a way of complementing the organization of society provided by the market. The market itself is conceptualized as a form of organization of the society that is based on the maximization of individual interest, hopefully leading to an average level of satisfaction for the larger social group involved. Regulation, in contrast, operates

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[29] Gérard Timsit, *Archipel de la norme* (1998), pp. 219-231.

[30] See for instance the discussion in Timsit, *ibid.*, pp. 203-207, 212-213.

[31] Julia Black, "Critical Reflections on Regulation," *Australian Journal of Legal Philosophy*, Vol. 27, Issue 2 (2002), pp. 9-10 identifying the goals of regulation as traditionally conveyed in literature: preventing and correcting market failures, occasionally distributional aims and management and distribution of risks; Mitnick, *supra* note 14, pp. 91-107; Mike Feintuck, "Regulatory Rationales Beyond the Economic: In Search of the Public Interest," in Baldwin, Cave and Lodge, *supra* note 12, p. 39.

[32] Anthony Ogus, *Regulation, Economics and the Law* (2001), p. xii. Cento Veljanovski, "Economic Approaches to Regulation," in Baldwin, Cave and Lodge, *supra* note 12, p. 17.

beyond the individual interests or the sum thereof. Yet if regulation is aiming at promoting the public interest, outside the market forces, in what terms is it functionally different from law?[33] Would regulation overlap with public law, while private law would be of a different nature? What about public interests being dealt with in other arena than the government and in other forms than those traditionally associated with public law?

This debate does not need to be closed for a conflict of laws purpose. What matters, however, is to observe that the identification of regulation as a distinctive concept necessarily presupposes to distinguish it from what law is, or from what private law is, depending on the more or less philosophical level of the discussion and depending on whether legal instruments can be qualified as regulatory tools. Generally speaking, two points surface in the discussion on regulation: (i) regulation is sometimes seen as a normative concept distinct from law and in this case, law is considered as rather abstract and neutral, while regulation is a more individualized strategy influencing behaviors; (ii) when regulation (or part of the regulatory instances) can be associated with a legal concept, it is often conflated with public law, as opposed to private law.[34] Interestingly, conflict of laws scholarship is divided and animated by on-going debates about the same fundamental questions, for which party autonomy serves as a trigger.

2. Party Autonomy, Conflict of Law and (Private) Law

Some concepts work for scholarship, as a developing bath for argentic photography. Such is the case of party autonomy for conflict of laws. Party autonomy reveals how the conflict of laws scholarship is actually engaged in a conversation about the concept of law.

For conflict of laws scholarship, the justification of party autonomy seems to be a particularly tricky issue. This is the reason why the foundations of party autonomy are still in discussion today, while its practice in contrast is widely accepted. The practice of party autonomy is so widespread that even the most sophisticated critics of party autonomy do not go all the way as to propose to abolish party autonomy.[35]

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[33] For a discussion of whether regulation "is" law or is "less" or "more" than law see Black, *supra* note 31, pp. 29-33.

[34] And again, there are obvious exceptions. See *infra* part II, note 151.

[35] Horatia Muir Watt, "'Party Autonomy' in International Contracts: from the Makings of a Myth to the Requirements of Global Governance," *European Review of Contract Law*, Vol. 6, Issue 3 (2010), p. 33 (proposing to develop requirements of transparency and accountability into the conditions imposed on party autonomy, inspired by scholarship on global administrative law). More nuanced on the virtues of global administrative law, see Takeshi Fujitani, "The Law, Governance, and Society in the Context of Globalization —

(1) Justifying Party Autonomy: a Specific Conception of Private Law

In the European legal doctrine, several justifications of party autonomy can be traced. Generally speaking, party autonomy is often thought of as the natural extension (or mirror) of contractual freedom at the domestic level. The argument goes in at least three directions.[36] According to a first (in time) conception, party autonomy *is* contractual freedom (*Version 1*): parties are free to choose a foreign law, just like and within the same limits as, they would be free to draft their own contractual terms under the law that applies to their contract.[37] In other words, the chosen foreign law is nothing more than a contractual provision drafted by the parties and the limits of the parties' freedom to insert new provisions in their relationship are set by law, a law that objectively applies to the contract. In a second version (*Version 2*), when choosing the applicable law, parties localize the contract in a legal system. Party autonomy becomes, under this version, a true conflict rule: it designates the law applicable to the contract through a connecting factor (the choice of the parties) that will identify a law governing the contract and thereby set aside any other law that might apply or claim to apply to the contract. A third version considers party autonomy as a derivative of the idea behind domestic con-

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Renewed Formation of the Law and Sovereign States," *Japanese Yearbook of International Law*, Vol. 57 (2014), p. 215.

[36] Ralf Michaels has recently summarized these conceptions (that he reduces to two positions) in clear and pointed terms and showed how they present "mutual blind spots," *available at* <http://www.pilaj.jp/data/2013_0602_Party_Autonomy.pdf> (this is the script of talk entitled: "Party Autonomy: a New Paradigm Without a Foundation?"). Here I follow the three parts presentation of Henri Batiffol, "Subjectivisme et objectivisme dans le droit international privé des contrats," in *Mélanges offerts à Jacques Maury* (1960), pp. 39-58. In this piece, Batiffol shows how party autonomy can receive various interpretations from party autonomy as contractual freedom (objective account) to party autonomy as parties entirely free from any legal system (subjective account). The latter version, as well known, leads to accepting depeçage, petrification (freezing the chosen law), the impossibility to consider the contract void under any legal system, the complete freedom from mandatory rules that would impose restraints on the parties (mandatory rules of the chosen law, as well as mandatory rules of the normally applicable law would be displaced). Batiffol proposes a third way: party autonomy as a method for locating the contract in a legal system, inspired by the English concept of the proper law of contract (p. 53). This account, which Batiffol considers as a balanced middle ground (since the parties may not refuse the application of parts of the chosen legal system, p. 53), leads however to speculation as to the implicit choices formulated by the parties (pp. 56-58). See also the brief historical part by Hessel E. Yntema, "'Autonomy' in Choice of Law," *The American Journal of Comparative Law*, Vol. 1 (1952), pp. 341-345.

[37] Yuko Nishitani, *Mancini und die Parteiautonomie im Internationalen Privatrecht* (2000) (showing how Mancini is said to have grounded the idea of party autonomy, even though he conceived it in a limited sense, *i.e.* within the limits of internal law).

tractual freedom but playing on the international scene (*Version 3*): party autonomy, once set in the international arena, has different attributes, tailored for the specific needs of international relationships. Party autonomy is, as domestic contractual freedom, the expression of free will, but somehow placed above legal systems.[38] The idea of party autonomy as a human right, or some right preceding the existence of states, would fit in this account.[39]

The three versions have been debated in the last one and a half century so that the limits of each account are actually quite clear: (i) under *Version 1*, it is very difficult to explain what party autonomy actually provides that is different from contractual freedom and thus why the concept of party autonomy would even exist in private international law; (ii) under *Version 2*, it is difficult to see what to do when parties localize their contract in a system that renders the contract void, when the only reason for applying this law is the parties choice; (iii) in *Version 3*, it is very difficult to explain why (and how far) parties would be placed above any law and why the so-called special needs of international contracts would justify the "contrat sans loi" to be binding for the parties in any sort of ways.[40]

In addition, all of these versions struggle with the problem of mandatory or overriding mandatory rules. Mandatory rules are the domestic rules restricting the exercise of contractual freedom. Overriding mandatory rules are domestic rules that intend to regulate specific situations in mandatory way, even if the situation presents connections with foreign legal systems and irrespective of the law designated by regular conflict rules. Those rules thus trump the designation of a foreign law via party autonomy. The conflict of laws scholarship is divided on a number of questions relating to mandatory and overriding mandatory rules: when and how far should mandatory and/or overriding mandatory rules apply? And which mandatory or overriding mandatory rules: those of the chosen system; those of the *lex fori*; those of the law normally applicable to the contract; those of third states? I will come back to these questions. For now, it is sufficient to point out that, irrespective of the account provided for legitimizing party autonomy, mandatory and especially overriding mandatory rules are an issue. One the one hand, one could think that party autonomy and mandatory rules are mutually exclusive. In *Version 1*, the "freedom" to choose the applicable law is virtually inexistent; in *Version 3*, the mandatory and overriding mandatory rules are virtually inexistent. On the

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[38] This is what Batiffol describes as the subjectivist vision of party autonomy. See *supra* note 36.

[39] Jürgen Basedow, "Theorie der Rechtswahl oder Parteiautonomie als Grundlage des Internationalen Privatrechts," *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 75, No.1 (2011), p. 32.

[40] Ralf Michaels makes this important point in "Party Autonomy: a New Paradigm Without a Foundation?," *supra* note 36, p. 8.

other hand, trying to mediate between party autonomy and mandatory or overriding mandatory rules in conflict of laws leads to other contradictions. This is for instance the problem for *Version 2*: why would parties choose a system that would curtail their liberty, not to mention nullify the contract?

When considering the difficulties each account of party autonomy encounters, it becomes striking that despite these difficulties none of these accounts considers a conflict of laws world without party autonomy. In other words, party autonomy is taken for granted and the discussion is in many ways focused on the unease felt around the necessity for setting limits to party autonomy.[41] From the start, party autonomy is considered legitimate and, on this basis, an *ex post facto* narrative needs to be developed that can justify party autonomy. Therefore, there must be something behind, or prior to, the narrative from which the narrative itself derives its legitimacy. This is where the theory (or rather: a meta-theory) of conflict of laws enters into play.

Behind the three accounts referred to here is a specific conception of law and of legal systems.[42] In other words, for thinking that parties can: (i) pick provisions of a foreign legal system and insert them in their contract (*Version 1*); (ii) locate their contract in a legal system of their choice (*Version 2*); (iii) be placed higher in a hierarchic scale than any State (*Version 3*); it takes a specific vision of what law and legal systems are in regard to private parties. For making this point, it is sufficient to see how difficult it is to justify or consider party autonomy in a governmental interest analysis: party autonomy does not fit the conception of law and legal system, that lies at the heart of governmental interest analysis.[43] Another way of showing how the treatment of party autonomy is deeply intertwined with legal philosophy or at least a general conception of what law is, is to consider how

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[41] Takeshita, *supra* note 1, p. 222 pointing that we are regarding party autonomy as a dogma and considering issues deductively from this dogma.

[42] As Keisuke Takeshita pointed about Savigny and Zietelmann, they "formulated their theories of private international law within the frameworks of their general theories of law" (Takeshita, *supra* note 1, p. 220.). The entire contribution tends to show how the legitimation of party autonomy can only be understood in connection with a deeper vision of laws and legal systems (and one could extend this to "norms and normative systems").

[43] Brainerd Currie did not seem very keen on party autonomy; see Stewart E. Sterk, "The Marginal Relevance of Choice of Law Theory," *University of Pennsylvania Law Review*, Vol. 142 (1994), p. 963 citing one passage where Currie states that the ability to choose the applicable law "must to some extent, impair the apparent interest of a state which has, and has asserted, the interest in protecting the incapacitated party": Brainerd Currie, "Married Women's Contract: A Study In Conflict-of-Laws Method," *University of Chicago Law Review*, Vol. 25 (1958), p. 248. The reason why Currie never treated the subject as such might very well be that party autonomy is completely at odds with states' interests; see Michaels, *supra* note 36, p. 2, considers party autonomy as "incompatible with a focus on governmental interests."

Jürgen Basedow feels the need to anchor his defense of party autonomy in the writings of Rousseau and Locke, their conception of law and the corresponding legitimation of legal systems (or rather, states).[44] Even the ultimate, last-resort, legitimation of party autonomy provided by convenience for the parties and the feasibility of international transactions rests on a specific vision of the role of law: law should be convenient and serve the best interest of the parties as seen from their individual perspective. Despite all the difficulties, party autonomy is placed at the center of construction(s) of private international law. This reveals how the construction itself rests on a specific conception of law and legal systems, which it is time to question.

(2) Which Conception of Private Law?

In the EU, the conflict of laws system is inherited from Savigny, but is in many ways remote from the core conceptions of Savigny in regard to laws and legal systems. The current EU system of conflict of laws seems (to me) based on four basic ideas that we derive from Savigny's writings. Whether these are exactly Savigny's ideas or whether they result from a modern reconstruction of Savigny's writings is debatable. This is the reason why I try to identify here four ideas that we "kept" from Savigny, rather than referring to "Savigny's ideas."

First, we kept from Savigny the idea that relationships can be allocated to legal systems via a connecting factor that is due to localize the relationship, without consideration for the content of the laws potentially in conflict and without consideration for each legal system's potential claim as regards the application of its own law.[45] This is the core conception of the current conflict of laws method in Europe: this "localizing" method is called the multilateral method — as opposed to the unilateral method, which in Savigny's time was referred to as the "statutist" method as it focuses on the statute's intention to apply to certain situations.[46] For Savigny, the application of the law of system A or B was, to a certain extent, indifferent. This relates to the second idea we kept from Savigny, an idea that relates to the conception of private law, as being something radically different from public law: private law is supposedly apolitical, or in the contemporary vocabulary of French legal doctrine "neutral."[47] The two ideas are obviously intertwined: the "neutrality"

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[44] Basedow, *supra* note 39, pp. 42-43 and 50.

[45] Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, Vol. 8, (1849), § 348, p. 28: Savigny proposed to localize each relationship into the legal system where it belongs according to its deeper nature.

[46] See in detail Stéphanie Francq, "Unilateralism," in Jürgen Basedow *et al*. eds., *Encyclopedia of Private International Law* (forthcoming in 2017).

[47] Ralf Michaels, "Globalizing Savigny? The State in Savingy's Private international Law, and

of private law is the very reason why laws of different countries can be designated through "blind" connecting factors, based on the factual connections of a situation with a legal system.[48] Again, this is the core of the multilateral localizing method. A third idea prevails in our conflict of laws construction and is claimed to derive from Savigny's writings: private law focuses on private interests and thus private international law is chiefly there to serve the interest of the private parties involved in the international situations.

All three ideas are necessary to justify our current system of conflict of laws based on multilateral conflict rules in general and party autonomy in particular. The discourse can be summarized as follows: because private laws are neutral and can be designated by a localizing connecting factors, and since private law and private international law focus on the interest of private parties, the (blind) connecting factor might as well be the choice of the parties. This discourse underlines the *Versions 2* and *3* of party autonomy considered above.[49] *Version 2* highlights the connecting or localizing side of party autonomy. *Version 3* focuses on the superior interest of the individuals. But in many ways, the two versions are identical: the interest of private parties serves as a connecting factor to localize a relationship in the chosen system, irrespective of an analysis of the potential interests of the legal systems involved.

There is a fourth idea that we derive from Savigny and that both supports and limits our understanding of party autonomy. Legal systems, and thus legal systems that the parties can choose as applicable to their contract or relationship, are those of states.[50] The conflation of states and legal systems directly results from the posi-

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the Challenge of Europeanization and Globalization," in Michael Stolleis and Wolfgang Streeck eds., *Aktuelle Fragen zu politischer und rechtlicher Steuerung im Kontext der Globalisierung* (2007), p. 119.

[48] "Given the neutrality of private law, the relevant rules are fundamentally equal and exchangeable": Gieseal Rühl, "Unilateralism," in Jürgen Basedow, Klaus Hopt and Reinhard Zimmermann eds., *Max Planck Encyclopedia of European Private Law* (2012).

[49] Version 1 in contrast is not relevant from a conflict of laws perspective because under this version, parties do not designate a legal system, they simply incorporate some foreign provisions in a contract that is submitted to the normally applicable law.

[50] Michaels, *supra* note 47. This excellent piece shows how for Savigny, the "people" and the "state" are one and the same reality, leading thus to a comprehension of legal systems as limited to states. This view matches the historical context (the creation of nation states) in which Savigny was writing. When Savigny described a legal and social community of nations inheriting from the Christian and roman tradition, he probably did not support the existence of phantasmagoric form of universal law (or even *lex mercatoria*). Savigny's conception of legal systems is thus more sociologically anchored than those provided by many accounts relating to the existence of global law or non-state law. The basic vision of a sociological (legal, spiritual) community, however, offered by Savigny could fit other contexts than the state, without altering Savigny's conception, such as in the EU for

tivist turn that followed Savigny and explains why in virtually all conflict of laws systems, party autonomy is limited to choosing state's law.

As mentioned above, it is questionable that the ideas we "kept" from Savigny accurately represent what Savigny thought. Without being able to develop here a full reading of Savigny, a few points of nuances may be useful for the present topic. First, the reason why Savigny thought that private laws of different states could be indifferently designated via a connecting factor relates to his deeper conception of law. Laws and subjective rights are singular expression of the spirit of a social group, the *Volk*, taking the external form of a *Staat*.[51] But for Savigny, the singularity of laws is only the visible side of deeper common legal concepts (*Rechtsinstituten*) shared by all "civilized" Nations rooted in a Roman and, indeed, Christian heritage (the *Rechtsgemeinschaft*).[52] In other words, behind the apparent diversity of national laws lies another reality that of common legal concepts expressing a genuine legal community shaped by a common legal and spiritual heritage. In other words, laws are interchangeable because, and only to the degree that, they are merely the expression of common conceptions. Where this community, in the sociological and legal sense, is missing, Savigny considers that the method of the "seat" must give way to the statutist method.[53] Savigny recognizes thus that the multilateral "seat/localizing" method is only operational as long as it functions within a specific legal context, the context of a (mythical?) legal, sociological and spiritual community. And more precisely, as long as the laws concerned are the expression of this deeper legal community, Savigny considers that: (i) the statutist and multilateral method are just two equivalent ways of asking the same question, and (ii) the two ways of asking the same question should give an identical answer.[54]

Second, if he considers private law as a direct result of the people's will, Savigny does not seem to focus on individual will as it is sometimes assumed. Rather his concern is the existence of a community and the way in which this community finds its expression through states and laws. In other words, Savigny's

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instance; see Stéphanie Francq, *L'applicabilité du droit communautaire dérivé au regard des méthodes du droit international privé* (2005), pp. 462-474.

[51] On how *Staat* and *Volk* are actually one same reality: Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, Vol. 1 (1840), § 9, p. 23.

[52] On how laws, subjective rights and judgments applying subjective rights are actually the visible expression of the deeper realities of "Rechtsinstitutionen" and "Rechtsverhältnissen," see Savigny, *supra* note 51, § 4 and § 5, pp. 6-11. On the importance of the (legal, social, spiritual) community despite singularities: *ibid.*, p. 21 (about the Volk), p. 9 (about Rechtsinstitut).

[53] Savigny, *supra* note 45, § 349, pp. 32-39.

[54] *Ibid.*, § 345, pp. 3 and 10-11.

vision of private interests is not individualistic but rather "relational," in the sense of relating to a community or a group.[55] This is the reason why the domicile of a person receives a leading role: not merely because the person "chooses" the localization of her domicile, but more because the domicile is the expression of the sense of belonging to a community. Therefore stating that Savigny supported party autonomy as a result of his focus on the individual concerns might be misleading.[56] As a result, it seems that we "kept" from Savigny a general discourse on private law and on the corresponding conflict of laws method that is in at least two ways foreign to the actual conception of Savigny concerning law and legal systems.

Admittedly, Savigny is not the only one offering a fully-fledged justification of the multilateral method of conflict of laws as localization. Pierre Mayer, for instance, replaced the ideas of laws as the emanation of a deeper social/legal/spiritual community, by another conception of law, which also leads to a neutral vision of private law. For Mayer, private law is an abstract and thus potentially universal rationale: private law embodies an expression of pure rationality and is abstract as opposed to specific, in the sense that it does not relate to specific social relationships, but can apply to virtually any private relationship wherever it is localized.[57] Private law certainly encompasses legal categories (such as marriage, contract of sale or tort) but in an abstract fashion that does not allow for the precise identification of any specific relationship in regard to its localization. Because private laws, owing to their abstract character, would thus be neutral as regards their application to international relations, states would have no specific

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[55] The term "relational" is borrowed from Roxana Banu, "From Conflicts of Sovereignty to Relationships: Recovering Nineteenth Century Relational Internationalist Perspectives in Private International Law," PhD thesis submitted 2016 (University of Toronto).

[56] It is often stated that Savigny opened the door to party autonomy because he conceived private law as an emanation of the "people" (Volk) and endorsed the liberal spirit of the time or frankly endorsed party autonomy as a result of the "voluntary submission principle": see for instance, Sagi Peari, "Savigny's Theory of Choice-of-Law as a Principle of 'Voluntary Submission,'" *University of Toronto Law Journal*, Vol. 64, No.1 (2014), pp. 122-127. For an opposite reading of the link between voluntary submission and party autonomy, see Takeshita, *supra* note 1, pp. 207-214. See also Michaels, *supra* note 47, p. 132, "Savigny's conception of a apolitical private law, created by society instead of a legislator, proved useful to upcoming liberalism and bourgeois thought who did postulate a separation of state and society, of state and private law (fn omitted). Not surprisingly, this required a reinterpretation."

[57] Pierre Mayer, "Le phénomène de la coordination des ordres juridiques étatiques en droit privé," *Recueil des cours de l'Académie de droit international*, Vol. 327 (2007), pp. 26-34, 138-140 and 145-146; see also Pierre Mayer, *La distinction entre règles et décisions et le droit international privé* (1973). According to Mayer, the difference between rules and decisions is that rules only are abstract and neutral, in the sense that they do not relate to pre-identified relationships or situations, while decisions are taken in regard to specific, pre-identified relationships.

policies in regard to the international application of their private laws. The application of the law of system A or system B is indifferent. Conflict of laws systems must choose between the legal systems with which a situation might be connected and thus allocate situations to legal systems via connecting factors. Mayer comes to the same result as Savigny — but based on a different, even more abstract, conception of law.[58]

Another aspect touching upon the fundamentals of conflict of laws becomes relevant. The neutral and abstract conception of private law, as well as the sharp divide between private and public law, is and has always been contested, even in the European scholarship. A long standing tradition in conflict of laws approaches private law in a very different fashion: for unilateralists, law, and private law in particular, is not neutral when it comes to its international application. On the contrary, the unilateralist tradition considers that laws determine their own scope of application in regard to international situations. Therefore, the conflict of laws process is not about allocating a situation to a legal system, but rather about determining the international scope of the laws in conflict according to their own terms. Assessing the way in which laws determine their own addressees and their international scope is the first step of the reasoning. What has been labelled in the late sixties as the "contemporary unilateralist" trend, based on the writings of Rolando Quadri, derives from a specific conception of law, opposed to the one described above as the supposed inheritance from Savigny: law is a command for action and needs for this reason to identify its addressees, also in an international perspective.[59] For different historical reasons, the US conflict revolution also uncovered how states pursue specific (public) interests and how these interests and policy objectives shape the scope of application of their statutes. The opposition between the multilateralists' and the unilateralists' reading of conflict of laws is the direct result of their contradictory understanding of private law: more abstract and conceptual for multilateralism; more practical and sociological for unilateralism.[60]

Even without embracing unilateralism, various contemporary scholars challenge the sharp divide between public and private law and wish to open up conflict of laws to a more substance and policy oriented conception of law.[61] And as

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[58] In contrast with Savigny, Mayer admits only one method for conflict of laws: the bilateral method. In his conception of laws as neutral and abstract, the statutist or unilateral approach does not make any sense.

[59] The writings of Quadri and his form of unilateralism have been introduced in the French speaking conflict of laws scholarship by Pierre Gothot: Pierre Gothot, "Le Renouveau de la tendance unilatéraliste en droit international privé," *Revue critique de droit international privé* (1971), pp. 1-36, pp. 209-243, pp. 415-450.

[60] For more details, see Francq, *supra* note 46.

[61] The literature that should be cited here is extremely vast and diverse. Among (many)

mentioned above, Savigny himself was not considering private laws as always interchangeable or neutral and therefore, contrary to some claims, did not reject the statutists' unilateral method.

Again, this dispute cannot and does not need to be drawn to an end for the purpose of this paper. It suffices to underline that (i) a conflict of laws system rests on a specific vision of law; (ii) the current system and the widespread acceptance of party autonomy rests on a vision of private law as abstract and neutral; (iii) other views are expressed in scholarship and challenge not only the conception of private law upon which the multilateral method is based, but also the role allocated to party autonomy.

3. Conclusion of Part I

The scholarship dealing with regulation and the scholarship dealing with conflict of laws share a common point: both are engaged in a conversation about the concept of law. In addition, at least part of the scholarship in each field rests on a rather abstract and neutral conception of private law, distinct from public law. Regulation can be considered as a concept distinct from law so long as law is considered abstract, general and neutral and regulation as a practical strategy to influence behaviors. And when regulation is discussed as a legal concept, it is usually conflated with public law. In the current European conflict of laws system, the field, also called private international law, is generally limited to private relationships, private law and private interests. The system of conflict of laws rests on a vision of private law as neutral (in the sense of a-political for Savigny, in the sense of abstract for Mayer). This neutral conception of private law legitimizes the multilateral localizing method and, most importantly, party autonomy. Laws are deemed to be interchangeable (and their application may thus depend on the will of the parties) *because* they are supposedly neutral, a-political and abstract.

If conflict of laws is a field concerned with private laws and private relationships, dealing with private law conceived as abstract and neutral, and if regulations are operational rules designed to influence behaviors in specific situations, belonging rather to the public law sphere, regulations and conflict of laws should never meet, beyond the overarching conversation about law the two fields are engaged with. Regulations, however, do penetrate the conflict of laws field, in various ways, that can best be described through the prism of party autonomy.

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others, see: Klaus Schurig, *Kollisionsnorm und Sachrecht: Zu Struktur, Standort und Methode des Internationalen Privatrechts* (1981); Horatia Muir Watt, "Private International Law Beyond the *Schism*," *Transnational Legal Theory*, Vol. 2, No. 3 (2011), p. 347; Andreas Bucher, "La dimension sociale du droit international privé," *Recueil des Cours de l'Académie de droit international*, Vol. 341 (2009), p. 9.

II. Party Autonomy and Regulation: An Encounter

The exercise of party autonomy interacts with regulations in different ways. The points of encounters identified in this contribution are not meant to be exhaustive. But they should sufficiently demonstrate how unsettling those encounters are, both for the legitimizing grounds of party autonomy and for some of the widespread conceptions of regulation. Two forms of encounters between party autonomy and regulation are pointed at here: one shapes their relation as a contradiction (1.), another one unveils their relations as collaborative (2.). These forms of encounters are situated at different points of the recent history of private international law, respectively in the Sixties and the late Nineties. They nevertheless mirror a similar difficulty surrounding the concept of law and the integration of the public interest.

1. Party Autonomy and Regulation: A Contradiction

The first clear manifestation of regulation in the field of conflict of laws took the form of what has been called *lois d'application immédiate* or overriding mandatory norms.[62] When Francescakis coined the term *loi d'application immédiate* in the Sixties, he did not refer to something called regulation, nor did he thought of identifying any sort of new phenomenon. Rather, he saw his contribution as the follow up of a long tradition in conflict of laws (2.) and he did not even mention the term regulation (1.). These two points deserve some comments and lead to reconsider the relationship between regulation and party autonomy, not only as one of contradiction, but also as one of mutual creation (3.).

(1) Regulation, "lois d'application immédiates" and party autonomy

Francescakis felt responsible for clarifying the notion that he had coined. The summary of his thoughts, wrapped up in a famous contribution, offers at least two interesting insights for the analysis of the relationship between party autonomy and regulation.[63] First, those rules or laws that Francescakis characterized as *lois d'application immédiate* would typically qualify as regulation, at least so long as one accepts that regulation can have a legislative or governmental origin. The ex-

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[62] The public policy exception introduces considerations relating to the public interest in the conflict of law discussion in a way that is related to overriding mandatory rules, but cannot be assimilated to a regulation in a classic command type as discussed here. I have to leave this discussion for another time.

[63] Phocion Francescakis, "Quelques précisions sur les 'lois d'application immédiate' et leurs rapports avec les règles de conflits de lois," *Revue critique de droit international privé*, Vol. 1 (1966), p. 1.

amples that he cited, such as currency exchange, social security, employment conditions, insurance, banking and stock exchange regulation, belong to the traditional fields in which regulation has been identified and discussed.[64] Francescakis underlines how these specific laws are akin to public law and provide an opportunity to bridge the private/public divide in conflict of laws.[65] And indeed what Francescakis identified as a distinctive feature for this category of laws is the fact that they operate beyond the individual interest: these laws implement the public interest (as a sum of all the private interests) pursed by the State and public authorities "in specific structures."[66]

Second, Francescakis identified the impact of this category of laws in terms of conflict of laws: in their field, they exclude the possibility of party autonomy, just as much as they trump the multilateral conflict of laws rules.[67] This is the reason why they are considered as *immediate*: their application cannot be mediated via the connecting factor of a multilateral conflict rule; rather those rules determine their own scope of application in an obligatory fashion. By identifying laws that do not match the conception of law presupposed by the multilateral system, Francescakis also identifies another conflict of laws method, in which party autonomy does not have primacy. Francescakis proposed a system of "partial unilateralism" (*unilatéralisme partiel*), *i.e.* unilateralism for a specific category of laws.[68]

Thus, what has later been identified as the "command type" of regulation seems to fall into the category of *lois d'application immédiate* identified by Francescakis. Those regulations often take the form of administrative/public commands implemented by the public authority in order to achieve the public interest, usually as an answer to market failures and in the form of a specific structure.[69] Those regulations, from a conflict of laws perspective, operate like the *lois d'application immédiate* described by Francescakis and exclude party autonomy (together with the multilateral system): they trump multilateral conflict rules, they

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[64] See for instance, *ibid.*, pp. 11 and 13, note 2.

[65] *Ibid.*, p. 15.

[66] "Il n'y va pas seulement des intérêts particuliers, ni même de l'intérêt commun en tant que somme des intérêts particuliers, mais bien de l'ensemble de ces intérêts quand ils sont pris en charge par l'organisation étatique." *Ibid.*, p. 2.

[67] *Ibid.*, pp. 7-9.

[68] Unilateralism however does not automatically entails an exclusion of party autonomy, as the question of the international scope of a piece of legislation and of its overriding mandatory nature are different. For more details, see Francq, *supra* note 50.

[69] One obvious form of which being what has later been identified as "Wirtschaftskollisionsrecht," see *infra* note 77. Acknowledging the overlap between economic regulation and "lois de police," see Jean-Baptiste Racine, "Droit économique et lois de police," *Revue internationale de droit économique,* Vol. 24, No. 1 (2010), p. 69.

assign their own scope of international application and they apply in an obligatory fashion to their addressees. The reason for this exclusion lies in the fact that those regulations do not match the traditional picture of private law which legitimizes party autonomy. In this regard, the natural relationship between regulation and party autonomy is one of mutual exclusion.

The phenomenon described by Francescakis is a contentious one in the conflict of laws field, and the measure of the controversy is just as large as the acceptance of party autonomy. If the application of the overriding mandatory rules of the forum (despite a clear parties choice in favor of another country's law) is largely accepted, the application of the overriding mandatory rules of yet another, "third," country (distinct from forum and elected law) remains controversial.[70] Admittedly, within a multilateral system, applying foreign rules embodying the public interest because those rules intend to govern the situation seems totally at odds with the system's foundations. Not only is the nature of private law put into question: is private law neutral and focusing on private interest when rules pursuing the public interest and identifying their addressees in an obligatory fashion govern the same situation? But the method of the multilateral system itself also called into question: why would the applicable law sometimes be chosen by the parties or by another connecting factor, and sometimes result from the terms of the substantive law itself? Where is the red line?

So for the multilateral system to remain coherent, the phenomenon of the *lois d'application immédiate* needs to remain an exception.[71] Such is thus the first place of regulation in conflict of laws: a limited and exceptional category. A second look however might lead to see things under a different light.

(2) Regulation as a tradition?

When he was discussing the *lois d'application immédiate*, Francescakis seems to have under-estimated the controversial nature of his comments.[72] He thought to describe a tradition that had existed long before and that had never been denied by Savigny.[73] For Franceskcakis, this category of laws (pursuing public interest,

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[70] For instance, Rome I Regulation limited the possibilities of applying foreign mandatory rules (in comparison with the Rome Convention) and Rome II Regulation does not provide for such a possibility: Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *Official Journal of the European Union* (2008), L 177/6, Art. 9.3; Rome II, Art. 16 (limited to the application of the forum's mandatory rules), *supra* note 8.

[71] Bernard Audit, "Le droit international privé à la fin du XXe siècle: progrès ou recul," *Revue internationale de droit comparé*, Vol. 50, No. 2 (1998), pp. 440-442.

[72] Francescakis, *supra* note 63, p. 1.

[73] *Ibid*., p. 5.

through specific structure, delimiting their own scope of application and rejecting party autonomy) had always existed and had, indeed, been clearly identified by Savigny, as already explained earlier. Francescakis thus simply made the attempt to trace and conceptualize their operation in practice.

Francescakis has certainly not been the only one to identify a category of legal devices protecting the public interest in a specific manner that cannot be conciliated with the multilateral "seat/localizing" method, or to underline their relatedness to public law. In Germany for instance, the "Eingriffsnormen" had long been identified as one of the irritating problems of conflict of laws.[74] The German tradition distinguishes the public interest and the private interest in a sharp way: German laws protective of merely private interests, such as those of a weaker party, do not qualify as *Eingriffsnormen*;[75] only laws protecting (public) institutions and thus the public interest, do. This position triggers a discussion on the distinction between the protection of the public and of the private interest. In cases relating to the protection of a commercial agent or of a consumer: is the public or the private interest at stake?[76] Interestingly, even though the German and the French discussion both admit that *Eingriffsrnormen* and *lois d'application immédiate* are a legislative form for enforcing an interest that transcends the individual interest and that can be qualified as a public or common interest, they end up with diverging visions on where the dividing line between the public and the private interests should stand. In Germany, for example, the public interest cannot be reduced to the protection of one party such as the consumer, while in France consumer protection would be part of this category. These differences in approach do not mean that the category of *Eingriffsnormen* is considered as much narrower in Germany than in France: by identifying a specific field of *Wirtschaftskollisionsrecht*, German scholarship created a space and structured a debate about interventionist type of regulation on economic market and their (limited) impact on conflict of laws.[77] Yet again, the identification of what is economic law or economic regu-

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[74] Wilhelm Wengler, "Die Anknüpfung des Zwingenden Schuldrechts im internationalen Privatrechts," *Zeitschrift für Vergleichende Rechtswissenschaft*, Vol. 54 (1941), p. 176; Klaus Schurig, "Lois d'application immédiate und Sonderanknüpfung zwingenden Rechts: Erkenntnisfortschritt oder Mystifikation?," in Wolfgang Holl and Ulrich Klinke eds., *Internationales Privatrecht, Internationales Wirtschaftsrecht* (1985), p. 56 ("berührt doch auch dessen innersten Kern [des IPR]").

[75] BGH 13 dec. 2005, *IPrax* 2006, 272, *EuZW* 2006, 285.

[76] For more details on those questions in regard to the famous ECJ cases Ingmar and Arblade, as well as a comparative perspective, see Stéphanie Francq and Fabienne Jault-Seseke, "Les lois de police, une approche de droit comparé," in Sabine Corneloup and Natalie Joubert eds., *Le règlement communautaire 'Rome I' et le choix de loi dans les contrats internationaux* (2011), p. 357.

[77] In English, see Jürgen Basedow, "Conflicts of Economic Regulation," *American Journal*

lation as opposed to private law proved difficult and led to the identification of a "heuristic concept" placed on the "gray area" between traditional "conflict rules and core components of public policy."[78]

This discussion echoes concerns encountered earlier in this paper about regulation. The defense of the public interest seems to constitute a commonly accepted criterion regarding the purposes of regulation. But when accepting this criterion, the scholarship on regulation also opens up a large question about the *boundaries* of its own field: where does regulation start and where does it stop? When regulation is conceived as a legal device, is regulation limited to public law and is private law then excluded? As mentioned above, the question whether consumer law is part of regulation is also debated in the field of regulation. An important part of the regulation scholarship does not exclude private law from the regulatory field. On the private law side, contract law has sometimes been described as regulation.[79] On the regulatory side, some scholars in the regulatory field discuss the progressive disappearance of the distinction between the public and the private sphere, or between public and private law. They describe how the public functions of the state are privatized and monitored in a decentralized fashion through regulation, while the private sphere, formerly left to private law, is actually regulated and thus the object of a public ordering.[80] As explained by Halal Shamir, when showing how the existence, content and interaction between the public and the private sphere have been transformed, "this transformation occurred primarily due to the rise of the regulatory state and the increased visibility of interconnectedness of the spheres due to the public ordering of private activity in an age of widespread privatization."[81]

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of Comparative Law, Vol. 42, No. 2 (1994), p. 423; in German, Jürgen Basedow, "Wirtschaftskollisionsrecht: Theoretischer Versuch über die ordnungspolitischen Normen des Forumstaates," *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 52 (1988), p. 8; Anton K. Schnyder, *Wirtschaftskollisionsrecht, Sonderanknüpfung und extraterritoriale Anwendung wirtschaftsrechtlicher Normen unter besonderer Berücksichtigung von Marktrecht* (1990); Ogus, *supra* note 18, p. 2 considers that *Wirtschaftsverwaltungsrecht* is the German (and more precise) version of regulation.

[78] Basedow, *supra* note 77, p. 426.

[79] Hugh Collins, *Regulating Contracts* (1999). Fabrizio Cafaggi and Horatia Muir Watt, "Introduction," in *idem* eds., *Making European Private Law — Governance Design* (2008), p. 2.

[80] See Judith Resnik, "Globalization(s), Privatization(s), Constitutionalization, and Statization: Icons and Experiences of Sovereignty in the 21st century," *International Journal of Constitutional Law*, Vol. 11, Issue 1 (2013), p. 162 and Hila Shamir, "The Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State," *Theoretical Inquires in Law*, Vol. 15, Issue 1 (2014), p. 1 (about privatization of prisons in Israel).

[81] Shamir, *supra* note 80, pp. 4 and 10-11.

When comparing the discussion occurring in the sphere of conflict of laws and in the field of regulation, a few interesting points emerge:

i) Without using the term "regulation," regulation in the form of legislative/normative intervention in defense of the public interest existed and had been identified in conflict of laws, already at the time of Savigny.

ii) For conflict of laws, much of the discussion focuses on limiting this category, which is at odds with the fundamental conception of private law upon which the system is based, in particular upon which party autonomy is legitimized.

iii) Identifying the exact contours of this category (and thus the space of operation of party autonomy) proves particularly challenging and rests on a controversial distinction between the public and the private interest.

iv) Along the same lines, the regulation scholarship struggles with the definition of its own field of inquiry as limited to the defense of the public interest and often underlines that the "rise" of regulation has blurred and transformed the distinction between public and private law.

v) The scholarship on regulation tends to consider regulation, a phenomenon often constrained as an exception in EU conflict of laws, as a vast and multiform phenomenon, often penetrating the private field.

In the end, the regulatory scholarship sheds a new light on conflict of laws by showing that the tradition of regulation and *lois d'application immédiate* in conflict of laws is more important and much less an exception than as suggested so far. Regulation or *lois d'application immédiate*, *i.e.* the "command" type of legal regulation, is a long lasting and phenomenon whose expansion corresponds to an equivalent restriction of the party autonomy space.

(3) Party autonomy and Regulation: Mutual Creation

Regulation and party autonomy have been read as mutually exclusive. Command type of regulation as an answer to market failures excludes party autonomy; conversely, outside of the regulatory sphere, party autonomy seems in principle accepted, though submitted to variable restrictions depending on the field concerned and as regards the possibility of depeçage for instance. Phrasing the relationship of party autonomy and regulation as one of mutual exclusion, however, also stresses how their existence and corresponding spheres are related and even interdependent. Regulation might simply be an answer to party autonomy, especially at times where globalization offers even more opportunities for transnational individualistic behaviors and corresponding externalities.

In his piece on *Wirtschaftskollisionsrecht*, Basedow identified a turning point in history after which the liberal ideas of the 19th Century (upon which private law and conflict of laws had been designed) of free market and free economy progressively unveiled their potentially destructive side, in the form of "natural monop-

olies, external effects or unequal information of the parties."[82] According to him, the rise of economic regulation answers, on the one hand, the need to protect the free market from its own internal deficiencies such as monopolies and, on the other hand, the need to constraint the negative side effects of transnational economic freedom such as by the protection of national markets or the regulation of labor relations.[83] The story told by Basedow in the late eighties, early nineties finds resonance in other analysis of historical legal developments. For instance, Hans Micklitz and Dennis Patterson, commenting on the rise of regulatory private law in the EU, tell a similar story about the evolution of the state's functions.[84] The pre-World War I state was, according to them, based on a "foundational *laissez-faire* policy coupled with the growth of a legal system designed to protect private property and contract rights,"[85] where regulatory functions were progressively adopted by nation states in order to ensure welfare (and progressively protect workers for instance), before being generally taken over and transformed at EU level.[86] Regulations could thus be read as a counter-balance to the 19th century liberal spirit and its conflict of laws implementation, *i.e.* party autonomy.[87] This arguably leads to the following hypothesis: party autonomy (and its domestic equivalent, contractual freedom) actually fostered the rise of regulation or even the reg-

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[82] Basedow, *supra* note 77, p. 427.

[83] *Ibid.*

[84] Hans Micklitz and Dennis Patterson, "From the Nation State to the Market: The Evolution of EU Private Law as Regulation of the Economy beyond the Boundaries of the Union?," in Bart Van Vooren, Steven Blockmans and Jan Wouters eds., *The EU's Role in Global Governance: The Legal Dimension* (2013), pp. 59-78.

[85] *Ibid.*, pp. 59 and 61.

[86] *Ibid.*, pp. 70-71, showing that a clear-cut distinction between EU private law (qualified as being "regulatory in nature meant to design market") and nation states private law (qualified as being "equated with torts, contracts and tort law, with freedom of contract and private autonomy") certainly is exaggerated. Nevertheless, the distinctive feature of "today's regulatory private law" is, according to them, that it "cuts across all sectors of economic policies." See also Mahmood Bagheri, "Conflict of laws, Economic Regulations and Corrective/Distributive Justice," *Journal of International Economic Law*, Vol. 28 (2007), p. 166.

[87] Personally I am not sure that the nature of private law has been "transformed" from something inherently neutral to something inherently political or social, nor that regulatory private law actually embodies another "type" of private law distinct from the liberal private law existing before. I rather share the realist intuition that all law is, in a way, public and political and always was (so already in the 19th Century). I need to leave this point for another contribution. Hila Shamir offers a concise and yet informed historical review of the way in which the private sphere and the public/private divide has been apprehended in American legal thought by the formalists, the legal realists and the critical legal scholars: Shamir, *supra* note 80, pp. 4-7.

ulatory era (in its command and interventionist version) in order to safeguard the public interest that could be jeopardized by excessive weight given to individualistic concerns. As explained in the first part of this essay, regulation is often conceived as an answer to market failures and externalities. In the field of conflict of laws, the areas in which the command type regulations have been identified as overriding mandatory norms largely corroborate this hypothesis. They range from the protection of the market itself (for instance: competition law) to protection of the individuals (for instance: consumer law) from abuses of free will on open and transnational markets.[88] Correspondingly, in conflict of laws, overriding mandatory rules (a command type of regulation) have sometimes been analyzed as a direct result of party autonomy.[89] By an interesting twist of history, party autonomy is more and more often presented as either the answer to (over)regulation or the best path of regulation. In this sense, party autonomy would *be* regulation. This is the second form of encounter between regulation and party autonomy.

2. Regulation and Party Autonomy: An Alliance

As discussed above, party autonomy to some degree undermines the efficiency of public policies and the protection of the public interests. Correspondingly, the "command" type of regulation, taking the form of overriding mandatory rules, should be the expression of the public interest by formalizing specific public pol-

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[88] Showing quite clearly how forbidding choice of law and choice of jurisdiction clauses (and arbitration clauses) is the only efficient way for protecting the weaker party in international contracts, especially in the aftermath of the financial crisis, see Catherine Walsh, "The Uses and Abuses of Party Autonomy in International Contracts," *University of New Brunswick Law Journal*, Vol. 60 (2010), p. 12, notes 43-55. Dominique Bureau and Horatia Muir Watt, "L'impérativité désactivée? (à propos de Cass. civ. 1re, 22 octobre 2008)," *Revue critique de droit international privé*, Vol. 98 (2009), p. 1; Horatia Muir Watt and Luca Radicati di Brozolo, "Party Autonomy and Mandatory Rules in a Global World," *International Law FORUM du droit international*, Vol. 6, Issue 2 (2004), p. 90.

[89] The affirmation can be considered from two points of views. First, it is possible that the rise of party autonomy fostered a more generous admission of the existence of overriding mandatory rules. Second, it is sometimes stated that the existence of overriding mandatory rules as a final safeguard of the public interest facilitated the acceptance of party autonomy (Antoon V. M. Struycken, "La contribution de l'Académie au développement de la science et de la pratique du droit international privé," *Recueil des cours de l'Académie de droit international*, Vol. 271 (1998), p. 44). In a completely different setting, see already, J. Perroud, "De l'extension extraterritoriale des lois de police comme conséquence de l'autonomie de la volonté," *Journal du droit international (Clunet)*, Vol. 33 (1906), p. 633 (showing how at the time French judges were interpreting the supposed choice of the parties in favor of French law to justify the application of French overriding mandatory rules to situations partially localized out of France, to which the French rules should not have applied under a strict principle of territoriality).

icies and giving them teeth to defend the public interests against abuse — by privates in use of party autonomy. But there is, of course, also the other side of the coin. Decades after Francescakis (and many others) identified a first regulatory expression in the realm of conflict of laws — that would exclude party autonomy —, regulation and governance literature discovered party autonomy as a regulatory technique. Two major trends illustrate this idea. Firstly, and most obviously from a conflict of laws perspective, normative competition is sometimes discussed as a governance tool apt to serve the integration of markets and to foster efficient law-making at the national level. Indeed, from a conflicts perspective, normative competition derives from the exercise of party autonomy (1). Second, self-regulation is promoted as an answer to the often invoked failure of the ("Westphalian") State and to the downsides of the regulatory state (2). In conflict of laws terms, self-regulation triggers questions as to the type of rules parties can elect in a choice of law clause.

On the two fronts, critics have been prompted to identify the downsides of party autonomy as a regulatory technique, for reasons relating to the identification of the public interest and the best means to preserve it. The whole discussion replicates, in another setting and with corresponding adaptations, the discussions identified above that is at the core of conflict of laws: a specific vision of law and a struggle to integrate the public dimension of any private situation into the orthodoxy.

(1) Normative competition

Normative competition (or as it is often called: regulatory competition) is obviously contingent on party autonomy: for normative competition to operate, parties must be able to choose among various legal systems the one which matches best their interest. In other words, party autonomy is the "exit" door parties can activate to manifest their dissatisfaction with a regulatory system. If not the only one, party autonomy is thus the first pre-condition for the existence of normative competition. In addition, normative competition takes another set of pre-conditions: parties must be knowledgeable enough about legal systems to operate a choice based on the quality of the various legislative sets and on the other side, lawmakers should be willing to adjust their legal rules to render them attractive.[90] If functioning properly, normative competition, as conceptualized by Tiebout, should

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[90] The preconditions of normative competition are clearly and briefly summarized from a conflict of laws perspective by Giesela Rühl, "Regulatory Competition in Contract law: Empirical Evidence and Normative Implications," *European Review of Contract law*, Vol. 9 (2013), pp. 61-89. Warning against the simplicity of scholarly approach of normative competition, see Joel P. Trachtman, "Regulatory Competition and Regulatory Jurisdiction," *Journal of International Economic Law*, Vol. 3 (2000), pp. 331-348.

produce positive results, similar to those of economic competition.[91] If law is a product put at disposal by states (or other lawmakers), parties will choose the system that best accommodates their needs and their choice should thus further efficient legislative designs. Obviously, legal realities are not that simple and the provocative terms of the equation raise deeper concerns about their actual meaning (What is the parties' "best interest"? How is the "quality of laws" to be assessed?) and their reality (Are parties possessing all the necessary information? Are states willing to adjust to parties' putative interests and how are they to assess those interests?). The discussion on the merits and drawbacks of normative competition has evolved in a vast and nuanced body of literature.[92]

Normative competition made its way into the governance discussion chiefly in regards to subsidiarity considerations in federal settings. Normative competition offers a way of avoiding central or federal intervention and of keeping regulatory power at the sub-federal level. Indeed if normative competition does lead to the expected race to top, sub-federal legal systems should progressively converge (to a certain extent) towards the optimal legal framework, in the absence of any centralized, top-down harmonization process.[93] And where markets are open (as within a federal state), parties are in a position to express their interest by exiting from one legal system (eventually through party autonomy) in favor of another one. Normative competition might thus be perceived as a "low cost" governance technique preventing invasive central regulation, avoiding the burden of over-regulation and circumventing the information deficit of central/federal authorities on local realities.

In the EU in particular, normative competition is considered as a regulatory option, not only because of subsidiarity concerns, but also because it might directly derive from the so-called principle of mutual recognition.[94] The principle of

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[91] Charles Tiebout, "A Pure Theory of Local Expenditures," *Journal of Political Economy*, Vol. 64 (1956), p. 416.

[92] Erin O'Hara and Larry Ribstein, "From Politics to Efficiency in Choice of Law," *University of Chicago Law Review* Vol. 67 (2000), p. 1151; Andrew Guzman, "Choice of Law: New Foundations," *Georgetown Law Journal* Vol. 90 (2002), p. 883; Trachtman *supra* note 90; Horatia Muir Watt, "Aspects économiques du droit international privé — Réflexions sur l'impact de la globalisation économique sur les fondements des conflits de lois et des conflits de juridictions," *Recueil des cours de l'Académie de droit international*, Vol. 307 (2004), p. 26; Giesela Rühl, "Methods and Approaches in Choice of Law: An Economic Perspective," *Berkeley Journal of International Law*, Vol. 24 (2007), p. 801.

[93] Anthony Ogus, "Competition Between National Legal Systems: A Contribution of Economic Analysis To Comparative Law," *The International and Comparative Law Quarterly*, Vol. 48 (1999), p. 405.

[94] The principle of subsidiarity is enshrined in Art. 5(3) of the Treaty on the European Union, which states: "Under the principle of subsidiarity, in areas which do not fall within

mutual recognition has been established by the ECJ in the famous *Cassis de Dijon* case.[95] In this decision, the Court stated that in application of the EU Treaty provisions on free movement of goods (now: Art. 34-36 TFEU), Member States may not oppose the importation on their territory of products "lawfully produced and marketed in one of the Member States."[96] Mutual recognition is obviously subject to exceptions justified by mandatory requirements of the Member State of destination (such as health, safety, environmental protection) and where the resulting obstacles to the free movement remain proportionate. Since the landmark decision of the ECJ, the principle proved to be at the core of the EU internal market, but also raised considerable controversy as to its limits and exact conditions of operation.[97] On the conflict of laws side, scholars struggle to assess its impact on conflict rules: it is sometimes read as a clear designation of the "law of origin" of any product or service (a concept that is itself not easily workable), sometimes as a necessary incorporation of some kind of party autonomy principle, sometimes as a potential exception to the normal operation of multilateral conflict rules (similar to the public policy exception), and sometimes as neutral regarding the designation of the applicable law.[98]

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its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level." Roger Van den Bergh, "Regulatory Competition or Harmonization of Laws? Guidelines for the European Regulator," in Alain Marciano and Jean-Michel Josselin eds., *The Economics of Harmonizing European Law* (2002), p. 27 (considering that a presumption in favor of regulatory competition derives from the principle of subsidiarity and trying to frame the conditions for a favorable functioning of normative competition).

[95] Case C-120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979, E.C.R. I-649.

[96] *Ibid*., para. 15. This principle has recently been restated by the European Commission in the following terms: "products lawfully manufactured and marketed in one Member State should in principle move freely throughout the Union where such products meet equivalent levels of protection to those imposed by the Member State of destination" (Commission Notice of 5.04.2016 — The "Blue Guide" on the implementation of EU products rules, C(2016) 1958 final, p. 7).

[97] The principle of mutual recognition has been used as a reference in the various fields of the internal market, beyond the free movement of products. It led to the adoption of the "home country control" principle and has been incorporated in various directives, including the E-commerce directive (the impact of which has been heavily discussed in conflict of laws scholarship, see *infra* note 98). See recently for a thorough discussion: Christine Janssens, *The Principle of Mutual Recognition in EU Law* (2013).

[98] See among others: For the application of the law of origin or the law of the place of establishment of the service provider when commenting the E-commerce directive: Peter Mankowski, "Herkunftslandprinzip und deutsches Umsetzungsgesetz zur e-commerce-

At the time it was first coined, the principle of mutual recognition already raised suspicion that it would possibly lead to a race to the bottom.[99] Admittedly, mutual recognition entails a regime of "portability" or mobility of the rules that *a priori* applied in the first place to a domestic situation. Moreover, that allows the parties to select the legal regime most favorable to them. By choosing their place of establishment or the Member State on the territory of which the products will be first manufactured, market actors (the service providers, the producers of goods, etc.) actually determine the applicable law (at least on a series of issues). Market actors thus "vote with their feet," as Tiebout anticipated. Applying this logic to public rules relating to the manufacturing of a product is one thing, as it can be assumed that the rules at the place of establishment within the Common Market ensure protection that is basically equivalent to those of the Member States of destination. But applying the same logic to issues relating to contract, tort or labor law is quite another.[100] The ECJ case law and some directives nevertheless follow the principle more or less directly, and arguably blindly, in areas that reach far beyond technical standards, composition or packaging requirements for products.[101] The

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Richtlinie," *IPRax*, Vol. 22 (2002), pp. 258-260; Emmanuel Crabit, "La directive sur le commerce électronique: Le projet 'Mediterranée'," *RDUE*, 2000/4, pp. 749-798; For the idea of a principle similar to party autonomy, leading to the application of the most favorable law for the parties: Jürgen Basedow, "Der kollisionsrechtliche Gehalt der Produktfreiheiten im europäischen Binnenmarkt: favor offerentis," *Rables Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 59 (1995), p. 25; For an exception similar to public policy, Marc Fallon and Johan Meeusen, "Le commerce électronique, la directive 2000/31/CE et le droit international privé," *Revue critique de droit international privé*, Vol. 91 (2002), pp. 435-490; For neutrality, Michael Wilderspin and Xavier Lewis, "Les relations entre le droit communautaire et les règles de conflits de lois des Etats membres," *Revue critique de droit international privé*, Vol. 91 (2002), pp. 1- 37 and 289, 303.

[99] Rewe-Zentral, *supra* note 95, para. 12, "[...] according to the German Government, to allow alcoholic products into free circulation wherever, as regards their alcohol content, they would comply with the rules laid down in the country of production would have the effect of imposing as a common standard within the Community the lowest alcohol content permitted in any of the Member States, and even of rendering any requirements in this field inoperative since a lower limit of this nature is foreign to the rules of several Member States."

[100] Mathias Audit, "Impact of the Mutual Recognition Principle on the Law Applicable to Products," in Fabrizio Cafaggi and Horatia Muir Watt eds., *The Regulatory Function of European Private Law* (2009), pp. 259-271 (coming to the conclusion that the principle should not interfere with the operation of private law even in the area of product selling).

[101] See for instance: Directive 2000/31 of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (directive on Electronic Commerce), *Official Journal* (2000), L 178/1 (see Art. 3 and the joined cases C-509/09 and C-161/10, eDate Advertising and others, 2011, E.C.R. I-10269); Directive 2006/123/EC of the European Parliament and

generalization of the principle of mutual recognition and its export outside of its original sphere of operation (limited by the condition of equivalence) have been described as a trigger for normative competition in the EU, sometimes as a new paradigm for EU integration, and sometimes as leading to an inevitable race to the bottom in contradiction with the reasons and framework within which the principle of mutual recognition had been first conceived.[102]

The debate on normative competition is obviously not limited to federal settings. Beyond federal settings, normative competition is acknowledged as a fact of transnational life and as a consequence of globalization favored by general schemes of market opening and party autonomy. Beyond the factual acknowledgment, advocates of normative competition consider that it offers a series of advantages. Beyond the identification of the right level of governance (subsidiarity) and spontaneous convergence (replacing central authoritative intervention), competition among systems offers, it is said, the best way of maximizing satisfaction since in situation of competition, the "offer" of legal system is large and diverse and should thus best match the heterogeneous expectations of market actors.

In conflict of laws, enhancing normative competition takes one simple form: favoring party autonomy. In a normative competition perspective, party autonomy should not only be allowed; its restrictions should be limited and its reach broaden. For instance, in the field of international contracts, Giesela Rühl considers that party autonomy should be rooted in international law, such as through the Hague Choice Principles, and that parties should be able to choose non-state law or any law irrespective of proximity consideration.[103] Giesela Rühl also stresses that limitations of party autonomy are usually provided for in presence of a weaker party.[104]

Normative competition is thus the first shape taken by the alliance between party autonomy and regulation. Party autonomy is the conflict of laws expression

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of the Council of 12 December 2006 on services in the internal market, *Official Journal* (2006) L 376/36, Art. 16.

[102] Norbert Reich, "Competition between Legal Orders: A New Paradigm of EC Law?," *Common Market Law Review*, Vol. 29, Issue 5 (1992), p. 861. In the field of labor law, see for instance: Simon Deakin, "Regulatory Competition after Laval," *Cambridge Yearbook of European Legal Studies*, Vol. 10 (2007-2008), p. 581; Simon Deakin, "Legal Diversity and Regulatory Competition: Which Model for Europe?," *European Law Journal*, Vol. 12 (2006), p. 440.

[103] Rühl, *supra* note 90, p. 81. The contribution also shows that competition should be regulated where it is more likely to trigger a race to the bottom, *i.e.* in case of unequal bargaining power and when third parties are affected by the contract (p. 83).

[104] *Ibid.* Such is the case in the EU in Rome I Regulation for instance, see Art. 6, 8 and 9, as discussed *infra*. It should be stressed, however, that such limitations are not implemented in all systems supporting party autonomy. For instance, in the US, arbitration clause are admitted in consumer contracts.

of normative competition as a regulatory tool. Conversely, party autonomy cannot be thought of without considering its regulatory dimension, *i.e.* the normative competition it can lead to and the larger governance issues behind normative competition.[105]

(2) Self- or Private Regulation

(a) Self- or Private Regulation in Regulatory Scholarship

Self-regulation as discussed in the scholarship observing regulatory phenomena takes various shapes. There is the purely private decision of drafting one's own rules, such as codes of conducts drafted by companies for their own use, rules of major corporations imposed on other contracting party like those of Lloyd's, declaration of intention of groups of corporations, technical standards or usages usually referred to in a field of business, as well as standards set by NGO's and voluntarily referred to by large companies. There are also normative frameworks initiated, supported, framed or implemented by governmental actors such as technical standards referred to in legislation, internal regulations privately elaborated in order to achieve general goals set in legislation, or fines imposed in case of breach of privately elaborated codes of conducts. In some instance, governmental actors may even "bargain in the shadow of hierarchy" in order to influence the content of such private arrangements.[106] As mentioned in Part I, pure self-regulation or private regulation proves therefore difficult to distinguish from other forms social normativity or even facts. As Collin Scott underlines, the "setting of standards and writing of codes, without more, does not of itself indicate the existence of a regulatory regime."[107] Private normative interventions come to be considered as regulation when their drafting takes place according to specific processes of elaboration and of goals setting, and when processes for monitoring their implementation and some "apparatus for correcting deviances" are put into place.[108] But these specifications raise in turn all sort of questions. If a code of conduct can be enforced via administrative sanctions, fines, contract or tort law, is it still self-regulatory when its

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[105] The real impact of party autonomy on competition between states in the field of private law is debated. Rühl, *supra* note 90, provides a full spectrum of the arguments denying the existence of a competition in the field of private law but takes stock of the program launched by Germany, France and the UK for promoting their own system of private law as attractive for investors to conclude that competition does take place.

[106] Colin Scott, "Beyond Taxonomies of Private Authority in Transnational Regulation," *German Law Journal*, Vol. 13, No. 12 (2012), p. 1335, citing, Rob Baggott and Larry Harrison, "The Politics of Self-Regulation: The Case for Advertising Control," *Policy and Politics*, Vol. 14 (1986), pp. 145-159.

[107] Scott, *supra* note 106, p. 1333.

[108] *Ibid*. Collin Scott refers to Black, *supra* note 31, p. 1.

enforceability depends on the intervention of public authority? By the same token, is private law, as a whole, then regulatory? Can religious law be considered as regulatory in the sense that its elaboration is submitted to specific processes, its application monitored and processes for correcting deviances are designed?[109] In fact, self-regulation naturally leads to questioning the status of law beyond the state.[110] Again, regulation appears as a phenomenon with blurry borders.

In the regulatory literature, self-regulation is observed as a fact of social life especially in transnational business relations. But it is also advocated in normative terms (as a practice that should be furthered) or in analytical terms (as a reality to embrace in order to think about law). Two main avenues seem to drive to the relatively important place taken by private regulation in the regulatory literature: one is a governance perspective, another one is a philosophical perspective; and in many ways their arguments overlap. From a governance perspective, self-regulation is presumed to offer a counter-balance or even a solution to the many problems of regulation itself. Regulation as conceived by public authorities is said to suffer from three major flaws: over-regulation, information deficit and capture by private interests. Because governments cannot know the industry better than the industry does, because public regulation would actually overwhelm economic actors in an inefficient fashion, and because government and agencies can be captured by all sorts of interests (short-term electoral interests, as much as those of specific industries or individuals), private regulation would offer a better alternative for the pursuit of the public interest.[111] In this sense (and because it is seen as a "better" governance model), private regulation is actually due to prevent and replace public regulation, while its implementation can (at various level) depend on public authorities. On the legal philosophy side of private regulation, Julia Black takes stock of "five central notions" to identify what she calls "decentered

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[109] The natural objection would be that regulation actually regulates economic life. This objection triggers two questions: could it be that religious law actually regulates economic life? Could it be that regulation cannot be confined in the borders of economic life?

[110] Not surprisingly, Julia Black underlines often in her writings how autopoiesis is influential in the regulatory literature. For instance, Black, *supra* note 31, p. 5, referring to Gunther Teubner, *Law as an Autopoietic System* (1993).

[111] Colin Scott explains for instance how the "insulation from electoral politics" would participate in the substantive quality of private regulation and thus its legitimacy (without denying that this might not be a sufficient ground of legitimacy): Scott, *supra* note 106, p. 1334. Generally on the governance side of private regulation: Colin Scott, Fabrizio Cafaggi and Linda Senden, "The Conceptual and Constitutional Challenge of Transnational Private Regulation," *Journal of Law and Society*, Vol. 38 (2011), pp. 1-19 (analyzing various regimes of transnational private governance, inquiring into means for ensuring their legitimacy and concluding that they offer substantive advantages in terms of efficiency, especially in the transnational sphere where global public regulation is too remote from electoral politics, p. 19); Freiberg, *supra* note 23, p. 27.

regulation": "complexity, fragmentation, interdependencies, ungovernability and the rejection of a clear distinction between public and private."[112] Drawing on philosophy and sociology, the idea of self-regulation (or "decentered" in Julia Balck's vocabulary) derives from the observation of social realities and interactions captured in those five notions. In a world of complex interactions between social actors, where social problems result from the interaction of multiple factors and actors, no single actor could be said to possess the knowledge, nor the power to regulate. Rather, actors and systems are perceived as self-referential (autonomous) and ungovernable in the sense that their action will always escape from regulation. The relationship between government and society can thus not be seen as one where the government has solutions for problems raised by the society, in the sense of social engineering. Rather solutions and problems are shared at all levels. Regulation "happens" at many levels and in many places, beyond the traditional government interventions. The governance and the legal philosophy avenue meet and overlap in many ways (information problem, diffuse notion of enforcement...) and chiefly regarding the role of the state. These two types of analysis pose a "diagnosis of regulatory failure" concerning classic (hierarchic, top/down) regulation and observe (and advocate) the changing role of the state and of formal authority.[113] Julia Black thus identifies the "collapse of the public/private distinction in socio-political terms."[114]

For the reasons highlighted above, self- or private regulation has thus received a great deal of attention in regulatory literature. Even if the link with conflict of laws and party autonomy is less obvious than in the case of normative competition, self-regulation or private regulation is also a matter of concern for party autonomy and conflict of laws. If regulatory literature admits (to a certain extent) the existence of rules by which parties, businesses, networks design their own conduct, also in transnational settings, how can this specific regulatory reality be apprehended in conflict of laws terms? In a pragmatic way, the question would be: can

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[112] Black, *supra* note 31, p. 5.

[113] *Ibid*., p. 8. Julia Black does not exclude the intervention of the state, but she intends to open the cognitive and analytical frame at a theoretical and policy level in order to embrace a wider variety of relationships between the state, law and society (see p. 10), while never denying the ambiguity of any analysis decoupling regulation from the state (see p. 11: "Once regulation loses its analytical link to the state and ceases to describe a particular form of state-society interaction, what has it become? The answer is not at all clear"). As mentioned in part I, she attempts to circumvent the notion of regulation, from a decentered perspective (See the discussion pp. 25-27 on the definition she proposes and pp. 12-25 on the variety of uses of the term regulation and of definitions proposed in literature).

[114] *Ibid*., p. 8. Here Julia Black points at the various locations where normative power is exercised, more than to the erosion between the public and the private sphere, or between public and private law. Obviously, these are various aspects of a similar reality.

parties invoke private regulation as the applicable law by way of party autonomy? And thus: can conflict rules designate rules of private design? In more general terms, the question for conflict of laws then is: are these privately designed rules considered as law or facts?[115] Private regulation offers thus another opportunity to revisit what is considered as law in the realm of conflict of laws.

(b) Self- or Private Regulation in Conflict of Laws

Self- or private regulation triggers a large and complex debate for conflict of laws as it relates to the status of non-state law.[116] Instruments like Rome I Regulation in the EU do not allow to consider the designation of non-state law as a true choice of law.[117] Under Article 3 Rome I Regulation, the parties can only chose the "law" that applies to their contract, a formulation that excludes the choice of non-state norms. During the adoption process of the Regulation, the possibility of extending party autonomy to non-state law had been seriously considered since the Commission's proposal allowed for the choice of non-state law "recognized internationally or in the Community."[118] The discussion faced two practical difficulties. The first concerned the identification of a body of non-state law that would be sufficiently precise and well recognized internationally. This necessity implied drawing a distinction between bodies of rules that would satisfy these criteria and others that would not.[119] The second major difficulty related to the completeness of these bodies of rules. Because most of them do not offer a comprehensive set of answers for every legal issue that a contract could raise, the identification of an applicable law remained necessary.[120] And if the designation of an applicable law is necessary

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[115] The question can be put in similar terms when approached as a matter of domestic law: if a person is excluded from an association because he/she supposedly did not respect the rules of this association.

[116] For instance: Yuki Asano, "From the Theory of Private Law to Legal Pluralism: On the Reconstruction of Private Law in the Age of Globalization," *Japanese Yearbook of International Law*, Vol. 57 (2014), p. 163 (applying the "as if" method of Knop, Michaels and Riles to the question of pluralism).

[117] Rome I, *supra* note 70.

[118] *Proposal for a regulation of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)*, *COM* (2005) 650 final, p. 5 of the explanatory memorandum and Art. 3.2 of the proposal: "The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community."

[119] The *lex mercatoria*, for instance, was judged as "not precise enough," see *COM* (2005) 650 final, p. 5 of the explanatory memorandum, *supra* note 118.

[120] See the second part of Art. 3.2 as formulated in the Commission proposal (COM (2005) 650 final, p. 14), "However, questions relating to matters governed by such principles or rules which are not expressly settled by them shall be governed by the general principles

after all, why would that law not have a say on the role non-state law can play in the contract it governs? Recital 13 expresses the compromise reached in this discussion: "This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention."

Another difficulty echoed a more general concern: the circumvention of public policies and thus the protection of public interests. When parties choose the law of a state, they are likely to find in the chosen legal system some restrains on their free will due to safeguard the public interest. States, however liberal their own political system may be, are due to consider the protection of the society at large, beyond the purely private interests of the parties to the contract and thus to design legislation striking a balance between the private interest of the parties and the interests of those who could be affected by the contract. In contrast, nothing ensures that private regulation or privately elaborated norms offer the same restraints in regard to the public interest or even rules creating a fair balance between the parties themselves. This concern was clearly expressed in the Comments of the Max Planck Institute on the Proposal for Rome I Regulation.[121] The Institute welcomed the proposal of the Commission, but stressed that some guarantees should accompany the possibility of choosing a non-state body of rules: "The respective set of principles has to be created by an independent, impartial, and neutral body; its content has to be balanced and protected against evasion and abuses by certain mandatory rules." The Institute thus highlighted concerns regarding the legitimacy of private normativity and its impact on public interests.

In the end, the law of a state is due to govern the contract (either by way of parties choice or by way of another conflict rule designating the law applicable to the contract) and to set the limit within which the parties can "incorporate" privately elaborated rules into their contract.[122] In other words, parties are not allowed to choose non-state law, or privately elaborated norms as the law applicable to their contract.

Another crucial instrument, the Hague Principles on Choice of Law in International Contracts, offers an interesting example of decentered regulation in two respects.[123] First, the principles elaborated at the Hague Conference are, as

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underlying them or, failing such principles, in accordance with the law applicable in the absence of a choice under this Regulation."

[121] Max Planck Institute for Comparative and International Private Law, "Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)," *Rables Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 71 (2007), p. 244, note 26.

[122] This is Version 1 of party autonomy as identified in Part I. 2. of this contribution, where party autonomy is identical to domestic contractual freedom.

[123] Principles on Choice of Law in International Commercial Contracts, approved on 19

they state themselves, not a "formally binding instrument such as a Convention" enacted by states, but rather a set of non-binding principles which the Hague Conference encourages States to incorporate into their law. As such, the Hague Principles are an example of decentered regulation prepared by a group of experts and that can be voluntarily taken over by states into their legislation, without entering into binding relationships with other potential contracting states as it would be the case for a convention, or be referred to by arbitral tribunals, when determining the law applicable to a contract. The potential normativity of the Principles does not derive from their binding character but rather from other features: persuasion, quality… In addition, Article 3 of the Principles opens up to the choice of non-state law. Under Article 3, "the law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise." The choice of such non-state law (as well as the choice of state law) remains submitted to the limits set by the forum's public policy and overriding mandatory rules, and forum law determines how far the court may or must apply or take into account the overriding mandatory rules of another state or the public policy of the state the law of which would apply in absence of choice.[124] As the wording of Articles 3 and 11 of the Hague Principles makes clear, the drafters encountered similar concerns as the Commission and even the Max Planck. The Commentary of Article 3 almost reproduces the terms of the Commission's Proposal as to the general acceptance of the chosen rules, as well as the examples given by the Commission of acceptable non-state body of rules.[125] By underlining that the set of rules should offer neutral and balanced solutions and by restating the limits of overriding mandatory rules and of public policy, the Hague Principles also attempt to answer the legitimacy concerns raised by the Max Planck Institute in regard to the Proposal for Rome I Regulation.[126]

Admittedly, the question of non-state law in conflict of laws ranges wide beyond contract to reach the shores of family law. But a brief overlook of the discussions led in the field of contracts sufficiently illustrates the parallelisms with discussions taking place in regulatory literature as to private regulation. Two points

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March 2015, *available at* < https://www.hcch.net/en/instruments/conventions/full-text/?cid=135> (last visit, June 26, 2016).

[124] Art. 11 of the Hague Choice of Law Principles.

[125] As under the European Commission's proposal, the CISG, the Unidroit principles and the PECL would satisfy the requirements concerning the "rules generally accepted on an international [...] level."

[126] In this respect, the Principles offers more possibilities for considering foreign overriding mandatory rules, since contrary to Art. 9.3 Rome I Regulation, this possibility is not limited to the rules of the State of performance of the contract.

of convergence surface. First, state centrism. The discussion relating to self-regulation and decentered regulation intends to open the cognitive scope of normativity by decoupling regulation from the state. Doing so, it also stresses how regulation has (exclusively) been understood as a state product. In a similar fashion, conflict of laws struggles to consider non-state law, as "law" and rather tends to consider it as a fact that parties can incorporate into their contract within the limits of the applicable law.[127] The Hague Choice of Law Principles offer a notable exception.[128] The second point concerns the protection of the public interest and deserves some specific developments.

(3) The Critique of Party Autonomy as Regulation: Public Interest Defense

Party autonomy forms the basis upon which normative competition as a regulatory technique and self-regulation can develop in transnational situations. As indicated before, party autonomy is the first precondition for normative competition to take place and the most obvious way for developing regulatory competition as a governance technique. In transnational situations, self-regulation needs to be acknowledged as part or as constituting the applicable law for self-regulation to become effective. For parties (corporations, members of associations) to benefit of the rules they privately designed, national conflict rules on party autonomy need to authorize the choice of a non-state law.[129] Milder forms of party autonomy also promote self-regulation, for instance, when "*depeçage*" allows parties to deconstruct state legislation and basically reconstruct their own normative framework.[130] It is therefore no surprise that the critiques addressed to normative competition and self-regulation in the regulatory literature echo those addressed to party au-

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[127] See already Michaels, *supra* note 47.

[128] Ralf Michaels, "Non-State law in the Hague Principles on Choice of Law in International Contracts," in *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz* (2014), p. 43; Symeon C. Symeonides, "The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments," *American Journal of Comparative Law*, Vol. 61, No.3 (2013), p. 873. Interestingly, the debate on non-state law also underlines how social realities are organized in a binary fashion in conflict of laws: social rules are either law or facts. There is thus no space for alternative forms of normativity as the one identified by Timist about regulation. See Timsit, *supra* note 29.

[129] Florian Rödl, "Private Law Beyond the Democratic Order? On the Legitimatory Problem of Private Law 'Beyond the State'," *American Journal of Comparative Law*, Vol. 56 (2008), p. 749: "[...] anyone wanting to think about private law 'beyond the state' should think also, maybe even first, about party choice of law."

[130] Sixto Sánchez Lorenzo, "Choice of Law and Overriding Mandatory Rules in International Contracts after Rome I," *Yearbook of Private International law*, Vol. 12 (2010), p. 71 (judging "absurd" that Art. 3 Rome I Regulation allows pretty wide "depeçage" but forbids the choice of non-state law).

tonomy in the field of conflict of laws.[131]

Concerning normative competition, as mentioned above, the critique range over several arguments. At a first level, the critique questions the reasons why normative competition is considered to constitute a regulatory technique. As highlighted by Trachtman, "it is by no means a foregone conclusion that competition is a 'better' discipline on government than other disciplines or that competition adds something to other disciplines."[132] Second, the ideal economic parameters of normative competition are never exactly met into practice (as regards the perfect information of the parties for instance).[133] Third, some scholars question the generalization of normative competition as an adequate regulatory technique while studies show that the results of normative competition are highly context dependent.[134] In particular, normative competition requires safeguards and monitoring: in other words normative competition needs a design that can hardly be elaborated in the absence of a federal or overarching system creating space for these considerations. Finally, and most importantly, the deregulatory side of normative competition would trump its advantages in many contexts. The argument has two sides: on the one hand, race to the bottom creates convergence and thus destroys the natural laboratory that normative competition is supposed to preserve (too much competition kills competition); on the other hand, normative competition offers a way of evading from mandatory requirements (by exiting) and in addition, erodes on the long term the mandatory requirement supposed to protect public interests.[135] On

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[131] On those see, Muir Watt, *supra* note 1.

[132] Trachtman, *supra* note 90, p. 335.

[133] *Ibid*. See also, Rühl, *supra* note 90, who nevertheless considers that the conditions of normative competition do not need to be perfectly (but sufficiently) met for competition to take place (pp. 2-14). For a discussion of 8 problems concerning the operational conditions of (positive) normative competition: Claudio Radaelli, "The Puzzle of Regulatory Competition," *Journal of Public Policy*, Vol. 24 (2004), p. 7-19.

[134] See book of Daniel C. Esty and Damien Géradin eds., *Regulatory Competition and Economic Integration* (2001); Daniel C. Esty, "Regulatory Competition in Focus," *Journal of International Economic Law*, Vol. 3 (2000), p. 217 (introducing the book and its core results). Joel P. Tratchman comes to the same conclusion. Some also consider that competition (as a race to top or race to the bottom) hardly takes place: Radaelli, *supra* note 133, p. 19.

[135] See for instance, Simon Deakin, "Regulatory Competition versus Harmonization in European Company Law," in Esty and Géradin eds., *supra* note 134, p. 190 (p. 209: "The suggestion then is that in the US context regulatory competition has led to a system in which company laws are comparatively uniform in content, but where they are also highly permissive."). Simon Deakin advocates for a figure of reflexive harmonization which has been successfully used in the EU. This approach "couples external regulation with self-regulatory processes" (p. 211). See for instance, Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure

the latter point, the fears of deregulation have been clearly expressed not only in civil society, but also in scientific literature relating to substantive law and to conflict of laws.[136] In the realm of conflict of laws, Annelise Riles has demonstrated how party autonomy coupled with differences in national regulatory regimes gives rise to regulatory arbitrage in the field of financial transactions and thus to the evasion of regulatory constraints: the game of delocalization (for instance by booking a financial transaction offshore) is simply too easy and too low cost, so that the financial industry has no incentive to withdraw from a cat-and-mouse game with national regulators.[137] The perception that party autonomy is a well settled doctrine in the field of financial transactions apparently "allows traders to act with confidence that courts will honor their wishes no to be subject to national law."[138]

Self- or private regulation has generated similar critics. They range at, at least, two levels. A first critique formulated, for instance, by Florian Rödl unsettles party autonomy in general and the choice of "law beyond the state" in particular. Party autonomy contradicts democratic theory (notably as elaborated in the work of Habermas "Between Facts and Norms") since it uncouples private autonomy from the basic democratic consensus that supports it. The allocation of rights (and thus of spheres of autonomy) results from the democratic procedure within which citizens decide which right they give to each other. However, with "an opening to party autonomy, this unity of the co-originality of private law and public autonomy, required by reason, is interrupted."[139] Therefore party autonomy "raises fundamental problems for the democratic legitimation of private law."[140] Self-regulation

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in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast), *Official Journal of the European Union*, (2009), L 122/28.

[136] For two very different examples, see in the field of substantive EU law: Deakin, *supra* note 102; in the field of conflict of laws: Vincent Heuzé, "Lettre ouverte — L'Union européenne, la démocratie et l'État de droit," *La Semaine Juridique Edition Générale* (2006), act. 586, 2213 (fearing the erosion of mandatory rules due to EU interventions in the field of conflict of laws, taking stock of ECJ decisions like *Centros*: Case C-212/97, Centros Ltd v. Erhvervs-og Selskabsstyrelsen, 1999, E.C.R. I-1459).

[137] Annelise Riles, "Managing Regulatory Arbitrage: A Conflict of Laws Approach," *Cornell International Law Journal*, Vol. 47 (2014), pp. 75-76, showing that regulatory arbitrage can be at the cost of the particular values that might be important to a political community; p. 99 on the link with party autonomy, raising also the following question: "Should party autonomy trump all other values?" Regulatory arbitrage is defined as "those financial transactions designed specifically to reduce costs or capture profit opportunities created by different regulations of laws" (p. 65, citing Frank Partnoy, "Financial Derivatives and the Costs of Regulatory Arbitrage," *Journal of Corporation Law*, Vol. 22 (1997), p. 277).

[138] Riles, *supra* note 137, p. 99.

[139] Rödl, *supra* note 129, p. 759.

[140] *Ibid.*, p. 754.

could thus only play a supplemental role within the realm of the applicable law.[141]

Another critique is formulated, among others, by Joel Bakan and questions directly the rationale of self-regulation: why would corporations (or association or professional bodies) provide a better protection of the public interest than government?[142] The basic argument for advocating in favor of private regulation is that companies (or the private sector generally speaking) can effectively replace the traditional forms of centralized/governmental intervention in a globalized world where corporations are freed from national boundaries and their regulatory constraints. However, Bakan says, despite voluntary scheme of corporate social responsibility (CRS), companies have no incentive to consider the public interests as such. Rather, the CRS approach is based on a "shared value" test, meaning that an action (in favor of social or environmental values for instance) is only taken into consideration when it "presents an opportunity to create shared value — that is a meaningful benefit for society that is also valuable to the business."[143] Obviously, shared value offers a limited window on the public interest, as narrow as the overlap between business interest and social and environmental concerns.[144] Bakan underlines that the legal requirements weighing on companies "limit their pursuit of social and environmental values unless such pursuit can somehow be aligned with their own financial interests."[145] In short, the idea of private regulation (as a means of pursuing the public interest through privately designed norms) is self-defeating because inherently contradictory. And the true operational value of mandatory regulations is according, to Bakan, largely obscured by discourses about the erosion of the role of the state as a side effect of globalization.[146] Privately designed rules cannot be expected to replace an independent (non-profit driven) pursuit of the public interest.

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[141] *Ibid.*, p. 765 (a solution akin to the *version 1* of party autonomy presented in part I. 2 (incorporation) and eventually supported by the Recital 13 Rome I Regulation).

[142] Joel Bakan, "The Invisible Hand of Law: Private Regulation and the Rule of Law," *Cornell International Law Journal*, Vol. 48 (2015), pp. 279-300.

[143] *Ibid.*, p. 292 cites here: Michael E. Porter and Mark R. Kramer, "Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility," *Harvard Business Review*, Vol. 84 (2006), pp. 6, 12.

[144] Bakan, *supra* note 142, p. 297.

[145] *Ibid.*, p. 287

[146] *Ibid.*, p. 298. This critique is supported by others, for instance Carola Glinski showed that self-regulation is rarely of purely private design: Carola Glinski, "Self-Regulation of Transnational Corporations: Neither Meaningless in Law Nor Voluntary," in Sorcha MacLeod ed., *Global Governance and the Quest for Justice — Corporate Governance* (2006), pp. 197-220. The contribution shows that privately designed rules are rendered binding by the use of private law schemes, such as for instance tort law, misleading advertisement etc. In this sense, the "private" side of self-regulation is limited.

Interestingly, Bakan's argument relating to the one-sided view of multinational corporation on public interest echoes concerns expressed in the realm of conflict of laws about the choice of non-state law as the law applicable to the contract. As mentioned earlier about the Commission's proposal to allow parties to choose non-state law as the law applicable to their contract, the Max Plank Institute seemed to doubt whether non-state body could elaborate "balanced" rules. The Institute therefore proposed to include requirements relating to the quality of this non-state body ("independent, impartial and neutral") and as to the content of those non-state rules ("balanced"). Clearly these requirements would exclude rules elaborated by multinationals or professional associations.[147] In addition, the Institute considered necessary to recall that those rules should be submitted to national mandatory rules and should not be used as a means for evading from those rules. Again, the conditions proposed by the Max Planck (and later taken over by the experts sitting in the Hague Conference when negotiating the Hague Principles on Choice of Law) all indicate that private regulation or non-state rules raise serious public policy concerns.[148]

Why is it so important that rules on private relations are adopted by an impartial and independent body? And is there something like an independent and impartial normative entity? As mentioned above, the critique of governmental regulation is that it is captured by various interests (short term electoral interests, lob-

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[147] The examples cited by the Commission in its explanatory report were very limited: Unidroit Principles, Principles of European Contract Law and a potential EU instrument on contract that was never enacted.

[148] In the field of securities, Walsh (*supra* note 88) shows how the combination of self-regulation and choice of law and choice of court permits the evasion of public policies. She discusses a litigation between Lloyd's (at the time a purely private entity) and private investors who underwrite the market in exchange for a share of the profits. After important losses, Lloyd's turned to the underwriters whose liability was unlimited. As Walsh reports, many resisted payment alleging that their investments had been solicited by insiders at Lloyd's who did not disclose the losses and took opportunity for shifting responsibility to the new investors and exit the market. Lloyd's Council issued a compulsory settlement plan basically shifting the risks to a new reinsurance entity to be financed by reinsurance premiums paid by the non-settling underwriters. Walsh details a litigation brought before Ontario courts by one of the underwriters against Lloyd's, alleging fraud and failure to comply with Ontario prospectus requirements (*Ash v Lloyd's* (1991), 6 O.R. (3d) 235 (Gen. Div.) at 248, aff'd (1992), 9 O.R. (3d) 755 (C.A.)). Relying on the choice of court and choice of law clauses (in favor of English court and English law) inserted in its standard form agreement, Lloyd's obtained a forum non convenience declaration in Ontario and later a favorable judgement in the UK relying on English law and Lloyd's self-regulation. In a similar case brought before Australian Courts, the Australian judge refused to give way to the choice of court clause because this would circumvent the policies behind the Australian trade practice legislation (*Commonwealth Bank v White; ex parte Lloyd's*, [1999] VSC 262, paras. 88-89).

bying etc.). The whole discussion about private regulation indicates that interests are everywhere, but that when it comes to choosing among them — and this is exactly what conflict of laws does: choosing among various normativity —, state laws (thus governmental normativity) offer a more convincing picture for two intuitive, but also philosophical and sociological reasons. The state offers at this stage the only democratic forum where the extent and limits of rights and freedom can be inter-allocated between citizens. And the state seems more apt to offer a non-profit driven and balanced picture of the various interests at play.

3. Conclusion on Part II

From a conflict of laws perspective, the critiques of normative competition and private regulation point at the abuses of party autonomy: the deregulatory impact of party autonomy in normative competition, the evasion of public policies, the capture by profit-driven and one sided interests in self- or private regulation. While party autonomy is sometimes pictured as an appropriate regulatory and governance technique (in the form of normative competition or in the form of a delegation of regulatory power to private parties), critiques are prompt to question its rationale and to underline how this regulatory technique can jeopardize the public interest. The discussion that takes place in the regulatory fields thus replicates in many ways the discussion going on in the conflict of laws fields regarding party autonomy. The reasons why party autonomy as a regulatory technique is questioned by some commentators had been anticipated in the conflict of laws field in various ways: when designing a protection of the weaker party against party autonomy; when refusing to designated non-state rules as the applicable law; and when restating the limits brought by overriding mandatory rules.

This conversation between advocates and critiques of party autonomy as a regulatory technique recalls many well-known considerations for conflict of laws. It also sheds a new light on the system of conflict of laws based on the assumption that private law is neutral and abstract. Acknowledging that the possibility for private parties to choose non-state law raises questions about the "making" of private rules, about the balance of interests those rules will express, and about the protection of public policy seems hardly compatible with the image of private law presented in the first part of this paper.[149] Acknowledging that normative competition as prompted by party autonomy may lead to the evasion of public policies, result in deregulation and endanger the public interest, also questions the conception of private law and party autonomy as originally presented. If private laws were neutral and abstract

[149] Comp. for a radically different enterprise: Matthias Lehmann, "Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws," *Vanderbilt Journal of Transnational Law*, Vol. 41 (2008), p. 381.

and therefore interchangeable — which are the assumptions upon which the multilateral conflict system and party autonomy in particular are based — then normative competition and non-state law would not be problematic.

One could argue that normative competition and non-state law are only a problem in limited areas of economic life, *i.e.* those areas occupied by regulation. In the limited regulatory field, so the argument goes, public interests might be at stake and require governmental interventions taking the form of more technical and behavior-conducting rules. In other words, the regulatory side of private law justifying concerns about regulatory competition and non-state law would constitute an exception within the larger neutral continent of private law. The rhetoric is identical to the one used to describe the *lois d'application immédiate* as an exception in the field of conflict of laws. The same rhetoric can also be traced in the literature underlying the distinction between law and regulation. Admittedly, concerns about deregulation produced by normative competition and evasions of public policies discussed above have often been expressed in regard to specific areas of law: financial regulation, labor law, protection of the weaker party. But in those areas, protection of public interests should already be accomplished, in the EU, by way of specific conflict of laws provisions such as for instance Articles 6 (consumer protection), 8 (employment contract) and 9 (overriding mandatory rules) of the Rome I Regulation, which all limit or forbid party autonomy. So why worry about normative competition and non-state law, if the designated regulatory fields and specific regulatory interventions are beyond the parties' disposal anyway? Furthermore, if the protection of the public interest was only necessary in specific fields of private law, normative competition and the choice of non-state law could be generally accepted beyond those limited areas. In other words, if private law did (generally speaking) not engage into public interest consideration, there would be no reason for limiting the admission of non-state law to rules elaborated by an "impartial and independent body" or for fearing (or even promoting) normative competition on a general scale.

In fact, the allegedly limited island to which public interest concerns would be circumscribed might very well have the size of a continent. As discussed earlier, the delimitation of a specific "regulatory field" constitutes an ongoing challenge for the regulatory literature. Turning to private law in particular, the regulatory nature of private law has often been discussed as a relatively recent transformation of private law provoked by the driving forces for specific policies.[150] But others have

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[150] Hans Micklitz, "The Visible Hand of European Regulatory Private Law — The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation," *Yearbook of European Law*, Vol. 28 (2009), p. 3 (identifying the "competition policy" and the "industrial policy" as the "two driving forces" in the process of modernization of private law, p. 7; see also pp. 9-20).

identified many fields of private law as regulatory, among them even family law and contract law.[151] Regarding the link between public and private law, the claim that property rights and contract rights, thus the core of private law, are just another form of public law has been formulated already long ago by the American Legal Realists.[152] For them, contracts (and thus party autonomy) are instruments of power and coercion similar to public law. That is a vision of contracts perfectly contradictory to the one advocated by economists and those who saw and see contracts as an instrument of liberty, deprived of any stakes for the larger social community.[153] Others have pointed at how private law contributes to compromising not only the liberty of the parties involved, but also the liberty of a community and thus engages into questions of distributive justice.[154] And indeed looking back at some historical statements about private law, one really wonders how it has ever been possible to ignore the public policy side of private law.[155]

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[151] About family law, see the books cited by Black, *supra* note 31, p. 15, note 55. For contracts, Hugh Collins, *Regulating Contracts* (1999). Hugh Collins considers that contract regulation is in a "process of transition for the dominance of traditional private law regulation to one where welfarist regulation increasingly provides the basic discourse" (p. 8) and in which "the effects or policies of private law, become central reasons for the legal discourse" (p. 9). He identifies a shift in the global regulation of contracts arising out of the "collisions between private law and public regulation" (p. 9).

[152] Morris R. Cohen, "Property and Sovereignty," *Cornell Law Review*, Vol. 13 (1927), p. 8; Morris R. Cohen, "The Basis of Contract," *Harvard law Review*, Vol. 46 (1933), p. 553; Robert Hale, "Coercion and Distribution in a Supposedly Non-Coercive State," *Political Science Quarterly*, Vol. 28 (1923), p. 470; Joseph W. Singer, "Legal Realism Now," *California Law Review*, Vol. 76 (1988), p. 465; Neil Duxbury, *Patterns of American Jurisprudence* (1995), pp. 107-110. The realist insisted on how the state is actually engaged in private law by coercively enforcing contracts and property. For this reason, private law is "public" and derives from public regulation. There is thus a public interest for the state in regulating contracts and property.

[153] For the vision of a regulatory economist, Ogus, *supra* note 18, p. 16. The role of the state is occasionally identified in reducing transactions costs or preventing some externalities, but private law is mainly facilitative (pp. 17 and 257).

[154] Florian Rödl, "Contractual Freedom, Contractual Justice and Contract Law (Theory)," *Law and Contemporary Problems*, Vol. 76 (2013), p. 60. The liberal approach to contract law is "too narrow from a normative point of view, as it is interested only in the formal freedom of property owners and contractors, not in the substantive freedom of human beings, which depends in large part on notions of distributive justice in judicial holdings." The equality of human beings which should be mirrored in contracts is the "only public dimension of contracts law's basic structure" (p. 70).

[155] "So great is the regard of the Law for private property, that it will not authorize the least violation of it; no, not even for the common good of the whole community," attributed to Blackstone by Benjamin M. Ziegler, *The Supreme Court and American Economic Life* (1962), p. 267.

Conclusion

Observing the relationship between regulation and party autonomy opens a window on the public side of private international and on the public interests stakes of party autonomy. By the same token, this relationship also opens a window on the private side of regulation and more precisely on the necessarily mixed nature of regulation — and of conflict of laws.

Regulatory literature and conflict of laws scholarship are engaged in a conversation about the nature of law, upon the basis of which each field legitimizes its own construction. As explained earlier in this contribution, part of the challenge faced by regulatory scholarship is the "definitional chaos"[156] and the variety of approaches of the notion, some accepting more overlap between law and regulation, some treating the two notions as distinct sources of normativity. The distinctiveness of regulation in regard to legal normativity seems to rest on a specific image of law as abstract and neutral, as opposed to regulation that would be designed as a method to influence behaviors in specific situations, most obviously in the economic sector. In the regulatory field, perceptions of abstraction and neutrality are especially attached to private law as opposed to public law since regulation is sometimes conflated with public law or at least the public interventions aimed at controlling the private behavior on the market.

Similarly, conflict of laws, as conceived in the EU, is based on the assumption of private law as being neutral, abstract and immune of public interest for the most part. On this basis, private laws can be considered interchangeable and their application can depend on the exercise of party autonomy. Exceptions can be considered, but only in restricted fields that would not jeopardize the general picture of private law.

A closer look however reveals how these images of private law are eventually blurred, if not misleading. A more impressionist picture, or even deconstructivist, emerges as the interactions between regulation and private international law are scrutinized. The relationship between party autonomy and regulation can be conceived as contradictory or as collaborative. In either form, the interaction between party autonomy and regulation raises concerns regarding the protection of public interests. The instances of protection of public interests, however, can hardly be considered as insular exceptions.

Regulation can be considered as an exception in the landscape of private international law and as a derogation to party autonomy when it takes the form of overriding mandatory rules, *Eingriffsnormen* or *lois d'application immédiate*. One could even say that the entire field of *Wirtschaftskollisionsrecht* is covered by regulations in the command style, which obviously exclude party autonomy. However,

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[156] Black, *supra* note 13, p. 129.

the delimitation of these exception proves very difficult to trace. Just like those of the regulatory field, the borders of the overriding mandatory rules islands prove elusive. This invasive tendency of the public interest sphere as defended by overriding mandatory rules, as much as they override also party autonomy, explains much of the debate about their proper sphere of application and the need to limit their intervention. The space of overriding mandatory rules is, to a large degree, inversely proportional to the sphere of party autonomy. More importantly, the mere existence of overriding mandatory norms mirrors the implications of private relations and of private law for the public interest.

When looking at the other side of the coin and considering party autonomy as a modus of regulation, the challenge of public interests is equally dominant. The use of party autonomy as a regulatory technique, taking the shape of normative competition or of private regulation, should be perfectly acceptable if private law, generally speaking, were not to touch upon public interests and if it were really neutral and abstract. But this regulatory technique has raised considerable concerns in practice and in theory in regard to the evasion from public policies and the protection of the public interest. These concerns indicate, in turn, that public interests are actually at stake throughout the realm of private law.

Therefore, considering the public interest aspects of private law as a minor island in a sea of neutral private law seems hardly convincing. The public side of private law and of private international law is certainly not a new discovery. American Legal Realists as Cohen and Hale had already emphasized it in the realm of private law.[157] Private law scholars have identified a political shift in the making of private law.[158] Unilateralists have established a long-standing tradition of conflict of laws that takes for granted that laws determine their own sphere of application based on the interests and policy objective they pursue — something Savigny never denied but judged irrelevant in the context of a homogeneous socio-legal community. Other conflict scholars have equally underlined the social and political dimension of conflict of laws.[159] The neutrality of private law and therefore the basis of the conflict of laws system is far from settled. How could this shaky basis not affect the whole construction?

Surprisingly, despite the contestation of the very foundation of the multilateral system, the construction of conflict of laws seems hardly affected at all. New instruments, like those enacted in the EU, embrace the multilateral method, with marginal adaptations of multilateral conflict rules pursuing more or less efficiently policy goals (so called substantive conflict rules). But when the *raison d'être* of an entire construction reveals its weakness, would this not deserve some more scien-

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[157] *Supra* note 152.

[158] *Supra* notes 84, 150 and 151.

[159] *Supra* note 61.

tific consideration? Or at least some "Critical Reflections" similar to those Julia Black addressed to her own field?[160] And in particular, as already suggested in this review, should we not think of better foundations for party autonomy?[161]

The findings are somehow unsettling for the regulatory scholarship as well. The field seems equally divided. On the one hand, part of the scholarship is built on a distinction between public and private law, between abstract and neutral rules versus regulation based on behavioral commands designed to protect the public interest from the excesses of the market. On the other hand, the — or another part of the — regulatory literature observes various phenomena: the expansion of the regulatory field beyond the market; the erosion of the distinction between public and private law; and the need for protection of the public interest in particular in matters for which a delegation of the regulatory power to the "private" is advocated. The fault line, again, coincides with the public/private divide, and more precisely, the public interest side of any private arrangement. Actually, looking at regulation from the party autonomy perspective or looking at party autonomy from the regulatory perspective are equal ways of confirming the intuition of the Legal Realists about the pervasiveness of public interests in all private rules.

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[160] Black, *supra* note 31.

[161] For instance, in a unilateralist perspective, the varying degrees of imperativity of a normative command, Francq, *supra* note 50.