SUMMARY THESIS: PRIVATE INTERNATIONAL LAW AT THE NEXUS OF EUROPEAN INTEGRATION

A STUDY OF COMPARATIVE FEDERALISM

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Abstract: European integration results in a paradigm change for private international law in Europe. The altered context of European federalism, regarding its influence on private international law comparable with the US federal context, has lead firstly to constitutional constraints on the content of private international law rules adopted by member states or by the European legislator, delimiting at the same time the member states’ competence. These constraints are the result of the interpretation, adopted by the Court of Justice and the Supreme Court, of several provisions included in the EU treaties and in the US Constitution respectively. Such interpretation, which has in particular in the US strongly fluctuated throughout its history, determines the form of federalism of the two unions. The altered context has lead secondly to a transformation of the function of private international law rules. Though neglected by the European legislator, the transfer of competence to adopt such rules to the Union reinvested the field of private international law with its function of distributing competences among states and, moreover, invested it with a new, systemic function: while configuring the European system of private international law the European legislator determines both the form of regulatory competition between states and their ability to produce legislative externalities. Having an influence on the nature of state law and on the functioning within states of both the principle of the rule of law and of democracy, it is the European legislator which defines thus, within the constitutional limits laid down by the Court of justice, the form of European federalism.

1. The thesis examines the paradigm change to which European integration has lead for private international law in Europe. As a rule, a comprehension of private international law rules requires an analysis of the context within which they are being implemented. The process of regional integration in Europe has resulted in a form of federalism, which, as regards its impact on private international law, may be compared with the United States federal system. The aim of the thesis is not to provide an analysis or even a description of applicable private international law in the European Union. Its ambition is more limited: to contribute to the identification and analysis of the most important specificities the altered context entails for private international law. While being centered on the effect of the context of European federalism on private international law, the rich US

1 Original title of the doctoral thesis summarized: Le droit international privé dans le nexus de l’intégration européenne. Étude de fédéralisme comparé, Thèse, Université Paris I Panthéon-Sorbonne, 2012. Obviously, this summary does not contain the same detailed analysis and reasoning as the thesis itself; it is only intended to provide an impression in English of the thesis, without being part of it. Also, for all bibliographical and other references, omitted in the summary, reference is made to the thesis itself.
experience in this respect is introduced and used to put the influence of the altered European context into perspective.

2. A first marked feature of both the EU and the US federal context are the constitutional constraints on the content of private international law rules adopted by the states or by the central – i.e. “European” or “federal” – legislator, delimiting at the same time the constituent – “member” or “federated” – states’ competences. These constraints are the result of the interpretation, adopted by the Court of Justice (“ECJ”) and the Supreme Court respectively, of several provisions included in the EU treaties (free movement rules, non discrimination principle) and in the US Constitution (full faith and credit clause, due process clause, commerce clause, equal protection clause, privileges and immunities clause). Such interpretation by the two courts, which in particular in the US strongly fluctuated throughout its history, (co)determines the form of federalism of the two unions.

3. The altered European context has lead secondly to a transformation of the function of private international law within the EU. The transfer of competence to adopt private international law rules to the Union, and the actual use the European legislator made of this competence, reinvested the field of private international law with its function of distributing competences among states. The field was moreover invested with a new, systemic function: while configuring the European system of private international law, the European legislator determines both the form of regulatory competition between states and their ability to produce legislative externalities. Having an influence on the nature of state law and on the functioning within states of both the principle of the rule of law and of democracy, it is the European legislator which defines thus, within the constitutional limits laid down by the Court of justice, the form of European federalism. However, such transformation of the function private international law appears as yet to be neglected by the European legislator, which, at least in its public communications, expresses a reductionist perception of this field of law. While the US federal context entails potentially the same transformation of the function of private international law in the United States, such transformation has to date not materialized, for the reason that the federal legislator has hardly made use of its legislative competences regarding the field.

4. While analysing the two aforementioned features, the thesis investigates, from an institutional perspective, the respective roles of the ECJ – at a constitutional level – and the European legislator in shaping private international law, and the (potential) influence of their activities in this field on the form of European federalism. Throughout the thesis, it is tried, moreover, to make more explicit the normative choices underlying the action of both the ECJ and the European legislator, both from such institutional perspective and from the perspective of European federalism, and to shed some additional light on the interdependencies of their respective action.
5. Following a traditional outline, the thesis consists of two parts (with each four chapters). Part 1 relates to the constitutional constraints on private international law. Part 2 relates to the transformation of the function of private international law due to the transfer of legislative competence to the Union. However, in order to provide an overview of each of the two specific contexts insofar as relevant for the present thesis, in a preliminary chapter some features of both EU and US federalism are sketched. This also allows us to verify whether indeed the two contexts are comparable for our purposes.

Preliminary chapter: constitutional principles determining the features of European and American federalism (nos. 9 – 72²)

6. The preliminary chapter sketches, in a first section (nos. 10 – 23), the vertical division of competences between the states and the union. Regarding the EU, the principle of the conferral of competences, and the subsidiarity and proportionality principles are briefly described, followed by a description, regarding the US, of the principle of enumerated federal powers, as confirmed in the Tenth Amendment. This is followed by a description of the normative hierarchy within the two polities: principles of direct effect and primacy of EU law, supremacy and pre-emption regarding US federal law.

7. In a second section (nos. 24 – 67), the principles meant to procure unity within the diversity characterizing both federal systems are scrutinized: the free movement rules establishing the EU interior market and, regarding EU citizens, the prohibition of discrimination on the grounds of nationality and (also) the freedom of movement. As regards the US are presented the commerce clause and economic due process (US common market), as well as the different aspects of the right of travel. An analysis of the case law of the ECJ (notably concerning the free movement rules) and the Supreme Court (economic due process and commerce clause) shows that neither US federalism nor EU federalism is stable: through their interpretation of the constitutional provisions mentioned, the two courts determine the form of federalism of the US and the EU respectively. Examples of the fluctuation of the case law in this respect are constituted by the Lochner era and its demise, as well as – though less dramatically – by the turn of the ECJ case law through its Keck judgment. As a tool of analysis of the possible interpretations adopted by the courts of the constitutional provisions mentioned, three models of federalism are put forward: the centralized model, the decentralized model, and the economic due process model. As the normative foundations underlying each model are made explicit, their introduction allows moreover putting into perspective the on-going debates on the meaning of the several constitutional provisions and their effect on private international law and on the states’ competences.

² The numbers mentioned refer to the paragraphs of the thesis.
8. Finally, in a third section (nos. 68 – 72) the principles of horizontal federalism are briefly introduced. The EU treaties paid, at least initially, very little attention to such principles, while in the US constitutional texts they are notably laid down in the full faith and credit clause and the (procedural) due process clause.

Part 1: Negative integration and private international law. Constitutional constraints on private international law in a federal system (nos. 73 – 492)

9. Part 1 of the thesis relates to the constitutional constraints on private international law within EU and US federalism. Throughout the United States’ history, constitutional constraints on private international law have known an important evolution. However, as a result of a relatively constant US Supreme Court case law for several decades, they currently benefit of a certain stability. Contrarily, as within the European Union the question regarding such constraints only emerged relatively recently, the case law of the ECJ has not yet reached the same maturity. The resulting uncertainty has lead to various hypotheses put forward within European legal academia during the last twenty years as regards the content of the constraints on private international law rules following from the EU treaties. This thesis connects the still evolving case law of the ECJ and the various European debates, first to each other and second to the US constitutional history in this respect. It thus tries to show that the different interventions of the ECJ and the debates concerning them are far from isolated and that they have a common denominator, also with the US doctrines mentioned.

10. As a starting point, the thesis attempts to provide, through an analysis of direct legal sources – i.e. the constitutional provisions concerned and relevant case law – a description of the actual constitutional constraints, notably at present but also, in the case of the US, historically. However, as is demonstrated by the fluctuating case law both of the Supreme Court and the ECJ, the open texture of the constitutional provisions from which the constraints are derived leaves the two courts an important room for interpretation. Therefore, it is tried secondly to make more explicit the normative foundations underlying the constitutional constraints to which different interpretations may lead, the model of federalism with which they correspond as well as the institutional aspects each time involved. Finally, as regard the European Union, in as far as relevant, the policy room left to member states and the European legislator is identified.

11. Different forms of constitutional constraints are conceivable. Such constraints may be such that they provide by themselves a solution to private international law issues. One may speak in such case of constitutional private international law rules, resulting directly from the EU treaties or the US Constitution. In case of such constitutional private international law rules, the discretion of the states and the central legislator is reduced to zero. The constraints may also be such that they reduce such discretion, without however being constitutional private international law rules. In the latter case, the states and the central legislator, while retaining
part of their discretion, are constitutionally limited in their adoption of private international law rules. The first two chapters of Part 1 deal with constitutional private international law rules, making a subdivision between such rules that entail the constitutionalization of an entire branch of private international law (nos. 78 – 174) and those that only for a specific issue or field of law fully puts aside any diverging private international law rule adopted by the states or the European legislator (nos. 175 – 274). A third and fourth chapter of Part 1 relate to constitutional limits to private international law rules set by the states and the central legislator, first as regards the United States (nos. 278 – 340), subsequently as regards the European Union (nos. 341 – 482).

1.1 The constitutional system of private international law

12. The US constitutional system on the recognition of judgments, put forward in the first section of this chapter (nos. 79 – 105), constitutes a first example of the constitutionalization of a whole branch of private international law. This system, elaborated by the Supreme Court on the basis of two constitutional provisions, and a marked feature of US federalism without equivalent in Europe, imposes on the states the recognition of judgments rendered in sister states. The Supreme Court determines on the basis of the full faith and credit principle both the scope of the obligation as regards the judgments covered and the effect that must be attributed to such judgments. Excluding in principle any exception on the obligation to recognize sister state judgments insofar as derived from state law (including the public policy exception), the limits on the obligation to recognize such judgments follow from another constitutional provision: the due process clause. The Supreme Court however not only constitutionalized but also, gradually, privatized this branch of private international law: the possibility of putting aside of a sister state judgment being fully left to the initiative of the parties, excluding any defence by the states of their respective policies possibly thwarted through such judgment.

13. The second section relating to a system of rules constitutionalising an entire branch of private international law (nos. 106 – 174), demonstrates the link between, first, the hypothesis, put forward and heavily debated in Europe during the 1990s, according to which the EU free movement rules contain a vast conflict of law rule designating the law of the country of origin of an economic operator and, second, the conflict of law rule constitutionalized by the Supreme Court at some point during the Lochner era. In the first part of the 20th century, the US Supreme Court gradually provided, as part of its Lochner era case law characterized by its recourse to the economic due process principle, a constitutional foundation to the vested rights doctrine defended by the then well-known scholar Joseph Beale. An analysis of this case law shows that at its zenith it lead to a constitutional conflict of law rule putting aside any divergent state conflict of law rules and also to the exclusive competence of a single state to regulate each specific situation. In a second stage, still during the Lochner era, the Supreme Court abandoned the strictly territorial vested rights doctrine, searching for a new theoretical foundation for its constitutional scrutiny of state
competences. While at first the Court found such foundation in the new criterion of governmental interests put forward by its Justice Stone, it subsequently, as part of the broader constitutional revolution marking the end of the Lochner era, abandoned such constitutional scrutiny of state competences altogether. After all, it was not so much the vested right foundation of the constitutional conflict of law system, but the fact itself that the Supreme Court constitutionalized this field of law on the basis of vague principles like economic due process that proved problematic. In view of the lessons of this period of American constitutional history, it is interesting that at the end of the 20th century several European legal scholars put forward a hypothesis, resulting in an important polemic, having many similarities with the American constitutional conflict of laws system abandoned more than half a century before. According to the said scholars, the free movement rules included in the EU treaties contain a conflict of law rule designating systematically, unless the law of the country in which they are doing business proves more favourable, the law of the country of origin of an economic operator. Such hidden “constitutional” conflict of laws rule would put aside divergent conflict of law rules adopted by the states or the European legislator or would even make such rules redundant. It is showed that this hypothesis does not reflect the case law of the ECJ and is therefore currently not part of positive law. The hypothesis is examined moreover from a normative perspective. Drawing on the American experience, the resulting economic due process model of federalism is described, and the significance of institutional alternatives highlighted.

1.2 Constitutional private international law rules on specific issues

14. While in the first chapter of Part 1, rules that entail the constitutionalization of an entire branch of private international law are examined, a second chapter deals with constitutional rules that only for certain specific issues or fields of law put aside diverging private international law rules adopted by the states or the central legislator. A first section deals with the constitutionalization of free choice of law for contractual matters, while a second section examines the hypothesis according to which, regarding corporations, the applicability of the law of the state of incorporation is constitutionally compelled. The first section (nos. 176 – 196), describes the hypothesis of several European scholars according to which it follows directly from the free movement rules included in the EU treaties that, within their scope, parties to a contract have the freedom of choice of the applicable law. This suggestion is put next to the theory of an American scholar according to which such conflict rule follows directly from the commerce clause. It is submitted that currently neither the case law of the ECJ nor the case law of the Supreme Court supports such hypothesis. Moreover, once more, the normative foundations of such constitutional conflict of law rule are examined, describing, while taking into account the institutional alternatives, the resulting form of federalism.

15. The second section (nos. 197 – 271) relates to a constitutional conflict rule regarding corporate law. First, the American internal affairs doctrine and its
evolution, the doctrine being transformed today basically in a free choice of law rule, are examined. Subsequently, through an analysis of both the case law of the Supreme Court (MITE Corp. and CTS Corp. cases) and of the continued application by New York and California of their respective laws to so-called “pseudo-foreign corporations”, claims regarding the constitutional foundation of the internal affairs doctrine are scrutinized. We find that such constitutional basis of the internal affairs doctrine is at least uncertain and that it appears even likely that it is lacking. Second we show that in this respect in Europe the ECJ appears to have gone further in limiting the states autonomy in this field than its American counterpart. We briefly recall the history of the regulation of corporations within the EU, and describe some theories put forward within European legal academia during the 1980s, claiming the contrariety of the so-called real seat doctrine, adopted by most member states, to the freedom of establishment included in the EU treaties. Subsequently we analyse the case law of the ECJ, starting with its Daily Mail decision and for the time being concluded by its VALE Építési decision. This allows us to conclude, dismissing claims by legal scholars to the contrary, that no more than the Supreme Court did the ECJ constitutionalize a conflict of laws rule regarding corporations. Assuming a role of “substitute-legislator” the ECJ did devise however, through its decisions, a coordination of the competences of member states to regulate corporations. After an analysis of this coordination from a normative perspective we identify the policy room left for the (real) European legislator to adopt a legislative conflict of laws rule. Different rules may be adopted by the legislator, leading to one of three models of federalism we identified in the preliminary chapter: centralized model, decentralized model or economic due process model.

1.3 Constitutional limits on private international law in the US

16. In the first and second chapter of Part 1, it has thus been shown that, at the important exception of the US system of recognition of sister state judgments, positive law is currently such that, despite various theories to the contrary, neither in the US nor in the EU are there any constitutional private international rules. Nevertheless, without constituting such rules, within both federal systems there are constitutional limits to the private international law rules adopted by the states and the central legislator. We submit that such constitutional limits can only be well understood if they are considered for all three branches of private international law together. In the chapter regarding constitutional limits in the US, a first section relates to such limits on the jurisdiction of state courts, while a second section deals with limits on conflict of law rules. As regards the limits on the assumption of jurisdiction by state courts (nos. 280 – 307), their evolution is traced through the Pennoyer v. Neff, International Shoe and subsequent Supreme Court decisions. Moreover, further to Hughes v. Fetter, it appears that under certain circumstances also the refusal to assume jurisdiction may be unconstitutional. All in all, while it is generally recognized that the International Shoe criteria limiting jurisdiction are an improvement in comparison with the former territorial limits of Pennoyer, recent decisions of the Supreme Court are
criticized for their lack of coherence and the resulting legal uncertainty. Furthermore, and at least as important for the present thesis, the decisions leave a large measure of discretion to the states in determining the jurisdiction of their courts, which by several states is used to the maximum constitutionally permitted. This fact makes all the more relevant the constitutional limits to the conflict of laws solutions adopted by the states.

17. A second section (nos. 308 – 339) relates to the constitutional limits to conflict of laws. Since the demise of the *Lochner* era case law in this regard, the Supreme Court has shown great deference to the states. First the case law of the Supreme Court regarding the full faith and credit and the due process clauses are examined. As follows from the *Allstate, Shutts,* and *Wortmann* decisions, current constitutional restrictions on the application of forum law based on these provisions are very modest. Second, it is examined whether the constitutional provisions regarding non-discrimination (privileges and immunities, equal protection and commerce clause) limit in any way the states in their choice of conflict of law rules. While many legal scholars are of the view that these provisions should indeed limit the states, for example in adopting the approach defended by Brained Curry, the Supreme Court has to date not seized an opportunity to clarify its view, without doubt also motivated by its general position of deference to the states in this field. We conclude (nos. 330 – 339) *inter alia* that the constitutional limits regarding the three branches of private international law in the US have lead to a paradoxical autonomy for the states. In fact, the autonomy the states retain in the field of private international law erodes importantly their authority to regulate and, on the same token, their general (substantive) autonomy. Moreover, the resulting form of federalism, marked by legal uncertainty, induces forum and law shopping and encourages a race-to-the-court. Leading to a particular form of what we called the economic due process model, it could even be said that federal values of democracy and pluralism are put at stake. However, the reticence of the Supreme Court to impose stricter limits is founded in its nature as a court of law and in its function within the institutional framework of United States federalism, and seems the only tenable position. An improvement of the current situation, we hold, can therefore only be brought about through coordinated action of the states or by Congress.

1.4 Constitutional limits on private international law in the EU

18. In Europe, *inter alia* in view of the stage of integration, the ECJ has only relatively recently started to impose constitutional limits on the private international law rules of member states. Moreover, differently than in the United States, and possibly in view of uniform rules elaborated for important areas of the two other branches of private international law, the limits elaborated by the ECJ only concern the branch of conflict of laws. The limits find their legal basis in the principle of non-discrimination on the grounds of nationality and in the various free movement rules. In a first section (nos. 342 – 391) the incidence of the non-discrimination principle on conflict rules adopted by the states or the European
legislator is examined. After an analysis of the content of the non-discrimination principle itself, the case law of the ECJ is examined for indications regarding the impact of the principle in the field of conflict of laws. Through an analysis of the Garcia Avello and the Grunkin-Paul cases, it is first shown, that, differently than has been put forward in the past, the non-discrimination principle does not invalidate as such the use of the criterion of nationality in conflict rules. However, it is also demonstrated that several other ECJ decisions show that conflict rules employing nationality or equivalent criteria to distinguish situations are not immune to invalidation under the non-discrimination principle. Drawing on the analysed case law and on legal writings – from which follows for example that the use of the nationality criterion is more suspicious in the economic realm than in the field of family law – it is tried to sketch some guidelines regarding the application of the principle of non-discrimination in the field of conflict of laws. From a normative perspective, it is finally put forward that in view of the potential pervasiveness of the non-discrimination principle in the field of conflict of laws, it depends on the level of scrutiny applied by the ECJ, what form of federalism results.

19. In a second section (nos. 392 – 482), the effect of the free movement rules included in the EU treaties on conflict of law rules adopted by the states or the European legislator is examined. A first constraint following from the free movement rules (nos. 393 – 438) is that they may limit the non-recognition by a member state of a legal status or right acquired in view of another state’s law, also in the absence of a judgment. The ECJ case law from which this constitutional constraint on the autonomy of states in the field of private international law rules can be deducted is for the time being limited to two areas: the recognition of names of individuals, and the recognition of the existence and the names of corporations. First, these strands of case law are analysed. Second, we submit that this ECJ case law leads to uncertainty regarding the scope of this constitutional constraint, both regarding the fields of law affected (e.g. does it also apply to marriages, adoptions, property rights?), the precise criteria which must be fulfilled before the constraint is unleashed, and as to the question what such recognition actually implies (Wirkungserstreckung or Gleichstellung). We attempt to clarify these questions as much as possible, drawing on recent literature regarding the methodological shift in the field of conflict of laws from multilateral conflict rules towards the method of recognition. Third, we conclude that despite this uncertainty it is clear that the ECJ did not constitutionalize a specific method (e.g. the method of recognition) or rule (e.g. freedom of choice), as some have claimed. The constraints it put in place on the basis of the free movement rules are of a functional nature. Finally, from a normative and prospective perspective, we depict both the possible directions in which the ECJ case law may evolve and the possible legislative responses to this constitutional constraint, keeping sight of their respective consequences for the form of European federalism. A second constraint following from the free movement rules (nos. 439 – 482), as follows from the ECJ case law in the field of labour relations, is that they may invalidate the application of the law of a member state if such application would lead to a
double regulatory burden for an economic operator. First the evolution of such ECJ case law regarding individual labour relations is analyzed. It is shown that the ECJ’s stand in this field becomes more and more invasive of the member states competences, starting from the anti-protectionist rationale characterizing the decentralized model of federalism, but leaning currently (Laval and Rüffert decisions) towards the economic due process model characteristic for the Lochner era in the US. Moreover, the correlation between the content of European legislative conflict rules covering the field and the constitutional constraints is studied. Second, the constitutional limits to conflict of laws solutions of collective labour rights are examined through an analysis of the ECJ Viking and Laval cases. We conclude once more with a normative analysis, describing from this perspective the implications of the current position of the ECJ.

20. Shortly summarizing and concluding Part 1 (nos. 483 – 492), it is submitted that as a consequence of the open texture of the relevant provisions of the EU treaties, the ECJ has, in elaborating the constitutional constraints on private international law and thus on member states’ competences, a considerable margin of appreciation. The interpretation for which it opts and the resulting constitutional constraints determine the form of European federalism. A debate on such constitutional constraints should therefore integrate the normative choices underlying the case law of the Court, first regarding the role of the Union in the field of private international law and therefore in the horizontal distribution of competences between the member states, and second regarding the role which, among the different EU institutions, the Court should assume in this respect. The American experience in this regard provides precious lessons.

Part 2: Positive integration and private international law. Private international law as an instrument determining the model of European federalism (nos. 493 – 659)

21. Part 2 of the thesis relates to transformation of the function of private international law within the EU to which the altered context of European federalism has lead. The transfer of competence to adopt private international law rules to the Union, and the actual use made by European legislator of this competence, reinvested it with its function of distributing competences among states. It was moreover invested with a systemic function, determining the form of European federalism. While the US federal context entails potentially the same transformation of the function of private international law in the United States, such transformation has to date not materialized, for the reason that the federal legislator has hardly made use of its legislative competences regarding the field. Part 2 consists of four chapters. The first chapter examines the legislative competence of the Union in the field of private international law, and the use made of this competence (nos. 495 – 548). The second chapter relates to the reinvestment of private international law with its function of distributing competences among states, following from this transfer of competence to the
Union level (nos. 549 – 579). The two final chapters analyse the new, systemic function, dealing first with the effect of private international law rules on the form of regulatory competition between states (nos. 582 – 614) and second with their effect on the ability of states to produce legislative externalities (nos. 615 – 653).

2.1 The legislative competence of the EU in the field of private international law

22. In the first Chapter of Part 2, In a first section (nos. 496 – 510), the legal basis of the action of the EU in the field of private international law is examined. As the scope of the competences of the Union in this field is controversial, first the evolution of the legal basis from the Rome Treaty until the Amsterdam Treaty is described, followed by a description of the current legal basis resulting from the Lisbon Treaty. Second, the scholarly debate on the scope of the competences of the Union in the field is outlined. While notably the extent of the competence to adopt conflict of law rules remains controversial, making a clarification of the legal basis desirable, the instruments already adopted by the European legislator will remain in force now that their legal basis has not been challenged within the period set in the EU treaties.

23. A second section (nos. 511 – 548) relates to manner in which the Union implemented its competence regarding private international law. It is through five-year plans (the Tampere, the The Hague and the Stockholm programmes), that the institutions advance, in a systematic manner, the EU agenda regarding the field, which is part of the new objective to establish within the EU a so-called area of freedom, security and justice. We outline the policy objectives which are expressed in the relevant policy documents. Moreover, the legal instruments adopted by the European legislator on the basis of its private international law competences are briefly described. This allows us to conclude that the EU institutions maintain for the time being a very reductionist perception of field of private international law and its functions, largely ignoring the new functions with which private international law rules are (re)invested following the transfer of competence to the Union.

2.2 The transformation of the function of private international law within the EU

24. As regards these functions, in a first section (nos. 551 – 568), through a brief historical survey, the correlation between the function (or effects) of private international law rules and their context is described. The Italian, French and Dutch statutists, believing in the universality of the conflict of laws solutions they deducted from roman sources of law, did not yet problematize the question of their function. The applicability of a statute was however perceived by them as an expression of the exercise of power by the authority that promulgated it. In the 19th and 20th centuries, writers adhering to universalism perceived the distribution of competences or powers as a main role of private international law rules. Contrarily, writers denying that the source of private international law lies outside the legal order of each nation state, and adhering therefore to particularism,
refuted – after a period of scientific transition – also the presence of such distributional function of private international law rules.

25. In a second section (nos. 569 – 579), it is first submitted, through a description of French scholar’s analysis, that within a particularist context, as regards private international law, the use of the term “competence” is inappropriate, not to say incorrect. In such context, the function of private international law can indeed not be the distribution of competences between states. However, subsequently, we claim that the transfer of legislative competence regarding private international law to the Union changed the context in which private international law rules are implemented in Europe. The particularist setting has been replaced by a European universalism. As the source of private international law is thus relocated to the supranational, European level, this field of law reassumes, in addition to its other functions, its function of distributing competences among states. In this respect, we hold that it is the content of the rules of all three branches of private international law, which determines the states’ competences. Through its distributing role, private international law acquires within European federalism moreover another, systemic function.

2.3 Private international law and regulatory competition

26. The last two chapters of Part 2 examine, through the concepts of “regulatory competition” and “legislative externalities”, in what way the configuration of the system of European private international law determines the form of European federalism. The third chapter of Part 2 elaborates in a first section (nos. 582 – 598) on the concept of “regulatory competition” and its underlying theories. The competitive pressures on the legislative processes within states, resulting from the arbitrage of private parties, have been problematized from the 1950s in the context of US federalism. The origin of current theories on regulatory competition lies in the economic model of fiscal federalism. This model was subsequently transposed to the functioning of the legislative process of states, constituting the theoretical foundation of different theories regarding regulatory competition. These theories can be boiled down to the idea that individuals, enterprises and investors have various means of arbitrage between different regulatory regimes and are able, through their ability to evade (or “exit”) such regimes, to put pressure on state legislators; such pressure being sometimes perceived as salutary, sometimes as harmful.

27. In a second section (nos. 599 – 614) it is shown that it is the configuration of the system of European private international law which determines the nature of regulatory competition between states. The means of sidestepping legislation which individuals, enterprises and investors have depend amongst other things on the distribution of competences between the states (which results as shown in the preceding chapter from the configuration of the system of private international law rules). Consequently, different configurations of the private international law system may lead to different forms of regulatory competition between the states,
corresponding for their part with different forms of federalism. It is shown moreover that such configuration by the European legislator influences not only on the content, imperative character and nature of state law, but also on the functioning within states of both the rule of law principle (Rechtstaat principle) and of democracy.

2.4 Private international law and legislative externalities

28. In the last chapter, a first section (nos. 616 – 624) introduces the concept of “legislative externalities”. In short, these can be described as the effects of legislation outside the state that enacted it. This phenomenon, within a federal system even more important than elsewhere, has been deciphered first in economic terms applying general theories regarding externalities put forward by e.g. Harold Demsetz and Ronald Coase. Here externalities are often considered as a failure or imperfection of the market mechanism, the costs of an activity being assumed by others than the economic agent(s) undertaking it. The phenomenon has been described, second, by political sciences as the effects of legislation on persons (“foreigners”) not represented in the democratic process that lead to its enactment.

29. In a second section (nos. 625 – 653) it is shown that it is inter alia the configuration of the system of European private international law which determines the ability of member states to produce such legislative externalities. One way to counter undue legislative externalities – applied by the Supreme Court – consists of a test on the basis of, for example, the commerce clause or the free movement rules. Such test should lead to the invalidation of legislation insofar as a lack of representation in the process leading to its adoption resulted in its costs being externalized in an illegitimate and disproportional manner. However a more direct means of regulating legislative externalities consists of a calibration of the competences of the states. In fact, the more its competences enable a state to affect non represented interests, the more the state will be able to produce legislative externalities, and vice versa. Influencing in another way the integrity of democratic process within states, the European legislator can therefore control, through the private international law system, the occurrence of legislative externalities, defining in the same way another element of the form of European federalism. This is another expression of the systemic function of private international law within a federal system.

Final conclusion

30. Concluding (nos. 654 – 659), it are thus both the ECJ, imposing constitutional limits on private international law rules, and the European legislator, elaborating legislative private international law rules, which determine the horizontal distribution of competences between the member states. Each in its respective realm – the ECJ on a constitutional level, the European legislator on a legislative level – models by the same token the form of European federalism. The new
context of European federalism is demanding. Besides the role private international law had in its former context of particularism, it now fulfils additional functions. With its new systemic function, the configuration of the private international law system influences, on the level of the states, the nature of law and the functioning of both the principle of the rule of law and of democracy. From an institutional perspective, also drawing on the American experience, it appears appropriate that the ECJ limits itself to sketching, through the constitutional limits on state competences, the contours of the European model of federalism, leaving to the European legislator the task to elaborate, through the legislative system of private international law rules, its further details.