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Internationalizing the New Conflict of Laws Restatement

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Internationalizing the New Conflict of Laws Restatement

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INTERNATIONALIZING THE NEW CONFLICT OF LAWS RESTATEMENT

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TABLE OF CONTENTS

INTRODUCTION	349
I. THE INTERNATIONAL CONTEXT	351
II. THE COMPARATIVE CONTEXT	356
III. PROPOSALS	358

INTRODUCTION

Some sixteen years ago, on the occasion of one of many symposia on the possibility of a new Restatement of Conflict of Laws to replace the much-derided Second Restatement, Mathias Reimann suggested that a new Restatement should focus on the requirements of what he called “the international age.”¹ Conflict of laws is increasingly international, he pointed out. This remains true today—just recall that three of the four most recent U.S. Supreme Court decisions on personal jurisdiction concerned international conflicts.² A new Restatement must account for this trend toward internationalization. Reimann formulated three very sensible wishes

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1. Mathias Reimann, *A New Restatement—For the International Age*, 75 IND. L.J. 575, 589 (2000); see also Symeon Symeonides, *A New Conflicts Restatement: Why Not?*, 5 J. PRIV. INT’L L. 383, 401-03 (2009).

2. *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (English defendant with a U.S. distributor); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011) (foreign defendants; accident in France); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). The fourth, domestic, case was *Walden v. Fiore*, 134 S. Ct. 1115 (2014).

for drafters of a new Restatement: they should consider every rule and principle they formulate with international disputes in mind; they should work comparatively; and they should include foreign advisers among their ranks.³

Now that a Third Restatement is underway, we can see that the third of Reimann's wishes, the one for foreign advisers, remains unfulfilled. Not a single member of the Advisers Group is situated outside the United States (though some have a foreign educational background). Within the (self-selected) Members Consultative Group, only four scholars are based abroad.⁴ This stands in sharp contrast to the new Restatement (Fourth) of U.S. Foreign Relations Law, which can rely on an international advisory panel with twenty-one members from all around the world.⁵ This may make it particularly challenging to completely fulfill Reimann's first two wishes—even though the current draft displays in some sections ample comparative and international materials.⁶

It was with this type of concern in mind that the two of us, together with the *Duke Journal of Comparative and International Law*, and with the American Law Institute's generous sponsorship, organized a conference held at Duke University School of Law in November of 2016. The articles in this issue are the outgrowth of that conference. Scholars from the United States and elsewhere were asked to address questions of internationalization in

3. Reimann, *supra* note 1, at 583-88.

4. Andrea Bjorklund (Montreal); Richard Garnett (Melbourne); Catherine Kessedjian (Paris); Bea Verschraegen (Vienna).

5. See *Annual Meeting Project, Restatement of the Law Fourth, The Foreign Relations Law of the United States, Participants*, AM. LAW INST., https://www.ali.org/projects/show/foreign-relations-law-united-states/#_participants.

6. See, e.g., RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 1.04 cmt. a (AM. LAW INST., Council Draft No. 1, Nov. 11, 2016) (hereinafter Council Draft) ("Consideration has also been given to foreign codifications, particularly choice-of-law codes, and the practice of foreign courts"); *id.* § 2.01 Reporters' Note 1 ("For example, the concept of habitual residence has gained significant acceptance throughout U.S. law as well as international and supranational law and the law of other countries"); *id.* § 2.02 Reporters' Note 3 (discussing use of habitual residence concept in law of European Union, Canada, England and Scotland); *id.* § 2.07 Reporters' Note 2 (discussing how foreign law addresses problem of presence under compulsion when determining domicile); *id.* § 5.01 Reporters' Note to cmt. e (listing some recent codifications worldwide); *id.* § 5.06 Reporters' Note 8 (using European Union law to inform and support rule on notice of foreign law); *id.* § 5.07 Reporters' Note 4 (using comparative study of foreign law in civil litigation to inform and support comment that parties are not required to prove foreign law); *id.* § 5.07 Reporters' Note 6 (using comparative studies to inform and support rule that in absence of sufficient information of foreign law, court should ordinarily apply forum law); *id.* § 5.08 Reporters' Note 2 (using comparative studies to inform and support rule that the court should ordinarily determine foreign law in light of how it is authoritatively interpreted and applied in the foreign state); *Cf.*, by contrast, RESTATEMENT OF THE LAW (SECOND) CONFLICT OF LAWS § 10 cmt. 1 (AM. LAW INST. 1971) ("The rules in the Restatement of this Subject are derived, unless otherwise indicated, from cases with elements in one or more sister States. These interstate cases provide most of the relevant authority"). For occasional such use in the Restatement (Second), see the references in Reimann, *supra* note 1, at 576-77.

concrete areas related to the new Conflict of Laws Restatement. They were asked to be as constructive and specific as possible in order to be of the greatest help to the project. All three reporters for the new Conflict of Laws Restatement participated in the conference (though as listeners and chairs, not as speakers) and found the symposium constructive, thought-provoking, and insightful. It is our hope that this issue will likewise be helpful to the broader conflict-of-laws community.

In what follows, we address some general themes in this regard, to supplement Reimann's proposals. We discuss the importance of international law, and of comparative law, for conflict of laws in general and the new Restatement in particular, before focusing on specific issues. In conclusion, we highlight three concrete proposals for how to address internationalization in the Restatement, each of which was presented at the conference.

I. THE INTERNATIONAL CONTEXT

In the United States, the methods used to address international conflict-of-laws problems are generally the same as those used for purely domestic conflict-of-laws problems. Accordingly, Section 1.04 of the current draft of the new Conflicts Restatement provides as follows: "Some rules in this Restatement limit their application to States of the United States or to nations. Rules that contain no such limitation are generally applicable, although it remains possible that factors in a particular international case will call for a result different from that which would be reached in an interstate case." Indeed there are, of course, differences between the two types of conflicts. There has been a long debate about this in conflict-of-laws scholarship.⁷ An important question—and one to be grappled with by the reporters of the new Restatement project—is therefore to what extent conflict-of-laws methods should be different for international and domestic problems. Scholars have criticized the Restatement of the Law (Second) Conflict of Laws for neglecting the international context. Mathias Reimann has demonstrated how "[t]he Second Restatement is largely blind to international concerns."⁸ Friedrich Juenger argued that "[t]he fact that [conflict of laws] has been preoccupied with domestic phenomena ought to

7. See generally, e.g., Albert A. Ehrenzweig, *Interstate and International Conflicts Law: A Plea for Segregation*, 41 MINN. L. REV. 717 (1957) (arguing for separate conflict-of-laws rules for the domestic and international contexts); Eugene F. Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States*, 54 CAL. L. REV. 1599 (1966) (arguing that separate choice-of-law rules are not always necessary); Peter Hay, *International versus Interstate Conflicts Law in the United States: A Summary of the Case Law*, 35 RABEL J. COMP. & INT'L PRIV. L. 429 (1971) (showing that U.S. courts in practice do not tend to use different approaches for domestic and international conflicts).

8. Reimann, *supra* note 1, at 576.

be of some concern to law teachers now that ‘globalization’ has become the cliché of choice.”⁹ One *raison d’être* of the new conflicts restatement project is to address the international context more effectively.¹⁰

The following are among the considerations that would be useful to keep in mind when drafting conflict-of-laws rules for international conflict-of-laws problems. First, in many cases the stakes of an international conflicts problem may be considerably greater from the perspective of both the parties and the relevant nations, though of course this is not universally so and it may not always necessitate different rules.¹¹ Also, differences between U.S. state and foreign nation laws and legal systems are often more significant than differences between sister state laws, for cultural and other reasons.¹² The differences in policies underlying those laws may be greater cross-nationally than across U.S. states. Additionally, a number of specific problems appear primarily in international conflicts. For example, how do we deal with parties who negotiate in different languages? What happens when exchange rates change dramatically? Who is responsible for acquiring public permissions (when necessary) from agencies in countries without a market economy?

Moreover, foreign nation laws contain institutions with which U.S. law is unfamiliar. Foreign nations have many varieties of family relations—polygamous marriages,¹³ weak adoption (*kafala*),¹⁴ and the like—that must properly be addressed. Institutions in foreign law perform functions that fall between those regulated by U.S. law. Take, for example, the *mahr*—the money an Islamic husband has to pay (or promise) his wife at the time of marriage. The *mahr* concerns validity requirements of marriage, questions of marital property, questions of succession law, and questions of post-divorce support. Courts need conflict-of-laws rules to guide them in addressing such institutions of foreign law.

9. Friedrich K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems*, 73 TULANE L. REV. 1309, 1329 (1999).

10. See Letter from Kermit Roosevelt to Ricky Revesz (Sept. 24, 2014) (on file with the authors) (noting that a new Restatement “would provide an opportunity to pay greater attention to the international context than the Second Restatement did. Conflicts issues—whether choice of law, recognition of judgments, or domestic relations—now frequently involve not two U.S. states but a state and a foreign country. It would be valuable to reassess Second Restatement rules in light of the increased presence of international factors, and also to consider attempts to learn from or harmonize with foreign approaches.”).

11. See the discussion in Donald Earl Childress III, *International Conflict of Laws and the New Conflicts Restatement*, 27 DUKE J. COMP. & INT’L L. 361 (2017).

12. See, e.g., Louise Ellen Teitz, *Children Crossing Borders: Internationalizing the Restatement of the Conflict of Laws*, 27 DUKE J. COMP. INT’L L. 519, 533–38 (2017).

13. See Ann Laquer Estin, *Marriage and Divorce Conflicts in International Perspective*, 27 DUKE J. COMP. INT’L L. 485, 495 (2017).

14. See Teitz, *supra* note 12, at 534.

Finally, the mere geographic and cultural differences between different nations make international conflicts different from interstate conflicts, often with concrete consequences. For example, determining the content of foreign nation law can create more significant problems than with sister states.¹⁵ In many countries, official and unofficial law differ widely. Civil wars, like that in Syria, mean that official state law may be supplanted by unofficial law and no longer applied in certain areas of a country. The law applicable to political refugees establishes a more significant problem than simply choosing between the refugee's country of origin and her country of destination as domicile:¹⁶ the refugee may not want to stay in the new country, but the old country that persecuted her may often be unattractive, too.

Second, international conflicts are not under the same umbrella of constitutional and federal law as domestic cases.¹⁷ The recognition and enforcement of foreign nation judgments, for example, occurs under comity; the Full Faith and Credit Clause of the U.S. Constitution applies only to U.S. judgments. Consequently, requirements and effects are very different in the international and interstate contexts. *Forum non conveniens* operates differently in the international realm, in large part because transfer is possible only between federal courts, not between a U.S. court and a foreign nation court. Questions on foreign law cannot be certified to a foreign nation court because no such mechanism exists yet on an international level, except for individual memoranda of understanding like the one between New York and New South Wales.¹⁸ Some states have even enacted legislation banning reference to foreign law entirely,¹⁹ something that would be impossible vis-à-vis sister states under the Full Faith and Credit Clause.

Third, international conflict-of-laws problems (but not purely domestic ones) may implicate limitations under customary international law on jurisdiction to prescribe, adjudicate and enforce. This raises questions about the proper role of these principles in conflict-of-laws methodology. To use choice of law as an example, one possibility is that a two-step analysis is required: in the first step, international law is applied to determine which states have authority to prescribe. Only those states that do have authority to prescribe under international law are included in the second step, in which

15. For discussion, see especially the concurring opinions of Judges Posner and Wood in *Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F.3d 624, 631–40 (7th Cir. 2010).

16. Council Draft, *supra* note 6, § 2.08 Reporters' Note 3.

17. See generally Hannah L. Buxbaum, *Determining the Territorial Scope of State Law in Interstate and International Conflicts: Comments on the Draft Restatement (Third) and on the Role of Party Autonomy*, 27 DUKE J. COMP. & INT'L L. 381 (2017).

18. Council Draft, *supra* note 6, § 5.08 Reporters' Note 2.

19. See Teitz, *supra* note 12, at 538–39.

choice-of-law rules are applied to determine which state's law will provide the court's rule of decision. Another possibility is to design choice-of-law rules that, in practice, avoid applying the law of a particular state when that state lacks jurisdiction to prescribe under international law. Under this approach, an explicit and separate international law step may be unnecessary. This is the intended approach of the current draft of the new Conflicts Restatement.²⁰ Working together, international law and conflict-of-laws scholars can help clarify the relationship between international law principles of jurisdiction and conflict-of-laws rules.

Fourth, treaties increasingly address international (but not purely domestic) conflict-of-laws issues. For example, a variety of Inter-American conventions deal with conflict-of-laws problems in contexts ranging from adoption to bills of exchange and promissory notes.²¹ The Hague Conference on Private International Law has produced conventions on conflict-of-laws problems in the fields of commercial and, especially, family law.²² European Union regulations—whether they are characterized as regional international law or supranational law—are noteworthy for their expansive coverage of conflict-of-laws issues.²³ Conflict-of-laws scholars—including those involved in the new Conflicts Restatement project—must be attentive to the growing body of international conventional and supranational conflict-of-laws rules. Even conventions to which the United States is not a party may serve as useful comparative material.²⁴

Fifth, human rights law plays an increasingly important role in conflict-of-laws, especially but not exclusively in the area of family law.²⁵ From the right to marry to the right of freedom from torture, from the right to a fair trial to the prohibition of discrimination, human rights are beginning to infiltrate conflict-of-laws analyses that go beyond mere formal rules without

20. See Council Draft, *supra* note 6, § 1.01, cmt. e (“The rules stated in this Restatement . . . conform to the requirements of public international law. Applying these rules will not, in the absence of a treaty provision to the contrary, violate the obligations states owe each other under public international law.”).

21. See generally Christopher A. Whytock, *Conflict of Laws, Global Governance, and Transnational Legal Order*, 1 U.C. IRVINE J. INT'L, TRANSNAT'L & COMP. L. 117, pt. II.B (2016).

22. *Id.* at Part III.A-B. For family law conventions, see generally Estin *supra* note 13; Teitz *supra* note 12, at Parts I.A, I.C.

23. Whytock, *supra* note 21, at Part II.A.

24. For example, the work of the reporters on the current draft of the new Conflicts Restatement's concepts of “habitual residence” and “marital center” was significantly aided by analysis of international and supranational law. See Council Draft § 2.02, Reporters' Note 5; § 7.13, Reporters' Note 4.

25. Estin, *supra* note 13, sec. II.B.; see also, e.g., LOUWRENS RIENK KESTRA, *THE IMPACT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ON PRIVATE INTERNATIONAL LAW* (2014); JAMES FAWCETT, MAIRE NI SHUILLEABHAIN & SANGEETA SHAH, *HUMAN RIGHTS AND PRIVATE INTERNATIONAL LAW* (2016).

normative value on the one hand, and mere negotiations between state interests on the other.

Sixth, it might reasonably be asked to what extent conflict-of-laws issues might plausibly have implications for foreign relations. As it turns out, the current draft of the new Restatement (Fourth) of U.S. Foreign Relations Law covers two topics that are traditionally part of conflict of laws and outside the core of international law scholarship: *forum non conveniens* and the recognition and enforcement of foreign judgments.²⁶ In *Asahi Metal Industry Co. v. Superior Court of California*, the U.S. Supreme Court insisted that a determination of whether personal jurisdiction would be reasonable must turn in part on the case's "international context," and should include consideration of "the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by the California court."²⁷ That requirement was justified at least in part by foreign relations considerations.²⁸ Perhaps this reasonableness requirement should therefore, as Linda Silberman and Nathan Jaffe suggest in this issue, be confined to international conflicts?²⁹ By contrast, if jurisdiction is about horizontal federalism, as some argue (somewhat dubiously),³⁰ must it not be treated differently in international cases? These potential foreign relations implications of conflict of laws should not be exaggerated, and lawyers and judges must be on guard for the ways the label "foreign relations" is sometimes strategically applied to divest state courts of the ability to hear a transnational case, or to deny access to U.S. courts altogether. But it is a potential connection to which the drafters of the new Conflicts Restatement should be attentive.

Finally, a word on method. On the one hand, as one of us has argued,³¹ the new Conflict Restatement's use of interest analysis as a basis for its general approach might encounter distinctive difficulties in the international context that play out differently than in the purely domestic U.S. context.

26. *C.f.* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS, (AM. LAW INST., Tentative Draft No. 3, Mar. 10 2017), §§ 304 (*forum non conveniens*), 411-20 (Recognition and Enforcement of Foreign Judgments in the United States) .

27. *Asahi Metal Ind. Co. v. Superior Court*, 480 U.S. 102, 115 (1987).

28. *C.f.* RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 403 (AM. LAW INST. 1987).

29. Linda J. Silberman & Nathan D. Jaffe, *The Transnational Case in Conflict of Laws: Two Suggestions for the New Restatement Third of Conflict of Laws—Judicial Jurisdiction over Foreign Defendants and Party Autonomy in International Contracts*, 27 DUKE J. COMP. & INT'L L. 405, 407-24 (2017).

30. Allan Erbsen, *Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather Than Liberty After Walden v. Fiore*, 19 LEWIS & CLARK L. REV. 769, 787-90 (2015).

31. See Ralf Michaels, *The Conflicts Restatement and the World*, 110 AJIL UNBOUND 155, 158 (2016); for further critique, see Lea Brilmayer, *What I Like Most about the Restatement (Second) of Conflicts, and Why It Should Not Be Thrown Out with the Bathwater*, 110 AJIL UNBOUND 144 (2016); see also Carlos M. Vásquez, *Choice of Law Step Zero* (on file with authors).

The reporters of the new Restatement should be aware of such concerns. On the other hand, international conflicts, especially as concerns the scope of federal law, follow a unilateral approach based on the concept of extraterritoriality; in state courts this approach conflicts in often unclear ways with more bilateral choice-of-law rules.³²

II. THE COMPARATIVE CONTEXT

Beyond being attentive to the international context, comparative law can play a productive role in the development of the new Conflicts Restatement. Why should the rest of the world matter for a Restatement? The Restatement, one might suggest, restates U.S. law, not foreign law. And, as mentioned earlier, U.S. courts have, by and large, employed the same methods in addressing conflicts with foreign law that they have to interstate conflicts. Moreover, specific problems concerning international conflicts are dealt with in the Restatement of the Law on Foreign Relations, which is also the subject of a new ALI project.

The reporters for the new Conflicts Restatement reject such parochialism in principle and are working to avoid it in practice.³³ They are right to do so for at least four reasons. The first concerns the nature of Restatements in general. Restatements serve three functions: to describe the law as it is, to suggest the best rules for adoption, and to prescribe actually applicable law.³⁴ For the latter two functions—the determination of the best law—a comparative perspective seems almost indispensable. Other Restatements, like the one on agency, have also used comparative law.³⁵ One might have a different view regarding the descriptive function. But, even here, a comparison seems helpful, if only to show what is truly peculiar about U.S. law. More importantly, the descriptive function has always played a slightly lesser role for Restatements in conflict of laws than in other areas, and for a good reason: Courts, left to their own devices, are often said to favor their own law over that of other states.³⁶ Such a preference for domestic

32. See Childress, *supra* note 11, at 364–72; Buxbaum, *supra* note 17.

33. Council Draft, *supra* note 6, § 1.04; for a list of factors, see *id.* cmt. d. The Reporters are continuing to work toward articulating “different rules for the interstate and international context,” which have yet to be fully implemented. Some Reporters’ notes do make clear distinctions, however. See, e.g., Council Draft, *supra* note 6 § 5.08 Reporters’ Note 2, (certification of questions of foreign law beyond U.S. State and federal courts); § 5.09 Reporters’ Note 2 (discussing comparatively European approaches to insufficient information about foreign law); see also *supra* note 6 (listing further examples).

34. Ralf Michaels, *Restatements*, in MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW 1466 (Basedow et al. eds., 2012).

35. RESTATEMENT (THIRD) OF THE LAW OF AGENCY 7 (Introduction—Common Law and Statutes), 11-12 (Reporters’ Notes) (AM. LAW INST. 2006).

36. *But see* Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84

law would be suspicious from a broader perspective, at least to some degree. It is for these reasons that the Second Restatement ignored the homeward trend that was discoverable in existing case law and instead formulated “the needs of the interstate and international systems” as the first of its choice-of-law principles—precisely because these needs were underappreciated in existing case law.³⁷

A second reason is that the form of a Restatement—a quasi-codification—can draw on ample experience from foreign codifications of conflict of laws, which Symeon Symeonides discusses in his recent invaluable book.³⁸ U.S. conflict of laws has, apart from its earlier Restatements, relatively little experience with codification, with the exception of codifications in Louisiana and Oregon (and the unenacted code for Puerto Rico). If only for technical drafting issues, foreign law can here be of immense value.

A third reason, this one peculiar to the discipline, is that conflict of laws, perhaps more than other disciplines, has always developed through interchange between different countries. U.S. conflict of laws in the nineteenth century was deliberately comparative, beginning with Livermore’s and Joseph Story’s engagement with European sources, and lasting at least until Joseph Beale, the reporter for the First Restatement. It was only during legal realism and the so-called conflict-of-laws revolution that U.S. conflicts law became inward-looking. At the same time, the rest of the world keenly observed the U.S. conflicts revolution and adapted its own approaches to the field in light of the experience.³⁹ There is much to learn from these developments. The reporters should, where possible, take into account that the Restatement provides guidance not just for U.S. lawyers but for lawyers around the world dealing with U.S. conflict of laws.

Fourthly, and relatedly, U.S. conflict of laws necessarily interacts with foreign conflict of laws in a way different from that in which, say, U.S. tort law interacts with foreign tort law. Even if *renvoi* is rejected (as it is, mostly,

N.Y.U. L. Rev. 719, 769 (2009) (empirical analysis of international choice-of-law decisions by U.S. district court judges in tort cases, finding that those judges are not biased in favor of domestic law).

37. Empirical findings suggest that this principle may have had its intended effect. *See id.* at 771–72 (finding that the rate of pro-domestic law choice-of-law decisions is lower when courts apply the Second Restatement than other choice-of-law methods).

38. *See generally* SYMEON C. SYMEONIDES, *CODIFYING CHOICE OF LAW AROUND THE WORLD* (2014). The draft refers to this book in several places as a survey. *See* Council Draft, *supra* note 6, § 5.01 Reporters’ Note to cmt. e; *id.* § 5.01 Reporters’ Note to cmt. a on subsection (1); *id.* § 5.03 Reporters’ Note to cmt. b; RESTATEMENT (THIRD) OF CONFLICT OF LAWS, (AM. LAW INST. Preliminary Draft No. 2, Aug. 12, 2016) § 6.01 Reporters’ Note; *id.* § 6.03 Reporters’ Notes to cmts. a and b; *id.* § 6.06 Reporters’ Note; *id.* § 6.08 Reporters’ Note.

39. For Europe, see generally Peter Hay, *European Conflicts Law After the American “Revolution”*—*Comparative Notes*, 2015 U. ILL. L. REV. 2053.

in the current draft),⁴⁰ foreign conflict-of-laws rules play an important role for parties' agreements on choice of law, for their strategic behavior (for example forum shopping),⁴¹ and so on.

Finally, it is worth emphasizing that useful comparisons include not only comparisons between U.S. law and foreign law, but also comparisons between U.S. law and international law. As already noted, there is a growing body of treaty law dealing with conflict-of-laws issues, and even if not binding on the United States, treaties can provide useful comparative materials. In some situations, international experience is richer than interstate experience. Here, we can learn a lot. Take, for example, party autonomy for choice-of-forum and choice-of-law agreements. In the United States, discussions still often revolve only around the fundamental question whether, and under what circumstances, such agreements are enforceable at all.⁴² Internationally, it appears that we see far more sophisticated instruments and discussions of issues including, among others, asymmetric agreements, enforcement agreements, penalty clauses for breach of agreements and choice of nonstate law.⁴³

III. PROPOSALS

The new Conflict of Laws Restatement provides an exciting opportunity to offer courts much-needed guidance in conflict of laws in the international context and to benefit from comparative analysis. Three concrete steps discussed at the Duke conference may prove helpful to the Reporters as they continue work on the new Restatement project with the international and comparative contexts in mind.

First, the comments on each black letter rule in the Restatement could contain at least one comment that discusses whether the rule applies differently to international conflicts. Where differences are substantive enough, they should be listed in the rule itself. Models for this exist. Before German reunification, commentaries on Germany's Conflict of Laws Code included, at the end of the comments for each provision, at least one paragraph pointing out that conflicts with East German Law (which were not

40. Council Draft, *supra* note 6, § 5.04.

41. See generally Ralph U. Witten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 TEX. INT'L L.J. 559 (2002).

42. RESTATEMENT OF THE LAW (SECOND) CONFLICT OF LAWS §§ 32, 43, 187 (AM. LAW INST. 1971).

43. See Silberman & Jaffe, *supra* note 29, at 424–30; see generally Patrick J. Borchers, *How "International" Should a Third Conflicts Restatement be in Tort and Contract?*, 27 DUKE J. COMP. & INT'L L. 461 (2017). For English law (which may be leading in this area), see generally ADRIAN BRIGGS, *AGREEMENTS ON JURISDICTION AND CHOICE OF LAW* (2008); RICHARD FENTIMAN, *INTERNATIONAL COMMERCIAL LITIGATION* (2d ed. 2015).

considered international) were subject to the same approach. Including such a note would ensure that the Reporters at least considered whether specific issues of international conflicts are relevant.

Second, the Reporters could consider expanding their comments to Section 1.04 (Interstate and International Conflict of Laws).⁴⁴ The comments to Section 1.04 provide an instructive list of factors that make international conflicts potentially different.⁴⁵ Expanded comments could provide more concrete guidance—perhaps inspired by the differences discussed above—to judges who are confronted with international conflicts and need to know how to handle them.

Third, the Reporters could consider including comments or notes focusing on comparative materials that were considered in the drafting process. This will not be particularly helpful if the notes or comments include merely a list of such materials; but to the extent they were considered and informed the design of a rule, such notes or comments would help explain the rationale for the rule and signal the Restatement's engagement with comparative materials.

Even setting aside these concrete proposals, renewed dialogue between conflict of laws and international and comparative law would be fruitful for scholars and practitioners in both fields. If the contributions to this issue provide an impetus for such dialogue, for the new Restatement and for conflict-of-laws scholarship in general, that in itself will be a significant and positive contribution.

44. See Council Draft, *supra* note 6 § 1.04, cmt. c. (stating the two contexts are “broadly similar” since “similar values and considerations are involved in both interstate and international cases,” but noting that in some cases “a rule should be limited in its application to one or the other context”).

45. See *id.* § 1.04, cmt. d.