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Book Review

ADRIAN BRIGGS, *PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS* (Oxford University Press, 2014).†

*Reviewed by S.I. Strong**

Nearly fifteen years ago, this journal published an article discussing the interdependence between comparative law and conflict of laws, also known as private international law.¹ That piece framed the two fields as mutually supportive, claiming that “comparative law [finds] its application in drafting, interpreting and applying conflict rules; reciprocally, conflicts law [gives] comparative law (too often considered as a purely academic discipline) part of its practical legitimacy.”² However, some commentators, most notably Arthur von Mehren, have suggested that the two fields are not so much allies as enemies,³ given that comparative law aspires, at least to some degree, “to eradicate pluralism and diversity by unifying or at least harmonizing major fields of the law” while “the law of conflicts . . . thrives on and even demands pluralism.”⁴

Although debates about cooperation versus competition make for good scholarly fodder, this issue actually has an important practical component, as demonstrated by Professor Adrian Briggs of the University of Oxford in his masterful new book, *Private International Law in English Courts*.⁵ Professor Briggs is extremely accomplished in this area of law, having spent fifteen years as an assistant editor on Dicey, Morris & Collins, *The Conflict of Laws*, considered by many

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1. See Bénédicte Fauvarque-Cosson, *Comparative Law and Conflict of Laws: Allies or Enemies? New Perspectives on an Old Couple*, 49 AM. J. COMP. L. 407 (2001).

2. *Id.* at 426.

3. See Arthur von Mehren, *The Contribution of Comparative Law to The Theory and Practice of Private International Law*, in INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE 153, 162 (W.E. Butler ed., 1980) (containing comments from the 10th Congress of Comparative Law, Budapest, 1978).

4. Fauvarque-Cosson, *supra* note 1, at 427.

5. ADRIAN BRIGGS, *PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS* (2014).

to be the leading text in the field.⁶ Although Professor Briggs's contribution to the field departs significantly from the approach reflected in Dicey, Morris & Collins, the change in focus can be described as innovative rather than radical.

Like all truly superlative texts, Professor Briggs's book is deceptively accessible. The prose is not only elegant and eloquent, it is peppered with the dry wit one would expect from an Oxford don.⁷ Thus, when discussing the role of territoriality in the field of private international law, Professor Briggs notes that "[a]lthough this question has been said to bring the common law to the point at which it has to confront the principle of *renvoi*, . . . the common law had long since thrown off the need to express itself in some form of French."⁸

Professor Briggs first makes his mark by taking exception to the terminology traditionally associated with this field. Although the phrase "conflict of laws" provided an accurate description of the task undertaken by Dicey in 1896, Professor Briggs argues that "[t]wo developments in the common law made this original terminology rather unsuited to the task for which it had been designed."⁹ First, common law courts began to consider "[t]he question of which law would apply [as] . . . part of the question of where adjudication should take place; and the conflict of jurisdictions became as significant a part of the common law rules as the conflict of laws."¹⁰ Second, increased recognition and respect for party autonomy shifted the analysis in many cases from conflict of laws to choice of law. As a result, he believes the field is now more accurately described as private international law.

However, Professor Briggs's modernizing efforts extend beyond mere nomenclature. Indeed, his more enduring legacy may lie in the way he synthesizes comparative law and private international law. This methodology might be appropriately adopted in other contexts, including cases involving federalized legal systems such as that of the United States.¹¹

6. DICEY, MORRIS & COLLINS: THE CONFLICT OF LAWS (Lord Collins of Mapesbury et al. eds., 15th ed., 2012) [hereinafter DICEY, MORRIS & COLLINS]. As many, including Professor Briggs, have said, "if it is not in Dicey, it probably never happened." BRIGGS, *supra* note 5, at 37.

7. For example, Briggs's sly references to elopements to Gretna Green not only capture the imagination of readers of Jane Austen and Charles Dickens, they are also legally relevant. See BRIGGS, *supra* note 5, at 2–3. Another similarly amusing and jurisprudentially appropriate reference involves a case considering whether an English widower could escape English laws prohibiting marriage within certain degrees of kinship by marrying in Denmark. In his analysis, Briggs notes that the law in question was well known at the time, since it appeared in "the Table of Kindred and Affinity, printed at the back of the Book of Common Prayer: familiar to all of a certain age who, as children, spent every Sunday morning, bored and freezing, with nothing else to ease the pain of endless sermons." *Id.* at 3. Briggs reports that the law in question was subsequently overturned by the aptly named Deceased Wife's Sister's Marriage Act 1907. See *id.* at 4.

8. *Id.* at 5.

9. *Id.* at 17.

10. *Id.*

11. Some scholars have resisted comparative methodology in conflicts analyses, at least as a general matter. See Mathias Reimann, *Parochialism in American Conflicts*

Professor Briggs's new approach arises out of the recognition that traditional common law principles of private international law have the potential to conflict with European principles of private international law. Although the possibility of overlap existed from the earliest days of the European Community, subsequent developments have made it clear that European regulations can operate in the field of private international law.¹² Thus, for example, the Brussels I Regulation (original and recast)¹³ directly affects two matters—jurisdiction and judgments—that also lie at the heart of common law principles of private international law.

Professor Briggs recognizes that

[i]t would be quite wrong to look on the European legislation as having been made to modify the common law rules of private international law in England, to modify the rules of French private international law in France, and so forth; indeed, nothing could be further from the truth. The entire point of the legislation is to lay a new foundation, built to operate in a uniform manner across the Member States.¹⁴

However, the advent of European private international law means that “the domains of each set of rules will overlap, and maybe substantially.”¹⁵ Thus, “the work of the private international lawyer is to map the edges of his [or her] categories—and in mapping the edges of what is covered by . . . [various European regulations], reference back to a common law past can only be a distraction.”¹⁶ As a result, *Private International Law in English Courts* puts European law front and center, something that more traditional texts on English conflicts law do not do.¹⁷

This approach suggests that Professor Briggs can be placed within the growing number of scholars seeking to establish and understand a new field of inquiry known as European private international law.¹⁸ However, Professor Briggs does not content him-

Law, 49 AM. J. COMP. L. 369, 384–85 (2001) (but suggesting an exception might be made in transnational disputes). However, as shall be seen, the comparative exercise that Professor Briggs undertakes is not between domestic and foreign law but between two different aspects of the same legal system.

12. See BRIGGS, *supra* note 5, at 18; see also Treaty on the Functioning of the European Union art. 81, May 9, 2008, 2008 O.J. (C 115) 47.

13. See Regulation (EU) 1215/2012, of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 2012 O.J. (L 351) 1; Council Regulation (EC) 44/2001, of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 12) 1.

14. BRIGGS, *supra* note 5, at 22.

15. *Id.*

16. *Id.*

17. Although Dicey, Morris & Collins refer to European law in their text, they do not deal with the issue as directly or clearly as Professor Briggs does. See DICEY, MORRIS & COLLINS, *supra* note 6 (noting the impact of European law but seeming unwilling to cede the waning importance of the common law).

18. See, e.g., GEERT VAN CALSTER, EUROPEAN PRIVATE INTERNATIONAL LAW (2013) (discussing modern realities of private international law in Europe); XANDRA KRAMER

self with focusing solely on matters of European law, as others in this group often do; instead, he seeks to describe how European and common law principles interact and operate in English courts in matters involving private international law.¹⁹

This technique not only requires an in-depth knowledge of both English and European forms of private international law, it also requires a sophisticated comparison of the two legal regimes. This sort of comparative approach is established from the very beginning of the text. Thus, the first substantive section of the book provides a comprehensive introduction to the structure and methodology of European rules of private international law, while the second substantive section offers a similar discussion of the common law rules of private international law. These summary chapters are examples of comparative law at its very best.

However, Professor Briggs recognizes that the need for this sort of analysis may be waning, given the shrinking importance of the common law in matters of private international law. Indeed, traditional principles of English law now only apply when (1) the issue is not covered by European rules of private international law or (2) the issue is regulated by European law but the rules either refer to or make an exception allowing for the application of national law.²⁰ The rapid rate of future change in this field is evident from Professor Briggs's long and detailed list of "[f]oreseen and foreseeable statutory changes" involving European private international law.²¹

Professor Briggs then turns his attention to specific areas of law, including jurisdiction; judicial assistance and judicial intervention; foreign judgments; contractual obligations; non-contractual obligations; property; corporations, corporate insolvency, and personal bankruptcy; adult relationships; and children and parental responsibility. The book also includes a chapter on arbitration, which may seem unusual in a book dealing with judicial procedures.²² However, Professor Briggs believes that the few instances where European pri-

ET AL., A EUROPEAN FRAMEWORK FOR PRIVATE INTERNATIONAL LAW: GAPS AND FUTURE PERSPECTIVES (2012) (containing the findings from a study conducted at the request of the European Parliament's Committee on Legal Affairs); IVANA KUNDA & CARLOS MANUEL GONÇALVES DE MELO MARINHO, PRACTICAL HANDBOOK ON EUROPEAN PRIVATE INTERNATIONAL LAW (2010) (involving a project funded in part by the Civil Justice Programme of the European Union); Alex Mills, *The Identities of Private International Law: Lessons From the U.S. and the EU Revolutions*, 23 DUKE J. COMP. & INT'L L. 445, 468-72 (2013) (discussing the changing identity of private international law); Matthias Weller, *Mutual Trust: In Search of the Future of European Private International Law*, 15 J. PRIVATE INT'L L. (forthcoming 2015).

19. See BRIGGS, *supra* note 5, at 25.

20. See *id.* at 89; see also James Goodwin, *Reflexive Effect and the Brussels I Regulation*, 129 LAW Q. REV. 317, 317-18 (2013).

21. BRIGGS, *supra* note 5, at 30-37.

22. Professor Briggs sees the two procedures as nevertheless related as a result of courts' residual oversight of arbitral proceedings. See *id.* at 29-30. English courts' residual powers in this regard are somewhat more expansive than those of U.S. courts. Compare Arbitration Act, 1996, c. 23, § 69 (Eng.) (allowing an appeal on a point of law unless the parties agree otherwise) with 9 U.S.C. §§ 9-11 (limiting judicial review to various procedural issues); see also *Hall St. Assoc., L.L.C. v. Mattel*,

vate international law has come into contact with arbitration have led to “an unusual degree of friction,” thereby justifying the inclusion of arbitration in the book.²³

Private International Law in English Courts is, at 1064 pages, too lengthy a tome to discuss in detail here. However, a few general observations may be helpful. First, as previously suggested, this is a highly comparative work, with numerous references not only to European and English rules of private international law, but also to the law of other jurisdictions. Thus, for example, the discussion of *forum non conveniens* is not limited to an analysis of English law in the face of European regulations, but is further illuminated by citations to the law of other common law countries, such as Australia, and by references to the European Convention on Human Rights.²⁴ Other types of international law, such as model laws promulgated by the United Nations Commission on International Trade Law (UNCITRAL), are discussed in other parts of the book.²⁵ This sort of broad comparative approach is not only extremely impressive from a scholarly perspective, it is also incredibly useful to courts, commentators, and counsel.

Second, Professor Briggs organizes each chapter in a logical, rather than mechanical, manner, thereby increasing the clarity of the discussion for readers of all levels. Thus, Chapter 7 begins with a “[b]rief guide to the law applicable to contractual obligations,” noting in three succinct sentences whether a particular matter falls under the Rome I Regulation,²⁶ the Rome Convention,²⁷ or the common law.²⁸ The chapter then discusses the European rules of private international law followed by an analysis of the common law rules, a framework that appears suitable given the bright-line nature of the applicable law in this field. However, Chapter 9, which deals with the more nebulous subject of property, follows a slightly different framework. The chapter begins as Chapter 7 does, with a quick summary of the relevant European legislation. However, the subsequent discussion is not organized according to the nature of the law (i.e., European or common law) but by subject matter. This approach makes a great deal of sense, given the diverse nature of property law, which encompasses the nature of property, immovable property, tan-

Inc., 552 U.S. 576, 588–89 (2008) (rejecting the notion that parties can expand the scope of judicial review under the Federal Arbitration Act by contract).

23. BRIGGS, *supra* note 5, at 30.

24. *See id.* at 340–41. Decisions from the European Court of Human Rights are not included in Professor Briggs’s definition of the European rules of private international law, which is limited to those rules that were given legal force in England by virtue of the European Communities Act 1972. *See id.* at 38. The European Convention on Human Rights was given legal force in English courts through the Human Rights Act 1998.

25. *See id.* at 835–36 (discussing the UNCITRAL Model Law on Cross-Border Insolvency).

26. *See* Regulation (EC) 593/2008, of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), 2008 O.J. (L 177) 6.

27. *See* Convention on the Law Applicable to Contractual Obligations, June 19, 1980, 1980 O.J. (L 266) 1; *see also* Contracts (Applicable Law) Act, 1990, c. 36 (Eng.).

28. *See* BRIGGS, *supra* note 5, at 500.

gible movable property, intellectual property, and trusts of property, among other subjects. By structuring his book in this manner, Professor Briggs allows his readers to move swiftly to the area that is of most interest to them.

Private International Law in English Courts is an extraordinary piece of scholarship and required reading for anyone involved with English judicial processes. However, this text is much more than a summation of one country's approach to private international law. Instead, Professor Briggs has provided readers with a useful framework for analysis of private international law in any multijurisdictional legal system. Indeed, it would be fascinating to see U.S. scholars adopt a similar methodology for approaching the interaction between private international law at the state and federal levels, something that has been referred to as a "vertical conflict."²⁹

Some assistance in this regard may be forthcoming in the form of the Restatement (Third) on Conflict of Laws.³⁰ However, that work will likely focus primarily on interstate, rather than international, matters, just as the Second Restatement did.³¹ Indeed, a number of subjects covered in Professor Briggs's book will likely not be addressed in the Restatement (Third) on Conflict of Laws but instead in the new Restatement (Fourth) of Foreign Relations Law.³²

This type of fragmentary approach to private international law is highly problematic, since it can lead to confusion and inconsistency in the application of the law. What courts, commentators, and counsel in both the United States and elsewhere need is a U.S. equivalent to *Private International Law in English Courts*. Hopefully, there is an

29. See Symeon C. Symeonides, *Choice of Law in the American Courts 2013: Twenty-Sixth Annual Survey*, 61 AM. J. COMP. L. 217, 221 (2013). Some efforts have been made in this area, but more comprehensive and more diverse analysis would be welcome. See, e.g., Donald Earl Childress, III, *When Erie Goes International*, 105 NW. U. L. REV. 1531 (2011); Julian G. Ku, *The Crucial Role of the States and Private International Law Treaties: A Model for Accommodating Globalization*, 73 MO. L. REV. 1063 (2008); Alex Mills, *Federalism in the European Union and the United States: Subsidiarity, Private Law, and the Conflict of Laws*, 32 U. PA. J. INT'L L. 369 (2010); S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. 45 (2014). Professor Symeon Symeonides has written several monographs in this field, including *American Private International Law* (Kluwer Law International 2008) and a forthcoming text from Oxford University Press, but those books treat interstate and international issues interchangeably. Although that methodology reflects current U.S. jurisprudence, it would be interesting to see how these matters would be analyzed under Professor Briggs's approach.

30. See *Current Projects, Restatement of the Law Third, Conflict of Laws*, AMERICAN LAW INSTITUTE, http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=33 (last visited Dec. 15, 2014).

31. See Restatement (Second) of Conflict of Laws § 10 (1971). This type of approach is also seen in the leading hornbook on U.S. conflicts law. See PETER HAY ET AL., *CONFLICT OF LAWS* (5th ed. 2010) (focusing primarily on interstate matters).

32. See *Current Projects, Restatement of the Law Fourth, Foreign Relations Law of the United States*, AMERICAN LAW INSTITUTE, http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=33 (last visited Dec. 15, 2014) (including subjects such as jurisdiction and judgments).

intrepid author out there who is willing to take up that challenge and implement it as brilliantly as Professor Briggs has with his book.