EDITORIAL

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This issue of the European Journal of Legal Studies is the second of its second volume.[1] It focuses on European Private Law. Europeanisation, globalisation and advances in communications technology have presented new challenges to cross-border activity and revitalised the field of private law. As private individuals and commercial entities engage in potentially multi-jurisdictional activities, solutions must be found which avoid conflict, confusion, inequality and legal uncertainty. In public law, the problem of multi-level jurisdiction, *i.e.* various layers of jurisdiction existing within an uncertain hierarchy, is well-known. Private law may well face even more complicated issues, as it entails potentially conflicting and even contrary jurisdictions, and their interplay is complicated by unifying forces at the top - the EU has attempted to harmonise some rules, but not others, and finds itself dealing with longstanding state legal practices that have developed in relative isolation. On a global level, these jurisdictions multiply, and although legal traditions on both sides of the Atlantic share a relatively common history, these traditions have diverged in important ways.

The contributions to this issue of the Journal provide snapshots into various private law topics affected by the aforementioned developments. Each of the authors points to the challenges posed by globalisation and Europeanisation, and proposes solutions and new ideas for further thinking, reflecting the cutting-edge of current research in the field.

The first of these authors is Fabrizio Cafaggi. In his article, "Creditor's Fault: In Search of a Comparative Frame", Professor Cafaggi compares the role of the conduct of the creditor or the promisee in contractual relationships in the legal systems of the United States and Europe. The fact that there are two different words for the same actor already demonstrates the existence of different approaches, and Professor Cafaggi

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[1] This issue is long overdue. The delay has in fact been so long that I wish to offer a heartfelt apology on behalf of the editorial board to both our readers and especially the contributors, some of whom have really waited too long for the publication of their articles. The editorial board is in the process of reforming its methods of operation to prevent any such delays in the future, and the result of this process will be borne out, I am confident, by the next volume.

clearly sets out where the legal systems diverge. The focal points in his discussion are the doctrines of comparative negligence and mitigation. He reveals that the degree of convergence or divergence between the US and continental Europe depends on the level of analysis: "if we consider only comparative negligence in contract, divergences are relatively high, whilst when mitigation is included, divergences decrease." Although they may operate as functional equivalents, divergences between the two are still relevant, as they go to the core of the different approaches to contractual relationships and contract law in Anglo-American and continental European systems. Professor Cafaggi then explains these divergences from three complementary perspectives: the historical, the philosophical, and the functional. He concludes that the lack of comparative negligence in the US is explained by the fact that different business practices and community norms have been internalised in the legal systems: US contract law is primarily aimed at risk allocation, whereas contractual relationships in continental Europe are placed in a legal framework which aims at fostering a higher level of cooperation.

Professor Cafaggi's insightful article takes due account of societal factors to explain differences in private law systems. Other contributions to this issue focus on communication between them. A bridge between these two topics is built by Jan Smits in his essay, "Democracy and (European) Private Law: a functional approach". He assesses the current state of the development of a Common Frame of Reference (CFR) for European private law. In particular, he addresses whether the drafting of the CFR should follow the same kind of rules as the intricate drafting procedure at the national level to ensure legitimacy, where private law is made in close cooperation by courts and legislature with input from legal academia.

Professor Smits rejects criticism that the drafting of the CFR has so far been lacking in democratic legitimacy, and proposes to "radically change our views" of how rules in the area of private law are legitimised in this age of Europeanisation and globalisation. He focuses on rules that seek to regulate the conduct of private parties – "the core of private law", and specifically the law of contract. He provides an overview of the new types of rule-making which, despite evading the democratic decision-making process, are important in regulating the behaviour of individuals and states. Professor Smits argues that these new types of rules only pose a problem for the legitimacy of private law if legitimacy is conceptualised in a very restrictive way. Departing from a narrow focus on decision-making by national parliaments, he then proposes a functional approach which deconstructs the concept of democracy. In a wide-ranging and provocative section, he first suggests that legitimacy provides a more useful analytic term than democracy, and then breaks it down in terms of participation,

accountability and transparency, and considers some additional factors. He then argues that when we look at the draft CFR from the perspective of transnational law-making and take into account the specificities of private law, the criteria described do not necessarily need to be met or are not met by traditional parliamentary democratic procedures. Professor Smits thus concludes that we should look beyond territorial entities such as national parliaments when looking for democratic legitimacy. He also emphasises that in the case of the draft CFR, it serves no further purpose than to provide inspiration to national legislators in any case.

In her article, "*Bibliotecas Digitales y Obras Cautivas*", Maria Iglesias addresses a slightly different topic: digital libraries and captive works. She discusses a problem which stems from the organisation of intellectual property rights: even though the very purpose of intellectual property is to reach the public, certain works are lost to it: either the owner can no longer be found or identified, and obtaining the permission of the rights holder then becomes impossible; or when works are abandoned for other reasons. Specifically, she addresses the issue of what can be done with these 'captive' or 'orphan' works in digital libraries, as the problem is exacerbated by technological developments and the accompanying changes in intellectual property law. Due to the increased (over)protection of these works, they pass less frequently into the public domain.

Professor Iglesias places this *problematique* in the context of the current shift towards a knowledge-based economy, which turns access to knowledge into a matter of public interest. In the past fifteen years legislative focus has been strongly protective of creation. Both national and European legislators (notably in the context of the Lisbon Agenda) have now placed access and use of information at the centre of the political agenda, and the most important aim is to balance the protection of knowledge with the facilitation of access. She argues that it will not be sufficient to leave this to the market and illustrates this by discussing various (partial) solutions which have been developed in Europe and North America, ranging from *ad hoc* solutions to doctrinal proposals fundamentally overhauling the entire field of intellectual property law. She concludes that in all cases, the existence of captive works reflects a common deficiency in the system of intellectual property, which is incapable of responding to cases in which the market fails and causes works to become unavailable. She argues for the promotion of a legal regime or at least some common principles to address these failures. In the case of digital libraries, which serve the public interest by enabling preservation and wider availability of these works, governments should encourage the adoption of voluntary schemes to diminish the cost of transfer of works into these libraries. Instead, Professor Iglesias proposes a

subsidiary rule of intellectual property law, activated only when the rights holder does nothing to exploit her works and shows no intent of doing so in the future. Moreover, she suggests that legislatures define which type of digitalisation project should be considered to serve the public interest notably libraries, archives and museums, and projects which do not serve a commercial purpose. This system should then authorise that 'silenced' works are made available to the public.

The final two contributions describe different aspects of the ECJ's judgment in *Cartesio*.[2] This judgment is essential to understanding the Court's current approach to the interplay between European and private law. In his article, "*Cartesio* and *Grunkin-Paul*: Mutual Recognition as a Vested Rights Theory Based on Party Autonomy in Private Law", Jan-Jaap Kuipers discusses the relationship between private law and Community law. Whereas Jan Smits discussed the legitimacy of the development of new rules, Kuipers' article concerns current practice and how it can be improved, particularly when reconciling rules and principles of private international law with Community law. He suggests the two can complement each other, and proposes to use the principle of mutual recognition, as it is used in the area of free movement of goods, as a guideline.

As in the other contributions, Kuipers identifies technological development and globalisation as catalysts for a change that substitutes the strong link private parties have to one state for several looser links with various legal systems, thus increasing private autonomy and decreasing the role of conflict of law rules and public law considerations. He demonstrates that in cases dealing with the transfer of commercial entities and concerning surname law, the ECJ has taken an approach which is not of a completely Community law nature, does not solely refer to national law, and also does not take a (traditional) private international law approach. He explores to what extent a vested rights doctrine can be discerned from the Court's decisions, how it differs from taking an approach solely based on mutual recognition, and what general conclusions may be drawn for private law, while warning against judicial overstretch in the application of EU citizenship rules. As Kuipers argues, academic interpretations of ECJ case law have often neglected the private international law perspective, and in his article, he endeavours to rectify this oversight, suggesting that application of the doctrine of vested rights serves both the interests of the EC as well as the national states when they wish to preserve their own identities.

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[2] European Court of Justice, Case C-210/06, *Cartesio*.

In the final article in this issue of the Journal, Beata Węgrzynowska also discusses the *Cartesio* judgment, and situates it within the context of company law and freedom of establishment under Community law, both with reference to prior case law and prospective Community legislation. She concludes that the judgment failed to deliver on some of the expectations leading up to it, most notably not bringing the expected clear rules on cross-border transfer of the seat of a company. She notes that after the judgment, the question that remains unresolved is whether there is a need for harmonisation and secondary law on companies' cross-border seat transfer. From her reading of the judgment, Węgrzynowska concludes that the ECJ adopted neither the incorporation nor the real seat theory, as the judgment does not impose a general obligation for companies to change the applicable law when they move their seats. It rather chose to deal with the matters at hand based on the provisions on freedom of establishment. She then discusses the question of whether different rules should apply to 'immigrating' and 'emigrating' companies, and whether the *Cartesio* judgment should be seen as overruling or systematising previous case law. She concludes that the *Cartesio* rule may lead to different treatment of companies moving out and moving in to member states, and also companies emigrating from countries which follow different theories.

Additionally, Węgrzynowska argues that more secondary law is needed on the issue of cross-border transfer of companies, and that the ECJ should not be left to fill the lacunae with its case-law.

To conclude the issue's focus on European Private Law, in the first of several book reviews featured in this journal, Marija Bartl discusses Fabrizio Cafaggi and Horatia Muir Watt's book,*Making European Private Law: Governance Design*. This book addresses issues and topics also discussed by the authors in this issue, notably what is private law in this changing day and age; how it changes due to globalisation; and what European law is doing with it.

Moving away from European Private Law, the remaining review essays turn to issues of public international law. Sacha Garben's review of Finn Laursen's book on *The Rise and Fall of the EU's Constitutional Treaty* provides a timely retrospective on the process which led to the creation and ultimate failure of that ill-fated document. On a global level, Valentina Vadi examines John W. Head's *Losing the Global Development War: A Contemporary Critique of the IMF, the World Bank, and the WTO*, addressing current issues surrounding the international institutions most involved in development, while Ciarán Burke reviews Philip Alston and

Euan McDonald's edited collection of essays on humanitarian intervention: *Human Rights, Intervention, and the Use of Force*. Finally, Axelle Reiter-Korkmaz takes us back into the neverending debate on the differences and relationship between law and morality in her review of Sean Coyle's *From Positivism to Idealism: A Study of the Moral Dimensions of Legality*.

On behalf of the Editorial Board of the European Journal of Legal Studies, I hope that you will enjoy reading the contributions to this issue and that they will make a valuable contribution to further development and renewal of European private law, a field which remains as dynamic as all the private actors in what is too often unjustifiedly dismissed as the 'old world'.