Yearbook of Private International Law

Vol. IV
2002

Edited by: Petar Šarčević and Paul Volken

YEARBOOK OF PRIVATE INTERNATIONAL LAW

YEARBOOK OF PRIVATE INTERNATIONAL LAW

VOLUME IV – 2002

EDITORS

PETAR ŠARČEVIĆ
Professor at the
University of Rijeka

PAUL VOLKEN
Professor at the
University of Fribourg

PUBLISHED IN ASSOCIATION WITH
SWISS INSTITUTE OF COMPARATIVE LAW
LAUSANNE, SWITZERLAND

Sellier. European Law Publishers

Sellier. European Law Publishers
ISBN 978-3-935808-50-7

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über http://dnb.d-nb.de abrufbar.

© 2001 Kluwer Law International und Swiss Institute of Comparative Law.
© für den Nachdruck 2007 Sellier. European Law Publishers GmbH und Swiss Institute of Comparative Law.

Dieses Werk einschließlich aller seiner Teile ist urheberrechtlich geschützt. Jede Verwertung außerhalb der engen Grenzen des Urheberrechtsgesetzes ist ohne Zustimmung des Verlages unzulässig und strafbar. Das gilt insbesondere für Vervielfältigungen, Übersetzungen, Mikroverfilmungen und die Einspeicherung und Verarbeitung in elektronischen Systemen.

Herstellung: Karina Hack, München. Druck und Bindung: AZ Druck und Datentechnik, Kempten. Gedruckt auf säurefreiem, alterungsbeständigem Papier. Printed in Germany.

ADVISORY BOARD

JÜRGEN BASEDOW
Hamburg

GENEVIÈVE BASTID-BURDEAU
Paris/The Hague

SIR LAWRENCE COLLINS
London

HUANG JIN
Wuhan

HANS VAN LOON
The Hague

FERENC MÁDL
Budapest

RUI MANUEL GENS DE MOURA RAMOS
Luxembourg/Coimbra

YASUHIRO OKUDA
Sapporo

GONZALO E. PARRA-ARANGUREN
The Hague/Caracas

SYMEON C. SYMEONIDES
Salem (Oregon)

PIERRE WIDMER
Lausanne

ASSISTANT EDITOR AND
ADRESSEE FOR MANUSCRIPTS AND CORRESPONDENCE

ANDREA BONOMI
Swiss Institute of Comparative Law
Dorigny, CH – 1015 Lausanne

ENGLISH REVISION

SUSAN ŠARČEVIĆ
Faculty of Law, Rijeka

TABLE OF CONTENTS

FOREWORD

In the Foreword to volume I of the *Yearbook of Private International Law*, we predicted that the science of private international law would take a new direction in the new millennium. At that time we noted that the effects of globalization in the field of commercial relations had intensified the search for uniform substantive rules that would apply worldwide. However, as shown by the recent Congress in Rome on the occasion of the 75th anniversary of UNIDROIT (International Institute for the Unification of Private Law), regional and national developments are still an obstacle to the quest for worldwide unification. The Inter-American developments presented in this volume in the column 'News from Washington' are another such example.

Three articles of volume IV of the *Yearbook* deal with regional matters, in our opinion, extremely important conflicts developments in the European Union. The fact that rules of private international law have become part of the *acquis communautaire* under the Treaty of Amsterdam does not seem to exclude national legislation. The best example is the fact that Belgium is now in the last phase of adopting a new Private International Law Act, the draft of which is presented in this volume. This shows that the tradition of national conflict of laws is still strong in the EU Member States and continues to develop parallel to the European quest for universalism. Thus it is safe to assume that developments in EU private international law will remain on our agenda for a considerable time.

In addition to reports on new developments in Canada and China, we are also pleased to have a Russian national report presenting an overview of the new legislation on private international law adopted in 2002. Although one might question the solutions of some of the new rules, they certainly represent significant progress in Russia's endeavour to endorse the rule of law. According to Prof. Lebedev, private international law had long been neglected in Russia not only by the legislator but also by legal scholars. While there were only a handful of PIL scholars in the past, the situation has changed dramatically in recent years. Today the subject is being taught at an increasing number of law schools throughout the country. Now regarded as a key subject because of its importance for the new free market economy, it is not surprising that a recent Russian textbook on Private International Law[1] cites the Strasbourg Resolution of 1997 of the *Institut de droit international* recommending that '[e]very school and faculty of law offer a foundation course or courses on public and private international law'.[2] We are pleased that this recommendation has been taken so seriously.

Petar Šarčević Paul Volken

[1] *Международное частное лраво*, Г.К. Дмитриевой, Moscow 2000, p. 4.

[2] *Annuaire de l'Institut de droit international*, Vol. 67, II, Paris 1998, p. 469, No. 1.

ABBREVIATIONS

Am. J. Comp. L.	American Journal of Comparative Law
Am. J. Int. L.	American Journal of International Law
Clunet	Journal de droit international
ECR	European Court Reports
I.C.L.Q.	International and Comparative Law Quarterly
I.L.M.	International Legal Materials
id.	idem
IPRax	Praxis des internationalen Privat- und Verfahrensrechts
OJ	Official Journal
PIL	Private International Law
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Recueil des Cours	Recueil des Cours de l'Académie de la Haye de droit international = Collected Courses of The Hague Academy of International Law
Rev. crit. dr. int. pr.	Revue critique de droit international privé
REDI	Revista española de derecho internacional
Riv. dir. int. priv. proc.	Rivista di diritto internazionale privato e processuale
Riv. dir. int.	Rivista di diritto internazionale
RIW	Recht internationaler Wirtschaft
RSDIE	Revue suisse de droit international et européen = Schweizerische Zeitschrift für internationales und europäisches Recht

DOCTRINE

THE COMMUNITARIZATION OF PRIVATE INTERNATIONAL LAW

Katharina BOELE-WOELKI[*] and Ronald H. VAN OOIK[**]

[*] Professor of Private International Law at the University of Utrecht, Molengraaff Institute for Private Law.

[**] Senior lecturer and researcher in EU Law, Europa Institute, Faculty of Law, Utrecht University

Yearbook of Private International Law, Volume 4 (2002), pp. 1-36
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

I. Introduction

The worlds of private international law and European Union law are traditionally quite separate, with diverse fields of interest prevailing on either side of the dividing line, different sets of terminology and different general doctrines to clarify the cohesion within the field of expertise. It is hardly surprising that there is 'peaceful coexistence' in this context, given that the legal regulation of private relations used to be mostly a national affair, and to an important extent still is. Insofar as private law relations display cross-border traits, international arrangements may become relevant; however, these usually have been drawn up by other international organizations than the EU, such as the Hague Conference on Private International Law.

Where cross-border legal relations were concerned, the gap between the two worlds was traditionally bridged only by the 1968 Brussels Convention on jurisdiction and enforcement and its Protocol concerning the jurisdiction of the Court of Justice of the EC,[1] and by the 1980 Rome Convention[2] on the law applicable to contractual obligations, which also exclusively applies between the EU Member States.[3] Although the Brussels Convention is based on Article 293 EC (ex Article 220 of the EC Treaty), EC lawyers and private international law experts wonder whether it should actually be considered a part of ordinary Community law. While the EC Treaty expressly provides a legal basis for the matter in question, it does not provide such a basis for the adoption of an 'ordinary' Community act but for the conclusion of a treaty between the Member States.[4]

The *Maastricht Treaty* subsequently slightly reinforced the ties by placing 'judicial cooperation in civil matters' under the so-called third pillar of the European Union, dealing with cooperation in the field of Justice and Home Affairs

[1] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters *(OJ* 1972 L 299/32; consolidated version in *OJ* 1998 C 27/1); Protocol on the interpretation of the 1968 Convention by the Court of Justice (consolidated version in *OJ* 1998 C 27/28).

[2] 1980 Rome Convention on the law applicable to contractual obligations (*OJ* 1980 L 266/1; consolidated version in *OJ* 1998 C 27/34). See also the First Protocol on the interpretation of the 1980 Convention by the Court of Justice (consolidated version in *OJ* 1998 C 27/47) and the Second Protocol conferring on the Court of Justice powers to interpret the 1980 Convention (consolidated version in *OJ* 1998 C 27/52).

[3] A complete overview (until 1996) of uniform EU private international law, including several provisions from EC Directives can be found in DE LY F., 'Europese Unie en Eenvormig Internationaal Privaatrecht', Communication from the Dutch Society for International Law [NVIR] 1996 (consultative report), pp. 6-10. The terms '*EC*' and '*EU*' are deliberately distinguished but the complex three-pillar-structure of the European Union cannot be discussed here in detail.

[4] For the exact status of the 1968 Brussels Convention, see, e.g., GABRANDT R., 'Het EEG-Executieverdrag is ook EG-recht', in: *Advocatenblad* 1989, p. 424.

(JHA).[5] In the ensuing period, however, this new area of EU policy hardly got off the ground. In this period between Maastricht and Amsterdam, the Brussels I Draft Convention and the Brussels II Draft Convention, for example, did not achieve much beyond the form of draft conventions on Justice and Home Affairs, and they never actually entered into force.[6]

Mainly as a result of the *Treaty of Amsterdam*, European law and private international law have, however, become more closely and more structurally intertwined. In the framework of the establishment of 'an area of freedom, security and justice', this Treaty suddenly placed the cross-border cooperation in civil matters as it were right in the middle of the Community pillar, i.e., more specifically, right in the middle of new Title IV on 'visas, asylum, immigration and other policies related to free movement of persons'.[7] This caused the general doctrines of European *Community law* – such as the principles of supremacy and direct effect – which had slowly evolved over a period of approximately fifty years, to become applicable to this new area of Community law in one fell swoop. This important change, however, took place in a rather hidden manner. The *Herren der Verträge* had really only devised the Amsterdam transfer from pillar 3 to pillar 1 for asylum and immigration issues.[8] The fact that private international law was transferred to the first pillar simultaneously with the 'communitarization' of asylum and immigration law is something we have only recently begun to realize, at a time when the new Community powers are effectively and intensively being activated in practice.

The initial impetus was given by the Tampere European Council and the Vienna Action Plan of the Council and the Commission, which contained a large number of concrete proposals for decision-making in the field of private international law and for the reinforcement of the cooperation between the Member State

[5] See former Article K.1, point 6 of the EU Treaty.

[6] See, e.g., the (non-ratified) Council Act of 28 May 1998 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (*OJ* 1998 C 221/1). Other Title IV decisions to be mentioned below did not get beyond the status of non-ratified K.3 Conventions during this period. See, e.g., the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters (*OJ* 1997 C 261/2).

[7] Cf. HESS B., 'Die Europäisierung des internationalen Zivilprozessrechts durch den Amsterdamer Vertrag. Chancen und Gefahren', in: *Neue Juristische Wochenschrift* (*NJW*) 2000, pp. 23-32.

[8] On this transfer operation in general, see, e.g., KUIJPER P.J., 'Some Legal Problems associated with the Communitarization of Policy on Visas, Asylum and Immigration under the Amsterdam Treaty and Incorporation of the Schengen *Acquis*', in: *Common Market Law Rev*. (*CML Rev*.) 2000, pp. 345-366.

authorities involved in this field.[9] Subsequently, the first pieces of EC 'hard law' concerning private international law were enacted. The familiar 1968 Brussels Convention, for example, was turned into an (almost) ordinary Community law instrument, namely an EC *Regulation*, which entered into force on 1 March 2002.[10] The jurisdiction, recognition and enforcement of judgments in matrimonial matters – a unification project which was supposed to be regulated during the Justice and Home Affairs period in the form of a K.3 treaty (hence in the period between Maastricht and Amsterdam) – can now be found in what is known as the Brussels II *Regulation*,[11] with a 'Brussels II-bis' Regulation as its possible successor to also cover the areas of parental responsibility and child abduction.[12] Further

[9] Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice – Text adopted by the Justice and Home Affairs Council of 3 December 1998 (*OJ* 1999 C 19/1). Points 16 and 39-41 of the Action Plan have particular relevance for private (international) law.

[10] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*OJ* 2001 L12/1). On the content of this Regulation, see, e.g., MICKLITZ H.W./ ROTT P., 'Vergemeinschaftung des EuGVÜ in der Verordnung (EG) Nr. 44/2001', in: *Europäische Zeitschrift für Wirtschaftsrecht* (*EuZW*) 2001, pp. 325-334; DROZ G.A.L./ GAUDEMET-TALLON H., 'La transformation de la Convention de Bruxelles du 27 septembre 1968 en Règlement du Conseil concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale', in: *Rev. crit. dr. internat. privé* 2001, pp. 601-652; ANCEL B. 'The Brussels I Regulation: Comment', in this *Yearbook* 2001, pp. 101-114; GEIMER R., 'Salut für die Verordnung (EG) Nr. 44/2001 (Brüssel I-VO)', in: *IPrax* 2002, pp. 69-74. We speak of an 'almost ordinary' Regulation because the UK, Ireland and Denmark are in principle not bound by this Title IV decision and the Danes in this case do not actually participate in practice. See further section 4.3.

[11] Council Regulation (EC) No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (*OJ* 2000 L 160/19). See WIDMER C., 'Brüssel II – die neue EG-Verordnung zum internationalen Eheverfahrensrecht', in: *FamPra* 2001 pp. 689-719; BOELE-WOELKI K., 'Brüssel II: Die Verordnung über die Zuständigkeit und die Anerkennung von Entscheidungen in Ehesachen', in: *Zeitschrift für Rechtsvergleichung* (*ZRvgl.*) 2001, pp. 121-130; and SCHACK H., 'Das neue Internationale Eheverfahrensrecht in Europa', in: *RabelsZ* 2001 pp. 615-633.

[12] Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No. 1347/2000 and amending Regulation (EC) No. 44/2001 in matters relating to maintenance (COM (2002) 222 final of 17 May 2002). This Brussels II-bis Regulation will not only replace the current Brussels II Regulation but will also include – to make things even more confusing – a 'Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility' (COM (2001) 505 final of 6 September 2001). On the latter proposal, see SUMAMPOUW M. , 'Voorstel Verordening ouderlijke verantwoordelijkheid: een voorbeeld

adopted were – to mention just a few examples – the Insolvency Regulation, the Service of Documents Regulation and the Evidence Regulation; in the pipeline are a large number of EC rules, including the private international law regulations concerning matrimonial property and inheritance law, on the one hand, and the contractual[13] and non-contractual law of obligations, on the other.[14] The introduction of a European enforcement order is also on the agenda.[15]

This remarkable tendency towards the communitarization of important parts of private law and, in particular, private international law, seems to be receiving the largest measure of attention in private law circles. However, the tendency in question has not gone entirely unnoticed among EU lawyers either – for example, there is talk of 'unprecedented ambition' on the part of the EC in this sector.[16]

This contribution will focus on the EC angle, the attempt to clarify the position of private international law within the European Union's first pillar and thus to put this new Community policy area 'on the map'. The private international law expert should furthermore acquaint and familiarize herself or himself with the European law doctrines. These two objectives require, in our view, examining the following fundamental institutional and substantive issues.

First, we will discuss what the concept of 'European private law' should or could be understood to mean (section 2). Next, Community private *international* law is more specifically dealt with, shifting the focus more to Article 65 EC. What action is permitted to the EC in the thus further defined new area of 'European private international law', both internally and in its relations with third countries? In other words, what kind of internal and external *competences* does the European Community have in the field of private international law? (section 3). How are legally binding rules on European private international law created, what kind of legal instruments are involved and whom do they bind? (section 4). What, after-

---

hoe het niet moet', in: *Met recht verkregen - Liber Amicorum Ingrid Joppe*, Deventer 2002, pp. 201-218.

[13] Due to the conversion of the 1980 Rome Convention into a Title IV Regulation.

[14] See the 'Consultation on a preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations': <http://www.europa.eu.int/comm./justice_home/unit/civil/consultation/index_en.htm>.

[15] Proposal for a Council Regulation creating a European enforcement order for uncontested claims (COM(2002) 159 final, *OJ* 2002 C 203 E/86). See in more detail WAGNER R. , 'Vom Brüsseler Übereinkommen über die Brüssel I-Verordnung zum Europäischen Vollstreckungstitel', in: *IPRax* 2002, pp. 75-95.

[16] According to DRIJBER J. in his annotation of the *Tobacco Advertising Case*, in: *Sociaal-Economische Wetgeving* (*SEW*) 2001, p. 319. For a specific private international law perspective, see the recent consultative reports of JOUSTRA C.A., 'Naar een communautair internationaal privaatrecht', Nederlandse Vereniging voor Internationaal Recht 2002 No. 125, pp. 1-60 and POLAK M.V., 'Oppassen – Inpassen – Aanpassen', *ibid.*, pp. 61-119.

wards, is the role of the European Court of Justice (ECJ) in Luxembourg as regards the rules of Community private law that have been adopted? (section 5).

The content of the European legislation in the field of private international law, such as the recent (draft) regulations based on Article 65 EC, may be integrated in this approach by way of illustration. The rather too recondite legal problems, such as the case law concerning the interpretation of Article 5 of the 1968 Brussels Convention or the question whether the Directive on unfair terms in consumer contracts has been properly transposed into national law, must on the contrary – however important – be left to one side.[17]

II. What is European Private Law?

The descriptions of European law, on the one hand, and private international law, on the other, may be considered to be common knowledge. In order to be able to place the new designation *European private international law* in its proper context, it is first necessary to examine the more general term *European private law*. On the face of it, everyone seems to have their own description of the term and it is used in quite a variety of meanings. Viewed more closely, however, in our opinion it is possible by and large to distinguish *two* main definitions.

Two approaches may therefore be distinguished.[18] First, the *Community* description of the concept of European private law (section 2.1) and, second, the *ius commune* description (section 2.2). Depending on the definition used, the object of research, education or professional activity can be entirely different. It is our contention that the problem of definition is too often overlooked or that a self-devised working definition is too often used as a matter of course. This will explain the elaborate attention devoted to the matter here, which is not intended, however, to impose any normative choice in favour of one or the other approach.

[17] On these two specific issues, which cannot be discussed in detail here, see, e.g., Case C-256/00, *Besix*, judgment of 19 February 2002 and – more generally – DIETZE J./ SCHNICHELS D., 'Die aktuelle Rechtsprechung des EuGH zum EuGVÜ', in: *EuZW* 2001, p. 581, and Case C-144/99 *Commission v. the Netherlands* [2001], in: *ECR* I-3541; see also LEIBLE S., in: *EuZW* 2001, p. 437, and LOOS E. in: *Nederlands Tijdschrift voor Europees Recht* (*NTER*) 2001, p. 242.

[18] See in more detail FLESSNER A., 'Juristische Methode und europäisches Privatrecht', in: *Juristenzeitung* (*JZ*) 2002, pp. 14-23.

A. The Community Definition of the Concept of European Private Law

European private law can first be considered to include: (1) legal rules which are *part of Community law* (Treaty, legislation of the EC institutions and the case law of the European Court of Justice) and (2) rules which are mainly or exclusively relevant for the regulation of certain legal relationships *between private individuals*.

The first element is of a more formal nature. It elucidates that what needs to be involved are rules emanating from the European Community or the European Union.[19] In this approach to the concept, the Hague Conventions on private international law would, for example, already drop from the equation and could not be considered part of the concept of *European* private law in the (strictly) Community sense of the word.

The second element ('between private individuals') aims to further restrict the area of focus to only a handful of EC policy areas, namely those which have special relevance for 'horizontal' relations, i.e., citizen-to-citizen, company-to-company or citizen-to-company relations.[20] Needless to say, the dividing line is not unblurred and further specifications will need to be put into place to be able to reach a more precise self-formulated working definition of European *private* law (in the Community sense of the word).

A very important specification in this context is to be obtained by distinguishing between European (in the sense of: Community) *private international law* and *substantive* European/Community *private law*. In our system and terminology, these two together form 'the' European private law in the Community sense of the word.

This first component of the multi-faceted term *European private law*, i.e., Community private international law, involves EC rules concerning one or more of the three core questions of 'ordinary' private international law, i.e., (1) rules on the international jurisdiction of the (civil) courts in cross-border matters, (2) rules establishing the applicable private law of a specific country and (3) rules on the mutual recognition and enforcement of judgments and semi-judicial decisions in civil and commercial matters. Viewed from the perspective of the EC Treaty, it is

[19] After the communitarization brought about by the Treaty of Amsterdam it is likely that *EC* law will be involved in most instances. The extra-Community law of the EU was mainly relevant at the time when 'judicial co-operation in civil matters' was still covered by the third pillar (see ex-Article K.1, point 6, of the EU Treaty and the introductory paragraph).

[20] The term *private individual* is thus in EC circles often interpreted to be *considerably wider* than is customary in private law circles (namely by including companies/partnerships/legal persons in the concept of private individual as well – as opposed to national private law).

clear that the new Article 65 EC is particularly relevant here, as the primary basis for the development of this European/Community private international law. [21]

In this contribution, the emphasis will be on Community private *international* law as defined in this way. What usually immediately and intuitively springs to mind when hearing the term *European private law*, however, is – what we consider to be – the second component of the multi-faceted concept of European private law in a Community sense, namely *substantive* European/Community *private law*. This concerns the norms/rules themselves that apply to citizens and companies, not the rules concerning jurisdiction and recognition or conflict rules that are typical of private international law. One could think of EC rules on consumer protection, the many EC Directives concerning the harmonisation of corporate law and also, for instance, European labour law, including the Directives concerning equal treatment between men and women. As regards their content, these mainly deal with employment relationships between the employee/natural person and private employers. In its wider meaning, even competition law, particularly the prohibition of cartels under Article 81 EC, could be considered part of substantive European/Community private law.[22]

From this perspective, the question where precisely to draw the line and which EC rules are to be considered sufficiently relevant to apply to mutual relationships of private individuals is quite subjective. Could EC law concerning the free movement of workers, which applies horizontally and may be invoked between private individuals,[23] be included as an object of study of substantive European private law, and what would be the position of the Culture Regulation and Directive, or the TV Directive? A certain freedom of choice, of course, applies to self-formulated working definitions, making it possible to draw the subjective boundaries of EC substantive private law. The European Commission, for example, lists, if not exhaustively, some ten categories of decisions 'relevant' for private law, especially the law of obligations: consumer contracts, payment systems, self-employed commercial agents, posting of workers, liability for defective products, electronic commerce, financial service, protection of personal data, copyright and related rights and public procurement.[24] It is further possible that the same set of

[21] See further the discussion of Article 65 EC in section 3.1.1.

[22] See, e.g., the Wouters Case concerning accountants, practising lawyers and the Dutch Bar Association (Case C-309/99 *J.C.J. Wouters* [2002], in: *ECR* I-1577; see also VOSSESTIJN A., in: *CML Rev*. 2002, pp. 841-863; K. MORTELMANS/ VAN DE GRONDEN J., in: *Ars Aequi* 2002, pp. 441-465.

[23] See, in particular, Case C-281/98 *Angonese* [2000] I-4921. See also Case C-415/93 *Bosman* [1995], in: *ECR* I-4139 and Case 36/74 *Walrave/Koch* [1974], in: *ECR* 1405. On these cases, see, e.g., STREINZ R./ LEIBLE S., 'Die unmittelbare Drittwirkung der Grundfreiheiten', in: *EuZW* 2000, pp. 459-466.

[24] See Annex I to the Communication from the Commission to the Council and the European Parliament on European contract law (*OJ* 2001 C 255/1). See also, e.g., DE LY's enumeration in his inaugural lecture (*Europese Gemeenschap en Privaatrecht*, Tjeenk

EC rules, for example, the Directives on consumer protection, is discussed from the perspective of (substantive) European private law, while at another time the same set of Directives is characterized as part of the Community's 'horizontal and flanking policies', i.e., considered as a kind of annex to the hard-core internal market policy.[25]

Making such self-imposed choices is in itself not a bad thing, if it is kept in mind that one should not assume too readily that others would automatically understand what is meant by 'substantive European private law'. Quite apart from the fact that European private law may be said to comprise not only *substantive* European/Community private law, but also – as was discussed earlier – Community private *international* law.

When examining the term *European private law* (either private international, but especially substantive private law) in the Community sense of the word, whether in the strict or narrow sense, one should in any event take account of the *general doctrines of European Community law*, and in particular link these general doctrines with one's own private law field of expertise. This could entail making the meaning of the doctrine of the direct effect of European law more explicit for the national private law system of a certain Member State. More particularly, this involves the problem whether EC Directives can be invoked in private relations,[26] or the importance of the duty of the national judiciary to interpret national law in the field of private law ('as far as possible') in conformity with EC law and Directives.[27] The general doctrines of substantive European Community law are especially concerned with clarifying the theoretical and practical meaning of the four freedoms of the internal market for national private law,[28] or, more generally,

---

Willink, 1993, pp. 4-13) and the selection made by HAKENBERG W., 'Gemeinschaftsrecht und Privatrecht. Zur Rechtsprechung des EuGH im Jahre 2000', in: *Europarecht* (*EuR*) 2001, pp. 888-913.

[25] The perspective of, e.g., the journal *European Review of Private Law/Revue européenne de droit privé/Europäische Zeitschrift für Privatrecht* and the approach of KAPTEYN P.J.G./ VERLOREN VAN THEMAAT P., *Introduction to the Law of the European Communities*, 3rd ed. (edited by L.W. GORMLEY) London (etc.) 1988, Chapter X, respectively.

[26] Answered in the negative by the European Court of Justice in the *Marshall I* and *Faccini Dori* cases, although on the other hand there is the 'semi-invocable' nature of the Notification Directive in private relations: Case C-443/98, Unilever Italia t. Central Food [2000], in: *ECR* I-7535. See, e.g., WEATHERILL S., 'Breach of directives and breach of contract', in: *European Law Rev.* (*EL Rev.*) 2001, pp. 177-186; KÖRBER T., 'Europäisierung des Privatrechts durch Direktwirkung des Gemeinschaftsrechts?', in: *EuZW* 2001, p. 353.

[27] See M.H. WISSINK's dissertation, *Richtlijnconforme interpretatie van burgerlijk recht*, Serie Recht en Praktijk 115, Deventer 2001.

[28] E.g., ROTH W.-H., 'Der Einfluss des Europäischen Gemeinschaftsrecht auf das Internationale Privatrecht', in: *RabelsZ* 1991, pp. 623-673; REMIEN O., 'European Private

with an overview of substantive EC law, making it possible to 'measure' its influence on the national private law systems.[29]

B. The *ius commune* Description of the Concept of European Private Law

On the other hand, there is the idea that the term *European private law* must be regarded as the sum total of various common elements found in the *national* private law systems of the different EU Member States. The comparison of these national private law systems, i.e., the analysis of differences and similarities, subsequently constitutes the 'European' element in this *ius commune* approach.[30] Under this approach come the numerous comparative law studies of private law principles, legal rules or legal institutions comparing the national legal systems of the EU Member States. In many cases this type of research has resulted in the establishment of a European 'common core' in the areas under examination.[31] These studies are the necessary building blocks for the possible enactment of a European Civil Code.[32]

It will be clear that, in this second meaning, the term *European private law* can only refer to *substantive* private law. A comparison of the private law rules of different countries/EU Member States can by definition only concern the actual rules/norms themselves, which is why a *ius commune* description of the term *European private law* will always call to mind substantive private law norms and how they compare. Private international law as allocation law presupposes the (continuing) existence of differences between the legal systems concerned.[33] The European unification of private *international* law therefore remains outside the

---

International Law, the European Community and its Emerging Area of Freedom, Security and Justice', in: *CML Rev*. 2001, pp. 53-86.

[29] E.g., HARTLIEF T., 'Enige opmerkingen over mogelijkheid en wenselijkheid van een Europees privaatrecht', in: *Nederlands Tijdschrift voor Burgerlijk Recht* (*NTBR*) 1994, p. 205.

[30] This approach can be found, *inter alia,* in: HARTKAMP A., HESSELINK M., HONDIUS E.H., JOUSTRA C.A. and PERRON E. (eds.), *Towards a European Civil Code*, Kluwer 1998.

[31] See HONDIUS E.H, 'Nieuwe methoden van privaatrechtelijke rechtsvinding en rechtsvorming in een Verenigd Europa', *Koninklijke Nederlandse Akademie van Wetenschappen*, 2001, Part 64, No. 4.

[32] In more detail on the form of the codification, see VAN GERVEN W., 'Codifying European private law? Yes, if…!', in: *EL Rev*. 2002, pp. 156-176. See also section 3.1.2 on the competences of the EC to adopt such a European Civil Code.

[33] See also BETLEM G./ HONDIUS E.H., 'European Private Law after the Treaty of Amsterdam', *ERPL* 2001, pp. 3-20, who argue that private international law, contrary to what the name suggests, is essentially *national* law.

scope of the *ius commune* description. In fact, Community private international law even preserves the differences between the national laws of the Member States.

Substantive private law doctrines regulated by the EU Member States in more or less the same way lend themselves for insertion into an EC Regulation or EC Directive. In that sense, a close connection does exist between European private law in its *ius commune* meaning (which is by definition substantive private law) and the Community definition of substantive European private law discussed earlier. The examination of national private law systems, however, still comes first, although the EC legislation subsequently resulting from *spontaneous*, and therefore *voluntary*, harmonization of parts of the Member States' private law by the EC institutions, can be included in the *ius commune* approach.

Practitioners of the *ius commune* approach regularly seem to want to add a *normative* dimension to this in the sense that the spontaneous harmonization of private law rules, which is freely entered into by all Member States, should be strongly preferred to private law Directives and Regulations imposed 'from above' by the central EU authorities.[34] Such resistance against 'unilateral European dictates' is in itself understandable, as the field in question traditionally had little to do with European law, but is now quite suddenly being 'harmonized out of existence'.[35]

III. Community Powers in the Field of European Private Law

A distinction can be made between the EC's competence to regulate certain intra-Community relations in the field of private law and its treaty-making powers in the field of private law involving third parties.

Since the entry into force of the Treaty of Amsterdam (1 May 1999), Article 65 EC has been the focal point for *internal* competence, at least insofar as

[34] A proponent of this 'natural process of the reception of legal rules' is SMITS J.M. , 'Een Europees privaatrecht als gemengd rechtstelsel', in: *NJB* 1998, p. 61, 65-66. An opponent: HAAZEN O.A., 'Comparative Law and Economics en het Europees privaatrecht als ongemengd rechtsstelsel', in: *NJB* 1998, p. 1227. See also the argument made by the Chairman of the Netherlands Scientific Council for Government Policy [*WRR*], SCHELTEMA M., 'Harmonisatie van recht in Europa', in: *Government Gazette* of 27 September 2001.

[35] In addition to private law (both substantive and private international), areas such as criminal law, education and public health are being ambushed by EC/EU interference in much the same way. Regarding criminal law, see especially the Police and Judicial Co-operation (PJC) framework decision by the Council concerning the fight against terrorism (*OJ* 2002 L164/3) and that concerning the European arrest warrant (*OJ* 2002 L 190/1).

this involves Community private international law. In addition, there are quite a few other Treaty Articles conferring competence which could be relevant to European private law, such as the provision concerning the internal market in particular. These, however, mainly deal with EC powers for the further development of substantive private law (section 3.1).

When it comes to the external dimension, the two aspects of what is known as the *ERTA doctrine* come into play. This raises the question whether the EC is competent to conclude treaties with third countries or international organizations on matters of private law. And, if so, is such external competence exclusive or not? In that case, the EU Member States would no longer be allowed to conclude private law treaties with third parties, thus implying, for instance, that they could no longer be or become parties to the Hague Conventions on private international law (section 3.2).

A. Internal EC Competences Relating to Private International Law

1. Article 65 EC

Since Amsterdam, competence in the field of private international law is concentrated in Article 65 of the EC Treaty.[36] Measures to be taken in the field of co-operation in civil matters having cross-border implications, if deemed necessary for the proper functioning of the internal market, shall include:

a) improving and simplifying:
   - the system for cross-border service of judicial and extrajudicial documents;
   - co-operation in the taking of evidence;
   - the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;

b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;

c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

Although the decisions concerned usually refer to Article 61(c) EC as their legal basis, this provision in turn refers to Article 65 EC ('measures in the field of judicial co-operation in civil matters as provided for in Article 65'). Therefore, it is

[36] See in more detail DRAPPATZ T., *Die Überführung des internationalen Zivilverfahrensrechts in eine Gemeinschaftskompetenz nach Art. 65 EGV*, Tübingen 2002.

our opinion that the actual conferral of competence is included in the latter provision and it would thus be preferable if the decisions concerned were to formally acknowledge Article 65 EC as their legal basis.

As appears from the text of this provision, measures to be based on Article 65 EC need to fulfil several general requirements: (1) they must concern co-operation in *civil matters*, (2) be relevant in certain *cross-border* situations, and (3) be necessary for the proper functioning of the *internal market*. From the structure of this provision it can be inferred that the more concrete topics that follow (listed under points a, b and c) in any case meet these three general limiting conditions.

The three general criteria are particularly relevant for private law topics not expressly mentioned in the enumeration of points a, b and c in Article 65 EC. The enumeration is therefore probably intended to be enunciative ('shall include'), meaning that Article 65 EC can also serve as the basis for other decisions, provided they, given their purpose and content, fulfil the three general criteria mentioned above: dealing with civil matters, regulating cross-border situations, and benefiting the internal market. It could therefore be argued that many of the national procedures and procedural rules which are the object of the *Rewe/Comet* case law of the ECJ could be made uniform or similar with the aid of measures based on Article 65.[37]

The decisions (mainly Regulations) adopted for the purpose of implementing Article 65 EC have so far, however, been predominantly directed towards the topics under points a, b and c and are clearly, as a result, of a private international law nature. Many of these Article 65 decisions deal with the mutual recognition of judgments (the 'free movement of civil judgments' under the Brussels I and II Regulations)[38] or with co-operation between the civil authorities of the Member States.[39] The close connection between international procedural law and the conflict of laws also justifies the enactment of Regulations concerning private interna-

[37] See the argument by A.M. VAN DEN BOSSCHE in her inaugural lecture 'Europees recht in de kering', Deventer 2002. In general on the *Rewe*/*Comet* case law, see, e.g., BIONDI A., 'The European Court of Justice and certain national procedural limitations: Not such a tough relationship', in: *CML Rev.* 1999, p. 1271; CURTIN D./ MORTELMANS K. , 'Application and Enforcement of Community Law by the Member States: Actors in Search of a Third Generation Script' in: CURTIN D./ HEUKELS T. (eds.), *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers*, Dordrecht 1994, p. 423.

[38] Brussels I and Brussels II, already cited above. See further the Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters (*OJ* 2001 C 12/1). See also KOHLER Ch., 'Auf dem Weg zu einem europäischen Justizraum für das Familien- und Erbrecht', in: *Zeitschrift für das gesamte Familienrecht* (*FamRZ*) 2002, pp. 709-714.

[39] E.g., Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (*OJ* 2001 L 174/1).

tional law and exclusively dealing with the choice of applicable law. This includes the 'transformation' of the 1980 Rome Convention on the law applicable to contractual obligations into an Article 65 Regulation and the drawing up of new Regulations for the law applicable to non-contractual obligations,[40] to dissolutions of marriage, and to matrimonial property and inheritance law.

In the Brussels practice, three priorities as regards policy are distilled from the new competence conferred by Article 65 EC.[41] First of all, improved access for citizens to civil procedure. Among other things, part of this is the simplification of legal assistance in civil cases or the increased involvement of victims of violent crimes in civil cases.[42] The second priority – the mutual recognition of judgments in civil and commercial matters[43] – covers many of the Regulations already or yet to be mentioned, such as Brussels I and Brussels II/IIA. The Insolvency Regulation also fits in this category, as it essentially involves the mutual recognition of insolvency judgments delivered in different Member States.[44] Thirdly, there is a sort of residual category of further measures whose primary function is to support the second priority (mutual recognition). This includes the organization of improved co-operation between national courts in the taking of evidence in civil matters and the establishment of official European networks for judicial co-operation in civil matters.[45]

2. Other Powers

In addition to the (for Community private international law) core Article 65, a great many other legal bases from the EC Treaty may be relevant for further regulation of matters in the field of private law. The relevant provisions on competence will

[40] Consolidated version of the Rome Convention in *OJ* 1998 C 27/34. See also the introduction to this article.

[41] According to the relevant website of the Commission: <europa.eu.int/comm./justice_home/unit/civil_en.htm>.

[42] See the Green Paper of February 2000, COM/2000/0051/final and the Green paper of 28 September 2001.

[43] See in particular for this principle the Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters (*OJ* 2001 C 12/1).

[44] Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings (*OJ* 2000 L 160/1).

[45] In this respect, the Green Paper mentions Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (*PB OJ* 2001 L 174/1) and Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters (*PB OJ* 2001 L 174/25), respectively.

strongly depend on how broadly one interprets the term *(substantive) European private law* in its Community meaning.[46]

Starting from a definition that is not too limited, one could especially refer to Article 95 EC concerning the *internal market*. The internal market provision has great significance for substantive European private law, as this provision may be used to underpin the freedoms of movement, especially the ones concerning goods and services, or to eliminate 'appreciable distortions' of competition.[47] Examples of the use of Article 95 in the private law sphere include the Directive on combating late payment in commercial transactions,[48] the Directive on electronic commerce[49] and, less recently, the Directives concerning self-employed commercial agents and defective products.[50]

Apart from this, European consumer law was also largely shaped under this provision on the internal market (and before, under the provision on the common market).[51] More recently, Article 153 EC from the Title concerning consumer

[46] Cf. the discussion of this question above under section 2.

[47] See especially the Tobacco Advertising Case (C-376/98, *Germany* v *European Parliament* and *Council* [2000], in: *ECR* I-8419). In more detail, see HERVEY T.K., 'Community and National Competence in Health after *Tobacco Advertising*', in: *CML Rev*. 2001, pp. 1421-1446; MORTELMANS K.J.M./ VAN OOIK R.H., 'Het Europese verbod op tabaksreclame: verbetering van de interne markt of bescherming van de volksgezondheid?', in: *Ars Aequi* 2001, pp. 114-130. See also pending Case C-338/01 *Commission* v *Council* (*OJ* 2001 C 303/13) and pending Cases C-272/02 and C-273/02 (*OJ* 2002 C 219/9), all concerning the delimitation of internal market – tax measures. Germany's objection against the general tobacco Directive (2001/37/EC) was a day late (Case C-406/01, Order of the Court of 17 May 2002), but thanks to the preliminary reference procedure we will still get a judgment of the Court on the validity of this Directive, see Case C-491/01, *BATCO* and *Imperial Tobacco*.

[48] Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions (*OJ* 2000 L 200/35). Cf. FREUDENTHAL M./ MILO J.M., 'Betalingsachterstanden in handelstransacties', in: *NTBR* 1999, p. 153. The draft Directive under discussion according to these authors 'touched upon the heart of private law', although the final version was eventually toned down considerably by the Council.

[49] Directive 2000/31/EC (*OJ* 2000 L 178/1), in addition to Article 95 EC, this Directive is also based on Articles 47 and 55 EC.

[50] Directive 86/653/EEC (*OJ* 1986 L 382/17) and Directive 85/374/EEC (*OJ* 1985 L 210/29, as amended by Directive 99/34/EC, *OJ* 1999 L 141/20). The latter Directive is also considered by some to belong to the category of consumer law Directives. These older Directives were originally based on Article 100 EEC/94 EC.

[51] E.g., Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (*OJ* 1999 L 171/12) and Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (*OJ* 1993 L 95/29). On this in general see, e.g., STUYCK J., 'European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or beyond the Internal Market?', in: *CML Rev*. 2000, pp. 367-400.

protection, which was inserted later, has also been used as a basis for taking all kinds of consumer-related measures, including harmonization measures.[52]

The provision concerning transport policy (Article 71 EC) could also be mentioned, as this was used, for example, as a basis for the Directives on third-party liability insurance in road transport.[53] Here, however, one is once more faced with the question of how broadly the term *substantive European private law* is to be interpreted.

As regards the legal basis of Community private *international* law, it is particularly relevant that former Article 220 EEC, which formed the legal basis for the 1968 Brussels Convention, continues to exist after the entry into force of the Treaty of Amsterdam, these days in the shape of Article 293 of the EC Treaty. The question is, however, why this provision was not repealed after the insertion of Article 65 EC (see the next section for further elaboration).

As for the legal basis of a possible 'European Civil Code', it suffices to say that the question whether enough Community competence is available depends greatly on what is to be regulated by such a Code. It seems inevitable, however, that Article 308 EC should be used if this European Civil Code is to truly amount to something 'impressive'. But possibly even this legal basis for 'unforeseen cases' will not be good enough and then the EC Treaty itself would have to be amended to *create* sufficient Community powers.[54]

---

[52] See Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers (*OJ* 1998 L 80/27). According to some, however, Article 153 (ex 129A(2)) EC does not permit harmonizing measures. See, e.g., the doubts of VAN GERVEN W., in: *EL Rev*. 2002, p. 167. Other non-harmonizing consumer protection measures under Article 153/129A(2) are, e.g., Decision No. 3092/94/EC of the European Parliament and of the Council of 7 December 1994 introducing a Community system of information on home and leisure accidents (*OJ* 1994 L 331/1, subsequently repealed) and Decision No. 283/1999/EC of the European Parliament and of the Council of 25 January 1999 establishing a general framework for Community activities in favour of consumers (*OJ* 1999 L 34/1).

[53] Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability (*OJ* 1972 L 103/1, subsequently amended).

[54] See, e.g., SCHMID C.U., 'Legitimacy Conditions for a European Civil Code', *EUI Working Paper* No. 2001/14 (revised and expanded version published in *MJ* 2001, pp. 277-298); and the contribution already mentioned by VAN GERVEN W., in: *EL Rev*. 2002, pp. 156-176. On the current state of affairs, see SCHWINTOWSKI H.-P., 'Auf dem Weg zu einem Europäischen Zivilgesetzbuch', in: *JZ* 2002, p. 209. He writes that: 'Das europäische Zivilgesetzbuch existiert schon, die es leitenden Grundprinzipien sind entwickelt. Es geht nur noch darum, das längst geleistete Harmonisierungswerk mit dem passenden Kleid zu versehen – nämlich das *Europäische Zivilgesetzbuch* als logischen Endpunkt der europäischen Harmonisierung aus der Taufe zu heben.'

3. Demarcation of Internal Powers

The fact that competence can be based on different co-existing provisions gives rise to the question of the choice of the most appropriate legal basis for EC decisions in the realm of private law. One should keep in mind that the procedure of Article 65 EC (consultation and unanimity) differs from that concerning the internal market or transport (co-decision), as well as from the procedure of Article 293 EC (ratification required since the Member States have to negotiate with each other).

Without being able to discuss this demarcation problem exhaustively, some remarks must nevertheless be made.[55] It is our contention that, in its relationship with the other provisions mentioned, Article 65 EC would have to be considered *lex specialis*. As appears from its wording, it lists a number of concrete aspects of cross-border private law. The provision on the internal market, on the contrary, is framed in more general terms, as is the wording of Article 293 EC, which is not limited to civil and commercial matters.[56]

This is why all topics covered by Article 65 EC should have this Article as their legal basis, even when other legal bases – such as Articles 71, 95 or 293 EC – could in principle also appropriately fulfil this task.[57] With respect to Article 293 EC, the result of this interpretation is that Article 65 EC relieves it from its task of acting as a legal basis for the subject matter of 'recognition of civil judgments in civil and commercial matters'. Matters relating to the 1968 Brussels Convention are now, after Amsterdam, exclusively covered by Article 65 EC because this legal basis is more specific than Article 293 EC, not because the latter legal basis would confer insufficient powers in itself.[58] Taking this view has far-reaching practical implications: it is no longer necessary to obtain the approval of all national parliaments, as was the case for the 1968 Brussels Convention and the 1980 Rome

[55] See already BOELE-WOELKI K., 'De toekomst van het IPR na het Verdrag van Amsterdam', in: *Privaatrecht en Gros*, pp. 355, 358-359 and VAN OOIK R.H., *De keuze der rechtsgrondslag voor besluiten van de Europese Unie*, Deventer 1999, EM No. 63, pp. 390-391.

[56] Cf. 'the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards' (Article 293 EC) and 'improving and simplifying the recognition and enforcement of decisions *in civil and commercial cases*, including decisions in extrajudicial cases (Article 65(a), third item, EC). Admittedly, the final addition does in turn seem to allow Article 65 a wider scope of application than Article 293 EC.

[57] See also WAGNER R. (note 15), pp. 84-86.

[58] Similarly, e.g., LAUWAARS R.H./ TIMMERMANS C.W.A., *Europees recht in kort bestek*, Groningen 1999, p. 236; and BARENTS R./ BRINKHORST L.J., *Grondlijnen van Europees Recht*, Alphen aan den Rijn 2001, p. 529.

Convention. In fact, such approval was not sought upon the adoption of the private international law *Regulations*.[59]

B. External Community Powers in the Field of European Private International Law

In regard to the external powers aspect of European private law, we would emphasize the treaty-making competence of the EC in the field of private international law (and not so much in the field of substantive private law). To this end, it should be examined whether an EC treaty-making competence *exists* in the field in question (section 3.2.1.) and, if so, whether this external EC competence is *exclusive*. In other words, does the European Community now have exclusive competence to enter into contractual obligations laid down in international agreements with third states or international organizations in the field of private international law? (section 3.2.2).

1. The Existence of Treaty-Making Powers in the Field of Private International Law

The Treaty provisions relevant for private law are of a highly introspective character, that is to say: written to cover certain *intra*-Community situations. One could mention the provision concerning the internal market, consumer protection, but also Title IV, with its Article 65 as the legal basis for regulating private international law matters. An express competence to conclude treaties with third states (or international organizations) in the areas covered by Title IV can therefore not be said to exist.

Nevertheless, we believe that it follows from the Court's well-known *ERTA doctrine* that the EC is still competent, even if only *implicitly*, to assume international obligations in the various fields covered by Title IV.[60] Concisely put, according to this doctrine a Community competence to conclude international treaties may not only derive from the express conferral of such a competence by the EC Treaty, but may also follow implicitly from treaty provisions which are intended to cover intra-Community situations, or from secondary acts based on treaty provisions. This is the case – i.e., that an implicit external competence exists – when the

[59] See further also section 4.1.

[60] Similarly, e.g., DRIJBER B.J., in: *Nederlands JuristenBlad* (*NJB*) 1999, p. 588; DE ZWAAN J., in: *NJB* 1999, pp. 492, 494. And previously: VAN OOIK R.H. (note 55), pp. 110-112.

external competence is necessary to realize the internal objectives in a meaningful way.[61]

The fact that this treaty-making power exists in respect of private international law emerges not only from the *ERTA* doctrine – a result of the creation of internal Community powers in this field since Amsterdam – but also from the Protocol concerning the UK and Ireland, and that concerning Denmark. These Protocols stipulate that these three Member States are not bound to 'international agreements concluded pursuant to that Title [IV]', which of course presupposes the *existence* of a treaty-making competence as regards Title IV issues.[62] A beginning in this direction by the Brussels decision-making practice has been the conclusion by the Community of international agreements with third countries concerning Title IV matters, which agreements, as far as the EC is concerned, are formally based on that Title.[63]

In the field of private international law, the implied powers doctrine under *ERTA* warrants the conclusion that the European Community is competent to accede to the Hague Conference on Private International Law.[64] Quite separate from this, however, is the question whether the EC should effectively *exercise* this external competence – a question governed to an important extent by the principle of subsidiarity and thereby by the European policy-makers. Also separate from the issue of the existence of external powers is the question whether it is the *exclusive* competence of the EC (and consequently no longer the competence of the Member States) to become a party to private international law treaties drawn up by international organizations.

---

[61] Case 22/70 *Commission v. Council* [1971] ECR 263. In general, see, e.g., DASHWOOD A., 'External relations provisions of the Amsterdam Treaty', in: *CML Rev.*1998, pp. 1019-1045; TRIDIMAS T./ EECKHOUT P., 'The external competence of the Community and the case-law of the Court of Justice: principle versus pragmatism', in: Y*earbook of European Law* (*YEL*) 1994, pp. 143-177; CREMONA M., 'External Relations and External Competence: the Emergence of an Integrated Policy', in: CRAIG P./ DE BÚRCA G., *The Evolution of EU Law*, Oxford q998, pp. 137-175; TEMPLE LANG J., 'The ERTA judgment and the Court's case law on competence and conflict', in: *YEL* 1986, pp. 183-218.

[62] See Article 2 of the Protocol concerning the position of the United Kingdom and Ireland, and Article 2 of the Protocol concerning the position of Denmark. See also section 4.3.

[63] Even if they concern immigration/Schengen/Dublin matters, see Council Decision 2001/258/EC of 15 March 2001 concerning the conclusion of an Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or Iceland or Norway (OJ 2001 L 93/38 and C 254E/244). This agreement is based on Article 63(1) EC.

[64] See also DRIJBER J. (note 60), p. 588, and J. BASEDOW, 'The Communitarization of the Conflict of Laws under the Treaty of Amsterdam', in: *CML Rev.* 2000, at p. 704.

2. Exclusiveness of the EC's Treaty-Making Powers in the Field of Private International Law

Title IV is also silent on this last question, i.e., whether the European Community is exclusively empowered to enter into treaty obligations with third countries in the areas covered by Article 65 EC, consequently excluding the Member States. This is the result of the fact that the actual existence of an external competence is not clearly regulated in this Title. It is then logical that the subsequent question as to the exclusive or, alternatively, shared character of the external powers is not expressly dealt with either.

Opinions on this matter are consequently divided, although at this point there seems to be a rather general reluctance to assume the exclusive competence of the EC in this private law field.[65] JESSURUN D'OLIVEIRA nevertheless contends that, as regards the international law of procedure in civil and commercial matters, the external powers have now become exclusive in this field, at least where the subject matter of the Hague Conventions on private international law is concerned, and that this is the result of the adoption of the (internal) Regulation on jurisdiction and enforcement.[66]

To answer this important question, one must in any event rely on the general doctrines of European Community law, this time on the doctrine of the exclusiveness of external powers. From the *ERTA* case in particular and the subsequent *Kramer* case, it appears that external powers can have or obtain an exclusive character in two ways.[67]

a) Exclusive Competence based on the EC Treaty

First of all, whether or not a competence is exclusive may become apparent from the actual *treaty provisions* involved. In these cases, the competence of the Community is exclusive *ab initio*, from the moment of their introduction. Thus the Court held that it followed from Article 133 (ex 113) EC that the Community

[65] See, e.g., SCHEIBECK F.C., *Die Aussenkompetenzen der EG im internationalen Zivilluftverkehr*, Frankfurt am Main 1999, pp. 262-285; STRUYCKEN A.V.M., 'Het Verdrag van Amsterdam en de Haagse Conferentie voor internationaal privaatrecht', in: *Weekblad voor Privaatrecht, Notariaat en Registratie* (*WPNR*) 1999, pp. 735, 739-742; THOMA I., 'La définition et l'exercice des compétences externes de la Communauté Européenne au domaine de la coopération dans les matières civiles ayant une incidence transfrontière', in: *European Rev. of Private Law* (*ERPL*) 2002, pp. 397-416.

[66] JESSURUN D'OLIVEIRA H.U., in: *NJB* 2001, p. 1208: 'Now that the EU has used its powers in this field internally, it has also become exclusively competent to discuss the matter [the mutual recognition of judgments under the 1968 Brussels Convention] externally'.

[67] In general, see, e.g., EMILIOU N., 'The death of exclusive competence?', in: *EL Rev.* 1996, p. 294 (and the literature on ERTA mentioned previously).

powers in the field of commercial policy are of an exclusive character. Only the EC is still competent to negotiate and conclude (free) trade agreements, no longer the Member States.[68] On the other hand, it emerges that the treaty-making competence of the EC relating, for example, to development aid, is not exclusive merely on the basis of the text of the Treaty provisions. Article 180 EC provides that the Community and the Member States shall co-ordinate their policies on development co-operation, consult each other on their aid programmes and may undertake joint action. This leads the Court to conclude that in this field the Community is not competent to the exclusion of the Member States from the very beginning. These retain the right themselves, either collectively or individually, or together with the EC, to assume obligations in this area with respect to third countries.[69]

When applied to Title IV of the EC Treaty, in our opinion, one cannot assume merely on the basis of the Treaty's wording that, after Amsterdam, the EC is exclusively competent to conclude agreements concerning the private law matters listed in Article 65 EC. The same applies to the other Title IV topics (asylum, immigration): an external competence exists but in principle is not exclusive.

The main reason underlying this opinion view is not so much the wording of Title IV or its obvious meaning or purpose; after all it is a fact that the Title itself is notably unclear on the subject of the exclusiveness of the external private law competence. Instead, the desire to share external powers with the Member States emerges from a Protocol concerning the external relations of the Member States in connection with the crossing of the external borders. This Protocol provides that the measures concerning the crossing of the external borders (Article 62 EC, i.e., also regulated in Title IV of the EC Treaty) leaves intact the Member States' competence to negotiate or conclude agreements with third countries, provided Community law and other relevant international agreements are respected.[70] A Declaration further stipulates that in another specific sub-field of Title IV, i.e., entry and long-term residence of third-country nationals, especially with a view to family reunion, the Member States have also retained their concurrent external powers.[71]

---

[68] See, e.g., Case 41/76 *Donkerwolcke* [1976], in: *ECR* 1921 (point 21).

[69] Case C-316/91 *European Parliament v. Council* [1994], in: *ECR* I-265 ('European development fund'), especially points 26-27. As a matter of fact, due to the nature of the policy area in question, it is difficult to see how external powers (concerning development co-operation) could *become* exclusive by means of the *internal* exercise of these powers. This could become easier after the accession to the EU of countries such as Romania and Bulgaria. See further section 3.2.2.2.

[70] Protocol No. 8 to the Treaty of Amsterdam.

[71] See Declaration No. 18 to the Treaty of Amsterdam: 'The Conference agrees that Member States may negotiate and conclude agreements with third countries in the domains covered by Article 63(3)(a) of the Treaty establishing the European Community as long as such agreements respect Community law' (*OJ* C 340 /1).

From the mentioned Protocol and Declaration to the Treaty of Amsterdam, it can therefore be concluded with sufficient certainty that the wording of Article 65 EC was not intended to immediately and completely deprive the Member States of their competence in the field of private international law.[72]

b) Exclusive competence is obtained

Secondly, external EC powers may, however, also *obtain* an exclusive character in the long run. The most important way in which this occurs is by the actual exercise of the (expressly) conferred *internal* powers, i.e., by the adoption of decisions by the EC institutions aiming to regulate intra-Community situations. The external competence is made exclusive when the internal measures adopted could be *affected* if Member States were still able to unilaterally conclude agreements with third parties.[73]

This means that it should be considered on a case-by-case basis whether decisions already adopted by the institutions could be *affected* by measures from Member States' treaties with third parties that deal with more or less the same matters. It goes without saying that this leaves ample room for subjectivity, but the final say in the matter will always belong to the EC's Court of Justice, usually in the form of an opinion pursuant to Article 300(6) EC.[74]

In recent case law, such as the opinion relating to the Cartagena Protocol, the Court, however, seems reluctant to assume the existence of external exclusiveness as a result of the exercise of internal powers.[75] In short, the Court held at the end of its opinion that it remains to be examined whether the Community derived from Article 175 EC (environmental protection) the exclusive competence to conclude the Protocol *because* secondary legislation adopted within the framework of the Community covers the subject of biodiversity and is liable to be affected if the Member States participate in the procedure for concluding the Protocol.[76] In that regard, the Court merely observed that 'the harmonisation achieved at Community

[72] From this Protocol and the Declaration, WIEDMAN M., in: SCHWARZE J. (ed.), *EU-Kommentar*, Baden-Baden 2000, p. 856, however, concludes that external competence does not even *exist* in the various specific sub-areas of Title IV.

[73] See, e.g., the Cartagena Opinion to be examined hereafter and ERTA, especially its point 17. See also the literature mentioned earlier on external EC competences.

[74] Cf., e.g., WTO Opinion 1/94 [1994], in: *ECR* I-5267. In *Open Skies* the issue of exclusive competence came before the Court under the Article 226 EC infringement procedure, see Cases C-466-475/98, judgments of 5 November 2002.

[75] Opinion 2/00 [2001], in: *ECR* I-9713. See DASHWOOD A., in: *CML Rev*. 2002, pp. 353-368.

[76] Opinion 2/00, point 45, referring to point 22 of the ERTA judgment.

level in the Protocol's field of application covers in any event only a very small part of such a field'.[77]

It would therefore seem too straightforward to wonder whether, in a certain policy area *as a whole* ('environment', 'private law' or 'agriculture'), the competence to conclude treaties with third countries falls exclusively on the EC by now. Instead, more specific topics/aspects should be looked at within the various EC policy areas. For instance, in the area of environmental policy, are more specific aspects such as waste substances, biodiversity, disposal of cadmium, etc. internally covered by Community legislation? In regard to transport, the question arises whether *air transport* within the EC has already been harmonized/co-ordinated to the extent that bilateral Open Skies Agreements of the Member States with the USA could 'affect' these internal packages of EC legislation.[78] Similarly, one will have to focus more closely on the policy area of 'private international law', examining the specific aspects that have or have not been regulated internally in order to determine whether these internal rules would consequently be affected by a unilateral external action on the part of the Member States.

As a result of this approach, one could indeed effectively argue by now that, for example, in respect of matters regulated by the 1968 Brussels Convention, the Member States are *no longer competent* – given the ERTA doctrine – to become parties to the global treaty concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters currently being prepared by the Hague Conference on Private International Law.[79] The Regulation concerning jurisdiction and enforcement essentially covers the same subject matter and an unnecessary overlap would be created if the fifteen Member States would become parties to this Hague Convention in addition to the EC.[80]

---

[77] Opinion 2/00, point 46, referring to several Directives to support the position, namely Directives 90/219 and 90/220, together with Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms (OJ 2001 L 106/1).

[78] See Advocate General TIZZANO's Opinion of 31 January 2002 in Case C-466/98 c.a., as well as the affirmative answer of the ECJ to this question in its important judgments of 5 November 2002.

[79] See the Internet for further information:<http://europa.eu.int/comm/justice_home/unit /civil/audition10_01/index_en.htm.> See also KOTUBY C., 'External competence of the European Community in the Hague Conference on Private International Law: Community harmonisation and worldwide unification', in: *Netherlands International Law Rev.* (*NILR*) 2001, pp. 1-30. It must be strongly emphasized here that we are expressing a *legal* opinion, based on ERTA, not a political policy judgment.

[80] The chances that this Convention will actually be enacted, however, are becoming increasingly slim. See VON MEHREN A.T., 'Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgements Acceptable World-wide: Can the Hague Conference Project Succeed?', in: *Am.J.Comp.L.* 2001, pp. 191-202.

The Commission also seems to lean towards assuming the established existence of exclusiveness in at least part of the field of Community private international law. From a recent proposal[81] it can be deduced that, in the Commission's view, the Member States are no longer entitled to individually accede to the 1996 Hague Convention for the Protection of Children, as the provisions of this treaty concerning jurisdiction and the enforcement of judgments affect the common provisions of the Brussels II Regulation. It follows that the Member States are no longer free to decide whether or not they will ratify this multilateral treaty. Initially, the Member States will now be 'authorised' to sign this multilateral Treaty 'in the interest of the European Community'. When they do, they must all make a uniform declaration specifying that: (a) in accordance with Article 52 of the 1996 Hague Convention for the Protection of Children, the Convention will take precedence over Community provisions relating to children who are not habitually resident in a Member State, but who are resident in another Contracting State, and (b) as soon as possible the necessary steps will be taken to begin negotiations concerning a Protocol to the Treaty enabling the accession of the Community and guaranteeing that the Community rules on the recognition and enforcement of a decision rendered in one Member State can be enforced in another Member State. Hereby the Commission in effect indicates that, as far as it is concerned, the EC already has exclusive competence. Why else would the Member States still need to be 'authorised' to act 'in the interest of the EC'? In the somewhat strained relations between the EC and the Hague Conference on Private International Law, this unilateral step on the part of the EC is entirely unprecedented.

IV. Enactment, Nature and Scope of Application of EC Rules Concerning Private International Law

The manner in which all decisions are adopted pursuant to Title IV is regulated in Article 67 EC, regardless of whether they deal with asylum and immigration or judicial co-operation in civil matters (section 4.1). During the decision-making process it should also be examined which types of decisions (Regulations, Directives, Recommendations, etc.) may be adopted (section 4.2). Finally, whom do these types of EC decisions bind? This question proves difficult to answer as regards private international law under Title IV since, in principle, the UK, Ireland and Denmark do not participate (section 4.3).

[81] Proposal for a Council Decision authorizing the Member States to sign in the interest of the European Community the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Hague Convention), COM (2001) 680 final.

A. Enactment of European Private International Law

1. The Period Until 1 May 2004

From Article 65 EC in conjunction with Article 67 EC it follows that the Council has to decide unanimously on a proposal from the Commission or the initiative of a Member State (therefore amounting to a shared right of initiative), and after consulting the European Parliament, as regards rules of European private international law during a transitional period of five years following the entry into force of the Treaty of Amsterdam (i.e., until 1 May 2004). This provision must, however, be read in conjunction with the Protocol concerning the position of the United Kingdom and Ireland, as well as the Protocol concerning Denmark. If these Member States do not participate in a given case, unanimity will mean agreement among 14, 13 or 12 Member States.[82]

This current decision-making procedure barely deviates from the procedure that applied in the period between Maastricht and Amsterdam, when cross-border private international law was still an integral part of the Justice and Home Affairs Pillar. At that time the Commission already had the shared right of initiative in the field of private law and the Council also had to decide unanimously.[83] The co-operation of the European Commission is therefore still not required, thus explaining how, for example, the Regulation concerning insolvency procedures was enacted on the initiative of Germany and Finland, even though it deals with first-pillar EC legislation.[84] As far as voting in the Council of Ministers is concerned, the consent of all fifteen members is required at all times for the adoption of every new decision under Article 65 (for instance, the Brussels I Regulation) and of course for every *amendment* of an existing decision (for instance, a Regulation amending the Brussels I Regulation on some technical points).

There is, however, an important difference compared to the 'ordinary' treaty-making procedure, including that under Article 293 (ex 220) EC: the *national parliaments* have ceased to play a role in the decision-making process. This difference in involvement clearly emerged in the enactment of the Regulation concerning jurisdiction and enforcement (national parliaments not involved since it concerned decision-making under Title IV), as compared with its predecessor from 1968, the Convention on jurisdiction and enforcement (when they were still involved as a result of the ratification requirement). Nevertheless, the national

[82] Article 1 of the UK/Ireland Protocol and Article 1 of the Denmark Protocol. See also section 4.3.

[83] See the former Article K.1, point 6 (concerning judicial co-operation in civil matters) in conjunction with Article K.3(2) of the EU Treaty.

[84] Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings (*OJ* 2000 L 160/1). See also, e.g., the initiative of the French Republic with a view to adopting a Council Regulation on the mutual enforcement of judgments on rights of access to children (*OJ* 2000 C 234/7).

parliaments can still duly influence the Brussels decision-making process by virtue of the requirement of unanimity in the EU Council under Title IV. To this end, they will need to bind 'their' Minister to a strict mandate, demand a considerable amount of prior consultation, and stipulate (at the national level) that decisions made in Brussels may not be approved as long as the national parliament opposes them.

The Dutch parliament has indeed managed to enforce such a right of assent, at least in regard to (draft) decisions intended to bind the Kingdom of the Netherlands pursuant to Title VI of the Treaty on the Union (on police and judicial co-operation in criminal matters) and also in regard to decisions under Title IV of the EC Treaty.[85] Although the arrangement for prior approval seems to be primarily intended to counter the so-called democratic deficit in the field of asylum and immigration as much as possible, the wording of the Dutch Act on prior approval is general to the extent that it encompasses *all* Title IV decisions, hence – in our opinion – those concerning private international law under Article 65 EC as well.[86]

2. The Period Following 1 May 2004/after Nice

After the transitional period of five years (i.e., after 1 May 2004), the Commission will be given an exclusive right of initiative and the Council will be empowered to declare the co-decision procedure applicable to all or some of the topics and policy areas mentioned in Title IV. This decision itself, however, requires unanimity in the Council (Article 67(2) EC).

On the other hand, there is a possibility that these rules on decision-making could fail to take on any practical significance in the future. If the Treaty of Nice would enter into force prior to 1 May 2004, under this Treaty the measures of Article 65 EC are to be adopted in accordance with the *co-decision* procedure – and therefore, as a rule, by qualified majority in the Council.[87] Assuming that Nice

[85] Articles 3 and 4 of the Act approving the Treaty of Amsterdam (Kingdom Act of 24 December 1998).

[86] After the entry into force of the Treaty of Nice, the scope of the assent procedure will remain the same for the Dutch Parliament, i.e., also covering EC decisions under Article 65, or at least those relating to family law. See Article 4 of the Kingdom Act for the approval of the Treaty of Nice as enacted on 26 February 2001 in Nice (Second Chamber, parliamentary year 2000-20012, 27 818 (R 1692), Nos. 1-2).

[87] Article 67(5) of the EC Treaty (new), as inserted by Article 2, point 4, of the Treaty of Nice. For the exception concerning family law, see hereunder. On QMV in the Council as part of the co-decision procedure (Article 251), see, e.g., BONO R., 'Co-decision: an appraisal of experience of the European Parliament as co-legislator', in: *YEL* 1994, pp. 21-71; BOYRON S., 'Maastricht and the Codecision Procedure: A Success Story', in: *ICLQ* 1996, p. 293; GIEBENRATH R., *Das Mitentscheidungsverfahren des Artikels 251 (ex-189b) EG-Vertrag zwischen Maastricht und Amsterdam*, Baden-Baden 2000.

indeed enters into force around mid-2003 (despite the initial Irish 'no'[88]), the Commission's role in respect of legislative initiatives in the field of private law would already be strengthened to an *exclusive* right of initiative, as an integrated part of the co-decision procedure of Article 251. A further consequence will be considerable extension of the European Parliament's power: from the mere right to prior consultation to the right to *co-decision*. From that moment it will be possible for the government representatives of the Member States to be *overruled* in the field of European private international law.

The Treaty of Nice, however, makes an exception for 'aspects relating to *family law*'. In light of the large number of EC decisions to be made in the field of international family law in the near future, this exception is of great importance. The rules of the current Article 67 EC will remain in force for family law topics (jurisdiction, applicable law and recognition and enforcement of decisions). This means that, during the transitional period (until 1 May 2004), a unanimity requirement applies in the Council, a shared right of initiative for the Commission and the Member States, and the European Parliament need only be consulted on draft legislation concerning family law – also in the event the Treaty of Nice will already have entered into force.[89] After this five-year-period (from 1 May 2004), the rules of Article 67(2) EC will apply to decision-making concerning family law: the Commission will enjoy the exclusive right to propose family law legislation and the Council can declare the co-decision procedure applicable (which, however, requires unanimity).[90]

This procedural splitting up of European private international law by means of and as of the Treaty of Nice may well give rise to problems concerning the legal basis of decisions in this already rather narrowly demarcated field.[91] Amendments to the Brussels II Regulations, however, will undoubtedly still fall within 'aspects relating to family law', thus requiring the Council to decide unanimously.

---

[88] A 'Denmark solution' (cf. CURTIN D./ VAN OOIK R., in: *Legal Issues of the Maastricht Treaty*, 1994, pp. 349-365) was the only remaining option, i.e., impressing upon the stubborn Irish that they really had to vote in favour of Nice in a second referendum (in the autumn of 2002) – something which they convincingly did this second time.

[89] In our view, this clearly appears from the wording and structure of Article 67(5) (new): 'By derogation from paragraph 1, the Council shall adopt, in accordance with the procedure referred to in Article 251: - the measures provided for in Article 65 with the exception of the aspects relating to family law'. Whatever does *not* derogate from paragraph 1 remains under its scope.

[90] A Declaration to the Treaty of Nice provides that the Council should take this option seriously: 'The Council will, moreover, endeavour to make the procedure referred to in Article 251 applicable from 1 May 2004 or as soon as possible thereafter to the other areas covered by Title IV or to parts of them.'

[91] For the scope of Article 65 in respect of other legal bases, see already section 3.1.

B. Legal Instruments for the Shaping of Community Private International Law

As regards the types of EC decisions to be employed by the institutions to further outline their policy in the field of private international law, Article 65 EC mentions 'measures', as do most other legal bases of Title IV. This term must be considered a collective term, including all the legal instruments of Article 249 EC (especially regulations, directives, decisions, but also recommendations and opinions) and what is known as the *sui generis* decisions and further 'soft-law' legislation.[92]

The decision-making institutions (Commission and Council) as a result enjoy a wide margin of discretion to choose the Community law instrument that in their view would be best suited to the subject-matter to be regulated in a given case. From the, albeit still youthful decision-making practice, it appears that the EC institutions have a marked preference for the Community *Regulation*.[93] This is the instrument *par excellence* to create uniform European rules that need not be transposed into national legislation, as they are 'directly applicable', but are legally binding and judicially enforceable.[94] It is thus the case that the most invasive legal instrument that European law has at its disposal is being deployed in the field of private international law,[95] although other instruments are of course being used as well.[96] Apart from this, the unification of private international law already achieved and planned in many areas at the Community level can be regarded as a general revaluation of private international law in Europe.[97]

The frequent choice in favour of the Regulation may be drastic, but at the same time is understandable and, so it would seem, inevitable. After all, most

[92] Similarly, e.g., BASEDOW J. (note 64), p. 687, 706.

[93] Five Regulations have been enacted to date: the Brussels II Regulation (entry into force 1.3.2001); the Brussels I Regulation (entry into force 1.3.2002); Service of Documents Regulation (31.5.2001); the Insolvency Regulation (31.5.2002) and the Evidence Regulation (1.1.2004).

[94] See, e.g., Case 34/73 *Fratelli Variola* [1973], in: *ECR* 981 and more recently Case C-253/00 *Antonio Muñoz*, judgment of 17 September 2002. See also LAUWAARS R.H., 'Implementation of Regulations by National Measures', in: *Legal Issues of European Integration* (*LIEI*) 1983, p. 41.

[95] Which also emerges from, e.g., the Amsterdam Protocol on subsidiarity and proportionality: 'Other things being equal, directives should be preferred to regulations and framework directives to detailed measures' (point 6 of the Protocol).

[96] See, e.g., the Council *Resolution* of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes (*OJ* 2000 C 155/1) and the Proposal for a Council *Directive* to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid and other financial aspects of civil proceedings (COM (2002) 13 final).

[97] In the same vein, BOS T.M., 'De herwaardering van het internationaal privaatrecht in Europa', in: *Met recht verkregen* (note 12), pp. 29-42.

Article 65 decisions to date have dealt with jurisdiction and the mutual recognition and enforcement of judgments from courts in different Member States. A mainly speedy uniform regulation of these important areas of private international law will undoubtedly lead to a simplification of the handling of judicial matters within the Community area. The choice in favour of the furthest-reaching unifying EC instrument for issues of procedural law is not without consequence for the EC rules planned to regulate the conflict of laws.[98] To achieve the necessary *Gleichlauf*, the Regulation will also be used for these matters and in some cases the three core questions of private international law (mentioned earlier) will even be jointly regulated by the same Regulation.[99]

The inevitable divergence caused by transposing European rules into national legislation therefore often renders the instrument of the *Directive* less suitable. The preamble to the Insolvency Regulation, for example, states: 'In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Community law measure which is binding and directly applicable in Member States.'[100]

Although the institutions enjoy a large measure of freedom, they must nevertheless restrict themselves to the first EC pillar in their choice of a specific legal instrument, due to the fact that European private international law was transferred from the earlier Justice and Home Affairs pillar to the current EC pillar. As a result of this change, some former JHA decisions had to be split up, as it were. The Grotius programme, for example, initially involved the exchange of all types of legal professionals, both in the field of private and of criminal law. In the period between Maastricht and Amsterdam this decision could still be based in its entirety on the Justice and Home Affairs pillar.[101] After the transfer of private law – but not of criminal law – this decision had to be separated into a Regulation concerning the private law component and a third pillar (Police and Judicial Co-operation) decision for criminal law professionals.[102] A comparable need for a division into a

[98] See DE BOER Th. M., 'Prospects for European Conflicts Law in the Twenty-first Century', in: *International Conflicts of Laws for the Third Millennium – Liber Amicorum Fritz Jünger*, Deventer 2001, pp. 193-213.

[99] This choice will be possible in the fields of matrimonial property law and inheritance law. Another option is to extend application of Brussels I or Brussels II to problems of international procedural law in these fields.

[100] Eighth consideration of the Preamble to Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings (*OJ* 2000 L 160/1).

[101] Joint Action of 28 October 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on a programme of incentives and exchanges for legal practitioners ('Grotius') 96/636/JHA (*OJ* 1996, L287/3).

[102] Council Regulation (EC) No. 290/2001 of 12 February 2001 extending the programme of incentives and exchanges for legal practitioners in the area of civil law (Grotius

private law and a criminal law component can be found in the rules on the European judicial networks: a Police and Judicial Co-operation decision in the field of criminal law and an EC decision in the field of private law.[103]

C. Territorial Scope of Application of Private International Law Decisions

Community decisions that can be considered part of private law, but are not based on Title IV (and therefore usually concern *substantive* European private law, such as the Directive concerning late payment in commercial transactions or the numerous decisions on consumer protection) in principle simply apply in and to all fifteen Member States. This is different in respect of decisions formally based on Title IV of the EC Treaty, and therefore also in respect of private international law measures based on Article 65 EC.

This is because the logical complement to the previously mentioned 'special' position of the United Kingdom, Ireland and Denmark during the decision-making stage is that decisions based on Title IV, once adopted, in principle do *not* apply to these three Member States. The two Protocols concerning these three Member States make this clear, as does Article 69 EC of Title IV itself. The UK/Ireland Protocol, for instance, provides that none of the provisions of Title IV, no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Community pursuant to that Title,[104] and no decision of the Court of Justice interpreting any such provision or measure shall be *binding upon or applicable in* the United Kingdom and Ireland. The UK/Ireland Protocol (in its Article 3), however, leaves the possibility open for the Member States in question to still become a 'party' to any Title IV decision on a case-by-case basis. If they choose to join the majority according to a specific procedure and within a fixed time, the decision will apply to them as well.

The Denmark Protocol, on the contrary, does not contain this opportunity to opt-in on an ad-hoc basis and beforehand. The Danish can only subsequently decide that they wish to be bound, after the adoption of the definitive regulation or directive. In that case an 'ordinary' public international law relationship is created between Denmark and the other Member States. It is, however, doubtful whether this possibility to opt-in subsequently is actually relevant for European private

civil) (*OJ* 2001, L43/1) and Council Decision of 28 June 2001 establishing a second phase of the programme of incentives and exchanges, training and cooperation for legal practitioners (Grotius II criminal) 2001/512/JHA (*OJ* 2001, L43/1), based on Articles 31 and 34(2)(c) of the EU Treaty.

[103] As for the private law component, see Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters (*OJ* 2001 L 174/25).

[104] See also section 3.2.

international law, as it seems to be limited to further building upon the so-called Schengen *acquis*.[105]

In all cases it is necessary to separately examine Article 65 decisions as to whether the British and/or Irish are in or out. As regards the Regulation concerning jurisdiction and enforcement, for example, the UK and Ireland have decided to be bound, thus rendering the Regulation equally applicable to these Member States. The same is true in regard to the Brussels II Regulation, the Service of Documents Regulation, the Insolvency Regulation and the Evidence Regulation. Denmark, on the contrary, does not participate at all. This means that, in relations with Denmark, the 1968 Brussels Convention and its 1971 Protocol remain in force.[106] The precise implications of this situation still need to emerge more clearly from the future case law of the European Court of Justice. What is already clear, though, is that this example of jurisdiction and enforcement is a striking illustration of the obscure and to the citizen totally incomprehensible Euro-legislation resulting from the European phenomenon of 'flexibility'.[107]

[105] See Article 5(1) of the Denmark Protocol (which only mentions the possibility of implementing proposals and initiatives 'to build upon the Schengen *acquis*' under the provisions of Title IV in Danish law).

[106] See considerations 20-22 of the Preamble to Council Regulation 44/2001/EC on jurisdiction and enforcement (*OJ* 2001 L 12/1): 'The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation. Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application. Since the Brussels Convention remains in force in relations between Denmark and the Member States that are bound by this Regulation, both the Convention and the 1971 Protocol *continue to apply* between Denmark and the Member States bound by this Regulation.'

[107] Even though discussions of flexibility often tend to take a positive sympathetic point of view. On closer co-operation, e.g., HOFMANN R., 'Wieviel Flexibilität für welches Europa?', in: *EuR* 1999, pp. 713-735; PHILLIPAERT E./ SIE DHIAN HO M., *The Pros and Cons of 'Closer Co-operation' within the EU. Argumentation and Recommendations*, WRR Working Documents No. W104, The Hague 2000; CURTIN D., 'The Shaping of a European Constitution and the 1996 IGC: 'Flexibility' as a Key Paradigm?', in: *Aussenwirtschaft* 1995, p. 237.

V. Judicial Protection before the National Courts and the EC Court

The fact that private international law is now in the first pillar of the European Union means that separate Protocols concerning the EC Court's jurisdiction are no longer necessary. The Protocol concerning the Court's jurisdiction to the Brussels Convention on jurisdiction and enforcement was consequently repealed by the *Regulation* on jurisdiction and enforcement, although it was still necessary for the Regulation to provide a number of transitional measures, especially given the exceptional position of Denmark.[108]

Now, in the post-Amsterdam era, the usual provisions of the EC Treaty on jurisdiction and judicial proceedings before the EC Court apply to Article 65 EC and the secondary Community legislation based on this Article. We therefore believe that it is possible, for example, to bring an action for annulment against a regulation based on Article 65 EC, requesting the Court to declare it void pursuant to the procedure set out in Article 230 EC. In such cases, proceedings should be instituted before the Court of Justice (or the Court of First Instance) within two months of the publication of the measure.[109] It is, however, doubtful whether the Member States that are not bound by legislation pursuant to Title IV would be able to bring such an action for annulment against private international law decisions (or, in fact, decisions concerning asylum/immigration) when the EC decision in question does not bind them and they need not carry it out within their national legal order.[110]

In any event, it is quite clear that a special regime applies to *references for preliminary rulings*. In regard to asylum and immigration issues, the drafters of the Treaty of Amsterdam wished to restrict the circle of courts that are permitted to refer preliminary questions to the Court. In particular, the large numbers of judges

[108] See especially considerations 19 and 22 of the Preamble to Council Regulation 44/2001/EC on jurisdiction and enforcement (*OJ* 2001 L 12/1). See section 4.3 on Denmark's exceptional position in relation to Title IV.

[109] For private individuals this would mean an action for annulment before the Court of First Instance (Article 230, fourth paragraph, EC), which must of course first be declared admissible, in particular in the case of Regulations and Directives. After the surprising but brave interpretation by the Court of First Instance in *Jégo-Quéré* of the term *individual concern*, this has become markedly easier for private individuals (Case T-177/01, judgment of 3 May 2002). Subsequently the CFI, however, came under heavy fire, see Case C-50/00 *UPA v. Council* (judgment of the Court of Justice of 25 July 2002) and the appeal Case C-263/02 P, *Jégo-Quéré* (*OJ* 2002 C 233/14, still pending).

[110] The Protocols concerning Denmark/UK and Ireland, however, do not include any express provisions with respect to this question. Matters become even more complicated when Danish, British or Irish private individuals/companies wish to institute proceedings under Article 230(4) EC.

in interlocutory asylum proceedings needed to be excluded. As a result, Article 68(1) EC provides a special procedure for preliminary rulings. Only the highest judicial instances in the Member States are entitled to, and indeed obliged to, refer matters concerning the interpretation of primary or secondary Title IV law or the validity of decisions based on this Title for a preliminary ruling whenever they deem a decision of the ECJ on such a matter necessary to give final judgment in a particular case.[111]

This preliminary reference procedure of Article 68 EC in its 'stripped' form also applies in its entirety to preliminary questions concerning the interpretation of Article 65 EC and to questions concerning the interpretation or validity of secondary legislation under this legal basis (such as the private international law Regulations mentioned previously). The reason for this is that Article 65 EC is an integral part of Title IV and the procedure for preliminary questions of Article 68 EC applies to the Title as a whole.

Only the *highest* national courts are therefore permitted/obliged to refer matters concerning private international law legislation pursuant to Title IV for a preliminary ruling. Lower Member State courts – there is still a judicial remedy under national law against their decisions – are excluded from the regime. As regards matters formerly regulated exclusively by the 1968 Brussels Convention, 'conversion' into a Title IV EC Regulation has even resulted in *reduced* possibilities for the legal protection of private individuals, compared to those that existed under the Protocol to the Convention. Based on this Protocol of 3 June 1971, *courts of appeal* were authorized to refer preliminary questions concerning the interpretation of the Brussels Convention. In addition, specifically indicated courts of the highest instance were obliged to refer preliminary questions.[112] What remains under Article 68 EC is the authorization to refer preliminary questions, which is at the same time an obligation, for the supreme courts of the Member States. The possibility for appellate courts to refer matters has thereby been repealed, as evidenced by the total and general exclusion of lower courts in Article 68 EC. As regards national courts of first instance, there has been no change: they still cannot ask the ECJ for guidance when interpreting the Brussels Convention/Regulation.[113]

On the other hand, the Court may now – as briefly indicated above – also give preliminary rulings on the *validity* of the Regulation on jurisdiction and enforcement, a competence that the Court previously lacked when the substantive legal rules were virtually the same, but still laid down in the Convention on

[111] See Article 68(1) EC. See, e.g., ALBORS-LLORENS A., 'Changes in the Jurisdiction of the European Court of Justice under the Treaty of Amsterdam', in: *CML Rev.* 1998, pp. 1273-1294; FENELLY N., 'The Area of 'Freedom, Security and Justice' and the European Court of Justice – A Personal View', in: *ICLQ* 2000, pp. 1-14.

[112] See Articles 2 and 3 of the 1971 Protocol to the 1968 Brussels Convention.

[113] See also VLAS P., 'Herziening EEX: van verdrag naar verordening', in: *WPNR* 2000, pp. 745, 747; BASEDOW J., 'Die Harmonisierung des Kollisionsrechts nach dem Vertrag von Amsterdam', in: *EuZW* 1997, p. 609.

jurisdiction and enforcement. Another difference is that the highest judicial instances are no longer specifically named, (as was the case in the Protocol to the Brussels Convention), thus conferring a duty also on the highest administrative courts and the highest criminal courts to refer matters to the EC Court in cases where the interpretation/validity of the Regulation concerning jurisdiction and enforcement is necessary to deliver a final judgment.

The restriction of preliminary rulings to the highest courts in civil matters takes on an even stranger aspect in light of the recently introduced possibility to obtain a preliminary ruling from the Court within a very short period of time. To this end, the referring national court has to request a speedy decision and the President of the Court must decide the request favourably and speed up the matter.[114] The underlying reason for introducing this accelerated procedure for preliminary rulings was the conversion of Brussels II into a Title IV Regulation.[115] In the interest of the minors involved (and their divorced parents), courts from the Member States should be able to obtain a ruling from the EC Court in a short time. However, in our opinion, Article 68 EC diametrically opposes this reasoning: lower courts are unable to obtain a speedy preliminary ruling because they are not authorised to request a ruling to begin with. Therefore, the possibility to apply for an accelerated preliminary ruling does not arise until cases have reached the highest courts in the Member States, including 'Brussels II cases' on family matters.[116]

The special rule of Article 68(3) EC does not seem to have been written especially for European private international law either, although it affects this field of law. The Council, the Commission or a Member State may request the Court to give a ruling on a question of interpretation of Title IV or of Community acts of the institutions based on this Title. The ruling given by the Court of Justice in response to such a request does not apply to judgments of national courts that have become *res judicata*.

VI. Concluding Remarks

European legislation in the field of private international law is new, both for lawyers trained in European law and for private international law experts. Apart

[114] See Article 104 bis of the Rules of Procedure.

[115] Cf., e.g., the former Dutch judge at the ECJ, KAPTEYN P.J.G., 'Om het behoud van een goed werkend systeem van prejudiciële verwijzingen', in: *SEW* 1999, pp. 282, 284.

[116] As has already been observed, the once minors – for whose benefit the accelerated procedure for obtaining a preliminary ruling was intended – could by then well have underage children of their own. Cf. MORTELMANS K./ VAN OOIK R. in their annotation to the *Jippes* Case (C-189/01 [2001] I-5689, in: *Ars Aequi* 2001, pp. 911, 917), which was the first example of the application of the accelerated procedure.

from a number of Regulations concerning mutual legal assistance, the content of the Brussels legislation is limited to the traditional problems of private international law, although the instruments to be employed have been tailored in accordance with European law. After the Treaty of Amsterdam, both disciplines have strongly come to depend on one another.[117] European law is now also private international law, and private international law is also European law.

This interconnectedness will only increase in coming years, given the fact that a general Community framework has been established to facilitate the implementation of European judicial co-operation in civil matters for the period from 2002 to 2007 (in which Denmark will not participate).[118] This general framework boasts a great many ambitious objectives, in particular: ensuring legal certainty and improving access to justice; promoting mutual recognition of judicial decisions and judgments; promoting the necessary approximation of legislation; eliminating obstacles created by disparities in civil law and civil procedures; improving mutual knowledge of Member States' legal and judicial systems in civil matters; ensuring the sound implementation and application of Community instruments in the area of judicial cooperation in civil matters; and improving information to the public on access to justice, judicial cooperation and the legal systems of the Member States in civil matters.[119]

Although the term *European private international law* may appear to have become familiar, it is not entirely correct. The terms *international* and *European* do not cover the exact same territory. In relations with non-Member States of the EU, private international law is either not, not yet or not yet completely determined in Brussels. In the territory of the EU, the divergence and sheer number of private international law measures available is continually increasing. Joining together the entire structure of rules in a single inter-regional code would do justice to the much-needed orderly arrangement required in daily practice. After all, in addition to the conventions in the field of private international law, all the EU Member States still have their national rules of private international law, which, however, are being increasingly set aside by European Regulations concerning private international law. Problems involving transition law[120] and issues concerning the concurrence of different sources of law will have to be resolved. The implementation

[117] See also REMIEN O., 'European Private International Law, the European Community and its Emerging Area of Freedom, Security and Justice', in: *CML Review* 2001, p. 86: 'Community law and conflict of laws still have difficulty in encountering each other, but their symbiosis is called for in Europe.'

[118] See Council Regulation (EC) No. 743/2002 of 25 April 2002 establishing a general Community framework of activities to facilitate the implementation of judicial cooperation in civil matters (*OJ* 2002 L 115/1).

[119] Articles 1 and 2 of Regulation 743/2002/EC.

[120] See, e.g., VLAS P., 'De EEX-Verordening en het overgangsrecht', in: *Met recht verkregen* (note 12), pp. 235-250.

of the Vienna Plan of Action will eventually have to result, in our view, in a single *inter-regional legal arrangement* to cover every private law legal relationship within the Member States of the EU. The extent to which this Community arrangement should serve as an example in relations with non-Member States depends on several factors, whereby, among other things, the advantages of the global unification of private international law as pursued by the Hague Conference on Private International law should not be underestimated. Either way, the idea of creating a single Code of European Private International Law is definitely on the agenda.

PRIVATE INTERNATIONAL LAW IN THE EUROPEAN UNION AND THE EXCEPTION OF MUTUAL RECOGNITION

Marc FALLON[*] and Johan MEEUSEN[**]

[*] Professor at the *Université catholique* of Louvain.

[**] Professor at the University of Antwerpen.

Yearbook of Private International Law, Volume 4 (2002), pp. 37-66
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

I. Introduction: European Private International Law in the Making

The private international law systems of the EU Member States have changed gradually but profoundly over the past fifteen years. From national sets of rules, with some international (e.g., the Hague Conventions) and a few European elements (e.g., the Brussels Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations), they have evolved into systems with an essentially European content. Although various factors have contributed to this evolution, the growing concern and sensitivity shown by the European legislator and judges for the impact of EC law on private law should not be underestimated. Not only the Member States as such (see the Brussels and Rome Conventions) and the Community legislator (see, e.g., recent directives on consumer protection[1]), but also the Court of Justice have demonstrated their awareness of how private international law rules may have both a negative and a positive impact on the successful development of the internal market.

This ongoing process, which is directly connected with the growing interest in European private law, culminated in an express Community competence relating to private international law, introduced by the Treaty of Amsterdam. Article 61(c) EC Treaty provides that, in order to establish progressively an area of freedom, security and justice, the Council shall adopt measures in the field of judicial cooperation in civil matters, as provided in Article 65, which reads as follows:

Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include:

a) improving and simplifying:
   - the system for cross-border service of judicial and extrajudicial documents;
   - cooperation in the taking of evidence;
   - the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;

[1] E.g., Art. 6(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, in: *OJ* , 21 April 1993, L 95, p. 29, Art. 12(2) of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, in: *OJ*, 20 May 1997, L 144, p. 19 and Art. 7 (2) of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, in: *OJ*, 7 July 1999, p. 12.

b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;

c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

These new and important, though not uncontroversial, competences were quickly used by the Commission and Council to transform existing international treaties into Community instruments and to adopt new legislation on private international law to be applied in the institutional framework of the new Title IV of Part III of the Treaty on 'Visas, asylum, immigration and other policies related to free movement of persons'.[2] We are now witnessing a process of European private international law in the making, as the application of the above-mentioned Treaty provisions to new fields (e.g., torts, the so-called Rome II project) provokes considerable discussion and uncertainty as to the correct interpretation of the new competences and policy orientations of a (future) Community choice-of-law system.

Legal scholarship has also discovered this new topic, raising issues not yet dealt with by the Court of Justice, or (adequately) by the Treaty or the Community legislator. One of these issues is whether the obligation of mutual recognition, which the Court of Justice regards as governing free movement in the EC, incorporates a hidden choice-of-law rule. This raises the difficult and still intensely debated question whether Community rules on the free movement of goods, persons, services and capital come into play when determining the law applicable to cross-border transactions and, if so, to what extent. Obviously, this issue is of great importance for both the Member States and the Community authorities, as it influences the conformity of the conflicts rules currently in force in the Member States (increasingly in the form of a codification) and the legality of the adoption of new Community choice-of-law rules.

Attempting to clarify the relationship between the conflict of laws and EC free movement law, this text focuses on the free movement of goods and services and, in particular, on the effect of the well-known rule of mutual recognition. It

[2] Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, in: *OJ*, 30 June 2000, L 160, p. 1; Council Regulation (EC) No. 1347/2000 of 29 May 2000 on the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, in: *OJ*, 30 June 2000, L 160, p. 19; Council Regulation (EC) No. 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters, in: *OJ*, 30 June 2000, L 160, p. 37; Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in: *OJ*, 16 January 2001, L 12, p. 1; Council Regulation (EC) No. 1206/01 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, in: *OJ*, 27 June 2001, L 174, p. 1.

will be submitted that, while mutual recognition does not hide a choice-of-law rule systematically designating the law of the country of origin, it does intervene functionally with the choice-of-law process, influencing the application of the law designated by the choice-of-law rules. This effect is essentially negative, and thus it is referred to as the exception of mutual recognition.

II. Private International Law and Mutual Recognition: Two Ways of Delimiting Conflicting Legal Systems

A. Introduction

The recent attention given to the conflict of laws and EC law (especially the rule on mutual recognition) should not be surprising. Situations and transactions with foreign elements – the core subject of private international law – are also of prime importance for Community free movement law. The EC Treaty aims to achieve unhindered movement of production factors between the Member States. Pursuant to Article 14(2) of the Treaty, the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty. Thus free movement in the Community refers essentially to cross-border economic activities. According to the Court of Justice's well-established case law, the Treaty's free movement provisions cannot be relied on in purely internal situations, i.e., where all relevant aspects of an economic activity occur within one Member State.[3]

In transnational situations, both private international law and Community law have the function of delimiting conflicting legal systems. This is evident in private international law because of the function of the traditional multilateral choice-of-law rules. In addition, unilateral conflicts rules, such as mandatory rules that unilaterally define their own scope of application, attempt to prevent the application of alternative foreign rules by imposing their own application. As for Community law, the following observations shed light on its delimiting function.

[3] KAPTEYN P.J.G. and VERLOREN VAN THEMAAT P., *Introduction to the Law of the European Communities*, London (Kluwer Law International) 1998 (3rd ed., edited and further revised by L.W. GORMLEY), p. 581. See, however, the nuances to this domestic situations doctrine in the Court's judgments on the free movement of goods (judgments of 7 May 1997, joined cases C-321-324/94, *Pistre e.a.*, in: *ECR* 1997, I-2343 and of 5 December 2000, case C-448/98, *Guimont*, in: *ECR* 2000, I-10663).

B. Free Movement of Goods and the Test of Equivalence

In *Dassonville*, the Court of Justice defined 'measures having an effect equivalent to quantitative restrictions' (Art. 28 EC Treaty) as all trading rules enacted by Member States capable of hindering, directly or indirectly, actually or potentially, intra-Community trade.[4] Based on this broad definition, the Court need not limit the prohibition of measures having an effect equivalent to measures that formally discriminate between domestic and imported products. As developed by the Court of Justice, the obligation of mutual recognition relates precisely to indistinctly applicable rules.

In the absence of Community harmonization, economic activities are governed by uncoordinated national legal norms, thus running the risk of imposing a double burden on economic actors involved in transnational activities. Requiring them to comply with laws of both import and export countries, which are substantially different, puts them at a disadvantage compared to market participants involved in domestic activities only. As developed by the Court of Justice since the late seventies, the obligation of mutual recognition attempts to eliminate this competitive disadvantage. Traditionally, the obligation of mutual recognition is said to have been introduced in the famous *Cassis de Dijon* judgment, where the Court ruled that the concept of 'measures having an effect equivalent to quantitative restrictions on imports' is to be interpreted as meaning that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a Member State falls under the prohibition of Article 28 (then: 30) EC Treaty in cases involving the import of alcoholic beverages lawfully produced and marketed in another Member State.[5] In retrospect, however, the main contribution of *Cassis de Dijon* in this respect was the introduction of the requirement of lawful production and marketing in the country of origin. In fact, as expressly confirmed in later judgments,[6] the criterion of equivalence was first introduced in the Court's *Biologische Producten* judgment of 17 December 1981.[7] The barrier to intra-Community trade does not arise as a result of the

[4] European Court of Justice (E.C.J.), 11 July 1974, case 8/74, *Dassonville*, in: *ECR* 1974, 837, para. 5.

[5] E.C.J., 20 February 1979, case 120/78, *Rewe-Zentral*, in: *ECR* 1979, 649, para. 8.

[6] See e.g. ECJ, 28 January 1986, *Commission v. French Republic*, case 188/84, in: *ECR* 1986, 419, para. 16; E.C.J., 11 May 1989, case 25/88, *Bouchara*, in: *ECR* 1989, 1105, paras. 18-20.

[7] E.C.J., 17 December 1981, case 272/80, *Criminal proceedings against Frans-Nederlandse Maatschappij voor Biologische Producten BV*, in: *ECR* 1981, 3277, paras. 14-16. In *Cassis de Dijon* itself, the Court held the application of German legislation to the import of French liquor unacceptable, not because equivalent norms existed in France, but because the alternative requirements of interchangeability and aptitude were fulfilled and the application of German law would have been disproportionate with respect to the policy goals.

discriminatory nature of any law, but is due to the cumulative application of the indistinctly applicable rules of both export and import States deemed to be equivalent in substance. Such cumulative application obviously imposes a considerably greater burden on the importer than on domestic actors, one that can be eliminated by recognizing that the importer has already complied with equivalent rules in the Member State of origin. This approach is based on what the Court calls the principle of mutual trust between the authorities of the Member States.[8]

This test of equivalence clearly involves the principle of proportionality, one of the general principles of Community law. When the requirements laid down in the relevant legislation of the States of origin and of destination are deemed sufficiently equivalent, i.e., the application of both suffices to achieve the policy goal set forward and justified under Community law, it is no longer necessary and would breach the proportionality requirement to apply the law of the State of destination. The fact that the product or service at issue complies with the legislation of the State of destination must be deemed sufficient.

Equivalence implies sufficient convergence between both of the laws involved. The similarities may occur by chance or as a result of the incorporation of (even minimally) harmonizing norms developed in the context of Community law.

C. Extension of Mutual Recognition to the Other Freedoms

The Court of Justice gradually extended the obligation of mutual recognition to the other freedoms. In regard to services, the Court ruled in its 1991 *Säger* judgment that Article 49 (then: 59) of the EC Treaty

> 'requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services'.[9]

The Court later ruled in *Kohll* that Article 49 (then: 59) of the Treaty precludes the application of any national rule that makes the provision of services between Member States more difficult than the provision of services within one Member State.[10]

[8] E.C.J., 11 May 1989, case 25/88, *Bouchara*, in: *ECR* 1989, 1105, para. 18.

[9] E.C.J., 25 July 1991, case C-76/90, *Säger*, in: *ECR* 1991, I-4221, para. 12.

[10] E.C.J., 28 April 1998, case C-158/96, *Kohll*, in: *ECR* 1998, I-1931, para. 33.

The same reasoning was used earlier in the *German Insurance* judgment of 4 December 1986, which is of interest for civil law issues.[11] The action concerned the declaration that several Member States had failed to comply with Article 49 (then: 59) EC Treaty in respect of the requirement that every national or foreign undertaking must have a permanent establishment and authorization in the State where the service is provided. The Court admitted that such national 'mandatory rules' relating to the conditions of insurance (§ 32) may be inspired by 'imperative reasons relating to the public interest', namely consumer protection, thus justifying restrictions, provided that 'the rules of the State of establishment are not adequate in order to achieve the necessary level of protection and that the requirements of the State in which the service is provided do not exceed what is necessary in that respect' (§ 33). Further, it emphasized that the requirement to obtain an authorization in the State of performance 'may not duplicate equivalent statutory conditions which have already been satisfied in the State in which the undertaking is established' (§ 47).

D. The *Keck* Exception and the Rule of Reason

The broad interpretation of the Treaty rules on free movement as incorporating indistinctly applicable rules has been delimited by two doctrines developed by the Court of Justice: the so-called *Keck* exception for the free movement of goods and the rule of reason for all freedoms.

Contrary to its earlier stand, the Court ruled in its 1993 *Keck and Mithouard* judgment that, if national provisions restricting or prohibiting certain selling arrangements are applied to products from other Member States, this does not hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment, provided that those provisions apply to all relevant traders operating within the national territory and that the marketing of domestic products and products from other Member States are affected in the same manner, in law and in fact. The Court found that, provided those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State does not prevent their access to the market nor does impede access any more than it impedes the access of domestic products. Thus the Court concluded that such rules do not fall under Article 28 (then: 30) EC Treaty.[12] In later judgments, the Court of Justice refused to apply the *Keck* exception to national provisions that directly affect access to the market in services and the employment market in other

[11] E.C.J., case 205/84, *Commission v. Germany*, in: *ECR* 1986, 3755.

[12] E.C.J., 24 November 1993, joined cases C-267/91 and C-268/91, *Criminal proceedings against Keck and Mithouard*, in: *ECR* 1993, I-6907, paras. 16-17.

Member States.[13] Moreover, in more recent judgments, the Court no longer focuses on the distinction between product requirements and selling arrangements, which is not always clear. Instead, emphasis has been shifted to the question whether the disputed measure impedes the access of products from other Member States more so than domestic products.[14]

The rule of reason is the second mechanism developed by the Court of Justice to allow the application of indistinctly applicable rules in certain circumstances. Although the Court already hinted at this exception in *Dassonville*[15] and *Van Binsbergen*,[16] it is traditionally affirmed that the rule of reason was fully developed in the *Cassis de Dijon* judgment, as a result of which it is called the *Cassis de Dijon* exception. In *Cassis de Dijon*, the Court maintained that obstacles to movement within the Community resulting from disparities between national laws relating to the marketing of the products in question must be accepted, provided those provisions may be recognized as being necessary to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.[17] Thereafter, the Court applied the same rule of reason to the free movement of services in the *German Insurance* case[18] and in the *Säger* judgment mentioned above.[19] Later the Court generalized the rule of reason as an exception mechanism applicable to the four Community freedoms by stipulating four conditions. Accordingly, national measures liable to hinder or make the exercise of fundamental freedoms guaranteed by the Treaty less attractive must be applied in a non-discriminatory manner; they must be justified by mandatory requirements in the general interest; they must be suitable for securing the attainment of the objective pursued; and they must not exceed the measures deemed necessary to attain it.[20] Thus the examination of the non-discriminatory restrictions of intra-Community trade essentially becomes a test of proportionality, checking the extent to which the application of the law of the Member State of destination is still

[13] E.C.J., 10 May 1995, case C-384/93, *Alpine Investments*, in: *ECR* 1995, I-1141, para. 37; E.C.J., 15 December 1995, case C-415/93, *Bosman*, in: *ECR* 1995, I-4921, para. 103.

[14] E.C.J., 13 January 2000, case C-254/98, *TK-Heimdienst Sass GmbH*, in: *ECR* 2000, I-151; E.C.J., 8 March 2001, Case C-405/98, *Gourmet*, in: *ECR* 2001, I-1795.

[15] E.C.J., 11 July 1974, case 8/74, *Dassonville*, in: *ECR* 1974, 837, para. 6.

[16] E.C.J., 3 December 1974, case 33/74, *Van Binsbergen*, in: *ECR* 1974, 1299, paras. 12-16.

[17] E.C.J., 20 February 1979, case 120/78, *Rewe-Zentral*, in: *ECR* 1979, 649, para. 8.

[18] E.C.J., 4 December 1986, case 205/84, *Commission v. Federal Republic of Germany*, in: *ECR* 1986, paras. 27-29.

[19] E.C.J., 25 July 1991, case C-76/90, *Säger*, in: *ECR* 1991, I-4221, para. 15.

[20] E.C.J., 30 November 1995, case C-55/94, *Gebhard*, in: *ECR* 1995, I-4165.

necessary, taking into account the legitimate and reasonable requirements contained in the law of the Member State of origin.

E. Mutual Recognition as a Conflicts Mechanism

Disparities in the laws of Member States create barriers to intra-Community trade as a result of the unrestricted application of similar and equivalent legislation in the Member States concerned. As such, the legislation does not violate Community law; however, problems arise when it is applied to all economic actors without taking account of the existence and application of legislation of other States enacted to achieve similar policy goals. The rule of mutual recognition helps to avoid imposing a double burden on economic actors in transnational activities. Although the Court of Justice[21] has refused to consider the rule of home State supervision as a principle laid down by the Treaty, its judgments in *Cassis de Dijon*, *Biologische Producten* and other cases cited above show that Member States must trust and thus recognize legislation enacted by other Member States. One striking example is its recent ruling against France, which was found to have breached Community law by not incorporating in its Decree No 93-999 of 9 August 1993, relating to preparations with *foie gras* as a base, a mutual recognition clause for products originating in another Member State that comply with the national rules in force in that State.[22]

The rule of mutual recognition is essentially a conflicts mechanism intended to promote the functioning of the internal market. From the perspective of free movement within the Community, it constitutes the basis for making decisions on the application of national legislation to cross-border economic activities.[23] Mutual recognition entails determining whether and to what extent effect can be granted to foreign legislation on the territory of another State.[24] Such conflict of laws characterization is normal in an internal market where economic agents act in a

[21] E.C.J., 13 May 1997, case C-233/94, *Federal Republic of Germany v. European Parliament and Council of the European Union*, in: *ECR* 1997, I-2405, para. 64.

[22] E.C.J., 22 October 1998, case C-184/96, *Commission v. French Republic*, in: *ECR* 1998, I-6197.

[23] BASEDOW J., 'Der kollisionsrechtliche Gehalt der Produktfreiheiten im europäischen Binnenmarkt: *favor offerentis*', in: *RabelsZ.* 1995, p. 4; BERNHARD P., 'Cassis de Dijon und Kollisionsrecht – am Beispiel des unlauteren Wettbewerbs', in: *Europäische Zeitschrift für Wirtschaftsrecht* (*EuZW*) 1992, p. 437; FALLON M., 'Les conflits de lois et de juridictions dans un espace économique intégré. L'expérience de la Communauté européenne', in: *Recueil des Cours*, Vol. 253, 1995, p. 146.

[24] BASEDOW J. (note 23), p. 4.

legal environment involving multiple national legal systems and where complete harmonization or unification is illusory.[25]

From this point of view, it is not surprising that mutual recognition in the EC is also examined from the perspective of private international law, although the policy backgrounds of Community law and private international law differ considerably. The purpose of the latter is to resolve conflicts between divergent substantive rules of national laws; a choice must be made because the cumulative application of the national rules of both States is often impossible. On the contrary, Community law aims at avoiding unnecessary, even protectionist charges against an economic activity due to the cumulative application of equivalent legislation.

III. Private Law and Free Movement

A. Private Law as a Barrier to Intra-Community Trade?

The difference in policy perspectives mentioned above explains why the parallelism between Community law and private international law escaped public and scholarly attention for such a long time. However, there is probably another reason as well. Traditionally, Community free movement law focused on the elimination of barriers to intra-Community trade resulting from the application of economic public or administrative law (requirements relating to product contents, establishment, licenses etc.).[26] Gradually, the suspicion arose that it shouldn't be excluded that such barriers also result from the cumulative application of private law rules of the Member States.[27] One obvious example is the regulation of the rights and obligations of the parties to a contract involving transnational goods or services; disparities as to the liability of sellers can also affect the export of goods and services to other Member States. In *Alsthom Atlantique*, for example, the Court examined whether the French doctrine on strict liability of the vendor for latent

[25] BERNARD N., 'La libre circulation des marchandises, des personnes et des services dans le Traité CE sous l'angle de la compétence', in: *Cahiers de droit européen* (*C.D.E.*) 1998, p. 33, who analyzes the *Keck*-exception on the basis of a classical conflict of laws approach where the law of the country of origin applies to product requirements and the law of the country of destination to selling arrangements. That 'choice-of-law rule' is interpreted as the application of the guiding principle that every State should apply its own law to the activities undertaken on its territory (*Ibid.*, 33-36).

[26] See also RADICATI DI BROZOLO L.G., 'L'influence sur les conflits de lois des principes de droit communautaire en matière de liberté de circulation', in: *Rev. crit. dr. int. priv.* 1993, p. 407.

[27] See the resolutions of the European Parliament of 1989, 1994 and 2001 on harmonization of private law (*OJ*, 26 June 1989, C 158, 400; *OJ*, 25 July 1994, C 205, 518; *OJ*, 13 June 2002, C 140 E, 538).

defects, as developed by the *Cour de cassation* on the basis of Article 1643 of the French Civil Code,[28] conforms to Article 29 (then: 34) EC Treaty. Furthermore, if a Member State applies strict rules on tort liability to the effects of an illegal advertising campaign, this could stop foreign traders from offering their goods or services in that State.

The fact that Community law has supremacy over national law,[29] regardless of its status[30] or nature,[31] leads to the conclusion that the application of national private law, including private international law, must also be examined as to its conformity with Community law.[32] The *Dassonville* formula is sufficiently broad to include barriers arising from the application of private law. Yet, the Court's case law is remarkably scarce in this regard. The most telling judgment to date is perhaps *Alsthom Atlantique*, mentioned above, in which the Court demonstrated its willingness to examine private law with regard to the free movement of goods. However, some other judgments can also be mentioned, where the Court appears to have made it clear that, in certain circumstances, the application of national private law rules by the Member States can violate the freedom of movement in the EC.[33]

B. The Debate Continues…

The EC Treaty contains no indication that private law barriers to intra-Community trade are subject to special treatment. Nonetheless, WILDERSPIN and LEWIS submit that private law falls under the *Keck* exception described above, thus escaping the application of Articles 28 (and 49) EC Treaty.[34] The same authors also suggest that the potentially obstructing effects of the application of national rules, which neither hinder market access nor determine the substance of the service provided, and

[28] E.C.J., 24 January 1991, case C-339/89, *Alsthom Atlantique*, in: *ECR* 1991, I-107.

[29] E.C.J., 15 July 1964, case 6/64, *Costa v. E.N.E.L.*, in: *ECR* 1964, 585.

[30] E.C.J., 17 December 1970, case 11/70, *Internationale Handelsgesellschaft*, in: *ECR* 1970, 1125.

[31] E.C.J., 9 March 1978, case 106/77, *Simmenthal*, in: *ECR* 1978, 629.

[32] MARTINY D., 'Gemeinschaftsrecht, ordre public, zwingende Bestimmungen und Exclusivnormen', in: VON BAR Ch. (ed.), *Europäisches Gemeinschaftsrecht und internationales Privatrecht*, Köln (Carl Heymann) 1991, p. 213; STEINDORFF E., *EG-Vertrag und Privatrecht*, Baden-Baden (Nomos) 1996, pp. 57-58.

[33] In different fields of private law, see E.C.J., 30 April 1996, case C-214/94, *Boukhalfa*, in: *ECR* 1996, I-2253; E.C.J., 7 March 1990, case C-362/88, *GB-INNO-BM*, in: *ECR* 1990, I-667; E.C.J., 29 October 1980, case 22/80, *Boussac Saint-Frères*, in: *ECR* 1980, 3427; E.C.J., 24 October 1978, case 15/78, *Koestler*, in: *ECR* 1978, 1971 (also with the conclusion of Advocate-General Reischl, para. III).

[34] WILDERSPIN M. and LEWIS X., 'Les relations entre le droit communautaire et les règles de conflits de lois des Etats Membres', in: *Rev. crit. dr. int. priv.* 2002, p. 31.

which are relied on in transnational contractual or tort disputes, are too limited to breach the free movement rules of the Treaty.[35] In *CMC Motorradcenter*, the Court of Justice ruled that possible restrictive effects of the obligation imposed by German contract law to provide pre-contractual information on the free movement of goods were too uncertain and too indirect to warrant the conclusion that it is liable to hinder trade between Member States.[36] The Court appears to have applied this qualification especially to private law.[37] While it is obvious that a State's entire legal system influences the commercial opportunities and risks of economic actors active in that State, its impact is certainly not always that great. RADICATI DI BROZOLO cites national legislation relating to guarantees as an example: although a State's strict legislation may affect a trader's decision to become active on that State's territory, it is likely that the justifying requirements of protection of public interest and proportionality will be satisfied.[38] But for many rules which together constitute the legal context of a trader's activities, e.g. the national legislation on guarantees, it is more likely that their impact on intra-Community trade will be too uncertain and indirect to be obstructive.[39] This could be different in the field of immaterial services where the terms of the contract may be a part of the 'product' itself. For example, in the case of insurance contracts, the mere application of mandatory provisions of the law of the State in which the service is provided may compel the foreign insurer to modify the insurance conditions, thus requiring modification of the insurance contract.

C. No Exemption for Private Law

Nevertheless, one should not generalize. Regarding the Treaty provisions on free movement as fundamental Community provisions, the Court of Justice maintains that any restriction in the sense of the *Dassonville* judgment is prohibited.[40] Therefore, there is no reason to exempt private law as such from the free movement test, as shown by the Court's judgments cited above (subsect. A and B). While it is

[35] *Ibid.*, at 32.

[36] E.C.J., 13 October 1993, case C-93/92, *CMC Motorradcenter*, in: *ECR* 1993, I-5009, para. 12. In regard to the export of goods, see E.C.J., 22 June 1999, case C-412/97, ED, in: *ECR* 1999, I-3845.

[37] FALLON M., Comment of E.C.J., 23 November 1999, in: *Rev. crit. dr. int. priv.* 2000, p. 736.

[38] RADICATI DI BROZOLO L.G. (note 26), p. 420.

[39] Cf. VAN GERVEN W. and WOUTERS J., 'Free Movement of Financial Services and the European Contracts Convention', in: ANDENAS M. and KENYON-SLADE S. (eds.), *E.C. Financial Market Regulation and Company Law*, London (Sweet & Maxwell) 1993, p. 67.

[40] E.C.J., 13 December 1989, case C-49/89, *Corsica Ferries France*, in: *ECR* 1989, 4441, para. 8.

certainly true that private law can fall within the scope of the *Keck* exception and that the effects of its application can be too uncertain and indirect to constitute a barrier to intra-Community trade, a complete exemption would be excessive. Private law rules concerning the requirements for the valid conclusion of contracts for the sale of goods or services, or the obligations of the actors involved, have a direct effect on the conditions for production and marketing and hence on market access. Even under the reasoning in *Keck*, one could maintain that Article 28 EC Treaty may be applied whenever the substantive law of the State of marketing does not apply to all relevant traders operating within the national territory, if, due to the effect of the national choice-of-law rule of that State on contracts, the liability of a foreign, for example, French, seller is governed by its State of origin (by virtue of Article 4 of the Rome Convention of 19 June 1980), for instance, by French strict substantive rules.

This interpretation is confirmed by the frequent adoption of Community acts harmonizing Member State legislation relating to private law,[41] which appear to be valid in respect of both the subsidiarity principle and of the requirements put forward by the Court in the Tobacco directive case in respect of Article 95 EC Treaty, i.e., they genuinely have as their object the improvement of the conditions for the establishment of the internal market and in fact pursue that objective, and the distortion of competition which they purport to eliminate is appreciable[42]. Indeed, most of them intend to harmonize the content of the 'public interest' requirements, in so far as such requirements justify a restriction to trade.

Recent Court interpretations of secondary Community law point in the same direction. The best known recent case is probably *Ingmar*, in which the Court ruled that, as the purpose of Articles 17 to 19 of the Commercial Agents Directive 86/653/EEC is to protect freedom of establishment and the operation of undistorted competition in the internal market, these provisions must be applied where the situation is closely connected with the Community, in particular where the commercial agent carries on his activity in the territory of a Member State, irrespective of the law by which the parties intended the contract to be governed.[43] In *Leitner*, the Court ruled that the purpose of the Package Travel Directive 90/314/EEC is to eliminate disparities between the national laws and practices of the various Member States. More specifically, the existence in some Member States but not in others of an obligation to provide compensation for non-material damage would cause significant distortions of competition.[44]

[41] See the list at the website <www.drt.ucl.ac.be/gedip>.

[42] E.C.J., 5 October 2000, case C-376/98, *Federal Republic of Germany v. European Parliament and Council*, in: *ECR* 2000, I-8419, paras. 84-85 and 106.

[43] E.C.J., 9 November 2000, case C-381/98, *Ingmar*, in: *ECR* 2000, I-9305, paras. 24-25.

[44] E.C.J., 12 March 2002, Case C-168/00, *Leitner*, not yet reported, paras. 20-21.

Since the application of the rule of mutual recognition closely resembles a conflicts mechanism and that rule must also be applied to private law, it is not far-fetched to examine whether the obligation of mutual recognition must be interpreted as hiding a conflicts rule, more specifically, a choice-of-law rule designating the law of the Member State of origin.

IV. Mutual Recognition as a Hidden Choice-of-law Rule?

A. Distinction between Primary and Secondary Community Law

This contribution deals with the relationship between mutual recognition and choice of law with regard to primary Community law, more precisely, the Treaty provisions on free movement of goods and services. Of course, a similar question arises in respect of provisions of secondary Community law affirming the obligation of mutual recognition. A well-known example is the recent E-commerce directive.[45] Article 3 of this directive contains an internal market clause that some authors interpret as a choice-of-law reference to the Member State of origin, while others consider it neutral as to choice of law. When interpreting secondary Community law from this perspective, much depends on the policy goals pursued by the Community legislator, as well as on the text and scope of application of the rules at issue. The conclusions reached in this regard, i.e., the thesis we submitted that the E-commerce directive has a specific choice-of-law effect,[46] need not necessarily be transposed to the analysis of primary Community law. However, the conclusion that the free movement provisions of the Treaty should be considered as hiding a choice-of-law rule would, of course, also affect secondary Community law.

B. Discussions in Legal Scholarship: Status Quaestionis

Although many nuances exist, there are two radically opposed views on the choice-of-law effect of the rule of mutual recognition.[47]

[45] Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, in: *OJ*, 17 July 2000, L 178, 1.

[46] FALLON M. and MEEUSEN J., 'Le commerce électronique, la directive 2000/31/CE et le droit international privé', in: *Rev. crit. dr. int. priv*. 2002, pp. 435 ff.

[47] See the survey of relevant literature by GRANDPIERRE A., *Herkunftsprinzip kontra Marktortanknüpfung*, Frankfurt a.M. (Peter Lang) 1999, pp. 170-181.

One view holds that the Treaty free movement provisions do not incorporate a latent choice-of-law rule, thus presuming that the respective perspectives of Community law and conflicts law should be separate.[48] Proponents of this view maintain that the rule of mutual recognition is applied only as a test of the obstructing effects of the substantive law designated by the choice-of-law rule and thus considered applicable to the legal issue concerned. Of course, the Member State's private international law rules will often lead to the application of the law of the country of origin, for example, under Article 4(2) of the Rome Convention, which presumes that an international contract is most closely connected with the country where the party carrying out the characteristic performance has his habitual residence, central administration or principal place of business. However, proponents of this view submit that Community law does not oblige the Member States to adapt their choice-of-law rules to conform to the country-of-origin principle.

According to the other view, the Treaty free movement provisions hide a choice-of-law rule which, subject to Treaty-based exceptions and the rule of reason, obliges the courts to apply the law of the Member State of origin.[49] Legal scholarship interpreting the rule of mutual recognition as pertinent for choice-of-law purposes sometimes adopts a more nuanced approach, according to which mutual recognition implies an alternative choice-of-law rule designating the law least restrictive for cross-border activities, be it the law of the State of origin or of the State of destination ('*favor offerentis*').[50] In both its first and second form, this

[48] BERNHARD P. (note 23), p. 440; DUINTJER TEBBENS H., 'Le conflits de lois en matière de publicité déloyale à l'épreuve du droit communautaire', in: *Rev. crit. dr. int. priv.* 1994, pp. 474 *et seq.*; FEZER K.-H. and KOOS S., 'Das gemeinschaftsrechtliche Herkunftslandprinzip und die e-commerce-Richtlinie', in: *IPRax* 2000, pp. 350-352; GEBAUER M., 'Internationales Privatrecht und Warenverkehrsfreiheit in Europa', in: *IPRax* 1995, p. 155; KOHLER Ch., 'La Cour de justice des Communautés européennes et le droit international privé', in: *Travaux du Comité français de droit international privé* 1993-94, pp. 75-77; ROTH W.-H., 'Der Einfluss des Europäischen Gemeinschaftsrechts auf das Internationale Privatrecht', in: *RabelsZ.* 1991, p. 628; SONNENBERGER H.J., 'Europarecht und Internationales Privatrecht', in: *Zeitschrift für vergleichende Rechtswissenschaft* (*ZvglRWiss.*) 1996, pp. 10-11; WILDERSPIN M. and LEWIS X. (note 34), pp. 23-24; VON WILMOWSKY P., 'EG-Vertrag und kollisionsrechtliche Rechtswahlfreiheit', in: *RabelsZ.* 1998, pp. 11 *et seq.*

[49] E.g., GRUNDMANN S., 'Binnenmarktkollisionsrecht – vom klassischen IPR zum Integrationsordnung', in: *RabelsZ.* 2000, pp. 459-460; RADICATI DI BROZOLO L.G. (note 26), pp. 408-409; WOLFF M., 'Privates Bankvertragsrecht im EG-Binnenmarkt', in: *Wertpapier Mitteilungen* 1990, pp. 1941 *et seq.*; GARDEÑES SANTIAGO M., *La aplicación de la regla de reconocimiento mutuo y su incidencia en el comercio de mercancías y servicios en el ámbito comunitario y internacional*, Madrid (Eurolex) 1999, pp. 213 *et seq.*: the law of origin is not applied in the strict sense, but taken into account when applying the law of destination, in order to verify whether the product conforms to a law ensuring an equivalent protection.

[50] BASEDOW J. (note 23), pp. 12 ff. See also JAYME E. and KOHLER Ch., 'Das Internationale Privat- und Verfahrensrecht der EG 1993 – Spannungen zwischen Staatsverträgen

view has far-reaching consequences requiring a systematic re-examination of all choice-of-law rules and, possibly, their modification to restore conformity with the rule of mutual recognition. In addition, a distinction should probably be made between the choice-of-law rules for cases with a Community connection and those for cases with no relevant connection with the Community.

C. A Functional Approach to the Effect of the Rule of Mutual Recognition on Private International Law

In this contribution, we submit and defend the idea that the Community rule of mutual recognition is neutral as to choice of law in the – rather limited – sense that it does not incorporate a hidden hard and fast choice-of-law rule referring to the country of origin. However, this does not mean that Community law in no way affects the specific *application* of the choice-of-law rules of the Member States, as the latter must be interpreted and applied in conformity with Community law. For this reason we advocate a functional approach when analysing the effect of the Community rule of mutual recognition on private international law, which is to be regarded as essentially negative.

Our view is based primarily on the analysis of the rule of mutual recognition developed by the Court of Justice. Important indications can also be deduced by taking a brief look at the Court's rulings in free movement cases.

The following remarks deal exclusively with the application of the rule of mutual recognition as a test of equivalence between the legal systems involved. The interchangeability test and the test of aptitude, which are also part of the proportionality principle, are not discussed here since a conflicts situation arises only where equivalence exists.

1. Approach Taken by the Court of Justice

a) The Court Focuses on the Substantive Rules Applicable to the Case

When evaluating the restrictive effect of the application of Member State legislation, the Court of Justice systematically refrains from examining the choice-of-law considerations that led to the application of the national rules at issue.[51] Therefore, its analysis is limited to the resulting application of substantive rules, and that application is apparently accepted as a fact.[52] For example, in *GB-INNO-BM*, the

und Richtlinien', in: *IPRax* 1993, p. 371, and 'Das Internationale Privat- und Verfahrensrecht der EG nach Maastricht', in: *IPRax*, 1992, p. 348.

[51] BERNHARD P. (note 23), p. 440; GEBAUER M. (note 48), p. 155; SONNENBERGER H. J., (note 48), p. 11.

[52] DUINTJER TEBBENS H. (note 48), pp. 474 and 476.

Court decided that under Articles 28 and 30 (then: 30 and 36) EC Treaty, advertising lawfully distributed in another Member State cannot be made subject to national legislation that prohibits the inclusion, in advertisements relating to a special purchase offer, of a statement showing the duration of the offer or the previous price.[53] The Court did not discuss the choice-of-law rule that led the Luxembourg court to apply the *lex fori* to an advertising campaign organized from Belgian territory.

b) The Underlying Choice-of-Law Process Is Not Totally Disregarded

This, however, does not mean that the Court totally disregards the underlying choice-of-law process. In the 1996 *Boukhalfa* judgment, for example, the Court accepted that the German choice-of-law rule subjecting the employment conditions of a Belgian national employed at the German Embassy in Algiers to Algerian law had to conform to Community law. Since the choice-of-law rule in the German statute on the diplomatic service was part of German law, its compatibility with Community law had to be established and the rule prohibiting discrimination on the basis of nationality was applicable.[54] However, the preliminary question in this case raised the issue of the territorial scope of application of Community law and its prohibition of discrimination. Offering a precise answer only to that rather formal question, the Court ruled that the prohibition of discrimination based on nationality, laid down in various norms of Community law, applies to a national of a Member State who is a permanent resident in a non-member country and is employed by another Member State in its embassy in that non-member country, and whose employment contract was entered into and is permanently performed there. The said discrimination prohibition applies to all aspects of the employment relationship governed by the law of the employing Member State. Undoubtedly, it would be necessary to compare the substantive rules applicable to Germans with those applicable to nationals of other Member States before stating that German law violated the prohibition of discrimination.

Contrary to traditional multilateral choice-of-law rules, the application of mandatory rules in private international law (*lois de police,* called 'public-order legislation' by the Court) depends on an intrinsic combination of an international scope of application and specific substantive norms. This explains why the Court held in *Arblade* that the fact that national rules are categorized as public-order legislation does not exempt them from compliance with the Treaty provisions, as this would threaten the primacy and uniform application of Community law. The considerations underlying such national legislation can be taken into account by Community law only in terms of the exceptions to Community freedoms expressly

[53] E.C.J., 7 March 1990, case C-362/88, *GB-INNO-BM,* in: *ECR* 1990, I-667.

[54] E.C.J., 30 April 1996, case C-214/94, *Boukhalfa,* in: *ECR* 1996, I-2253.

provided by the Treaty and, where appropriate, on the ground that they constitute overriding reasons relating to public interest.[55] Here, direct control exists because the rule at issue contains not only a provision pertinent for choice-of-law purposes, but also substantive rules that can be considered to be in breach of Community law.

c) Impact of the Court's Approach on the Community Legislator

The Court's approach appears to give decisive weight to controlling the substantive rules applied; however, it is difficult to measure how this influences the elaboration of choice-of-law rules by the Community legislator. Without analysing the relationship between secondary law and mutual recognition from the perspective of the choice-of-law process as such, we wish to mention two aspects inspired by the directives concerning insurance contracts and electronic contracts.

As for insurance contracts, Directive 88/357/EEC concerning non-life insurance[56] contains hard and fast choice-of-law rules of a very complex nature, which may be summed up as follows. The parties may choose the law applicable to a contract covering 'large risks' and, in the absence of a choice of law, the law of the State with which the contract is most closely connected shall apply. This is presumed to favour the law of the State where the risk is located, which, in most cases, is the place of establishment of the insured person. In contracts covering 'mass risks', the choice-of-law rule in the absence of a choice by the parties is the same; however, the possibility of a choice by the parties is strictly limited. Thus, in most cases, the policy tends to designate the law of the so-called State of destination of the service. This is presumably under the influence of the Court of Justice's ruling in the 1986 insurance cases cited above,[57] according to which such law may apply to consumer contracts, if justified by an imperative requirement of public interest. However, it appears that the Directive fails to take account of the equivalency concept developed by the Court, except in the general rule of Article 18, which permits the application of national provisions, especially those on contract terms, if the provisions of the State of establishment do not offer sufficient protection. This Article was abrogated by Directive 92/49/EEC.[58] Furthermore, Directive 88/357/EEC contains no substantive rule aiming to ensure a minimal protection standard by harmonizing essential requirements in the field of insurance contracts.

---

[55] E.C.J., 23 November 1999, joined cases C-369/96 and C-376/96, *Criminal proceedings against Jean-Claude Arblade .e.a.*, in: *ECR* 1999, I-8453.

[56] *OJ*, 4 July 1988, L 172, Art. 7.

[57] *Supra*, section II, A, 2.

[58] *OJ*, 11 August 1992, L 228, Art. 39.

On the contrary, Directive 2000/31/EC[59] attempts to realize such essential harmonization in respect of electronic contracts. Without ascertaining whether this act contains a real choice-of-law-rule in the traditional sense, it suffices to say that a minimum harmonization may be achieved by adopting substantive rules providing equivalent protection for consumers and other recipients of services in all Member States, whereas such protection would otherwise be ensured by the application of national mandatory provisions. This paves the way for the (Community or national) legislator to elaborate a positive hard and fast choice-of-law rule designating the law of the Member State of the establishment of the service provider.

2. Impact of Party Autonomy

Party autonomy also has an impact on the relationship between conflicts law and Community free movement law. Traditionally, private international law gives more weight to party autonomy than substantive law. The Rome Convention, for example, allows parties to avoid the application of domestic public policy and mandatory rules by introducing a contractual choice-of-law clause. The right to choose the applicable law enables economic actors to escape the problems caused by conflicting legal systems.

In legal scholarship it is frequently stated that, in private international law, the recognition of party autonomy removes the obstructing effect of the substantive rules of the national law designated by objective choice-of-law rules.[60] According to that view, examining the compatibility of national choice-of-law rules with the requirements of free movement should be limited to mandatory choice-of-law rules. However, such rules are rare in private international law, especially in the fields relating to the four freedoms. Even protective choice-of-law rules, such as those in Articles 5(2) and 6(1) of the Rome Convention relating to consumer and employment contracts, respectively, leave some room for a choice of law by the parties. However, the proponents of this approach seek support in the Court's case law, especially in *Alsthom Atlantique*. In its judgment of 24 January 1991, the Court ruled that the strict French rule on the liability of manufacturers and traders for latent defects did not breach Article 29 (then : 34) EC Treaty as it applied without distinction to all commercial relations governed by French law and didn't have as its specific object or effect the restriction of patterns of exports thereby favouring domestic production or the domestic market. Apparently as an additional argument, the Court added that 'the parties to an international contract of sale are generally free to determine the law applicable to their contractual relations and can thus avoid being subject to French law'.[61]

[59] *Supra*, section IV, A.

[60] BASEDOW J. (note 23), p. 28; W ROTH W.-H. (note 48), p. 652.

[61] E.C.J., 24 January 1991, case C-339/89, *Alsthom Atlantique*, in: *ECR* 1991, I-107, para. 15.

Nonetheless, it is not so evident that the freedom to choose the applicable law, granted by the choice-of-law rule concerned, suffices to exclude all obstructions of intra-Community trade. Until today, the *obiter dictum* in *Alsthom Atlantique* is the only statement of the Court of Justice in that regard, and its pertinence can be doubted.[62] Party autonomy presupposes that the parties have reached consensus on the applicable law. Of course, it seems logical to deny parties who have reached such agreement the right to later reject the law they had freely chosen as obstructing their right to free movement. At the same time, however, there is no convincing reason why the application of the substantive law designated by an objective choice-of-law rule would not be deemed a violation of the Community free movement rules only because the parties failed to reach agreement on a choice-of-law clause. Further, since party autonomy is more widely accepted in private international law than in national substantive law, such approach risks excluding a number of fields from the free movement test, for instance, national legislation relating to (certain) unfair trade practices. A further problem is the absence of guaranteed uniformity with regard to the acceptance of party autonomy in private international law of the Member States. Finally, even the much heralded principle of party autonomy is subject to limitations, namely the intervention of the public policy exception and the application of mandatory rules, both of which the parties cannot escape, even in transnational relations.

Strict application of the doctrine of party autonomy also risks leading to rather absurd results. It is likely that the horizontal direct effect confirmed in *Angonese* in regard to the free movement of workers[63] must also be accepted in respect of the free movement of services.[64] If this is the case, one could even be forced to accept the conclusion that a party who refuses to introduce a choice-of-law clause in a transnational services contract restricts the free movement of services! Such focus on the importance of party autonomy for free movement would paradoxically result in a reduction, or even negation of party autonomy.

Even more far-reaching is VON WILMOWSKY's thesis that Community free movement requires party autonomy to be recognized in all contracts relating to the free movement of goods, persons, services and capital, as only such approach would guarantee legal certainty.[65] In the same vein, RADICATI DI BROZOLO gives

[62] WILDERSPIN M. and LEWIS X. (note 34), p. 28.

[63] E.C.J., 6 June 2000, case C-281/98, *Angonese*, in: *ECR* 2000, I-4139.

[64] In its recent *Sapod Audic* judgment, however, the Court of Justice appears to exclude the extension of *Angonese* to the free movement of goods, when it states that, where an obligation to identify the packaging of a product 'arises out of a private contract between the parties to the main proceedings, […] such a contractual provision cannot be regarded as a barrier to trade for the purposes of Article 30 [now: 28] of the Treaty since it was not imposed by a Member State but agreed between individuals' (E.C.J., 6 June 2002, case C-159/00, para. 74, not yet reported).

[65] VON WILMOWSKY P. (note 48), pp. 3-5.

considerable weight to the recognition of party autonomy as a guarantee for truly free movement within the Community and submits that all restrictions of party autonomy require justification by mandatory general interest requirements.[66] Enabling the parties to choose the applicable law obviously enhances legal certainty (without making it absolute!) and thus promotes cross-border activities; however, it cannot be maintained that only the admission of party autonomy is compatible with the requirements of free movement. The view that objective choice-of-law rules result in less certainty can be based only on the fact that they may differ from State to State. In the absence of uniform jurisdictional rules, it cannot always be predicted which courts will have jurisdiction and which law will apply. Nevertheless, since the admission of party autonomy does not guarantee uniform interpretation and application, it does not take away the importance of the place of litigation. The argument that party autonomy allows the parties to shape their relationship according to their own wishes is not convincing either. The EC Treaty does not indicate that this solution, which favours free movement, is the only acceptable one. In *Alpine Investments*, the Court found that the fact that a Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with Community law.[67]

3. Mutual Recognition and Choice of Law: a Closer Analysis

The analysis of the free movement regime in the Community leads to the conclusion that the mutual recognition rule is not to be regarded as a positive hard and fast choice-of-law rule designating the substantive law of the country of origin. Several arguments can be invoked to support this view. This, however, does not preclude the choice-of-law rules of the Member States from taking due account of the requirements of Community law.

a) Mutual Recognition as an Essentially Relative Concept

First, it is important to realize that the restrictive effect caused by disparities in the laws of the Member States cannot be evaluated abstractly. The mere existence and application of divergent laws in the Member States does not obstruct intra-Community trade. Only a global approach taking account of the full treatment of a cross-border activity leads to the conclusion that diversity restricts free

[66] RADICATI DI BROZOLO L.G. (note 26), pp. 412-413.

[67] E.C.J., 10 May 1995, case C-384/93, *Alpine Investments*, in: *ECR* 1995, I-1141, para. 51.

movement.[68] Such restriction results when legislation that is deemed equivalent but is substantially divergent is cumulatively applied to the same cross-border activity, imposing a double burden on the economic actors involved.

When determining whether the law of a Member State is compatible with the Community rule of mutual recognition, the law of one Member State will be used as the law of reference. When the Court's case law requires economic actors to act 'lawfully', this means in conformity with the substantive rules of the country of origin. This fact will then be taken into account when similar and equivalent rules are applied in the country where the services are provided or the goods are delivered.[69] If equivalence is really present, the law of the country of destination will be adjusted to the extent necessary to realize free movement of the goods or services.[70]

Therefore, the application of the mutual recognition rule to disparities between the laws of the Member States is essentially relative. Non-application of the law of the State of destination is based neither on its characterization as excessively restrictive nor on the fact that it precisely concerns the legislation of that particular State, but on the observation that that law is more restrictive than acceptable norms already observed by the economic actor .[71] In *GB-INNO-BM*, for example, the Court of Justice did not condemn the Luxembourg legislation according to which sales offers involving a temporary price reduction must not state the duration of the offer or refer to previous prices; however, it refused to apply that law in a cross-border situation to advertising lawfully distributed in another Member State.[72] The same approach was used in the *Mazzoleni* judgment,[73] which is closer to private law issues. In *Mazzoleni*, the Court ruled that the host Member State's mandatory rules protecting workers may be applied to employees of a service provider established in another Member State only if the application of those mandatory rules is necessary and proportionate for the purpose of protecting the workers concerned. However, the objective of ensuring the same level of protection to the employees of such service provider as that provided in its own territory to workers in the same sector may be regarded as attained, if the application of the law of the Member State of establishment of the service provider results in an equivalent overall protection.

---

[68] Comp. E.C.J., 15 December 1982, case 286/81, *Criminal proceedings against Oosthoek's Uitgeversmaatschappij*, in: *ECR* 1982, 4575, para. 15.

[69] Cf. DUINTJER TEBBENS H. (note 48), p. 478; WILDERSPIN M. and LEWIS X. (note 34), p. 21.

[70] FALLON M. (note 23), p. 137.

[71] *Cf.* FALLON M. (note 23), p. 75; GRANDPIERRE A. (note 47), p. 113; KOHLER Ch. (note 48), p. 75.

[72] E.C.J., 7 March 1990, case C-362/88, *GB-INNO-BM*, in: *ECR* 1990, I-667.

[73] E.C.J., 15 March 2001, case C-165/98, *Mazzoleni*, in: *ECR* 2001, I-2189.

This relative character makes it clear that mutual recognition does not imply a blind preference for the country of origin, a conclusion that is also supported by other elements (*infra*). Quite logically, this view makes it impossible to interpret the rule of mutual recognition as a choice-of-law rule favouring the legislation of the Member State of origin. When deciding whether to apply the law of the State of destination, decisive weight is given to the fact that the economic actor complied with certain rules of the State of origin. This interpretation also explains why the rule of mutual recognition should not be regarded as an alternative choice-of-law rule. The application of one of the laws concerned is based not on an abstract comparison of the two legal systems, but rather on an evaluation of the circumstances of the particular case. Very telling in this regard is the Court's reasoning in *Alpine Investments:* the fact that one Member State imposes less strict rules than another Member State does not mean that the latter's rules are disproportionate and hence incompatible with Community law.[74]

b) No Privileged Position for the Country of Origin

It is also important to note that the Treaty free movement provisions prohibit *all* obstructions of intra-Community trade, even those resulting from the application of the legislation of the country of origin.[75] This broad approach cannot be reconciled with the view that, in the internal market, priority should always be given to the law of the country of origin. It is true that, in regard to the export of goods, the Court of Justice interprets Article 29 EC Treaty as a mere anti-discrimination clause.[76] On the other hand, the Court adopts a broader approach in respect of the free movement of services and persons.[77] In *Alpine Investments*, the Court made it clear that the State of origin is in the best position to regulate the activities of service providers (one element to justify the proportionality of the prohibition of cold calling by the Dutch authorities).[78] However, the Court maintained in the same judgment that Article 49 (then: 59) EC Treaty prohibits restrictions of the freedom to provide services within the Community in general; consequently, that provision

[74] E.C.J., 10 May 1995, case C-384/93, *Alpine Investments*, in: *ECR* 1995, I-1141, para. 51.

[75] WILDERSPIN M. and LEWIS X. (note 34), p. 20.

[76] E.C.J., 8 November 1979, case 15/79, *Groenveld*, in: *ECR* 1979, 3409, paras. 7-9.

[77] E.C.J., 15 December 1995, case C-415/93, *Bosman*, in: *ECR* 1995, paras. 95-97, referring to its *Daily Mail* judgment of 27 September 1968, case 81/87, in: *ECR* 1988, 5483, para. 16.

[78] E.C.J., 10 May 1995, case C-384/93, *Alpine Investments*, in: *ECR* 1995, I-1141, para. 48.

covers restrictions laid down by both the State of destination and the State of origin.[79]

From the Court's case law it further follows that both the provider and the recipient of services may invoke the principle of freedom of movement within the EC. In other words, the freedom to provide services includes the freedom of the recipient of services to go to another Member State to receive a service without being obstructed by restrictions.[80] In *GB-INNO-BM*, the Court ruled that the free movement of goods concerns not only traders but also individuals; particularly in frontier areas, consumers who are resident in one Member State may travel freely to the territory of another Member State to shop under the same conditions as the local population.[81] It is impossible to reconcile this broad approach with the view that translating the rule of mutual recognition into conflict of laws terms could always require the application, for example, of the liability law of the service provider or of the trader selling goods or of the law most favourable to him.[82] An alternative interpretation of the rule of mutual recognition in favour of the service provider results in a cumulative application to the disadvantage of the recipient of services, which need not be accepted from the perspective of free movement.[83] As pointed out in recent literature, the requirement to adapt all choice-of-law rules to the country of origin-principle is based on a very one-sided politically inspired understanding of the internal market and its consequences, aimed at allowing the service provider to perform the same service under the same conditions throughout the Community.[84] But not only the commercial interests of the traders and service providers should be taken into account; the Treaty allows a broader and more balanced view according to which the interests of other competitors, consumers, tort victims, etc. are protected, and the commercial interests mentioned are not systematically given priority.[85]

[79] *Ibid.*, para. 30.

[80] E.C.J., 2 February 1989, case 186/87, *Cowan*, in: *ECR* 1989, 195, paras. 15-17.

[81] E.C.J., 7 March 1990, case C-362/88, *GB-INNO-BM*, in: *ECR* 1990, I-667, para. 8. The same reasoning was held in favour of the recipient of a service, e.g. in E.C.J., 19 January 1999, case C-348/96, *Calfa*, in: *ECR* 1999, I-11.

[82] VON WILMOWSKY P. (note 48), pp. 17-19.

[83] FALLON M., 'Variations sur le principe d'origine, entre droit communautaire et droit international privé', in: *Nouveaux itinéraires en droit. Hommage à François Rigaux*, Brussels (Bruylant) 1993, p. 218.

[84] Cf. RADICATI DI BROZOLO L.G. (note 26), p. 407.

[85] WILDERSPIN M. and LEWIS X. (note 34), pp. 18 and 34-37.

c) Exceptions to the Rule of Mutual Recognition

Finally, the impact of the mutual recognition rule as such is reduced when the exceptions provided in the Treaty, as well as the rule of reason, are applied. Under strict conditions, the Treaty certainly allows the conclusion that it is not disproportionate for the Member State of destination to apply its own national rules to cross-border economic activities when these are not equivalent to the norms already complied with in the Member State of origin. Where mutual recognition is interpreted as a choice-of-law rule designating the law of the country of origin, such interventions of the country of destination can be explained only by choice-of-law principles, such as the public policy exception and the application of mandatory rules. However, as the *Arblade* judgment[86] shows, such application is not compatible with the EC Treaty per se, even if it concerns 'internationally mandatory' rules ('*lois de police*') of the State of destination. The application of such rules must still comply with the proportionality principle, which includes the obligation of mutual recognition if the conditions of the test of equivalence are met.

V. The Exception of Mutual Recognition

Affirming that the rule of mutual recognition does not hide a choice-of-law rule does not mean that Member States may disregard the requirements of Community law when applying their rules of private international law or that Community free movement law has no effect on the application of choice-of-law rules of the Member States. Both the principle of supremacy of Community law and the duty of Community loyalty expressed in Article 10 EC Treaty oblige Member States to apply their conflicts rules in conformity with EC law.[87] This leads to diverse effects.

A. Comparison with the Public Policy Exception

The relationship between mutual recognition and private international law is based on a two-stage process, in which the choice-of-law rules are first applied to determine the applicable law and then the test of mutual recognition is applied in the second stage. The first stage includes the complete process of determining the

[86] E.C.J., 23 November 1999, joined cases C-369/96 and C-376/96, *Criminal proceedings against Jean-Claude Arblade e.a.*, in: *ECR* 1999, I-8453.

[87] DROBNIG U., 'L'apport du droit communautaire au droit international privé', in: *C.D.E.*, 1970, p. 539; SCHAUB R., 'Die Neuregelung des Internationalen Deliktsrechts in Deutschland und das europäische Gemeinschaftsrecht', in: *RabelsZ* 2002, pp. 23, 36, 61.

applicable law: the application of multilateral or unilateral choice-of-law rules,[88] as well as the intervention of *renvoi*, public policy exception, etc. Thereafter the mutual recognition test is applied to determine whether the application of certain substantive rules in the country of destination obstructs intra-Community trade.

This scheme makes it clear that the so-called exceptions to free movement provided by the Treaty and the rule of reason are in nature essentially different from similar exceptions in private international law. Public policy is a good example. While the Treaty allows the Member States to invoke public policy in Articles 30, 39(3), 46, 55 and 58(1)(b), this must be done in the context of mutual recognition and its condition of equivalence. The obligation of mutual recognition, as it results from the proportionality requirement, limits the possibility of the Member States to invoke public policy for the purpose of applying their own legislation. This mechanism can be relied on only after the applicable law has been determined, thus following the conclusion of the choice-of-law process in which the applicable law could possibly have been determined after the intervention of the public policy exception. Obviously, this exception only rarely intervenes to reject the application of the law of another Member State. However, the two-stage approach necessarily leads to the conclusion that mutual recognition and the requirements of free movement would not prohibit application of the exception.

Still, the application of mutual recognition can be compared to some extent with the intervention of the public policy exception in private international law. While we believe that mutual recognition does not hide a choice-of-law positively designating the law of the country of origin, private international law still must take account of the requirements of Community law and its obligation of mutual recognition, which appears to intervene functionally, i.e., depending on the content of the law designated by the applicable choice-of-law rules. This functional intervention opens the way for the characterization of mutual recognition as an exception, the function of which can be compared to the well-known public policy exception. While the latter obliges the courts to set aside the application of an unacceptable foreign law, the exception of mutual recognition obliges the courts of the Member State to reject the application of substantive rules that would breach Community law. Furthermore, the application of both exceptions depends on an examination of the concrete effect of the law applicable to the particular case, in light of all pertinent circumstances. Although both exceptions thus share negative and functional effects, at least two important differences can be discerned. First, the public policy exception serves to reject foreign law, whereas the mutual recognition exception can and often does reject the application of the *lex fori*. Secondly, the public policy exception protects fundamental principles of the national legal system, the mutual recognition exception the fundamental principle of free movement in Community law. On the other hand, from a mere technical point of view,

[88] See E.C.J., 23 November 1969, joined cases C-369/96 and C-376/96, *Criminal proceedings against Jean-Claude Arblade e.a.*, in: *ECR* 1999, I-8453, paras. 30-31.

the public policy exception itself may be subject to the exception of mutual recognition. Such view of the exception of mutual recognition leads to two further conclusions concerning the relationship between private international law and free movement (mutual recognition).

B. Broad Scope of the Exception of Mutual Recognition

Since the test of mutual recognition focuses on the result of the application of the choice-of-law process in the Member State of destination, there is no reason to limit the examination of trade barriers to the law of the Member State of origin or even to the law of any Member State.

Traditionally, the debate on free movement focuses on the juxtaposition of the respective laws of the States of origin and of destination. This duality fits logically in the tradition of Community law in which the Treaty provisions on free movement were usually applied to national law in the field of public or administrative law (see *supra*). Such rules, for example, those relating to licenses or product requirements, have an intrinsically territorial nature in the sense that each State only applies its own law . From that perspective, it is obvious that the essential question raised in regard to intra-Community trade is whether the Member State of destination can fully apply the *lex fori* to goods or services imported from another Member State where they were lawfully produced or marketed.

Private international law takes a completely different approach, which is essentially justified by the acceptance of the application of foreign law. Therefore, it certainly cannot be excluded that, while intra-Community economic activities are covered by the Treaty free movement rules, the choice-of-law rules in the Member State of destination lead to the application of a law other than the *lex fori*, such as that of another Member State or even of a third State.

These last, not uncommon hypotheses make it clear that, as far as private law is concerned, the juxtaposition of the laws of the countries of origin and of destination is too simple a scheme. Indeed, it does not make much sense to oblige the courts of the State of destination to apply the law of the country of origin, if this State's choice-of-law rules refer to some other law. Further, only the content of the applicable substantive rules is important for the economic actors involved, not their origin. Therefore, a reference to the law of another Member State or even of a third State should not cause a problem for the courts in the State of destination. After determining the law applicable to the import of goods or services from another Member State, that law must be examined to determine whether the application of its substantive provisions would restrict intra-Community trade. If so, the exception of mutual recognition will intervene and that law will not be applied to the extent that its application would hinder intra-Community trade. As a result of the traditional juxtaposition of the laws of the States of origin and of destination, the reference to the law of a third State is apparently – often implicitly – viewed as a special situation, falling outside the traditional free movement scheme. This

approach is based on the assumption that free movement in the EC deals exclusively with the application of the laws of Member States since only they are subject to the supremacy of Community law. When the choice-of-law rules of the competent court of the State of destination designate the law of a third State as applicable – which cannot be excluded in certain exceptional situations – and that law is more restrictive than that of the Member State of origin, the requirement of free movement within the EC may prohibit application of that law. For the economic actor, it makes no difference whether the substantive rules of a Member State or of a third State are applicable. Both can restrict his cross-border activities. Whereas it is unacceptable to say that the law of a third State violates the EC Treaty, it would be perfectly acceptable to conclude that the application of such law designated by the choice-of-law rules of a Member State obstructs intra-Community trade and must therefore be rejected. Agreeing that the free movement test also covers private law aspects of intra-Community trade makes it necessary to examine all substantive solutions applicable in the Member State of destination. Only such a broad approach will truly guarantee free movement within the Community. This requires taking account of the law designated by the choice-of-law rules of the State of destination, whether it is the *lex fori*, another Member State's law or the law of a third State.

C. The Exception of Mutual Recognition Affects the Decision-Making Process

This brings us to our second conclusion: the exception of mutual recognition is not directed against the applicable substantive law as such, but it affects the decision whether that law shall apply in the particular case. Being part of national law, the private international law rules of the Member State must obviously be applied in conformity with Community law. However, they contravene the requirements of Community law when free movement within the Community is obstructed as a result of their intervention.

Extending the Community free movement test to whatever law is applicable in the Member State of destination may be surprising at first; however, such approach is perfectly legitimate in the existing context of Community law. Of course, only the legislation of the Member States is subject to the supremacy of Community law; the famous *Dassonville* formula holds that all trading rules enacted by *Member States* which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.[89] However, the *Cassis de Dijon* principles do not prohibit the *existence* of non-discriminatory rules in the Member States; they reject the cumulative *application* of equivalent norms. The same applies to the law of third States. Although the law of third States is not

[89] E.C.J., 11 July 1974, case 8/74, *Dassonville*, in: *ECR* 1974, 837, para. 5.

subject to the supremacy of Community law and its content does not violate the latter, Member States are prohibited from applying such law when its application would burden cross-border activities. The responsibility still lies with the Member State which, through its choice-of-law rules, commands the application of legislation which hinders intra-Community trade.

A fortiori, the same reasoning applies if the law of a Member State other than the State of destination is designated by the choice-of-law rules. Also in this hypothesis, the content and not the origin of the applicable substantive rules is decisive when testing the existence of barriers to intra-Community trade. But again, in view of its relative character (*supra*), applying the mutual recognition exception is not directed against the applicable substantive rules as such, but against the application of these rules in a particular case.

Traces of this approach can be found in the Court's case law. In the *Boukhalfa* judgment mentioned above, the Court held that the German choice-of-law rule subjecting the employment conditions of a Belgian national employed at the German Embassy in Algiers to Algerian law had to conform to Community law. Since the choice-of-law rule in the German statute on the diplomatic service was part of German law, its compatibility with Community law had to be established and the prohibition of discrimination based on nationality was applicable.[90] However, a condemnation of German law for violation of the prohibition of discrimination would have required comparing the substantive rules applicable to Germans with those applicable to nationals of other Member States. In this context, reference should also be made to the *Ingmar* judgment mentioned above (section III).[91] Whenever the contract of a commercial agent established in the Community is governed by the law of a third State by virtue of the choice-of-law rule of a Member State, it is up to the court of this Member State to protect the mandatory provisions contained in Directive 86/653/EEC, which claim to be applied in situations with a close connection with the Community. Therefore, if the law of a third State that is applied by virtue of the choice-of-law rules of the Member State deprives the person of protection offered by Community law in that case, this would amount to an infringement of the EC Treaty by the State of the forum.

VI. Conclusion

It is far from easy to ascertain the precise interaction between the conflict of laws and primary Community law. Although a growing number of scholars has dealt with this interaction for more than a decade, controversy still reigns over the question whether the provisions of the EC Treaty on free movement may, by virtue of

[90] E.C.J., 30 April 1996, case C-214/94, *Boukhalfa*, in: *ECR* 1996, I-2253.

[91] E.C.J., 9 November 2000, case C-381/98, *Ingmar*, in: *ECR* 2000, I-9305.

the direct effect doctrine, produce a positive hard and fast rule designating the law of the Member State of origin of a product or service as applicable in all cases covered by the Treaty – so-called intra-Community cases. A close analysis of general substantive Community law suggests that the provisions on free movement may indeed have an impact on the choice-of-law process, albeit less on the elaboration of a choice-of-law rule. This occurs when the choice-of-law rule is applied in a particular case, not during the process of determining the applicable law. In other words, it affects the *application* of the choice-of-law rule rather than its *elaboration.*

Reminding us of the public policy exception, the impact of Community free movement law on the conflict of laws can therefore be called the 'exception of mutual recognition', part of a potentially emerging 'intra-Community' choice-of-law process. The analogy, however, is only partial. Both mechanisms have a negative and a functional nature. The public policy exception affects the application of foreign law, whereas the mutual recognition exception may cause the law of the forum itself to be set aside, even its public policy exception. This distinction reflects the essentially different perspective of both exceptions: the public policy exception protects fundamental principles of the national legal system, the exception of mutual recognition the fundamental principles of free movement within the European Community.

The functional character of the latter exception is reflected in the fact that it is not directed against the applicable law as such, but against the decision to apply it in a specific case. Since private international law exceeds the traditional juxtaposition of the laws of the countries of origin and of destination, it is only logical that the application of the exception should not be limited to the application of the law of the Member State of origin or even to the law of another Member State. The application of the law designated by the choice-of-law process of the State of destination must be examined from the perspective of free movement, regardless whether it is the *lex fori*, the law of another Member State or even the law of a third State.

A EUROPEAN FAMILY LAW FOR CROSS-BORDER SITUATIONS – SOME REFLECTIONS CONCERNING THE BRUSSELS II REGULATION AND ITS PLANNED AMENDMENTS

Maarit JÄNTERÄ-JAREBORG*

I. General

A new development in the European Union (EU) is to regard cross-border family law as relevant for European integration. The action plans adopted by the European Council for the establishment of 'a genuine judicial area' include several family law projects limited to cross-border situations with links to the territory of the EU. The unification of rules on jurisdiction, choice of law and recognition and enforcement of judgments replaces – or at least precedes – the unification of substantive family law in Europe. The major result so far is the adoption of the Council Regulation (EC) No 1347/2000 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, which entered into force on 1 March 2001. This Regulation is commonly called '*Brussels II Regulation*'.

* Prof. Dr. Maarit Jänterä-Jareborg holds the chair in Private International Law with International Civil Procedure at Uppsala University, Faculty of Law since 1998. She represented Sweden in Brussels in the working party on the Extension of the Brussels Convention to Family Law (1995-1998). She is a member of the inter-Scandinavian working party on (international) family law issues and of the expert group of the Commission of European Family Law.

Yearbook of Private International Law, Volume 4 (2002), pp. 67-82
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

In May 2002, the Commission presented a proposal aimed at replacing the Brussels II Regulation with a new Regulation with partially the same, partially a new scope of application covering parental responsibility in all situations. This proposal is connected with a French proposal, originally from July 2000, to facilitate exercising the rights of access within the EU.

Some basic features and solutions of the Brussels II Regulation and the above-mentioned proposals will be commented upon in the present article. Although the comments are the author's own, their starting point is in the Scandinavian legal systems, in particular Sweden and Finland, and the Scandinavian legal cooperation in respect of cross-border marriages and parental responsibility.[1] At the end, some remarks are made on the recent reform of the inter-Scandinavian rules. This reform is a direct consequence of the adoption of the Brussels II Regulation and the so-called 'Scandinavian exception' in Article 36.2.

II. The Brussels II Regulation

A. Replaces the Brussels II Convention

The Brussels II Regulation replaces the 1998 European Union Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, generally known as the *Brussels II Convention*.[2] The provisions of the Convention were incorporated into the Regulation, save those that do not belong in a Community act. Some adjustments based on the revision of the Brussels and

[1] Following successful civil law cooperation between the Scandinavian States at the turn of the 19th and 20th centuries, legal cooperation in private international law was initiated in the 1920's. This cooperation has led to a number of Conventions, the most important of which were concluded as early as the 1930's. These Conventions are still largely in force between Denmark, Finland, Iceland, Norway and Sweden. This cooperation has involved private international law in a broad sense, i.e., jurisdiction, choice of law, recognition and enforcement of another Scandinavian State's judgment. – In this contribution, the term *'Scandinavian States'* is systematically used to include Denmark, Finland, Iceland, Norway and Sweden although, in a strict geographic sense, not all of these States belong to Scandinavia. The other alternative '*Nordic States*' risks being understood more broadly in a general European context.

[2] On 1 May 1999, the Amsterdam Treaty entered into force between the Member States of the European Union. In this Treaty, judicial cooperation in civil matters was removed from the third pillar to the first, the legal basis for enactments being now found in Articles 61c, and 65 of the (revised) Rome Treaty. In this situation, it was found necessary to transform the Brussels II Convention – which had not yet entered into force – into a Regulation.

Lugano Conventions in Civil and Commercial Matters[3] were also made. Since the Brussels II Regulation – as well as its predecessor – was modelled on those Conventions, these adjustments can be considered natural.

This author commented on the Brussels II Convention, its background, purpose and content in the first volume of the *Yearbook of Private International Law* (1999).[4] The present contribution focuses on some major advantages as well as shortcomings of the Brussels II Regulation, emphasizing issues relating to parental responsibility. It should, however, be pointed out that at present little is known about how the Regulation is functioning in practice.

B. An Improvement of 'Law and Order' in Cross-Border Divorces

The Brussels II Regulation contributes to 'law and order' in cases of cross-border marriage dissolution within the European Union. In such cases, the EU constitutes a single jurisdictional area where unified rules apply. A court of a Member State may assume jurisdiction only on these grounds. When the court lacks jurisdiction, it must decline *ex officio* if the court of another Member State would be competent under the Regulation.

The Regulation not only sets aside exorbitant national rules on jurisdiction but also prevents concurrent proceedings through special rules on *lis pendens* and dependent actions. Once proceedings are initiated in more than one Member State, the court second seized shall of its own motion stay its proceedings. When it is established that the court first seized has jurisdiction, the court second seized shall decline jurisdiction in favour of the first court. Earlier, concurrent proceedings in different Member States were not unusual – resulting in considerable inconveniences and expenses for the parties as well as contrary judgments.

The Regulation is based on the mutual recognition of judgments in matrimonial proceedings and guarantees the free circulation of such judgments. Earlier problems caused by 'limping divorces' within the Union are now resolved to a large extent.[5] A further improvement is the automatic recognition of other Member

[3] The Brussels Convention (on jurisdiction and the enforcement of judgments in civil and commercial matters, 1968) has been replaced by Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (= Brussels I Regulation) which entered into force on 1 March 2002.

[4] See JÄNTERÄ-JAREBORG M., 'Marriage Dissolution in an Integrated Europe – the 1998 European Union Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (Brussels II Convention)', in this *Yearbook* 1999, pp. 1-36.

[5] The 'origin' of what later became the Brussels II Regulation may, in fact, be claimed to be problems experienced in particular in relations between France and Germany as a result of the lack of mutual recognition of divorce decrees. See *Brussels II: The Draft Convention on Jurisdiction, Recognition and Enforcement of Judgments in Matrimonial*

States' judgments, i.e., by operation of law without any special procedure being required.

It is, however, important to bear in mind that the Regulation – with the exception of claims relating to parental responsibility – covers only the dissolution or weakening of the marital bond. Other related issues settled in connection with proceedings on marriage dissolution – such as distribution of property – are outside the scope of the Regulation. Accordingly, the Regulation does not provide a legal basis for jurisdiction or for recognition or enforcement of decisions relating to such issues.[6] Instead, the national rules of each Member State apply. This is a shortcoming since such issues are often more important for the spouses than the dissolution of the marriage as such.

C. Fear of 'Forum Shopping' and 'Racing to Court'

The Regulation has been criticized for including far too many jurisdictional grounds, which in addition are all equally ranked.[7] This, in turn, is feared to encourage 'forum shopping', i.e., choice of the forum on the basis of where the plaintiff considers the case to receive the most favourable outcome from his or her point of view. Moreover, it is feared that the Regulation will encourage the so-called 'race to court' since the competent court 'first seized' will have exclusive jurisdiction under the Regulation's stringent rules on *litis pendens* and dependent actions.

Although this criticism is not unfounded, it is likely that attempts to limit the number of jurisdictional grounds would cause resentment in at least some of the Member States and increase scepticism and even opposition towards Community enactments in family law. Without the multitude of grounds now contained in the Regulation, it would have been impossible to achieve the political compromise that made the adoption of the Brussels II Convention possible.[8] The experience of

---

Matters, With Evidence, House of Lords, Select Committee on the European Communities, Session 1997-98, 5th Report, 1997, pp. 5 and 8.

[6] See Preamble, point 10.

[7] See, e.g., PIRRUNG J., 'Europäische justitielle Zusammenarbeit in Zivilsachen – insbesondere das neue Scheidungsübereinkommen', in: *Zeitschrift für Europäisches Privatrecht* 1999, p. 844, blaming certain 'Nordic' Member States of the EU for this outcome: 'Ich halte die Einführung einer fast uneingeschränkten Kläger- oder genauer gesagt, 'Klägerinnen'-Zuständigkeit auf Wunsch dreier eher 'nördlicher' EU-Staaten für einen EU-einheitlichen Ansatz im Gegensatz zu rein nationalen Lösungen für unglücklich, weil damit dem forum shopping Tür und Tor geöffnet und ein Ausgleich über eine effektive Rechtshängigkeitsregel unerlässlich wird.'

[8] See BORRÁS A., 'Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and

the Regulation's practical operation is still too limited to justify any such changes. Furthermore, the rules on jurisdiction reflect well-established national rules in Member States. Rules deviating too much from these would hardly be in line with the ordinary citizen's notions of 'proximity' and 'proper forum'. It should be emphasized that the Regulation is also based on the philosophy that, in all cases, jurisdiction is available only where a genuine connection exists between at least one of the spouses and a Member State empowered to exercise jurisdiction.[9]

The action plans also call for the adoption of uniform choice of law for marriage dissolution. If every competent court in a Member State would apply the same choice of law rules and, as a result, the same laws, it is hoped that both 'forum shopping' and 'forum racing' would come to an end. Since the outcome in respect of the related issues is often more important for the spouses than divorce as such, this alone would be insufficient. To prevent the spouses from 'shopping and racing', the choice of law rules relating to the other issues would have to be unified as well.

In this author's opinion, both projects are questionable and, in reality, have a very weak link with the 'proper functioning of the internal market'.[10] It is also difficult to envisage how the Member States could reach agreement, in particular, on uniform choice of law rules for marriage breakdown. To give an example, application of the forum law to marriage dissolution prevails in all Scandinavian States today and any attempt to change this is likely to encounter opposition and even resentment.[11] This is due not to a general unwillingness to apply foreign law but mainly because of the huge divergences between the laws in the Member States of the EU. For example, in Sweden and Finland, marriage is regarded as a voluntary union that any spouse may at any time freely terminate by divorce. The question of guilt is totally irrelevant, and proof of an irretrievable breakdown of the marriage is not required.

Enforcement of Judgments in Matrimonial Matters', in: *OJ* C 221/27 of 16 July 1998, pp. 36-39 (paras. 27-34). This source is cited as 'BORRÁS REPORT' below.

[9] See Preamble, point 12.

[10] The proper functioning of the internal market is clearly more dependent on the mutual recognition and enforcement of judgments, supplemented by uniform rules on jurisdiction, than uniform choice of law rules.

[11] In their answers to the Council in respect of the 'Questionnaire concerning the law applicable to divorce (Rome III)', both Finland and Sweden expressed doubts as to whether uniform choice of law rules for marriage dissolution are necessary for the free movement of persons and, thus, for the proper functioning of the internal market. The United Kingdom and Ireland expressed similar doubts. *Council of the European Union, 8839/00, JUSTCIV 67* (5 June 2000). – Nor should one forget the role played by Article 18 of the Brussels II Regulation, according to which differences in applicable law may not be used as a ground for non-recognition. Inclusion of this provision (Article 17 in the Brussels II Convention) was of utmost importance for both Finland and Sweden because of their (in comparison) very liberal laws on marriage dissolution, both in domestic and international situations.

Allowing the application of a foreign law based on another outlook would lead to the dissolution of domestic and international marriages under different conditions.[12] Such an outcome was decisive for Sweden's decision in 1933 to withdraw from the 1902 Hague Divorce Convention. Under the Convention foreign law would also apply to divorces between a foreign and a Swedish citizen, thus making it more difficult to obtain a divorce in Sweden than under Swedish domestic law, or even impossible.[13] – Instead, one should strive to achieve a harmonization (in a liberal direction) of European divorce laws, which would then make the adoption of uniform choice of law rules unnecessary.

D. Parental Responsibility as Part of a Matrimonial Regulation

The Brussels II Regulation also covers jurisdiction in matters of parental responsibility in matrimonial proceedings between the child's parents, as well as the recognition and enforcement[14] of such judgments. If the court of a Member State has competence in matrimonial proceedings, under certain conditions this Member State will also exercise jurisdiction over parental responsibility. In view of the development in modern child law towards treating the child as a separate holder of rights, independent of his or her parents, and applying the same rules to all children irrespective of their birth in or out of wedlock, this link to matrimonial proceedings is clearly out of date. It was, however, the result of a political compromise, without which the instrument's practical value, according to some Member States, would have been diminished.[15]

This author belongs to those critics who believe that the Regulation should have been limited to cover purely matrimonial issues. In respect of parental responsibility, the Member States should have instead made efforts to join already existing international instruments. The adoption of a separate set of Community rules has a certain air of ridicule or at least arrogance since the Hague Conference on Private International Law – where all the EU Member States are members – adopted a Convention on jurisdiction, applicable law, recognition, enforcement and

[12] In a system such as Swedish law, it would also require changes in the law of procedure relating to divorce.

[13] See JÄNTERÄ-JAREBORG M., 'The Influence of the Hague Conventions on the Development of Swedish Family Conflicts Law', in: *Netherlands International Law Review* 1993 (Vol. XL), p. 52. – After the last fundamental reform of Swedish law on marriage dissolution in 1973 abolishing, i.a., the concept of 'quilt', it has been held that the application of foreign law giving effect to a spouse's fault to marriage breakdown would be manifestly incompatible with Swedish public policy.

[14] Enforcement under the Brussels II Regulation is limited to judgments on parental responsibility. In respect of judgments on divorce, legal separation or marriage annulment recognition is sufficient since they only concern matters of status.

[15] See JÄNTERÄ-JAREBORG M., (note 4), pp. 10-12.

cooperation in respect of parental responsibility and measures for the protection of children as recent as 1996.[16] This Convention is based on a child-centred approach and is in line with the latest development in child law.[17]

E. Exequatur Must Precede Enforcement of Judgments on Parental Responsibility

In substance, the rules on parental responsibility concerning both jurisdiction and recognition basically duplicate corresponding provisions in the 1996 Hague Convention. The result is a clear improvement compared to the national rules in many Member States.[18] Particularly noteworthy is the emphasis given to the child's habitual residence as the connecting factor determining the Member State where jurisdiction is primarily exercised. The exceptions to this rule are limited, well balanced and generally in line with the interests of children.[19]

The rules on enforcement, on the other hand, are based on the corresponding provisions in the Brussels I Convention on the enforcement of civil and commercial judgments. In essence, enforcement as such is not regulated but rather an 'in-between' procedure known as *exequatur*. Before a judgment can be enforced

[16] Also SUMAMPOUW M., 'Parental Responsibility under Brussels II', in: *Private Law in the International Arena, Liber Amicorum Kurt Siehr* 2000, p. 745, finds these rules superfluous for similar reasons.

[17] The adoption and entry into force of the Brussels II Regulation has prevented the Member States of the European Union from ratifying the 1996 Hague Convention. Instead, in issues relating to parental responsibility, the Member States now share with the Community their competence to enter into agreements with third States and cannot act on their own. There have been fears in several Member States that the Brussels II Regulation might mean the demise of the 1996 Hague Convention, at least in Europe. After pressure from the States that regard the Hague Convention as a most valuable instrument for international protection of children, the Commission presented a proposal in November 2001 for a Council decision authorizing the Member States to sign the 1996 Hague Convention in the interest of the European Community. This signature is subject to a declaration according to which the Convention shall take precedence over Community rules only in respect of children who are not habitually resident in a Member State but habitually resident in another Contracting State. In a working document presented in May 2002, the Spanish Presidency repeated the need of accepting that Member States sign and ratify the Hague Convention in the interest of the Community and urged the Commission to put forth a proposal on ratification before autumn 2002. The prospects are therefore good for the Hague Convention to come into force also in the Member States of the European Union. Community enactments will, however, take precedence in situations covered by them.

[18] Whereas the Swedish national rules on jurisdiction and recognition are out-of-date, the Finnish rules reflect a modern child-centred approach.

[19] See in particular Articles 3 and 4 of the Brussels II Regulation.

in another Member State, it must – on the application of any interested party – be declared enforceable there.

In light of frequent references to 'mutual trust' as the basis for the present cooperation between the Member States, at least a Scandinavian lawyer is likely to find the requirement of exequatur surprising and even excessive, especially since a certificate is required on all relevant aspects of the judgment.[20] In inter-Scandinavian relations a judgment on parental responsibility given in a Scandinavian State is directly enforceable in the other Scandinavian States without any 'in-between control' or certificates being required.[21] It should be pointed out that the Scandinavian laws on parental responsibility differ from each other, as do the laws of various Member States of the EU. This leads to the conclusion that mutual confidence within the EU is not the same as that traditionally practiced among the Scandinavian States! The exequatur requirement in Brussels II has irritated both the parties concerned and legal practitioners, at least in Sweden.

When evaluating the exequatur requirement in the Brussels II Regulation, one should bear in mind that enforcement had not been discussed in depth in the working party when the political compromise preceding the adoption of the Brussels II Convention was reached in December 1997. As a result, enforcement was not part of the compromise. Thereafter, the Member States were generally unwilling to continue discussing solutions differing from those adopted in the Brussels I Convention. This position was strengthened by the fact that, under the 1996 Hague Convention, enforcement also requires exequatur.[22] In this author's opinion, the Member States made a mistake in not taking a more liberal approach that would give credibility to special EU rules. If this issue had been given due attention, it would not have been necessary to start redrafting the text immediately after its entry into force!

[20] See Article 33 and Annex V to the Brussels II Regulation.

[21] This follows from the 1977 Nordic Convention on recognition and enforcement of judgments in civil and commercial matters. The judgment of another Nordic State is immediately enforceable as if it were a domestic judgment.

[22] See Article 26 of the 1996 Convention, which also requires each Contracting State to apply to the declaration of enforceability or registration a simple and rapid procedure. – On the other hand, the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration of Custody of Children, adopted in 1980 under the auspices of the Council of Europe and in force in all the Member States of the EU, does not require exequatur as a condition for enforcement. This Convention was, however, primarily designed to combat the unlawful removal and retention of children, and there seems to be very little – if any – documentation available on enforcement in accordance with the Convention in any other situations. The Brussels II Regulation takes precedence over this Convention.

F. The Content of the Free Circulation of Judgments

According to the 1996 Hague Convention, measures taken in one Contracting State and declared enforceable in another shall be enforced in the latter State as if they had been taken by authorities of that State. 'Enforcement takes place in accordance with the law of the requested State to the extent provided by such law, taking into consideration the best interests of the child.'[23] The Brussels II Regulation contains no corresponding provision, thus raising the question whether it can still be taken for granted that, in the absence of a contrary provision, the same applies when the legal basis for enforcement is found in that Regulation.[24]

The answer to this question seems to depend on what is meant by 'the free circulation of judgments'. Within the regime of the Brussels I Convention, this has commonly been defined as giving a Member State's judgment the same effect in all Member States as it has in its State of origin.[25] A similar definition has been used by some authors also in respect of judgments within the scope of the Brussels II Regulation.[26] The original judgment and the legal effects attributed to it should be respected in all Member States. This seems to imply that the judgment should not be 'domesticated' (naturalized) at the enforcement stage. Such an approach is not in line with the above-mentioned provision of the 1996 Hague Convention, which in fact emphasizes that foreign and domestic judgments on parental responsibility are equally binding (or non-binding) at the enforcement stage.

Evidently, the content of enforcement is of crucial importance when applying the Brussels II Regulation. One alternative is to regard the outcome of the exequatur as binding. Once it is found that the judgment is to be recognized, it

---

[23] Article 28 of the 1996 Convention.

[24] See BORRÁS REPORT (note 8), p. 54, which states that 'the procedure for enforcement in the strict sense is governed by each State's internal law'. 'Thus, once *exequatur* has been obtained in a State, that State's internal law will govern the practical measures for enforcement.' – These limitations to 'enforcement in a strict sense' and 'practical measures' indicate a more restrictive approach than Article 28 of the 1996 Hague Convention, which can also cover substantial considerations.

[25] See JENARD P., 'Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters', in: *Official Journal* C 59/1 of 5 March 1979, p. 43: 'Recognition must have the result of conferring on judgments the authority and effectiveness accorded to them in the State in which they were given.'

[26] KOHLER, e.g., writes: ‚Die Übertragung des Binnenmarktkonzepts auf den angestrebten europäischen Rechtsschutzraum bedeutet, dass in dessen Bezugsgebiet gerichtliche Entscheidungen "frei" zirkulieren können und dass insbesondere die Wirkungen, die einer Entscheidung in deren Ursprungsstaat zukommen, in den übrigen Mitgliedstaaten ohne "Beschränkungen" zur Geltung kommen.': KOHLER Ch., 'Auf dem Weg zu einem europäischen Justizraum für das Familien- und Erbrecht', in: *Zeitschrift für das gesamte Familienrecht* 2002, p.710.

must always be possible to enforce it. The scope of the domestic law of the State of enforcement would then be limited, *inter alia*, to 'technicalities' and the manner of enforcement.[27] Another alternative is to surrender enforcement fully to the law of the State of enforcement, including the substantial conditions for enforcement. This is how Sweden, for example, interprets the approach taken in the 1996 Hague Convention.[28]

In the Swedish discussion, we have found it very difficult to justify why another Member State's judgment on parental responsibility could be more binding at the enforcement stage than a similar domestic judgment.[29] The following situation serves as an example: A foreign judgment – which is recognized and declared enforceable in Sweden in accordance with the Brussels II Regulation – concerns a child who objects to enforcement. After the foreign judgment was given, the child reached an age and maturity that under Swedish domestic law requires the courts to pay due regard to the child's views. Does respecting the judgment's original effects mean that it must be enforced irrespective of the child's objection? According to Swedish law, when a child has reached the age of twelve, no enforcement can take place against the child's will, unless the court finds it necessary in the child's best interests.[30]

The following statement reflects the existing concerns: 'Foreign judgments cannot be allowed to take a VIP lane at the expense of the interests and welfare of the child.' If Member States cannot accept that the final outcome – enforcement or not – may depend on the domestic law (on enforcement) of the requested State (= substantial conditions in that law), then efforts must be made to harmonize (unify) the (substantive) rules on the enforcement of judgments in the Member States.[31] Such harmonization or unification could be restricted to enforcement in

[27] Article 24(2)-(3) in the Brussels II Regulation might be interpreted to support such a position. According to this view, a (positive) declaration on the enforceability of a judgment would lose all sense if the judgment cannot be enforced.

[28] This interpretation is based on Article 28 of the Convention. Article 27, on the other hand, does not differ essentially from Article 24 (or Article 19) of the Brussels II Regulation.

[29] In discussions within an inter-Scandinavian working party on (international) family law issues, Finland has taken a similar position (as have the other Scandinavian States). This working party, set up in the early 1990's, meets twice a year to discuss topical family law issues. It is also in charge of preparation of inter-Scandinavian legislation on international family law.

[30] The same applies in respect of a child under twelve years of age, where the child has reached such maturity that his or her will should be respected: Code on Parents and Children, Chapter 21, section 5.

[31] It might be argued that Articles 61.c and 65 of the Rome Treaty already provide a legal basis for such harmonization/unification. – The Commission's proposal for a new regulation from 3 May 2002 – see below IV – contains an explicit provision on the issue: 'The enforcement procedure is governed by the law of the Member State of enforcement'

cross-border cases.[32] Discussing this issue should be more important than prospects for abolishing *exequatur*!

III. The French Proposal to Facilitate the Exercise of Rights of Access

In July 2000, France presented a proposal aimed at facilitating the exercise of rights of access by (a) abolishing exequatur in respect of judgments relating to access rights and (b) stipulating the prompt and (in principle) unconditional return of a child who is retained in another Member State after the exercise of access rights.[33] Originally, the proposal covered only judgments within the scope of the Brussels II Regulation.

The first part of the proposal entails the canalisation of all control of another Member State's judgment to the court or other authority in charge of enforcement. This can save both time and confusion caused by different conclusions if exequatur is first granted by one court but thereafter enforcement is refused by another court (see above, II.F). The Scandinavian experience is that courts and other authorities in charge of enforcement are fully competent to control the requirements for recognition; no in-between control is needed.[34] Abolishing all requirements of a preceding exequatur would therefore be entirely uncontroversial from the point of view of these States (= Finland and Sweden).

The second part is more complicated. It also raises issues of a more general character, such as the proposal's effect on the 1980 Hague Convention on Civil Aspects of International Child Abduction. The Brussels II Regulation respects the primacy of the 1980 Hague Convention.[35] The French proposal, on the contrary, would mean setting the Hague Convention aside in situations covered by the proposed Regulation. If the child is not returned to the parent with custody at the end of the period of access set in the judgment, the competent authorities in the

(Article 50). It is not clear whether the scope of the provision is limited to purely procedural issues (= manner of enforcement) or even covers such discretion as the enforcement court may enjoy under the law of enforcement (= affecting the substance of the case). The second alternative would seem to require more detailed drafting.

[32] Needless to say, this alternative can be criticized for reasons demanding the equal treatment of domestic and foreign judgments.

[33] 'Initiative of the French Republic with a view to adopting a Council Regulation on the mutual enforcement of judgments on rights of access to children', in: *OJ* C 234/7 of 15 August 2000.

[34] See above, II.E.

[35] See in particular Article 4 of the Brussels II Regulation.

Member State where the child is staying shall order the prompt return of the child without the possibility, for example, to invoke any ground of refusal in the 1980 Hague Convention. Only provisional protective measures may be taken in the other Member State, and these measures cease as soon as the Member State of the habitual residence has taken other measures.

No convincing reasons have been given for the introduction of special Community rules relating to child abduction apart from general claims of inefficiency on the part of the Hague Convention and abuse of its grounds for refusal to return the child to the State of its habitual residence. It is also alleged to be common practice for a court, after refusal to return the child, to readily assume jurisdiction in respect of parental responsibility.

In many Member States of the EU it has taken a long time for the courts and other concerned authorities to learn to apply the Hague Convention in the intended manner. Bearing this in mind, it seems premature to propose other rules when the Convention has finally become well established throughout the EU.[36] The experiences of most Member States in respect of the 1980 Hague Convention have been evaluated positively. Moreover, the proposed rules are complicated, involve the introduction of additional proceedings lacking a counterpart in many Member States (such as proceedings for the suspension of an enforceable judgment) and risk being interpreted in different ways.

Surely there must be better methods to ensure the consistent interpretation and application of the grounds of refusal in the Hague Convention than proposing a new set of rules for EU Member States.[37] The proposal can be regarded as a new manifestation of the European Union's self-sufficiency and self-superiority: 'Only we can create proper rules for our internal relations.' Introducing another set of rules for a very special type of situation would cause even more confusion for legal practitioners.[38] Furthermore, this would bring another field of law – the civil aspects of international child abduction – under Community competence.

[36] Belgium was the last Member State of the EU to ratify the 1980 Hague Convention, as late as 1999.

[37] It should be mentioned that the Hague Conference is presently (autumn 2002) working on good practice guidelines aimed at improving the application of the 1980 Convention.

[38] According to information provided by the Swedish Ministry of Justice, a slight majority of the Member States of the EU has objected from the beginning to replacing the 1980 Hague Convention by the new 'French' rules.

IV. The Commission's Proposal to Replace Brussels II by a New Regulation

In the EU, politicians are encouraged to 'extort' enactments that would otherwise risk not being realized. When discussions in various working parties get stalled because of fundamental disagreements or because some Member States object to certain proposals, the alternative is to have the Council of Ministers of Justice and Home Affairs (JHA Council) take up the issue. The statements made at the Council – which rarely go against new proposals – are then effectively claimed to be (politically) binding on the working party. The French Proposal for abolishing exequatur in respect of judgments on access gained its 'legitimacy' in this way.[39] This method was also used to extend that proposal to cover all children and all situations.[40]

In September 2001, the Commission put forth a proposal on parental responsibility that covers all children and severs the link with matrimonial proceedings.[41] This proposal was replaced by a new Proposal by the Commission in May 2002.[42] The latter proposal is no longer supplementary to the Brussels II Regulation and the French proposal, but replaces them by integrating them into a single instrument.

In this author's opinion, it would be more logical to remove parental responsibility from the scope of the Brussels II Regulation and to restrict the new Regulation to the various aspects of parental responsibility. The work of judges and legal practitioners would be facilitated if Brussels II would only cover marriage dissolution: Not all marriages result in children and not all children have parents who are married to each other. In several Member States, for example, Finland and Sweden, parental responsibility continues after divorce without any adjustments required in the form of a judgment. Questions of parental responsibility arise everywhere without a connection to marriage dissolution. The adoption of an additional Regulation – Brussels III – would manifest the equality of all children and pay regard to the fact that there are Member States – for example,

[39] At its meeting in Tampere, Finland in October 1999, the Council identified the area of visiting rights as a priority for judicial cooperation. See 'Conclusions of the Tampere European Council', point 34.

[40] At its meeting on 30 November and 1 December 2000, the JHA Council agreed to extend the scope of the French proposal to establish the equal treatment of all children.

[41] 'Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility', in: *Official Journal* C 332/269 of 27 November 2001.

[42] 'Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No. 1347/2000 and amending Regulation (EC) No. 44/2001 in matters relating to maintenance of 17 May 2002.'

Sweden – where most children are born out of wedlock! As for the content of the new Brussels III, it should closely follow the provisions of the 1996 Hague Convention. Further, the primacy of the 1980 Hague Convention should be respected.

At this stage one must admit that it is too late to prevent parental responsibility in cross-border situations from falling into the ambit of Community law. Still, one has the bitter feeling that considerable funds have been spent on issues that could have been resolved at much less cost and with better quality by adopting the solutions proposed by other international organisations, above all by the Hague Conference on private international law in its Convention of 1996. The legal practitioner will certainly not be grateful for the resulting multiplicity of instruments.

V. The Effects of Brussels II on Inter-Scandinavian Cooperation

The Brussels II Convention reserved for each of the Scandinavian Member States of the Union, i.e., Denmark, Finland and Sweden, the option to declare[43] that, instead of applying the Convention in their mutual relations, they will apply the corresponding provisions in the Convention between Denmark, Finland, Iceland, Norway and Sweden containing private international law provisions on marriage, adoption and guardianship, originally concluded in 1931. A similar option – restricted to Finland and Sweden – is found in Article 36(2) of the Brussels II Regulation. Both concerned States made the declarations immediately after the adoption of an inter-Scandinavian Convention of 6 February 2001 that brought the jurisdictional rules in the 1931 Convention in line with the Brussels II Regulation.[44]

The Scandinavian States have a long tradition of legal cooperation, which has resulted in several conventions and uniform laws in the field of private international law. These unified rules are applicable only in inter-Scandinavian relations, i.e., proceedings initiated in one Scandinavian State but having a certain

[43] See JÄNTERÄ-JAREBORG M., (note 4), pp. 29-31.

[44] These declarations are published in: *Official Journal* L 58/22 of 28 February 2001. According to the declarations, the provisions of the 1931 Convention shall be applicable *in whole* in the mutual relations between Sweden and Finland, starting from the day when the Convention on the revision of the 1931 Convention enters into force. Since the revised Convention entered into force between Finland and Sweden as late as 1 July 2001, there was an interval – 1 March to 30 June 2001 – when the Brussels II Regulation applied in all respects between them. – In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on Amsterdam, Denmark does not participate, i.a., in the new civil law cooperation.

connection, often through the nationality of a party, to another Scandinavian State. Needless to say, the legislative activities of the European Union in this field threaten the inter-Scandinavian uniformity. Finland and Sweden participate fully in the new legal cooperation, whereas Denmark is outside of it, as are, of course, the EFTA States Iceland and Norway.

The option given to Finland and Sweden enabled the continuation of inter-Scandinavian uniformity. The requirements – non-discrimination on grounds of nationality and keeping jurisdictional rules in future agreements concluded between the concerned States in line with those laid down in the Brussels II Regulation – are such that the European Union can be said to have *de facto* dictated the new inter-Scandinavian rules. To meet the first requirement, the revised rules are limited to situations where both spouses are Scandinavian citizens and are habitually resident in Scandinavia.[45] In matters relating to parental responsibility, the child must also be habitually resident in a Scandinavian State. The second requirement was met by duplicating in substance the corresponding provisions on jurisdiction in the Brussels II Regulation.[46] Only the Convention's rule on recognition is left intact, save for some formal changes. Contrary to the Brussels II Regulation, the Convention contains no grounds for refusal of recognition. Although it can be criticized that these rules had to be modelled on Community enactments, in substance the new rules are definitely an improvement, except for the requirement of an exequatur preceding enforcement.[47]

It remains to be seen whether future legislative activities in the EU will leave scope for continued Scandinavian cooperation in the relevant fields[48] or – in

[45] Prior to the amendment it was sufficient if both spouses were Scandinavian citizens irrespective of the State(s) of habitual residence.

[46] See Article 7 (marriage dissolution) and Article 8 (parental responsibility in connection with matrimonial proceedings) in the revised Convention, as well as the provision on *lis pendens* (Article 8a, modelled on Article 11 of the Brussels II Regulation), which had no counterpart in the earlier version of the Convention.

[47] After the entry into force of the Brussels II Regulation, Finnish judgments falling within the scope of the Regulation are subject to an exequatur in Sweden, as are Swedish judgments in Finland. A judgment must first be declared enforceable by the competent court – in accordance with the Brussels II Regulation – before another authority in the State of enforcement can enforce it. Thus a more complicated procedure has replaced a simple one. The exception made in the Regulation (Article 36.2) giving Finland and Sweden the option to continue application of special inter-Scandinavian rules in their mutual relations does not cover inter-Scandinavian rules on enforcement contained in a special enforcement convention from 1977. – On the other hand, the lack of grounds for refusal in the 1931 Convention may reduce exequatur in the Finnish-Swedish relations to a mere control of the necessary documents.

[48] The Scandinavian States are likely to be interested in a similar extension of the scope of the rules on parental responsibility as has been proposed by the Commission (see above IV). In fact, the 1931 Convention has been criticized for decades in Scandinavia for containing special rules applicable only to children of married spouses. In light of the terms

fact – mean the death of unified Scandinavian rules. Simple rules on various private international law aspects originally found their basis in harmonized substantive law between the Scandinavian States. Even when the Scandinavian (substantive) laws later developed independently,[49] the exequatur-free circulation of judgments has continued to be a key element in Scandinavian cooperation. The Community would be well advised to seek guidance in the Scandinavian enactments.

of the 'Scandinavian exception' in Article 36.2 of the Brussels II Regulation, it was considered necessary to retain this out-of-date structure.

[49] This is the case today, in particular in family law.

NATIONAL REPORTS

PRIVATE INTERNATIONAL LAW IN A GLOBALIZING AGE: THE QUIET CANADIAN REVOLUTION

Joost BLOM*

I. Introduction

Canada is not given to revolutions. It owes its creation, not to a popular uprising, but to a bargain struck among the governments of four British colonies in North America, which was given effect by an Act of the Imperial Parliament in 1867.[1] It

* Professor and Dean of Law, University of British Columbia, Vancouver, B.C., Canada.

[1] British North America Act 1867 (U.K.). The four original colonies, which became provinces of Canada after Confederation, were Upper Canada (Ontario), Lower Canada (Quebec), New Brunswick and Nova Scotia. Other British colonies and territories were joined to Canada over the years, the last being what is now the province of Newfoundland and Labrador in 1949. Canada consists of ten provinces (from west to east British Columbia,

Yearbook of Private International Law, Volume 4 (2002), pp. 83-115
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

was content to leave its constitution embodied in that British statute, amended from time to time by the United Kingdom Parliament at Canada's request, until 1982.[2] Armed civil conflict has played little role in the development of the Canadian nation.[3] By and large, the course of Canadian history has been set, not in the streets or on fields of battle, but in boardrooms, legislatures and – arguably to an even greater extent than in the United States – the courts.[4]

It was the courts, for example, that interpreted the constitution so as to amplify the provinces' power to legislate on 'property and civil rights in the province'[5] to a breadth that the framers of the constitution probably never intended. The judges saw the protection of provincial legislative competence in matters of private law as fundamentally important. Therefore, they held repeatedly that provincial jurisdiction over a particular matter cannot be displaced by the federal Parliament unless such a measure is sanctioned by an express grant of federal power. A striking illustration of this principle is the power to implement treaties by legislation. Although only the federal government is able to enter into treaties, the constitution gives the federal Parliament no express power to implement them. The courts have declined to read such a power into the constitution. Hence, the federal Parliament cannot implement treaties by legislation if the subject matter of the legislation would otherwise fall within the provincial competence over property and civil rights in the province.[6]

Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Prince Edward Island, Nova Scotia, and Newfoundland and Labrador), and three territories (Yukon, Northwest Territories and Nunavut), the territories enjoying more limited self-government than the provinces. English law forms the basis of the private law of all the provinces and territories except Quebec, whose private law derives from that of France (see the Quebec Civil Code, S.Q. 1991, c. 64). For access to primary Canadian legal sources, see Canadian Legal Information Institute, online: <http://www.canlii.org>.

[2] At that time the British North America Act 1867 of the United Kingdom became the Constitution Act, 1867 of Canada. At the same time, Canada adopted the Constitution Act, 1982, which among other things enshrines a Canadian Charter of Rights and Freedoms (Part I) and provides a mechanism for amending the constitution (Part VI).

[3] There were two brief revolts by native inhabitants of the prairies in the early years, the Red River Rebellion (1869-70) and North-West Rebellion (1885), both of which took place in what is now Manitoba. Although abortive, they had lasting political consequences.

[4] Even the question whether, and under what circumstances, Quebec can legitimately secede from Canada was put by the federal government to the Supreme Court of Canada: *Reference re: Secession of Quebec*, [1998] 2 S.C.R. 217. The province of Quebec has elected nominally secessionist governments for much of the period since 1976, but, to this point, none has been able to muster enough popular support for actually taking decisive steps towards a break with Canada.

[5] Constitution Act, 1867, s. 92(13).

[6] *Attorney General of Canada v. Attorney General of Ontario* [1937] A.C. 326 (P.C.). This has consequences virtually every time that Canada becomes a party to a convention dealing with private international law. Either the legislation to implement the

Except where they form part of a body of federal law, like maritime,[7] bankruptcy[8] and intellectual property law,[9] the rules of private international law fall within provincial legislative competence. So far as they are concerned with court jurisdiction they fall under 'administration of justice in the province',[10] and so far as they deal with applicable law and the recognition and enforcement of foreign judgments they are within 'property and civil rights in the province'. Although in strict theory the system of private international law could therefore differ from province to province, in reality there are only two systems, that of Quebec and the common law system that applies everywhere else. There are two reasons why the private international law of the Canadian common law jurisdictions is essentially uniform. One is that private international law has not been very much modified by provincial statutes[11] and, where it has, the legislation has often been based on model uniform Acts, which has kept divergences to a minimum.[12] The other is that the Supreme Court of Canada is the court of final appeal in matters of provincial as well as federal law.[13] If a case on private international law from any of the common law provinces is appealed to the Supreme Court, the resulting decision, unless it turns on a provincial statute, binds the courts in all the common law provinces.

Beginning in 1990, the courts, led by the Supreme Court of Canada, have completely changed the ground-rules of private international law in Canada. As I will try to show, they have done so in response to two new, or newly perceived, realities. One was the implications of the Canadian constitutional framework for a modern system of justice dealing with inter-jurisdictional cases. The other was the manifold ways in which the world has become a more interconnected place – in a word (although the Supreme Court has not used it in this connection), globalization. The latter factor has been so strong that the changes, by and large, have encompassed not only interprovincial cases but also international ones, to which

---

convention must be passed by all provinces and territories, or, if the convention has a federal state clause, Canada can designate the provinces and territories that have passed the necessary legislation as the parts of Canada to which the convention applies.

[7] Constitution Act, 1867, s. 91(10), 'navigation and shipping'.

[8] *Ibid*, s. 91(21), 'bankruptcy and insolvency'.

[9] *Ibid.*, s. 91(22), 'patents of invention and discovery', and 91(23), 'copyright'.

[10] *Ibid.*, s. 92(14), which specifically includes procedure in civil matters in the courts of the provinces. In the common law system, court jurisdiction is traditionally viewed as a procedural matter.

[11] When 'provincial' or 'province' is used in this paper it should be understood as referring both to the provinces and to the territories of Canada.

[12] The model Acts are those promulgated by the Uniform Law Conference of Canada. Its uniform Acts, and information about the adoption of each of them by the provinces, can be found online: Uniform Law Conference of Canada, <http://www.ulcc.ca>.

[13] This is a crucial difference from the United States, where the Supreme Court of the United States decides only matters of federal, not state, law.

the inferences drawn from the constitution are irrelevant. The aim of this paper is to explore how the new contours of Canadian private international law have been shaped by judicial perceptions of the demands of justice in a globalizing age.

II. Start of the Revolution: Foreign Judgments

A. The *Morguard* Case

The critical case was *Morguard Investments Ltd v. De Savoye*.[14] Lenders had brought foreclosure proceedings in respect of a mortgage loan secured on land in Alberta. The debtor had formerly lived in Alberta but now lived in British Columbia. The lenders obtained an order[15] for service *ex juris*, that is, service of the initiating documents on the defendant outside Alberta. The defendant was duly served with process in British Columbia. The defendant took no steps to defend the action. He may well have been following the advice of his lawyer. Under the common law on the enforcement of foreign (that is, extra-provincial) judgments, a foreign court's *in personam* judgment was binding on the defendant only if the court had jurisdiction over the defendant. That jurisdiction had to be based either on the defendant's presence in the territory of the foreign country at the time the action was commenced, or on the defendant's consent. Consent could take various forms, namely, the initiation of the proceeding as plaintiff, submission to the foreign court's jurisdiction by taking part in the proceeding, or a prior agreement to submit.[16] Therefore, if the defendant was served *ex juris* and did not in any way consent to the jurisdiction of the court, the foreign judgment was regarded at common law as having no binding effect outside the country where it was given.

---

[14] [1990] 3 S.C.R.1077. The Supreme Court Reports since 1983 are accessible online: Université de Montréal, <http://www.lexum.umontreal.ca/csc-scc/en>.

[15] Alberta is unusual among Canadian province in still requiring leave to serve *ex juris*. Leave may be sought only in defined categories of case that are closely connected with Alberta. In most other provinces, service *ex juris* is authorized without leave in any of the listed categories of case, and with leave in cases not on the list. The rules of court on service *ex juris* effectively define the limits of the courts' jurisdiction over defendants not present in the province. However, as will be seen below (notes 69-100 and accompanying text), compliance with the rules for service is no longer – which it was formerly assumed to be – the only criterion on which the court's territorial competence depends. These remarks apply to the common law provinces only. The Quebec Civil Code, S.Q. 1991, c. 64, art. 3134-3154, defines the territorial competence of the courts of Quebec in substantive, not procedural, terms.

[16] *Emanuel v. Symon*, [1908] 1 K.B. 302 (C.A.). For the Canadian cases, see CASTEL J.-G., *Canadian Conflict of Laws*, 4th ed., Toronto 1997, pp. 273-278.

The debtor's interest in the land in Alberta was foreclosed and the land was sold, but the amount obtained was less than the amount owing. The lenders therefore obtained a default judgment[17] from the Alberta court against the debtor. They brought action on the judgment in British Columbia. The debtor relied on the common law to say that the judgment was not binding on him in British Columbia, but courts decided that the common law had to change. The British Columbia Court of Appeal thought the principle was reciprocity of jurisdictional practice, that is, a foreign judgment should be recognized if the foreign court took jurisdiction in circumstances that, if a parallel case had presented itself, would have enabled the local court to take jurisdiction under its own rules. Since a British Columbia court would have had jurisdiction over a non-resident defendant if foreclosure proceedings were brought in respect of land in British Columbia, the Alberta judgment should be enforced.[18]

The Supreme Court of Canada thought the reciprocity principle was too narrow. It preferred a standard of jurisdiction that would be independent of variations among the jurisdictional rules of the enforcing provinces. However, it arrived at the new test only after an extensive probing of the foundations of Canadian private international law.

The court's judgment was given by La Forest J. He suggested that the restrictive attitude of the common law towards recognizing foreign judgments could be traced to a nineteenth-century attachment to the notion of territoriality. The courts proceeded from the idea that a state's law could operate only within its own territory, and therefore could not bind persons elsewhere without their consent. Modern states, he suggested, 'cannot live in splendid isolation,'[19] and even the limited recognition given to foreign judgments at common law was a response to this reality.

> '[The enforcement of foreign judgments at common law], it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory […]
>
> Even in the 19th century, this approach [the English courts' narrow view of binding jurisdiction] gave difficulty, a difficulty in my view resulting from a misapprehension of the real nature of the idea of comity, an idea based not simply on respect for the dictates of a foreign sovereign, but on the convenience, nay necessity, in a world where legal authority is divided among sovereign states of adopting a doctrine of this kind.

[17] A judgment given in default of appearance by the defendant.

[18] *Morguard Investments Ltd. v. De Savoye*, [1988] 5 W.W.R. 650 (B.C.C.A.).

[19] [1990] 3 S.C.R. 1077, 1095.

> For my part, I much prefer the more complete formulation of the idea of comity adopted by the Supreme Court of the United States in *Hilton v. Guyot* 159 US 113 (1895), at pp. 163-64:
>
> "Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one national allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws[...][20]
>
> In a word, the rules of private international law are grounded in the need in modern times to *facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner*.[21]
> […]
>
> [W]hat must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice.[22]
>
> *This formulation suggests that the content of comity must be adjusted in the light of a changing world order*…'[23] [Emphasis added.]

In these remarkable passages, the Supreme Court of Canada revived the all but disused notion of comity as 'the informing principle of private international law', but at the same time connected it to contemporary social and economic conditions. It saw comity as the mediating principle that reconciles the sovereign rights of the forum state with the equally compelling demands of a 'changing world order'. The movement of wealth, skills and people is not to be managed, but 'facilitated'. By the same token, comity is a dynamic, not static, principle. When social and economic conditions change, so must private international law.

In his judgment La Forest J. went on to develop a theory that, if the conflict of laws is between Canadian provinces, the demands of comity are given additional force – and private international law, by the same token, may be given additional content – by the implications of the Canadian constitutional structure. 'The considerations underlying the rules of comity apply with much greater force between the units of a federal state, and I do not think it much matters whether one calls these rules of comity or simply relies directly on [...] reasons of justice, necessity and convenience [...]'[24]

---

[20] *Ibid.*

[21] *Ibid.* at 1096.

[22] *Ibid.* at 1097.

[23] *Ibid.*

[24] *Ibid.* at 1098.

> '[T]he English rules [on the enforcement of foreign judgments] seem to me to fly in the face of the obvious intention of the Constitution to create a single country. This presupposes a basic goal of stability and unity where many aspects of life are not confined to one jurisdiction. A common citizenship ensured the mobility of Canadians across provincial lines [...] [S]ignificant steps were taken to foster economic integration. One of the central features of the constitutional arrangements incorporated in the *Constitution Act, 1867* was the creation of a common market [...]
>
> These arrangements themselves speak to the strong need for the enforcement throughout the country of judgments given in one province. But that is not all. The Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation. All superior court judges – who also have superintending control over other provincial courts and tribunals – are appointed and paid by the federal authorities. And all are subject to final review by the Supreme Court of Canada [...][25]
>
> [T]he rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the Constitution.'[26]

Applying the idea of comity as being both fundamental to private international law and conditioned by the Canadian constitution, La Forest J. said:

> '[T]he courts in one province should give full faith and credit, to use the language of the United States Constitution, to the judgments given by a court in another province or a territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action.'[27]

Thus the court discovered an implicit full faith and credit obligation among the provinces, in a constitution that says nothing whatever on the subject expressly. This was as noteworthy an innovation on the constitutional side as the actual outcome of the case was on the private international law side. In *Morguard* itself La Forest J. stopped short of holding that the full faith and credit obligation was constitutionally mandated, not just a common law rule arrived at in the light of constitutional values. But whatever doubts there might have been on this score were laid to rest a few years later, when the court, again speaking through

[25] *Ibid.* at 1099-1100.

[26] *Ibid.* at 1101.

[27] *Ibid.* at 1102. The reference is to art. IV, s. 1 of the United States Constitution.

La Forest J., declared that the full faith and credit obligation 'is inherent in the structure of the Canadian federation, and, as such, is beyond the power of provincial legislatures to override'.[28]

Having cast off the old, rigidly territorial view of jurisdiction, the court had to devise a new test, because it admitted that even the intra-Canadian full faith and credit obligation was conditional on a proper or appropriate exercise of jurisdiction by the original court. What, then, defined proper or appropriate? At this level, comity and the constitutional framework had little to offer by way of firm guidance. They stated ends – facilitating the flow of wealth, skills and people, consistently with order and fairness – but not means. A legislature could have selected some acceptable bases of jurisdiction by way of a compromise solution, even if they did not exhaust the possibilities. But a court enunciating the common law or, *a fortiori*, implied constitutional obligations cannot do that. It must adopt a principle that, at least potentially, goes the full distance to achieving the ends.

The court cast no doubt on the propriety of taking jurisdiction on grounds that were traditionally regarded as unimpeachable, namely, where the defendant was present in the territory of the original country at the time the action was commenced or consented to the original court's taking jurisdiction.[29] The problem was to define the proper limits to jurisdiction over defendants who were not in the country of the original court and did not consent to its taking jurisdiction. '[T]here must be some limits to the exercise of jurisdiction against persons outside the province.'[30] What the court was forced to do is resort to very broad language, albeit to some extent sanctioned by precedent.

The essential idea, which La Forest J. expressed in somewhat varying phrases, was that there must be a 'real and substantial connection' between the action and the province where the suit was brought.[31]

---

[28] *Hunt v. T & N Plc* [1993] 4 S.C.R. 289, 324. Who, in fact, *does* have the power to change the rules is far from clear. If the rules are constitutional it follows that only a constitutional amendment can change them; but how does one amend, not an express provision, but an inherent implication of the structure of the constitution?

[29] [1990] 3 S.C.R. 1077, 1103-1104.

[30] *Ibid.* at 1104.

[31] La Forest J. said of the case at bar that a 'more "real and substantial" connection between the *damages suffered* and the jurisdiction can scarcely be imagined' [emphasis added], *ibid.* at 1108. He also referred to a ' 'real and substantial' connection between the jurisdiction and the *wrongdoing*' [emphasis added] (*ibid.* at 1106, citing the test for the location of a tort that was used in *Moran v. Pyle National (Canada) Ltd* (1973), [1975] 1 S.C.R. 393); a 'real and substantial connection with *the action*' [emphasis added] ([1990] 3 S.C.R. 1077, 1108); and 'substantial connection with the jurisdiction where the action took place' (*ibid.* at 1109). The phrase 'real and substantial connection' was used in the English case, *Indyka v. Indyka* (1967), [1969] 1 *AC* 33 (H.L.), as a jurisdictional criterion for the recognition of foreign divorces, but had not previously been extended, in England or Canada, to money judgments.

La Forest J. acknowledged that the test lacked precision, but preferred to see its open-ended quality as a virtue:

> 'It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties. In a world where even the most familiar things we buy and sell originate or are manufactured elsewhere, and where people are constantly moving from province to province, it is simply anachronistic to uphold a 'power theory' or a single *situs* for torts or contracts for the proper exercise of jurisdiction.'[32]

The Alberta foreclosure action clearly met the 'real and substantial connection' criterion. The lenders could therefore sue in British Columbia on their default judgment to recover the amount of the deficiency from the British Columbia-resident debtor.

B. The *Hunt* Case

As already mentioned, it was not long before the 'real and substantial connection' test was confirmed to have constitutional status. This was decided by *Hunt v. T & N Plc.*,[33] which was not strictly a private international law case. The question was whether certain asbestos manufacturers, who were sued in British Columbia for personal injuries that their products were said to have caused, were obliged to produce, as the British Columbia court had ordered, documents located in Quebec. A Quebec statute purported to bar the removal from Quebec of any business records pursuant to an order of any government or judicial authority outside Quebec.[34] The Supreme Court of Canada held that such a refusal to accommodate the requirements of litigation in another province was constitutionally impermissible. The Act must therefore be read as not applying to other Canadian provinces, although presumably it can still validly apply to orders from authorities in truly foreign countries.

---

[32] [1990] 3 S.C.R. 1077, 1108-1109.

[33] [1993] 4 S.C.R. 289.

[34] Business Concerns Records Act, R.S.Q., c. D-12. The Act, which dated from 1958, was apparently motivated by the wish to block attempts by American courts to compel the production of Canadian records as evidence in antitrust proceedings brought against companies in respect of business they did in Canada: *Hunt*, [1993] 4 S.C.R. 289, 304. It was modeled on a similar Ontario statute.

In the course of the decision, La Forest J. elaborated on the constitutional requirement that 'a court must have reasonable grounds for assuming jurisdiction'.[35] He noted that the 'real and substantial' test had been criticized, and sought to disarm at least some of the critics:

> 'Contrary to the comments of some commentators and lower court judges, this was not meant to be a rigid test, but was simply intended to capture the idea that there must be some limits on the claims to jurisdiction [...] The exact limits of what constitutes a reasonable assumption of jurisdiction were not defined, and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these. However, though some of these may well require reconsideration in light of *Morguard*, the connections relied on under the traditional rules are a good place to start...
>
> Since the matter has been the subject of considerable commentary, I should note parenthetically that I need not, for the purposes of this case, consider the relative merits of adopting a broad or narrow basis for assuming jurisdiction and the consequences of this decision for the use of the doctrine of *forum non conveniens* [...] Whatever approach is used, the assumption of, and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections.'[36]

C. The Effect of *Morguard* and *Hunt*

In *Morguard* and *Hunt*, the Supreme Court of Canada therefore reshaped not only the law on the recognition of foreign (that is, extra-provincial) judgments but also the law on the jurisdiction of Canadian courts. It was now clear that, at least in cases involving Canadian provinces, (1) a foreign default judgment must be recognized if the foreign court took jurisdiction on grounds amounting to a 'real and substantial connection';[37] (2) a Canadian court, whatever its rules of court may say, cannot lawfully take jurisdiction unless a 'real and substantial connection' exists

[35] *Hunt*, [1993] 4 S.C.R. 289, 325.

[36] *Ibid.* at 325-26.

[37] There is no reason why the constitutional obligation of full faith and credit among Canadian provinces should not extend to non-monetary judgments. For a pointer in this direction, see *Uniforêt Pâte Port-Cartier Inc. v. Zerotech Technologies Inc.*, [1998] 10 W.W.R. 688 (B.C.S.C.).

between the province and the facts underlying the litigation;[38] and (3) what constitutes a 'real and substantial connection' for either purpose is not just a factual but also a functional question, an assessment to be gauged by 'the requirements of order and fairness'.

Change (1) was a dramatic liberalization of the recognition rules for foreign judgments, and also dramatic in its effect, because, like any change in the common law, it took effect retroactively.[39] Change (2), on the other hand, was a narrowing of the traditional view that provinces were free to adopt whatever rules of court, and thus jurisdictional rules, seemed best to them.[40] Change (3), as far as the jurisdiction of foreign courts was concerned, enlarged what had been a reasonably clear, if arbitrary, set of rules with a principle that calls for case-by-case evaluation according to a purposive standard. As far as the jurisdiction of Canadian courts is concerned, it introduced this new principle where no qualification on the provincial power to define court jurisdiction had been seriously contemplated before. In short, the Supreme Court of Canada's response to the 'changing world order' was much greater deference to the jurisdiction of foreign (that is, extra-provincial) courts, somewhat less deference to the assumption of jurisdiction under Canadian court rules, and a markedly higher tolerance for uncertainty of outcome in both those areas of private international law.

A number of questions left open by the Supreme Court of Canada in *Morguard* and *Hunt*, and not revisited by the court since, have had to be answered by lower courts. Two are the most important for the present purpose. First, to what extent are international cases to be treated the same as interprovincial ones? Second, how far can the principle of 'order and fairness,' as embodied in the 'real and substantial connection' test, be translated into practical jurisdictional rules, as applied both to foreign judgments and to domestic jurisdiction?

---

[38] As noted above, note 31, the court never defined exactly which elements of the litigation the connections had to be with. I mean 'the facts underlying the litigation' to include both the territorial distribution of the subject matter of the action and the territorial connections of the parties.

[39] See BLACK V./ SWAN J., 'Case Comment: New Rules for the Enforcement of Foreign Judgments: *Morguard Invesments Ltd v. De Savoye*', in: *Advocates Quarterly* 1991, pp. 509-510. The technique of 'prospective overruling' of common law precedent was proposed, and rejected, in a case on the recognition of divorces: *Edward v. Edward Estate* (1987), 39 D.L.R. (4th) 654 (Sask. C.A.). The retroactive effect of the *Morguard* case was seldom disputed in subsequent cases and, where it was, the common law rule was affirmed without hesitation: *Beals v. Saldanha* (1998), 42 O.R. (3d) 127 (Gen. Div.), revd on other grounds (2001), 202 D.L.R. (4th) 630 (Ont. C.A.), leave to appeal granted, 16 May 2002 (S.C.C.); *87313 Canada Inc. v. Neeshat Oriental Carpet Ltd.* (1992), 11 C.P.C. (3d) 7 (Ont. Gen. Div.).

[40] Two provinces, Nova Scotia and Prince Edward Island, permit service *ex juris* without leave in any case at all if the defendant is resident in Canada or the United States.

D. Extension of *Morguard* to Non-Canadian Judgments

The answer given by the lower courts to the first question has been unequivocal in relation to foreign judgments. Despite the absence of any constitutional imperative, the courts have, with rare early exceptions, unhesitatingly held default judgments from outside Canada enforceable on the same 'real and substantial connection' jurisdictional test as those from another Canadian province.[41] To mention only the appellate decisions, they have enforced default judgments from foreign countries (in each of these cases, the United States) based on the Canadian-resident defendant having marketed and sold its goods to commercial purchasers in the foreign market;[42] having sold a parcel of land in the foreign jurisdiction to a person resident there;[43] and having had a subsidiary that operated a waste disposal facility in the foreign country that, after it closed, required extensive environmental cleanup by the government.[44] The real and substantial connection test was applied, but found not to be satisfied, where a resident of British Columbia had been sued in Texas for having defamed a Nevada corporation, itself managed in British Columbia, by material posted on an Internet site to which residents of Texas, or any other part of the world, had access. There was no suggestion that the defendant had in any way targeted residents of Texas when he published the allegedly defamatory matter.[45]

One of the cases just mentioned can be taken as an illustration of the potential difficulty that Canadian defendants face as a result of the 'real and substantial connection' rule. A boat builder in Richmond (near Vancouver), British Columbia, was held liable on a judgment given in Alaska in an action in respect of defects in a boat's construction, brought by the Alaskan fisherman who had bought the boat. As far as the reported facts show, the defendant had not actively marketed its boats in Alaska, but it certainly knew that the purchaser was Alaskan. In fact, it had dealt less with him than with the Alaskan government, which was assisting him to buy the vessel. Cumming J.A. in the British Columbia Court of Appeal said:

---

[41] The cases up to 1997 are discussed in BLOM J., 'The Enforcement of Foreign Judgments: *Morguard* Goes Forth into the World', in: *Canadian Business Law Journal* 1997, p. 373.

[42] *Old North State Brewing Co. v. Newlands Services Inc.*, [1999] 4 W.W.R. 573 (B.C.C.A.) (brewing equipment sold to North Carolina purchaser); *Moses v. Shore Boat Builders Ltd.* (1992), 106 D.L.R. (4th) 654 (B.C.C.A.), application for leave to appeal dismissed, 3 Mar. 1994 (S.C.C.) (fishing boat sold to Alaska purchaser).

[43] *Beals v. Saldanha* (2001), 202 D.L.R. (4th) 630 (Ont. C.A.), leave to appeal granted, 16 May 2002 (S.C.C.).

[44] *United States of America v. Ivey* (1996), 139 D.L.R. (4th) 570, application for leave to appeal dismissed, 29 May 1997 (S.C.C.). See *infra*, notes 63-67 and accompanying text.

[45] *Braintech Inc. v. Kostiuk* (1999), 171 D.L.R. (4th) 46 (B.C.C.A.), application for leave to appeal dismissed, 9 Mar. 2000 (S.C.C.).

> 'The manufacturer, Shore Boat, tendered its products directly to an Alaska purchaser. As a result, the manufacturer ought to assume the burden of defending that product in Alaska. There is no doubt that the Alaska forum is one which Shore Boat reasonably ought to have had in its contemplation when it so tendered its goods. In such a case, under Canadian conflicts law, the court should recognize that *the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over the foreign defendant.*'[46] [Emphasis in the original.]

In that case the Alaskan connections were particularly strong, including the extensive involvement of the Alaskan government in the negotiation of the contract and its performance. On the other hand, it cannot be supposed that mere knowledge that one is selling to a foreign purchaser, who will use the goods in the foreign country, is enough to make enforceable in Canada a foreign default judgment in a claim for damages for defects in the goods. If that were so, a Canadian clothing store would be liable on a Japanese default judgment in favour of the purchaser, just because it knew that tourists from Japan made up a proportion of its customers.

Just how extensive does the seller's knowledge or exploitation of the foreign connections have to be in order to make the seller bound by a judgment from the purchaser's home country? The answer is unclear, and this makes it difficult, in borderline cases, for Canadian sellers to know whether they should defend actions brought against them abroad. In another case, a British Columbia automobile seller was approached in British Columbia by an Ohio car dealer who wanted to buy certain special cars from the seller, and the seller made a contract in British Columbia agreeing to sell the cars and deliver at least one of them to the Ohio dealer in Ontario. In those circumstances a British Columbia judge thought there was not enough of a connection with Ohio to hold the seller bound, under the *Morguard* test, to an Ohio default judgment for breach of the contract.[47]

The globalizing impetus that *Morguard* gave to the Canadian foreign judgment rules has therefore been strong but imprecise in its limits. As suggested earlier, it is hard to see how a judge-made rule that aims to define, across all possible factual circumstances, when a foreign court properly or appropriate takes jurisdiction can be anything but imprecise. Imprecision is the price the common law has had to pay in order to break loose from the traditional criteria of the defendant's presence in the territory, and the defendant's consent.

---

[46] (1992), 106 DLR (4th) 654, 664-65.

[47] *Mid-Ohio Imported Car Co. v. Tri-K Investment Ltd.* (1993), 5 B.C.L.R. (3d) 271, reversed on the ground that the defendant had attorned to the Ohio court's jurisdiction (1995), 129 D.L.R. (4th) 181 (B.C.C.A.).

E. Defences to Foreign Judgments

A side-effect of the greatly expanded scope for enforcing default judgments, especially from outside Canada, has been to enhance the role of defences to enforcement, notably fraud, public policy, and violation of natural justice. Where the defendant has chosen to defend (and the judgment would therefore be enforceable under the pre-*Morguard* rules), these defences tend to be harder to raise than where the judgment is given in default of appearance. Where the judgment debtor has been able to fend for itself in the original court, an argument that the foreign court was duped or behaved in an unacceptable manner is less compelling than where the defendant was not there to set the foreign court straight.

In its recent decision in *Beals v. Saldanha*,[48] the majority of the Ontario Court of Appeal favoured the traditional Canadian view that a judgment debtor cannot impeach a foreign judgment for fraud except by evidence that was not available to it at the time of the foreign proceeding. If the evidence was available at that time, the defendant could have drawn it to the foreign court's attention, but chose not to defend. The rule parallels that for impeaching domestic judgments. The dissenting judge, however, would have distinguished between impeaching domestic and foreign judgments, and given more scope to the defence of fraud in relation to the latter. In her view, '[i]f the decision not to defend was not blameworthy and the defendants have no remedy in the foreign jurisdiction then it seems to me that they should not automatically be precluded from defending the action here on the basis of the "newly discovered facts" relating to fraud'.[49] The Supreme Court of Canada has given leave to appeal.

An issue that has faced the British Columbia Court of Appeal twice is whether Canadian public policy can be invoked against the enforcement of judgments from the United States that include, by Canadian standards, unduly large damage awards. In one,[50] a British Columbia manufacturer of a piece of industrial equipment was sued in Connecticut by a worker who was injured while using the machine in his place of work there. The injuries were claimed to be due to the manufacturer's negligence. The manufacturer did not appear in the Connecticut action. The worker obtained a default judgment against it for US$ 1.12 million, about US$ 1 million of which was for non-pecuniary damages including pain and suffering. In Canada the non-pecuniary damages would have been a fraction of the amount awarded by the Connecticut court.[51] The judgment was held enforceable in

[48] (2001), 202 D.L.R. (4th) 630 (Ont. C.A.), leave to appeal granted, 16 May 2002 (S.C.C.).

[49] *Ibid.* at para. 159 (Weiler J.A.).

[50] *Stoddard v. Accurpress Ltd.*, [1994] 1 W.W.R. 677 (B.C.S.C.)

[51] This is not just a matter of the conventional level of awards. Non-pecuniary damages are, by law, subject to a judicially imposed maximum, to be awarded only in the most catastrophic cases, of (currently) C$ 250,000. See *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229.

British Columbia on the basis of a real and substantial connection with Connecticut, but the Court of Appeal, on an application to extend the time for filing an appeal, took seriously an argument that a default judgment awarding damages so out of line with Canadian standards should be denied enforcement on the ground of public policy.[52] In the other case,[53] a British Columbia supplier of brewing equipment to a North Carolina brewery was sued in North Carolina for defects in the equipment. A default judgment was given against the supplier for a total of close to US$ 2 million. This included compensatory damages that were trebled under a North Carolina unfair trade practice statute. This, too, was held enforceable on the basis of a real and substantial connection of the litigation with North Carolina. The debtor contended that the enforcement of the treble damage award amounted to enforcing a foreign penal law, or contravened Canadian public policy. The Court of Appeal disagreed, saying that treble damages for unfair or deceptive trade practices were no different in essence from punitive damages, which are part of Canadian law.[54]

Canadian courts have traditionally been restrained in their use of public policy to exclude the enforcement of foreign judgments or the application of foreign law. This long-standing attitude is now reinforced by the heightened emphasis, stemming from *Morguard*, on the role of private international law as a facilitator of international movement and commerce. The most searching discussion to date of the role of public policy is that of the Ontario Court of Appeal in *Society of Lloyd's v. Meinzer*.[55] Lloyd's had obtained judgments in England against certain 'Names', or contributors of underwriting capital, who were resident in Ontario. The Names had previously attempted to bring proceedings against Lloyd's in Ontario, to establish that Lloyd's had fraudulently misled them in relation to the risks of their investments. They also wished to avail themselves of Ontario securities laws, because, they said, Lloyd's had not complied with the requirement that they be provided with a prospectus containing defined information about their investment. The Ontario Court of Appeal had held that, notwithstanding these arguments, the Ontario proceedings must be stayed because the Names had agreed

[52] (3 Dec. 1993), Vancouver CA017775 (B.C.C.A.) [unrep.]. The appeal is understood to have been settled.

[53] *Old North State Brewing Co. v. Newlands Services Inc.*, [1999] 4 W.W.R. 573 (B.C.C.A.).

[54] *Ibid.* at para. 52. The court also relied on the fact that federal legislation, the *Foreign Extraterritorial Measures Act*, R.S.C. 1985, c. F-29, s. 8(1), provides specifically for the non-enforcement of a money award in a foreign antitrust action if the Attorney General of Canada so orders. The court inferred from this that treble damage awards, which are standard in American antitrust actions, are not against Canadian public policy, because otherwise the specific power to render the judgments unenforceable would not have been necessary.

[55] (2001), 210 D.L.R. (4th) 519, application for leave to appeal dismissed, 13 June 2002 (S.C.C.).

that disputes arising out of their contracts with Lloyd's would be subject exclusively to the jurisdiction of the English courts.[56]

Nine years later, the English court had given judgment against them. Their arguments based on fraud had not been rejected but relegated to future decision. Lloyd's restructuring plan, to which they were contractually bound, made them liable to contribute premiums to cover Lloyd's losses, without set-off for claims against Lloyd's in respect of fraud or other causes of action; these were to be decided in subsequent proceedings. The English court had held that Ontario securities law had no effect on the Names' contracts with Lloyd's, the proper law of which was English law. When Lloyd's sought to enforce the English judgment against them in Ontario, they argued, *inter alia*, that to give effect to the English judgment would violate the public policy of Ontario because Ontario citizens had been deprived of the protection of their securities laws. Feldman J.A. reviewed the main Canadian cases on the meaning of public policy and said:

> 'The review of the case law confirms that the public policy exemption is narrow, when considered both in the context of applying foreign law in actions brought in Canadian jurisdictions, as well as in enforcing foreign judgments in Canadian provinces, and therefore, it has rarely been applied. This is consistent with the trend expressed by the Supreme Court of Canada in both *Morguard Investments Ltd. v. De Savoye* and in *Tolofson v. Jensen*,[57] the two cases which have set the modern rule for both interprovincial recognition of judgments of other provinces, and for the choice of law of the *lex loci delicti* for automobile accidents which have multi-provincial connections. That trend is to emphasize the concept of comity among nations and particularly among provinces of this country when addressing the issue of enforcement of judgments and choice of law. In both cases, the role of the public policy concept was left, in effect, as a safety valve to prevent anomalies.'[58]

Feldman J.A. accepted that the policy underlying the disclosure rules in the Ontario securities legislation, while perhaps not at the level of a 'moral imperative', was a 'fundamental value' of Ontario law.[59] That, however, did not decide the matter.

---

[56] *Ash v. Corp. of Lloyd's* (1992), 94 D.L.R. (4th) 378 (Ont. C.A.), application for leave to appeal dismissed, 8 Oct. 1992 (S.C.C.).

[57] [1994] 3 S.C.R. 1022; see *infra*, notes 105-124 and accompanying text.

[58] (2001), 210 D.L.R. (4th) 519, para. 60.

[59] *Ibid.* at para. 65.

> 'The issue of whether enforcement of a U.K. judgment must be refused as contrary to public policy in Ontario does not merely involve a definitional approach to the meaning of public policy but requires a consideration of all the dimensions of the case which carry implications for public policy. To determine whether enforcement of the particular judgment would be contrary to the public policy of Ontario, the court must consider the historical and factual context of the proceedings which led to the granting of the judgment, and where there are competing public policy imperatives, whether overall, registration would be contrary to public policy.'[60]

The court held that the fundamental value embodied in the Ontario securities laws was outweighed by the two factors. One was that the court itself had previously stayed the Ontario proceeding and, in so doing, expressly contemplated the possibility that an English court might not apply the rules in the Ontario securities laws. It would be inconsistent now to say, when that possibility eventuated, that the result was contrary to Ontario public policy. The other factor was that Lloyd's dispute with its Names was a world-wide dispute. The Names were residents of many countries and had been solicited in those countries. It would be unfair and anomalous if Names, depending on which country they were in, could rescind their contracts with Lloyd's and so, in effect, cancel retroactively their capital contributions to Lloyd's underwriting syndicates, which had issued policies and incurred liabilities on the basis of those contributions. It made sense to give international effect to Lloyd's restructuring measures, under which Names had to provide additional contributions to cover Lloyd's losses and, only afterwards, pursue their claims in respect of the alleged fraud. Feldman J.A. attached importance to the fact that United States courts had reached a similar conclusion in actions brought against American Names.[61] In short, the Ontario Court of Appeal decided that the public policy of Ontario must reflect, not only Ontario's own legislative purposes, but also the need to promote the harmonious working of justice at the international level.

The same court had taken a similarly international-minded approach some years before, in *United States of America v. Ivey*,[62] when the United States government sought to recover the costs of cleaning up environmental pollution at the site of a former waste disposal facility that had been operated in Michigan by a

---

[60] *Ibid.* at para. 66.

[61] The court referred to *Allen v. Lloyd's of London*, 94 F. 3d 923 (4th Cir. 1996); *Bonny v. Society of Lloyd's*, 3 F. 3d 156 (7th Cir. 1993); *Richards v. Lloyd's of London*, 135 F. 3d 1289 (9th Cir. 1998); *Riley v. Kingsley Underwriting Agencies*, 969 F.2d 953 (10th Cir. 1992); and *Lipcon v. Underwriters at Lloyd's*, 148 F. 3d 1285 (11th Cir. 1998), and several first instance decisions.

[62] (1996), 139 D.L.R. (4th) 570 (Ont. C.A.), application for leave to appeal dismissed, 29 May 1997 (S.C.C.).

Michigan subsidiary of a Canadian corporation. The liability was imposed on the parent company by United States law.[63] The government had obtained a default judgment against the Canadian parent company in federal court in Michigan, and brought action on the judgment in Ontario against the parent company. The defendant's arguments that the United States government was attempting to enforce extraterritorially a penal or revenue law, or a law otherwise of a public nature, were rejected. The liability created in favour of the government was so close to common law liability in nuisance that it was, in substance, of a commercial or private character. International comity, said the Court of Appeal, supported enforcement of such regimes. It approved the trial judge's reasons on this point.[64] The trial judge had said:

> 'The principle of comity which underpins the recent pronouncements of the Supreme Court of Canada in *Morguard* and *Amchem*,[65] and *Tolofsen v. Jensen*,[66] should, in my view, inform the development of this area of the law. What is sought to be enforced here is a judgment requiring parties who engaged in an environmentally hazardous activity for profit to make good the cost actually incurred to eliminate that environmental hazard. There is clearly a public purpose at stake, but in my view, the presence of that public purpose does not defeat the plaintiff's case. Given the prevalence of regulatory schemes aimed at environmental protection and control in North America, considerations of comity strongly favour enforcement.'[67]

The *Meinzer* and *Ivey* cases might have been decided the same way before *Morguard*, but they might not. What *Morguard* and the other Supreme Court decisions have done is to set in place, more strongly than Canadian courts had done before, an internationalizing counterweight to the usual tendency of courts to favour the laws and policies of the forum. As a consequence, public policy, already fairly sparingly used in Canada, has become an even more carefully circumscribed doctrine. On the other hand, both it and other defences to the enforcement of foreign judgments will probably be at issue more frequently now that Canadian courts may be called upon to enforce a large range of default judgments from non-

---

[63] Comprehensive Environmental Response, Compensation and Liability Act, 1980, 42 U.S.C., § 9607(a).

[64] *Ibid.* at 573-74.

[65] *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; see *infra*, notes 71-76 and accompanying text.

[66] [1994] 3 S.C.R. 1022; see *infra*, notes 105-124 and accompanying text.

[67] (1995), 130 D.L.R. (4th) 674, 689-90.

Canadian courts. *Beals v. Saldanha*[68] shows how the defence of fraud, at least, has come under pressure to be broadened because of this development.

III. The New Law of Jurisdiction

A. The Minimum Requirement for Jurisdiction *Simpliciter*

As described above, *Morguard* introduced the principle that the jurisdictional rules of Canadian courts themselves were subject to a minimum standard that was encapsulated in the 'real and substantial connection' expression. It has been left to the lower courts to work out the implications of the new principle. It almost certainly does not call into question the traditional jurisdiction based on consent or on the defendant's presence in the province.[69] Its function is to set the limits of jurisdiction over defendants who do not consent and are not in the province. On the technical level, the main problem the courts have faced is to develop a workable distinction between, on the one hand, the constitutional 'real and substantial connection' requirement, and, on the other hand, the well-established doctrine of *forum non conveniens*. They are clearly distinct in theory, because the former, now often referred to as jurisdiction *simpliciter*,[70] is a mandatory rule that determines whether the court has jurisdiction at all, whereas the latter refers to the court's discretion not to exercise the jurisdiction that it has. However, the method for determining whether there is jurisdiction *simpliciter* on the basis of a 'real and substantial connection' is very like the evaluation, in a *forum conveniens* situation, of whether the court is at least as appropriate as any other forum to hear the dispute.

The leading Canadian decision on *forum non conveniens* is an anti-suit injunction case, *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*.[71] The Workers' Compensation Board of British Columbia brought an action in Texas against various multinational manufacturers of asbestos products,

[68] *Supra*, notes 48-49 and accompanying text.

[69] *Teja v. Rai*, [2002] 2 WWR 499 (B.C.C.A.).

[70] *Strukoff v. Syncrude Canada Ltd.* (2000), 80 B.C.L.R. (3d) 294 (C.A.), application for leave to appeal dismissed, 24 May 2001 (S.C.C.); *Pacific International Securities Inc. v. Drake Capital Securities Inc.* (2000), 194 D.L.R. (4th) 716 (B.C.C.A.); *Jordan v. Schatz*, [2000] 7 W.W.R. 442 (B.C.C.A.); *Furlan v. Shell Oil Co.*, [2000] 7 W.W.R. 433 (B.C.C.A.); *Cook v. Parcel, Mauro, Hultin & Spaanstra, PC* (1997), 143 D.L.R. (4th) 213 (B.C.C.A.), application for leave to appeal dismissed, 10 July 1997 (S.C.C.); *Craig Broadcast Systems Inc. v. Frank N. Magid Associates Inc.* (1998), 155 D.L.R. (4th) 356 (Man. C.A.).

[71] [1993] 1 S.C.R. 897.

most of whom were headquartered in the United States. The action was in the name of plaintiffs to whom the Board had paid benefits because they had been injured at work by exposure to asbestos. The defendants in the Texas action applied to the British Columbia Supreme Court for interim and permanent injunctions against the Board's proceeding with its claim in Texas.[72] The defendants' position was that the claims should properly be heard in British Columbia, where the plaintiffs had been injured and where most of them still resided.

The Supreme Court of Canada held that no injunction should be granted. *Forum non conveniens* was the key to the Supreme Court's analysis. The threshold question was whether the foreign court was a *forum non conveniens* in the sense understood in Canada, or, more accurately, whether any reasonable court in the foreign court's position, had it applied the Canadian test, would have been driven to conclude that it was *forum non conveniens*. The critical issue under the Canadian approach to *forum non conveniens* is whether another court elsewhere is 'clearly more appropriate' as a forum for the litigation.[73] If no other court was clearly more appropriate than the foreign court in question, the foreign court's jurisdiction had to be respected. 'The policy of our courts with respect to comity demands no less.'[74] (an invocation of *Morguard*.)

If indeed the foreign court was, on any reasonable view, a *forum non conveniens* in the Canadian sense, the next question was whether an injustice would result if the litigation were allowed to continue there.[75] The determination whether the result would be unjust turned on the legitimate personal or juridical advantages that the plaintiff would enjoy in the foreign court as against the local forum, compared with the legitimate advantages that the other party would have in the local forum compared with the foreign one.[76] In the *Amchem* case it could not be said that the Texas court was *forum non conveniens* for the claims against the asbestos manufacturers and, even if it were, the manufacturers had not shown that they would, in Texas, be unfairly deprived of rights that they would have had in a court in British Columbia.

The relative appropriateness of the local as against the foreign (extra-provincial) forum – the *forum conveniens* issue – is judged on the basis of all the facts that have a bearing on where the case could best be heard from the point of

---

[72] The Board's presence in British Columbia gave the British Columbia court undoubted *in personam* jurisdiction over it, including the power to grant an injunction against it to restrain it from conducting foreign legal proceedings.

[73] [1993] 1 S.C.R. 897, 918-20, 931. The 'clearly more appropriate' test was first articulated in *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] 1 A.C. 460 (H.L.).

[74] [1993] 1 S.C.R. 897, 934.

[75] The Supreme Court adopted the two-stage analysis, with some modifications, from *Société Nationale Industrielle Aérospatiale v. Lee Kui Jak*, [1987] A.C. 871 (P.C.).

[76] [1993] 1 S.C.R. 897, 933-34. The legitimacy of an advantage turns on whether the party had a reasonable expectation that it would be entitled to it: *ibid.*

view of the parties and of the administration of justice.[77] How, then, does this concept differ from that of jurisdiction *simpliciter*, the constitutional requirement that turns on the existence of a sufficient connection with the local forum? It is clear that in many cases, *forum non conveniens* will trump jurisdiction *simpliciter*. Even if a real and substantial connection exists with the local forum, another court may nevertheless be found to be a more appropriate forum for the litigation and the local court will therefore decline jurisdiction on the ground of *forum non conveniens*. What is not clear is whether, in practice, the real and substantial connection test for jurisdiction *simpliciter* will ever trump *forum conveniens*, by denying a court jurisdiction in a case where it perceives itself to be an appropriate forum.

The issue arises most clearly where the plaintiff's residence in the province is the main connection with the forum. Plaintiffs have argued that courts should take jurisdiction on this basis if the plaintiff's ability to litigate elsewhere is hampered by personal circumstances or external conditions. Defendants have argued in reply that the plaintiff alone cannot supply the necessary connection, and that at least a significant portion of the relevant events in the case, or the defendant, must also be connected with the forum province. On the whole, courts have gone quite far in favouring the plaintiff's position in such cases. In *Oakley v. Barry*, [78] for instance, a resident of Nova Scotia was held able to sue a New Brunswick hospital and physicians for malpractice, although the treatment had taken place entirely in New Brunswick. The necessary connection with Nova Scotia was found to consist of the plaintiff's continued health problems suffered in that province, and her lack of resources to litigate in New Brunswick. The court noted that, in *Morguard*, La Forest J. had written not only of 'real and substantial connection' but also of 'order and fairness', and this entitled judges to apply *Morguard* 'in a flexible manner.'[79] It also said that, in deciding whether jurisdiction *simpliciter* exists, it may be appropriate to take into account the same considerations as in a *forum conveniens* evaluation in order to avoid injustice.[80]

In five recent decisions given together, the Ontario Court of Appeal has endeavoured to lay down the law on jurisdiction *simpliciter* in a reasonably defini-

[77] See CASTEL J.-G. (note 16), pp. 257-259.

[78] (1998), 158 D.L.R. (4th) 679 (N.S.C.A.), application for leave to appeal dismissed, 15 Oct. 1998 (S.C.C.).

[79] *Ibid.* at 691.

[80] *Ibid.* at 693-94. See also *Duncan (Litigation Guardian of) v. Neptunia Corp.* (2001), 199 D.L.R. (4th) 354 (Ont. S.C.J.), holding that the 'real and substantial' test should not be dogmatically applied if it would unjustly deny a local plaintiff access to the court. (An Ontario resident sued his multinational employer in Ontario for injuries suffered by gas poisoning in the apartment his employer had supplied to him in China.) Compare *Jordan v. Schatz*, [2000] 7 W.W.R. 442 (B.C.C.A.), which held that even if the action is statute-barred in the alternative jurisdiction(s), the mere presence of the plaintiff in the forum is not a real and substantial connection that supports jurisdiction *simpliciter*:

tive way. In all five cases, the primary connection of the litigation with Ontario was that the plaintiff lived there and, to some extent, suffered there from the consequences of the defendants' wrong. The Ontario Rules of Civil Procedure allow service *ex juris* without leave of the court in any case in which the claim is 'in respect of damage sustained in Ontario arising from a tort, breach of contract, breach of fiduciary duty or breach of confidence, wherever committed'.[81] The five actions stemmed from, respectively, the plaintiff's being injured as passenger in a motor vehicle accident in Alberta;[82] the plaintiff's being injured as a passenger in a motor vehicle accident in New York City;[83] the plaintiff's being injured when she fell on the premises of a restaurant near Buffalo, New York;[84] the plaintiff's suffering carbon monoxide poisoning in a taxi in Grenada, while on a shore excursion that was part of a Caribbean cruise;[85] and the plaintiff's falling while rappelling off a high platform during a tour of a forest in Costa Rica as part of a package holiday there.[86] In each case the Ontario court had jurisdiction as far as the rules for service *ex juris* were concerned, but the non-Ontario defendants[87] argued that the court had no jurisdiction *simpliciter* because the action lacked a real and substantial connection with Ontario. The Court of Appeal held that jurisdiction *simpliciter* was established in the first case, but that the Ontario trial court lacked jurisdiction in the other four.

Sharpe J.A., speaking for the court, agreed with the earlier case law, including *Oakley v. Barry*, that took a broader approach to the question of jurisdiction than merely insisting on a certain accumulation of factual connections with the province. From the previous decisions he drew eight factors that, he said, should go into the evaluation of whether jurisdiction *simpliciter* was present. The factors were as follows:[88]

> (1) The connection between the forum and the plaintiff's claim.This reflects the forum's 'interest in protecting the legal rights of its

[81] R.R.O. 1990, Reg. 194, Rule 17.02(h).

[82] *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577 (Ont. C.A.).

[83] *Gajraj v. DeBernardo* (2002), 213 D.L.R. (4th) 651 (Ont. C.A.).

[84] *Sinclair v. Cracker Barrel Old Country Store Inc.* (2002), 213 D.L.R. (4th) 643 (Ont. C.A.).

[85] *Lemmex v. Sunflight Holidays Inc.* (2002), 213 D.L.R. (4th) 627 (Ont. C.A.).

[86] *Leufkens v. Alba Tours International Inc.* (2002), 213 D.L.R. (4th) 614 (Ont. C.A.).

[87] In the last two cases, involving accidents while on holiday, the suppliers of the cruise and the package holiday were also sued; they were corporations that did business in Ontario.

[88] *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577, paras. 75-110.

residents and affording injured plaintiffs generous access for litigating claims against tortfeasors'.[89]

(2) The connection between the forum and the defendant. 'If the defendant has done anything within the jurisdiction that bears upon the claim advanced by the plaintiff, the case for assuming jurisdiction is strengthened.'[90]

(3) Unfairness to the defendant in assuming jurisdiction. 'The principles of order and fairness require further consideration, because acts or conduct that are insufficient to render the defendant subject to the jurisdiction may still have a bearing on the fairness of assumed jurisdiction. Some activities, by their very nature, involve a sufficient risk of harm to extra-provincial parties that any unfairness in assuming jurisdiction is mitigated or eliminated.'[91]

(4) Unfairness to the plaintiff in not assuming jurisdiction. 'The principles of order and fairness should be considered in relation to the plaintiff as well as the defendant.'[92]

(5) The involvement of other parties to the suit. 'The twin goals of avoiding a multiplicity of proceedings and avoiding the risk of inconsistent results are relevant considerations.'[93]

(6) The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis. This stems from the proposition that *Morguard* made clear, namely, that 'precisely the same real and substantial connection test [as applies to the recognition and enforcement of extra-provincial judgments] applies to the assumption of jurisdiction against an out-of-province defendant'.[94]

(7) Whether the case is interprovincial or international in nature. 'The decisions in *Morguard*, *Tolofson* and *Hunt* suggest that the assumption of jurisdiction is more easily justified in interprovincial cases than in international cases', because of the emphasis these cases placed on the demands of the Canadian federal system.[95]

(8) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere. In interprovincial cases it is unnecessary to consider the standards that prevail in other jurisdictions, but 'in international

[89] *Ibid.* at para. 77.

[90] *Ibid.* at para. 82.

[91] *Ibid.* at para. 86.

[92] *Ibid.* at para. 88.

[93] *Ibid.* at para. 91.

[94] *Ibid.* at para. 38.

[95] *Ibid.* at para. 95.

> cases, it may be helpful to consider international standards, particularly the rules governing assumed jurisdiction and the recognition and enforcement of judgments in the location in which the defendant is situated'.[96]

On the basis of these factors, jurisdiction *simpliciter* was established only in the action in respect of the automobile accident in Alberta. In all five cases, factor (1) pointed towards jurisdiction, since the plaintiffs were from Ontario and their injuries affected them there, and factor (2) away from it, because the defendants had done nothing in Ontario. In the Alberta case factor (3) did not loom large because it was not unfair that defendants driving in Alberta should be liable to suit in another province by residents of that province whom they injured. In the other cases, the unfairness to the defendants was perceived to be greater. Even in the New York car accident case, the reasonable expectations of the New York defendants was said to be directed at litigation in their home state, not in Ontario, with which they had no connection.[97] Factor (4) played a role in the Alberta case because, given his injuries, it would be difficult for the plaintiff to litigate in Alberta, and he had no insurance that would cover the costs.[98] In the other cases the court thought it was not unfair to require the plaintiffs to bring their claims in the defendants' home country. Factor (5) was not important in any of the cases, because in none of them were the claims against the non-Ontario defendants part of a group of interrelated claims for which Ontario was the more appropriate forum.[99] Factor (6) featured in the four international cases, the Court of Appeal taking the view that an Ontario court would not recognize a judgment from the other country if the other country's court took jurisdiction over an Ontario defendant in the same circumstances as those that were put forward here as sufficient for an Ontario court to take jurisdiction. Factor (7) also militated against a finding of jurisdiction in the international cases, and in favour of such a finding in the Alberta case. And factor (8) worked against finding jurisdiction in the international cases, because there was no evidence in any of the four that an Ontario judgment would be recognized in the defendants' home country.

The multi-factored approach taken by the Ontario Court of Appeal in these five cases highlights the labile nature of the concept of jurisdiction *simpliciter*.

---

[96] *Ibid.* at para. 102.

[97] *Gajraj v. DeBernardo* (2002), 213 D.L.R. (4th) 651, para. 17.

[98] *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577, para. 90.

[99] On this basis the court distinguished *McNichol Estate v. Woldnik* (2001), 13 C.P.C. (5th) 61 (Ont. C.A.), where the claim was for malpractice by a number of doctors who had treated a patient. One had treated him in Florida and the rest in Ontario. The claim against the Florida practitioner was held to have a real and substantial connection with Ontario because it was desirable to try all the claims together and Ontario was the natural forum for doing so.

This stems from the fact that the 'order and fairness' side of *Morguard* predominates over the 'real and substantial connection' side. Only the first two of the eight factors are strictly factual in nature; all the rest are designed, more or less explicitly, to assess the consequences of taking jurisdiction from the point of view of whether doing so would further the ends of justice.

The Court of Appeal's approach also highlights the extensive overlap, if its approach is correct, between jurisdiction *simpliciter* and *forum non conveniens*. Of the eight factors laid down by the court, only factor (6) (whether an Ontario court would recognize a foreign judgment given in parallel circumstances) would not usually be considered as part of a *forum conveniens* decision. All the factors have a clear bearing on the appropriateness of an Ontario forum as opposed to a foreign place of trial, the exact issue at stake in a *forum conveniens* dispute. Sharpe J.A. asserted that there is a distinction between the two concepts, and that each has its role to play, but he did not venture into particulars:

> 'The real and substantial connection test requires only *a* real and substantial connection, not *the most* real and substantial connection... Further, the residual discretion to decline jurisdiction also suggests that the consideration of fairness and efficiency is not exhausted at the stage of assumed jurisdiction and that there is scope for considering these factors at the *forum non conveniens* stage. The residual discretion therefore provides both a significant control on assumed jurisdiction and a rationale for lowering the threshold required for the real and substantial connection test.'[100] [Emphasis in the original.]

The question, whether jurisdiction *simpliciter* will ever trump *forum conveniens*, remains unanswered, although Sharpe J.A.'s last sentence certainly suggests the answer is no.

The most important new element that these Ontario cases (some or all of which may be appealed to the Supreme Court of Canada) add to the existing case law is the emphasis on jurisdiction *simpliciter* being the mirror image of jurisdiction of a foreign court for the purpose of recognizing and enforcing a judgment. This is the converse of the idea, rejected in *Morguard*, that we should recognize foreign courts as having jurisdiction if we would take jurisdiction in a parallel case. The principle here is that we should not take jurisdiction ourselves unless we think we would be prepared to recognize a foreign judgment given in the same jurisdictional circumstances. This idea will operate, as it is designed to do, as a restraining influence on the usual wish to assist local plaintiffs by taking jurisdiction on the basis of a liberal rule for service *ex juris*. It is likely to operate more strongly in international cases than in interprovincial ones because, in international cases,

[100] *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577, para. 44.

there is no federal framework to provide assurance as to standards of justice in, and ready access by defendants to, the extra-provincial court.

B. *Forum Conveniens* and *Lis Alibi Pendens*

Before leaving the topic of jurisdiction, one point may be noted on which the heightened emphasis on comity, both at the interprovincial and the international level, seems to have had a particularly strong impact. This is *lis alibi pendens*, the situation where a local court must decide whether to take jurisdiction even though proceedings between the same parties and on the same issues have been commenced in another province or nation. The common law has no absolute rule of priority in *lis alibi pendens* cases. Rather, *lis alibi pendens* is treated as a subcategory of the *forum non conveniens* discretion; the existence of parallel proceedings elsewhere offers a possible additional reason for the local court to decline jurisdiction. The effect of *Morguard* and *Amchem*, as interpreted by lower courts, has been to channel the discretion to decline jurisdiction (or, rather, not to decline jurisdiction) much more narrowly.

Adapting the *Amchem* two-stage approach, the British Columbia Court of Appeal has in effect decided that, as between the local forum and another court that is an equally appropriate jurisdiction in the *forum conveniens* sense, the other jurisdiction should have priority if proceedings were commenced there first, unless the party who does not want to litigate there can demonstrate that 'there is some personal or juridical advantage that would be available to him only in the British Columbia action that is of such importance that it would cause injustice to him to deprive him of it'.[101] This stands in sharp contrast to an older decision of the court in which considerable emphasis had been put on the right of local residents to sue in the local court if that was their choice.[102] To the argument that the new 'first to file' rule would encourage a 'race to the courthouse', Rowles J.A., for the court, pointed out that the alternative was a 'race to judgment', because, if both courts allow the proceedings to continue and the extra-provincial court is an appropriate forum, its judgment, if given first, would be expected to be recognized in British Columbia.[103] The Court of Appeal more recently stressed, however, that the issue

[101] *Westec Aerospace Inc. v. Raytheon Aircraft Co.* (1999), 173 D.L.R. (4th) 498, para. 25.

[102] *Avenue Properties Ltd. v. First city Development Corp.* (1986), 32 D.L.R. 94th) 40 (B.C.C.A.), overruled by *472900 B.C. Ltd. v. Thrifty Canada Ltd.* (1998), 168 D.L.R. (4th) 602 (B.C.C.A.), which relied on, *inter alia*, the emphasis in *Morguard* and *Amchem* on comity as between courts.

[103] *Westec* (1999), 173 D.L.R. (4th) 498, para. 40. This issue actually arose in the *Westec* litigation. The Court of Appeal decided that the British Columbia action should be stayed in favour of parallel proceedings between the same parties that were then under way in Kansas. In January 2001, at the hearing of the appeal from *Westec* before the Supreme

remains one of *forum conveniens* and the 'first to file' rule only applies – that is, the local court is only obliged to decline jurisdiction – if the other court is as closely connected to the litigation and the parties as the local forum. If the local forum is more closely connected, it is the *forum conveniens* and so need not defer to the other court, even if the proceedings in the other court were begun first.[104]

IV. The New Approach to Choice of Law

The revolution sparked by *Morguard* has spread to choice of law, but here, unlike in the areas discussed above, the emphasis on the needs of the interprovincial and international legal system has paradoxically led the Supreme Court of Canada to rigidify the law rather than make it more flexible. The decision usually referred to as *Tolofson v. Jensen*[105] was actually a combined decision on two actions for damages arising out of automobile accidents. One was a British Columbia case in which a boy sued his father for injuries suffered in an accident in Saskatchewan said to have been caused in part by the father's negligent driving and in part by the negligence of the driver of another car, who lived in Saskatchewan. The choice of law issues related to a limitations statute (the action was statute-barred in Saskatchewan but not in British Columbia) and a Saskatchewan law that required a gratuitous passenger to prove gross negligence in order to recover against a driver (British Columbia law required only proof of ordinary negligence). The other case (*Lucas (Litigation Guardian of) v. Gagnon*) was an action brought in Ontario by Ontario residents for injuries they suffered as passengers in a road accident in Quebec. The action was brought against the Ontario-resident driver of the car in which they were riding.[106] The choice of law issue was whether the bar imposed by Quebec law against any civil action for personal injuries suffered in an automobile accident in Quebec[107] should be applied by the court in Ontario, where no such bar existed.

Court of Canada, the Chief Justice announced that the court had just learned that the Kansas court had in the meantime given judgment, which altered the issues in the case. The parties chose not to proceed and the appeal was dismissed: (2001), 197 D.L.R. (4th) 211*n.*

[104] *Western Union Insurance Co. v. Re-Con Building Products Inc.* (2001), 205 D.L.R. (4th) 184 (B.C.C.A.), application for leave to appeal dismissed, 9 May 2002 (S.C.C.).

[105] [1994] 3 S.C.R. 1022. The style of cause of the action arising out of the Quebec.

[106] An action against the Quebec-resident driver of the car with which their car collided was discontinued.

[107] Enacted as part of a no-fault insurance regime in the Automobile Insurance Act, S.Q. 1977, c. 68.

Until these cases, the law in Canada had followed the English choice of law rule in tort. This required that the wrong be actionable by the *lex fori* and be 'not justifiable' by the *lex loci delicti*. The latter requirement could be met by a showing that the defendant was either civilly or criminally liable in the jurisdiction where the accident occurred.[108] Recent cases in the Ontario courts had strengthened the role of the *lex loci delicti* by insisting that, unless all the parties had little to do with that jurisdiction, its requirements of civil, not merely criminal, actionability had to be satisfied.[109] In the two cases under appeal in *Tolofson*, however, the lower courts had decided that the tort issues were governed by the rules of the *lex fori*. The absence of a civil action by the *lex loci delicti* was immaterial because, in each case, the negligent driving was 'not justifiable' in the province where the accident took place, since, according to the pleaded facts, the drivers' conduct amounted to offences there under the traffic laws.

The Supreme Court of Canada held in both cases that the *lex loci delicti* must exclusively determine the tort issues. That included the limitations issue, which the court characterized as one of substantive tort law rather than, as the precedents tended to say, of procedure – itself an illustration of the post-*Morguard* tendency to give fuller weight to the laws of other jurisdictions. The court's judgment was once more given by La Forest J. Whereas in *Morguard* and *Hunt* he had seen comity as a response to the functional needs of the interprovincial and international systems, here he saw comity as sanctioning a principle of strict territoriality.

> 'From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, *i.e.*, the *lex loci delicti*.'[110]

[108] *Phillips v. Eyre* (1870), L.R. 6 Q.B. 1 (Ex. Ch.), followed in *McLean v. Pettigrew*, [1945] S.C.R. 62.

[109] *Grimes v. Cloutier* (1989), 61 D.L.R. 94th) 505 (Ont. C.A.); *Prefontaine Estate v. Frizzle* (1990), 65 D.L.R. (4th) 275 (Ont. C.A.). These cases were influenced by the adoption of a 'double actionability' rule in England: *Boys v. Chaplin* (1969), [1971] A.C. 356 (H.L.). That rule, in turn, has since been abolished and replaced by a *lex loci delicti* rule subject to a flexible exception: Private International Law (Miscellaneous Provisions) Act 1995 (UK), c. 42, s. 10-12.

[110] [1994] 3 S.C.R. 1022, 1049-50.

He pointed out that the application of the *lex loci delicti* also had practical advantages. The rule was certain, easy to apply, and predictable in operation. It also seemed to meet normal expectations. To arguments that 'order and fairness' might in some circumstances suggest departure from the *lex loci delicti* rule, he answered: 'These 'public policy' arguments simply mean that the court does not approve of the law that the legislature having power to enact it within its territory has chosen to adopt.'[111] It might be bad luck for plaintiffs that they were injured in a place where the law was less favourable to recovery than the law of their home country, but that was part and parcel of the territoriality principle. 'While, no doubt, as was observed in *Morguard*, the underlying principles of private international law are order and fairness, order comes first.'[112]

As in *Morguard*, the court reinforced its private international law rules with constitutional underpinnings. Canada's structure, as a single country with different provinces exercising territorial legislative power, seemed to La Forest J. to 'support a rule that is certain and that ensures than an act committed in one part of this country will be given the same legal effect throughout the country'.[113] It is hard to know how seriously to take this comment. If taken to its logical conclusion, it would mean that the provinces, including Quebec, must have uniform choice of law rules. That means the rules must be fixed by the courts, since no provincial legislature could enact them on its own. La Forest J. went on to suggest that not only the uniformity, but also the content, of the rules might be subject to constitutional imperatives. If the courts of a province applied inappropriate choice of law rules, it could amount to the province exercising extraterritorial law-giving power by having its courts attach civil consequences to activities taking place outside its borders. These constitutional musings are not developed to any extent. If they represent the law they will hamstring the development of choice of law in Canada on a very thin rational basis, so it is fortunate that they were expressly made as *obiter dicta*.[114]

The decision in *Tolofson* is unusual, from the point of view of judicial technique, because it explicitly considers whether there should ever be any exception to the rule, rather than leaving that question for future cases to consider. La Forest J. rejected any exception to the *lex loci delicti* rule for interprovincial cases, on the ground of certainty. The applicable law should not depend, for

---

[111] *Ibid.* at 1058.

[112] *Ibid.* at 1064.

[113] *Ibid.* at 1066. This idea was drawn from the judgment of Mason C.J. of the High Court of Australia in *Breavington v. Godleman* (1988), 169 C.L.R. 41.

[114] [1994] 3 S.C.R. 1022, 1066. For a critical analysis of the constitutional aspects, see CASTEL J.-G., 'Back to the Future! Is the New "Rigid" Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?', in: *Osgoode Hall Law Journal* 1995, p. 35. More generally, see EDINGER E., 'The Constitutionalization of the Conflict of Laws', in: *Canadian Business Law Journal* 1995, p. 38.

instance, on whether all the parties are from the forum jurisdiction; that would treat similar cases differently, depending on whether there happened to be a party from the country where the accident took place, and might tempt litigants to exclude or include parties in order to influence the choice of law.[115] He left the door slightly ajar for departures from the *lex loci delicti* in favour of the *lex fori* in international cases, but gave little indication of the grounds on which such an exception would in his view be justified, other than as part of an international convention on choice of law.[116]

Since *Tolofson* a number of lower court decisions have invoked the 'international exception' in order to apply the *lex fori* in cases where Canadians have had accidents in the United States and all the parties to the lawsuit are from the forum province.[117] In each of them the application of the *lex fori*, rather than the *lex loci delicti*, was said to be more compatible with justice. The Ontario Court of Appeal has recently rejected the reasoning in this line of cases. It held that a mere difference in legal position from being bound by the *lex loci delicti* rather than one's home law is not an injustice sufficient to justify a departure from the general rule that the law of the place of the accident must be respected, as *Tolofson* laid down.[118] The international exception, according to the Court of Appeal, is very narrow and applies only in truly exceptional circumstances.[119] It did not apply where, for instance, an Ontario resident was injured in a single-car accident in New York State when riding as a passenger in a vehicle registered and insured in Ontario and owned and driven by Ontario residents. The plaintiff's rights were not affected by the Ontario no-fault scheme, which would have limited his recovery.[120]

---

[115] *Ibid.* at 1061.

[116] *Ibid.* at 1062. La Forest J. referred to the Hague Convention on Traffic Accidents, which provides for such an exception (and has been adopted in Yukon Territory: R.S.Y.T. 1986, c. 29. s. 5-8).

[117] *Wong v. Wei* (1999), 65 B.C.L.R. (3d) 222 (S.C.); *Hanlan v. Sernesky* (1997), 35 O.R. (3d) 603 (Gen. Div.), affd. (1998), 38 O.R. (3d) 479 (C.A.); *Lebert v. Skinner Estate* (2001), 53 O.R. (3d) 559 (S.C.J.); *Lau v. Li* (2001), 53 O.R. (3d) 727 (S.C.J.) (an interprovincial case).

[118] *Wong v. Lee* (2002), 211 D.L.R. (4th) 69 (Ont. C.A.); *Somers v. Fournier* (27 June 2002), ONCA C36748.

[119] *Wong v. Lee* (2002), 211 D.L.R. (4th) 69, para. 12. Feldman J.A. said there that *Hanlan v. Sernesky* (1997), 35 O.R. (3d) 603 (Gen. Div.), affd. (1998), 38 O.R. (3d) 479 (C.A.), was such an exceptional case. An Ontario resident was injured in Minnesota while riding as a passenger on a motorcycle, owned and driven by another Ontario resident and registered and insured in Ontario. The issue was whether his family could recover damages in respect of the injury to him. The trial judge held that this issue should be decided by Ontario law, which recognized such claims, and not Minnesota law, under which such claims could not be brought.

[120] *Wong v. Lee* (2002), 211 D.L.R. (4th) 69 (Ont. C.A.).

The only real uncertainty about *Tolofson v. Jensen* is whether its *lex loci delicti* rule applies with the same rigour to torts that are not as strictly localized as automobile accidents. The court in *Tolofson* hedged its bets in relation to this issue. La Forest J. said:

> 'There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong. Difficulties may also arise where the wrong directly arises out of some transnational or interprovincial activity. There, territorial considerations may become muted; they may conflict and other considerations may play a determining role.'[121]

No reported case has yet examined the choice of law issue in relation to the more 'interjurisdictional' torts he referred to.

The *Tolofson* case is remarkable because it is so out of keeping with the liberalizing effect and policy-oriented flexibility of the Supreme Court of Canada's decisions on foreign judgments and jurisdiction. The court adopted a choice of law rule that was rejected three decades earlier in the United States as too arbitrary.[122] When the United Kingdom adopted a statutory choice of law rule it also made it flexible.[123] Whereas in *Morguard* the court's vision of comity led it to take a cosmopolitan stance, it led it here to embrace a rather mechanistic solution and to discount the experience of the two other systems of private international law with which the Canadian usually compare itself. It may be that the constitutional elements, as he perceived them, were felt by La Forest J. to demand a fairly cut-and-dried solution to the choice of law problem. These elements are, with respect, the least persuasive part of the court's analysis and later decisions may see them modified or even removed from this branch of Canadian private international law. That in turn may allow some rethinking of how strictly the tort choice of law rule should adhere to the territorial model adopted in *Tolofson*.[124]

---

[121] [1994] 3 S.C.R. 1022, 1050.

[122] *Babcock v. Jackson*, 12 N.Y. 2d 743 (1963), is the most often cited case.

[123] *Supra*, note 109.

[124] For a proposal to liberalize the rule, see WALKER J., ' 'Are We There Yet?' Towards a New Rule for Choice of Law in Tort', in: *Osgoode Hall Law Journal* 2000, p. 331.

V. Conclusion

With only a few decisions, the Supreme Court of Canada has recast completely the underlying principles of Canadian private international law. The new principles expressly take into account the new context of the increased mobility of wealth, skills and people, in which conflicts arise. Lower courts have amplified the principles. The Supreme Court laid heavy emphasis on a constitutional rationale for its solutions in interprovincial cases, but the non-constitutional side of its reasoning has proved sufficiently compelling on its own that lower courts, with surprisingly little qualification, have applied the same solutions to international as to interprovincial cases.

The outcome up to now can be described as fourfold. First, the recognition and enforcement of foreign judgments has been strikingly liberalized. Second, a minimum standard for taking jurisdiction over out-of-province parties has been introduced into a system where the provincial rules of court had previously been subject to no such restriction. Third, courts have been given, in the shape of the concept of comity, an intellectual counterweight to their usual forum-centric tendencies. This shows itself especially in cases in which there is a direct contest between the forum and a foreign court, such as anti-suit injunction and *lis alibi pendens* situations. Fourth, choice of law in tort has been radically revised.

Canada now has a much better and more coherent system of private international law than before. It is not, however, without its weak points. The complementary 'real and substantial connection' and 'order and fairness' principles, which apply to foreign judgments and issues of domestic jurisdiction *simpliciter*, are inherently vague. Also, they are so purpose-directed that a decision on jurisdiction – whether for the purpose of recognizing a foreign judgment or deciding whether the forum itself has jurisdiction – has taken on many of the aspects of a *forum conveniens* decision, which, to a substantial extent, turns on the particular situation of the individual parties. The law has therefore become much less certain in its operation, and decision-making by litigants has become correspondingly more difficult.

Also a weak point, is, paradoxically, that the Supreme Court has attached too much weight to certainty in the field of choice of law. It has insisted that, in torts, only a strict *lex loci delicti* rule will operate to give predictable, uniform results in interprovincial cases and, with only a very narrow suggested exception, in international cases. A strict *lex loci delicti* rule has not worked satisfactorily elsewhere and there is no reason to think it will work any better in Canada. The rule will probably function well enough in the field of automobile accidents, where in North America, at least, insurance coverage is uniformly organized on a place-of-accident basis. But for less localized torts, and especially for other fields of choice of law like contracts, it is to be hoped that the revolution works itself out in a less dogmatic fashion.

Finally, the Supreme Court of Canada's recourse to the constitution, in each of its recent decisions on interprovincial cases, may have gone further than it needed to, and further than is desirable. It is one thing to use the federal framework as indicating the direction in which the common law should move. It is quite another to say that the federal framework compels the adoption of certain solutions, which the court did say in relation to the two areas of extra-provincial judgments and the standards for domestic jurisdiction, and came close to saying in relation to choice of law. If the solutions are constitutionally required, private international law becomes a branch of constitutional law. That would mean that legislatures cannot change the rules of private international law, since they cannot change the constitution from which the rules derive, and courts can change them only if perceptions shift as to what is inherent in the federal system. The development of private international law would be stultified. That would be a perverse legacy of a revolution that originated in the desire to make the field more responsive to the social and economic realities of modern life.

NEW RUSSIAN LEGISLATION ON PRIVATE INTERNATIONAL LAW

Sergei LEBEDEV[*], Aleksander MURANOV[**], Roman KHODYKIN[***], Elena KABATOVA[****]

I. Introduction

The Third Part of the Civil Code of the Russian Federation containing Section VI on Private International Law entered into force on 1 March 2002.[1]

Hoping for the adoption of a separate act on private international law (PIL), scholars submitted their last proposal in 1991.[2] Discussions were held on the advantages and disadvantages of regulating matters relating to PIL by consolidating the relevant rules in a single codification or by incorporating them into different codes and statutes governing private law relationships, as had been done

[*] Professor, Head, Chair of Private International and Civil Law, Moscow State Institute of International Relations (University), Ministry of Foreign Affaires of Russian Federation (MGIMO (U) MFA RF) (author of Section I, Introduction).

[**] Docent at the above-mentioned chair (author of Sections II-IV).

[***] Senior Fellow at the above-mentioned chair (author of Sections V-VII).

[****] Docent at the above-mentioned chair (author of Sections VIII-IX).

[1] Part III also contains Section V on inheritance law; Part I (general provisions, ownership and other property rights, the law of obligations) was enacted in 1994, Part II (types of obligations) in 1995. An English translation of the PIL provisions is included in the Section 'Text, Materials and Recent Developments' of this Yearbook.

[2] *Materials on Foreign and Private International Law Transactions*, Research Institute–VNIISZ, v. 49, Moscow 1991 (references to Russian sources in English translation).

Yearbook of Private International Law, Volume 4 (2002), pp. 117-144
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

earlier.[3] Adopting one special act would have contributed to the systematic regulation of PIL as a separate branch of law and would have been in line with progressive trends in many countries, without excluding the possibility of enacting additional provisions, when needed, in other legislative acts. However, for various reasons, which appear to be practical rather than conceptual (the Family Code and the Merchant Shipping Code, each of which contains a set of PIL rules, became effective in 1995 and 1999, respectively), no special codification was promulgated. Instead, relevant PIL rules (dealing mostly with conflict of laws issues) were incorporated into the Civil Code. As a result, at present, the conflict of laws rules continue to be dispersed in different normative acts.

According to the traditional concept, PIL governs relations of a civil law character in the broad sense (under L.A. LUNTZ's[4] formula) or, in other terms, private law relations – including civil, family and labor[5] law relations – complicated by a foreign factor or element.

With all non-concurring views that can be found in the doctrine on various aspects of PIL as a branch of law or legal discipline, PIL is generally considered to belong to national law rather than international law. Such approach does not imply any underestimation of the role of interstate cooperation, primarily in the field of unification of law, in developing rules in different countries governing private relationships involving foreign parties or complicated by another foreign element, thus giving rise to conflict of laws issues. In our age of globalization, international factors are present in numerous different fields, be it human rights or commercial activities, as a result of which conventions made by States and instruments elaborated by international organizations (model laws etc.) containing private law provisions constitute important (legal) sources for States. By accepting such instruments, a State assumes the obligation of making the rules therein binding within its jurisdiction on the relevant legal subjects in the manner prescribed by national legislation. By virtue of Article 15.4 of the Constitution of the Russian Federation, generally recognized principles and rules of international law and international agreements entered into by the Russian Federation constitute an integral part of its legal system. According to the Constitution and provisions of numerous other normative acts – including Article 7 of the Civil Code, in cases where the rules laid down in a treaty differ from those in domestic legislation, the treaty rules shall prevail (principle of priority). This applies in cases involving private law relations

[3] SEMENOV N.P., 'On Advisability of Preparing a Statute on Private International Law', in: *Soviet State and Law* 1990, No. 1; KABATOVA E.V., 'Fundamentals of Civil Legislation and the Draft Law on Private International Law', in: *Journal of Private International Law* 1993, No. 2; MAKOVSKY A.L., 'A New Stage in Development of Private International Law in Russia', in: *Journal of Russian Law* 1997, No. 7, etc.

[4] The classical treatise in three volumes written by Prof. LUNTZ in the 1970s is reprinted in the monograph *Course on Private International Law*, Moscow 2002, p. 21.

[5] Family law and labor law are regarded as separate branches of law.

regardless whether they are governed by domestic or by unified rules. Whenever unified rules are incomplete (unavoidable situations), they are supplemented by domestic rules.

The view can be found in legal scholarship that PIL consists only of conflicts rules set out in national legislation and international agreements, thus being in essence purely conflict of laws, whereas substantive rules unified by conventions constitute *lex specialis* within a particular branch of national law. However, according to the prevailing view, PIL also encompasses unified substantive rules, such as those laid down in the 1980 Vienna Convention on International Sale or the 1924-1968 Hague-Visby Rules on Bill of Lading etc. Functionally, uniform substantive rules eliminate the source of conflicts and thus the need to resolve conflict of laws issues (at least the aspects covered by such rules).

The views differ as to whether national substantive rules enacted to govern private law relations with an international element constitute part of PIL. Although the common approach is that such rules, like any general rule of Russian law, should be applicable not *proprio vigore*, but only where a choice of laws rule refers to Russian law, the view is held that the special enactment of the above rules justifies their being regarded as part of the normative structure of PIL.

As to procedural rules applied by courts in disputes with foreign parties (international civil procedure), scholarly works and courses on PIL obviously deal with these rules. However, from the standpoint of the classification of branches of law, they are regarded as belonging not to PIL (as recognized in some countries, including the 1987 Swiss PIL Act) but to the law of civil procedure.[6]

For many years in the Soviet Union, PIL issues were researched by comparatively few scholars and taught to the proper extent only in a limited number of law schools. Among the latter, PIL was attributed greatest significance as a profile and comparative discipline at the MGIMO and, earlier, at the Institute of Foreign Trade, where students were trained for international work and where many prominent experts, also from other centers, collaborated over the years, including S.B. KRYLOV, V.N. DURDENEVSKY, L.A. LUNTZ, A.D. KEYLIN, N.V. ORLOVA, R.L. NARYSHKINA, M.M. BOGUSLAVSKY, O.N. SADIKOV, N.N. VOZNESENSKAYA and others.

On the contrary, PIL has attracted considerable attention in recent years as a result of the political, social and economic transformations in Russia. Today thousands of private enterprises participate in transnational businesses; international contacts are commonplace; migration processes, capital investments and other

[6] In Russia, two systems of courts have jurisdiction over civil law disputes: 1) courts of general jurisdiction and 2) *arbitrazh* courts, which despite their name, are not arbitral tribunal but courts of law competent to hear economic disputes (similar to commercial courts). Each system of courts has its own supreme court and procedural code. Adopted in 2002, the Arbitrazh Procedural Code regulates the enforcement of foreign court decisions and arbitral awards and proceedings involving foreign parties (Chapters 31-33). The Code of Civil Procedure, also adopted in 2002, deals with these matters in Section V.

developments unknown in the past have characterized the transition to the twenty-first century. Within the legal framework, PIL has acquired not only academic standing, but also a very important role in practice as a growing number of lawyers deal professionally with international relations. In the past, questions relating to PIL were raised mostly before the Foreign trade and Maritime arbitration institutions at the Chamber of Commerce in Moscow; today they are becoming more common in ordinary court proceedings.[7]

The growing number of books, articles and other publications on PIL is evidence of the newly found interest in this complicated subject among scholars and practitioners. Several commentaries have already appeared, also on Section VI of the Civil Code; of these I refer to the detailed survey by two well-known scholars, who remark that the innovation of PIL legislation (conflicts rules – though modest as to matters covered – had been enacted in the 1960s) 'has become a major event in the life of our society', reflecting the profound changes that have occurred and aiming to provide certainty and greater security to the parties to international private relationships.[8]

Commentators note that old rules have been modified and new ones created; this includes rules of general character, for instance, reciprocity, *renvoi*, characterization, 'super mandatory' provisions and retortions, as well as rules for various types of legal relations (see below). An important innovation is the introduction of the principle of the closest connection (Art. 1186(2)), similar to Article 1 of the 1978 Austrian PIL Act.[9] More specifically, the provision in paragraph 1 of Article 1186 deals with peculiarities to be observed when determining the applicable law in international commercial arbitration.[10] It is said that evolutions in the doc-

[7] ROZENBERG M.G., *Treaties and Foreign Laws in the Practice of International Commercial Arbitration Court*, Moscow 2000; 'Survey of Arbitrazh Courts Jurisprudence Relating to Disputes with Foreign Parties' (Information letter), in: *Vestnik* 1998, No.29.

[8] MARYSHEVA N.I./ ZVEKOV V.P., 'New Codification of PIL', in: *Economy and Law* 2002, Nos 4, 5, 6 (No. 4 pp. 3-6); also *Commentarium on Part Three of the Civil Code of the Russian Federation* (eds. MAKOVSKY A.L. and SUKHANOV E.A.), Moscow 2002; BOGUSLAVSKY M.M., *International Private Law*, Moscow 2002.

[9] It is further stated in Art. 1 that specific rules contained in the Act are to be regarded as 'the realization of this principle'. This is merely a comment; however, it acknowledges the general idea that any conflicts rule laid down in a legislative act operates as a reference to the law of a particular country, thus providing legal certainty to the parties.

[10] It appears that this provision aims merely to preserve the rules contained in the law on international commercial arbitration, i.e., Art. 28 of the Russian Law on International Commercial Arbitration of 7 July 1993, based on the UNCITRAL Model Law of 1985. According to my recollection, during the lengthy debates at the UNCITRAL meetings, a compromise was achieved, in particular, about the right of the arbitral tribunal (as opposed to courts of law) to rely on 'the conflict of laws rules which it considers applicable' (instead of solely on the conflicts rules of the *lex fori*), which is in accordance with Article VII of the 1961 European Convention on International Commercial Arbitration. See HOLTZMANN H./

trine and practice in foreign countries were also taken into account in the new Russian legislation.

At this early stage, the primary commentaries are necessarily of general tenor as only the actual application of the new rules will test their adequacy to meet the needs of practice in that or another field. For instance, some problems may be encountered in connection with the application of the so-called flexible rules for contractual obligations. Under Article 1210(2) an agreement of the parties on the choice of law is recognized if it is expressly stated or if it clearly follows from the terms and conditions of the contract or the complex of circumstances of the case. In other words, even in cases where an implied choice of law does not arise from the given contract itself, the court may make its own affirmative conclusion based on the 'circumstances'. Such choice of law can hardly be regarded as an indication of the will of both parties. This takes us back to the 'softening' of the 'strict' wording of Article 2 of the 1955 Hague Convention, a process that took place at the 1985 diplomatic conference for adoption of the substitute convention. Surely aware of Article 3 of the 1980 Rome Convention, which also refers only to 'circumstances', the delegates of 62 nations found – after lengthy discussions – a more acceptable formula, thus reducing the risk of discretion by ultimately providing in Article 7 of the new Convention that the choice need be at least 'clearly demonstrated by the terms of the contract and the conduct of the parties viewed in their entirety'.[11]

Rather versatile is also the normative standard in Article 1211, according to which the law most closely connected with the contract is to be determined in the first place by taking account of 'the law, the terms or substance of the contract or the complex of circumstances of the case'. If that fails, then the law of the country of the party shall apply whose performance is crucial for the content of the contract (according to the specification as seller, contractor, carrier etc). However, such a specific reference can be followed only in cases where the party whose performance is crucial has not been initially identified on the basis of 'the law, the terms or substance of the contract or the complex of circumstances of the case' (paras. 2, 3, 4). As a result of such 'staging' or 'multi-step' method, the search for the applicable law may be plagued by controversies and complications.

In accordance with Article 71 of the Constitution of the Russian Federation, the Russian Federation has exclusive jurisdiction to enact conflict of laws rules for federal legislation, as well as for the legislation of the constituent divisions. Moreover, in regard to the application of Russian laws in international situations, only federal authorities are empowered to enact conflict of laws rules.

NEUHAUS J., *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*, Deventer (Kluwer) 1987, p. 799.

[11] Proceedings of the Extraordinary Session held 14-30 October 1985, Procès-verbal Nos 5.6, 16; LEBEDEV S./ MARTYNOV A, 'The New Hague Convention on the Law Applicable to Contracts for the International Sale of Goods', in: *Foreign Trade* 1987, No. 1, p. 45 (published in Russian, English and French).

This article is not a commentary but provides a brief inventory of the main provisions of Section VI of the Civil Code. An English translation of Section VI CC is found in the Section 'Texts, Materials and Recent Developments' of this Yearbook (see *infra*), as well as translations of Section VII of the Family Code of 1995 and of Chapter XXVI of the Merchant Shipping Code of 1999.[12] These three codifications contain the largest sets of PIL norms, mostly conflicts rules.[13] This inventory also includes some comparisons with earlier PIL rules in the RSFSR Civil Code of 1964 (with amendments) and in the Fundamentals of Civil Legislation of the USSR and Republics of 1991 (hereinafter: FCL 1991).

II. General Provisions (Chapter 66)

This Chapter consists only of nine articles but contains a large number of rules. Generally speaking, the number of rules devoted to general issues of private international law has increased significantly in comparison with Section VII of the FCL 1991, the main source of conflict of laws rules prior to the entry into force of Section VI of the RF CC. In addition to quantity, the new general provisions have undergone serious qualitative changes as well. Thus the new provisions on general problems of private international law can be regarded as an important and long-awaited step forward. In fact, this is the first time in the history of Russian law that certain issues have been clearly regulated by law. This applies, in particular, to the following issues.

Qualification of legal concepts when determining the applicable law (Article 1187). This Article provides that, when determining the applicable law, legal concepts shall be construed in accordance with Russian law, unless otherwise provided by law. If legal concepts requiring qualification are unknown to Russian law or are known by another wording or another content and cannot be determined by interpretation in accordance with Russian law, they may be qualified according to a

[12] The English texts reproduce the translations of the provisions of each of the three codes, as specifically indicated. There is no need to include a proviso stating that the original should be consulted for the purpose of interpretation, as this is the case in respect of any unofficial translation of a legislative act into a foreign language.

[13] Separate PIL provisions are also found in other normative acts. As to the Labor Code of 2002, reference should be made to the following provision in Art. 11: 'Within the territory of the Russian Federation, the provisions established by the present Code, statutes, other normative acts containing rules of labour law, are extended to labour relationships of foreign citizens, persons without citizenship, organizations set up or instituted by them or in which they participate, employees of international organizations and foreign legal persons, unless otherwise provided by Federal statutes or treaties of the Russian Federation.' This provision could hardly be said to exclude per se conflict of laws issues relating to labor contracts with foreigners.

foreign law. From this provision it follows that the emphasis is on the application of the *lex fori*, even in respect of foreign legal concepts – which can hardly be considered just. Therefore it appears that the necessity to take recourse to foreign law should have been manifested more adamantly in this Article.

Application of the law of a country with multiple legal systems (Article 1188). Pursuant to this Article, in cases where the law of a country having several legal systems is to be applied, the applicable legal system shall be determined in accordance with the law of that country. If, under the law of that country, it is impossible to determine which of the legal systems shall apply, the legal system with which the relationship is most closely connected shall be deemed applicable.

Conflict of laws reciprocity (Article 1189). According to this Article, foreign law shall apply in the Russian Federation regardless of whether Russian law would apply to the same relationship in the particular foreign state, unless the law provides for the application of foreign law on the basis of reciprocity. In cases where the application of foreign law depends on reciprocity, the existence of reciprocity is presumed, unless proved otherwise. The introduction of the presumption of the existence of conflict of laws reciprocity is very important in the current Russian environment, given the frequent inclination of Russian courts to avoid the application of foreign law. This, however, is not surprising since Russian legal persons just recently started to actively participate in international civil and commercial relations.

Renvoi (Article 1190). This Article provides that any *renvoi* to foreign law in accordance with the rules of Section VI of the RF CC should be regarded as a *renvoi* to substantive law, but not to the conflict of laws rules of the relevant country. An exception occurs in the event of a foreign law *renvoi* to Russian law for the purpose of determining the legal status of a natural person, i.e., in cases specified in Articles 1195-1200. Accordingly, the new conflicts rules laid down in Section VI of the RF CC do not stipulate a *renvoi* to a third country law.

Application of mandatory rules of the *lex fori* and third country law (Article 1192). According to this Article, the conflict of laws rules in Section VI of the RF CC do not affect the operation of mandatory rules of legislation of the Russian Federation. By virtue of instructions in the mandatory rules themselves or their special role, *inter alia*, in guaranteeing the legal rights and interests of parties to civil law relations, they apply regardless of the otherwise applicable law. When applying the law of another country pursuant to the rules of Section VI of the RF CC, the court may take into account the mandatory rules of another country closely connected with that legal relationship, if, under the law of that country, such rules must apply regardless of the otherwise applicable law. In doing so, the court must take into account the purpose and nature of such rules, as well as the consequences of their application or non-application. Today the principles underlying Article 1192 are widely applied in the private international law of various countries and have been incorporated into numerous recent codifications. In particular, the content of Article 1192 has been seriously influenced by similar

rules in recent PIL codifications of Western States and by the Rome Convention on the Law Applicable to Contractual Obligations of 1980.

The provisions of Article 1191 on establishing the content of rules of foreign law[14] and the public policy clause in Article 1193 are not new to the RF CC; however, they introduce new elements not contained in Soviet law. The new provision in Article 1191 provides that, in claims relating to the performance of a business activity by the parties, the court may place the burden of proving the content of rules of foreign law on the parties. In connection with Article 1193 of the RF CC, it is necessary to mention Article 158 of the FCL 1991, which read as follows:

> 'Foreign law shall not apply in cases where its application would contradict the fundamentals of Soviet law order (public policy). In such cases Soviet law shall apply.
> The refusal to apply foreign law cannot be based only on the distinction between the political or economic systems of the relevant foreign state and the political or economic system of the USSR.'

Unlike Article 158 of the FCL 1991, Article 1193 of the RF CC emphasizes that the application of foreign law may be excluded only 'in exceptional cases'. Moreover, the public policy exception may be invoked only if the effects of the foreign rule would be 'manifestly' incompatible with the public policy of the Russian Federation. Intentionally introduced by the drafters of the RF CC, these two limitations are very important, because in Russian courts there has been a recent tendency to construe the category of public policy too broadly, as a result of which the application of foreign law in some cases has been refused groundlessly on this pretext. (This is also true in regard to cases where Russian courts refused to enforce foreign court decisions, especially arbitral awards). To the same end, an indication was introduced into part two of Article 1193 specifying that a refusal to apply a rule of foreign law cannot be based only on the fact that differences exist between the legal system of the relevant foreign state and the legal system of the Russian Federation. Article 158 of the FCL 1991 contained no such indication.

Pursuant to Article 1194 of the RF CC, the Government of the Russian Federation may establish 'reply restrictions' (retortions) in respect of property and personal rights of natural and legal persons of States that have placed special restrictions on the property and personal rights of Russian citizens and legal persons. Article 162 of the FCL 1991 contained a similar rule ('The Government of the USSR may establish reply restrictions on legal capacity with regard to individuals and legal persons of those States where there are special restrictions on legal capacity of Soviet citizens and legal persons'). However, whereas the former

[14] A number of bilateral agreements and conventions on legal assistance set up procedures for the exchange of information on the law in Contracting States. Russia also participates in the 1968 European Convention on Information on Foreign Law.

provision was limited to restricting legal capacity, the formulation of the new provision of Article 1194 is broader, mentioning 'reply restrictions' in respect of property and personal rights in general. It should be noted that the Government of the Russian Federation may not introduce such retaliation measures arbitrarily, but only in cases where the foreign State has introduced special restrictions on the rights of Russian citizens and legal persons.

Finally, we return to Article 1186 (Determination of the Law Applicable to Civil Law Relations with the Participation of Foreign Persons or Civil Law Relations Complicated by Another Foreign Element), which opens Section VI of the RF CC. This provision is significant because there was nothing similar in either Soviet or Russian law. Part 1 of paragraph 1 of Article 1186 describes the subject of private international law for the first time:

> 'civil law relations with the participation of foreign individuals or legal persons, or civil law relations complicated by another foreign element, including cases where the object of civil rights is located abroad.'

Further, according to this Article, the law applicable to such relations shall be determined on the basis of international treaties to which the Russian Federation is a party, the RF CC and other federal laws, as well as usages recognized in the Russian Federation. It should be noted that international treaties are at the top of the hierarchy; only thereafter are the provisions of the CC be applied, then other federal laws and lastly usages. From this it also follows that normative acts lower than federal laws in the hierarchy may not contain conflict of laws rules. Part 2 of paragraph 1 of Article 1186 specifies that 'peculiarities' as to determining the applicable law in international commercial arbitration are to be laid down by the law on international commercial arbitration. The Law on International Commercial Arbitration, which is based on the UNCITRAL Model Law, has been in force in Russia since 1993.

Introducing the principle of the closest connection, paragraph 2 of Article 1186 provides that, if it is impossible to determine the applicable law under paragraph 1 of this Article, the law of the country with which 'the civil law relationship complicated by a foreign element' is most closely connected shall apply. Although the principle of the closest connection is treated as a subsidiary connecting factor in paragraph 2, subsequent rules of Section VI of the RF CC give reason to regard this principle as one of the fundamentals of Section VI as a whole. In many aspects, paragraph 2 can be said to be the tone setter for the entire body of conflicts rules in this Section.

Not included in the initial draft of Section VI of the RF CC, paragraph 3 of Article 1186 was introduced later to ensure the application of substantive rules of international treaties of the Russian Federation, as they are better suited to regulating international civil and commercial relations than conflict of laws rules.

III. The Law Governing the Legal Status of Persons (Chapter 67)

Special significance should be attributed to Chapter 67 not only because of the subject matter regulated therein (natural and legal persons, the State as a participant in civil law relations) but also because of the fact that only two articles dealt with these issues in the FCL 1991.[15] The following rules are new in respect of natural persons.

Article 1195 (Personal Law of Natural Persons). This Article lays down a set of rules for determining the personal law (*lex personalis*) of natural persons. The very notion of personal law is new to Russian PIL legislation. The personal law of a natural person is deemed to be the law of the country of which he/she is a citizen. Where a person has a foreign citizenship in addition to Russian citizenship, his/her personal law shall be Russian law. If a foreign citizen has permanent residence in the Russian Federation, his/her personal law shall be Russian law. If a person has several foreign citizenships, his/her personal law shall be deemed to be the law of the country of his/her permanent residence. The personal law of a stateless person shall be the law of the country where that person has his/her permanent residence. The personal law of a refugee shall be the law of the country that granted him asylum. The former provisions of Article 160 of the FCL 1991 laid down only two rules in this respect: the civil legal capacity of a foreign natural person was to be determined in accordance with the law of the country of which he/she was a citizen, while the civil legal capacity of a stateless person was to be determined in accordance with the law of the country where that person had his/her permanent residence.

Today, as specified in Article 1196 and paragraph 1 of Article 1197 of the RF CC, both the passive civil legal capacity of natural persons (capacity to have civil rights and obligations) and their active civil legal capacity (capacity to exercise civil rights and obligations) are determined in accordance with their personal law. Furthermore, according to Article 1196 of the RF CC, foreign citizens and stateless persons shall enjoy passive civil legal capacity in the Russian Federation in equal measure with Russian citizens, except in cases provided by law.

Paragraph 2 of Article 1197 (The Law Governing the Active Civil Legal Capacity of Natural Persons). This paragraph provides that the active civil legal capacity of natural persons shall be determined on the basis of their personal law. A natural person who lacks active civil legal capacity under his/her personal law shall not be entitled to rely on this lack, if he/she has active civil legal capacity under the law of the place where the transaction was concluded, except in cases

[15] The Federal Law No. 115-FL on the Status of Foreign Citizens in the Russian Federation, which regulates the rights and obligations of foreigners and stateless persons in various fields, was enacted 25 July 2002 (in: *Collection of Legislation of the Russian Federation* 2002, No. 30, Art. 3032).

where it is proved that the other party knew or should have known of this lack of capacity. The old provision on active civil legal capacity in Article 160 of the FCL 1991 was similar but unilateral: the capacity of foreign citizens and stateless persons in respect of transactions concluded in the USSR was determined by Soviet law.

Article 1198 (The Law Governing the Rights of Natural Persons to a Name). This Article provides that the rights of a natural person to a name, its use and protection shall be determined by his/her personal law, unless otherwise provided by the RF CC or other laws.

Article 1199 (The Law Governing Tutorship and Guardianship). According to this Article, guardianship or tutorship over minors and adults lacking active civil legal capacity or having limited active civil legal capacity shall be appointed or terminated according to the personal law of the person under guardianship or tutorship. The guardian's (tutor's) obligation to accept guardianship (tutorship) shall be determined by the personal law of the person appointed as guardian (tutor). Relations between the guardian (tutor) and the person under guardianship (tutorship) are governed by the law of the country of the institution that appointed the guardian (tutor). However, whenever a person under guardianship (tutorship) has his/her permanent residence in the Russian Federation, Russian law shall apply, if it is more favorable for the person. In this context it should be mentioned that the FCL 1991 had no similar rules. In the USSR, conflicts rules relating to guardianship and tutorship were laid down in the Marriage and Family Code, not in the CC.

Article 1201 (The Law Governing the Possibility of Natural Persons to Engage in Business Activities). This new rule provides that a natural person's right to engage in a business activity as an individual entrepreneur without establishing a legal entity shall be determined by the law of the country where the person is registered as an individual entrepreneur. If this rule cannot be applied due to the lack of obligatory registration, the law of the country of the main place of performance of the business activity shall apply.

Paragraph 3 of Article 1197 of the RF CC (under which the recognition of the lack of active civil legal capacity or of the limited active civil legal capacity of a natural person in the Russian Federation is governed by Russian law) and Article 1200 (under which the declaration of a natural person as missing or dead in the Russian Federation is governed by Russian law) repeat the respective provisions of Article 160 of the FCL 1991.

It should be noted that the new conflicts rules for legal persons also introduce the notion of personal law. As specified by paragraph 1 of Article 1202 of the RF CC, the personal law of a legal person shall be the law of the country where the legal person was established. The criterion of the place of establishment had already been in use in the USSR since the 1930s.

For the first time in Russian law, basic issues relating to a legal person are to be determined on the basis of the personal law of the particular legal person. As specified in paragraph 2 of Article 1202, these include the following: the organiza-

tion's status as a legal person; the organizational form of the legal person; requirements as to its name; matters of formation, reorganization and liquidation of the legal person, including matters of succession; content of the legal capacity of the legal person; procedure by which the legal person may acquire rights and assume obligations; internal relations, in particular relations between the legal person and its members; and liability of the legal person. Today there is no doubt about the importance of this rule in Russian conflict of laws, which enables Russian courts to find clear answers to questions concerning the status of foreign legal persons in disputes involving the latter.

Paragraph 3 of Article 1202 provides that a legal person (which could also include a Russian legal person) may not invoke a limitation of the powers of its body or representative to conclude a transaction in cases where such limitation is unknown in the law of the country where the body or representative entered into the transaction, except in cases where it is proved that the other party to the transaction knew or should have known about the said limitation. This provision has undergone serious changes compared with the rule contained in Article 161 of the FCL 1991. Applying only to foreign legal persons, that rule provided that, when concluding a transaction, a foreign legal person could not invoke the limitation of the powers of its body or representative to conclude the transaction if such limitation was unknown in the law of the country where the body or representative entered into the transaction.

Another innovation in Russian law is found in Article 1203 (Personal Law of a Foreign Organization Which is not a Legal Person Under Foreign Law), which provides that the personal law of a foreign organization that is not a legal person under foreign law shall be the law of the country where that organization was established. Where Russian law is applicable, the respective rules of the RF CC governing the activities of legal persons shall apply to the activities of the particular foreign organization, unless otherwise provided by law, other normative acts or the substance of the relation in question.

The new interesting provision of Article 1204 makes it clear that the rules of Section VI of the RF CC apply on general grounds to civil law relations complicated by a foreign element in which a State is a participant, unless otherwise provided by law. Under this provision neither Russia nor a foreign State participating in such relations may claim the exclusive application of Russian law or the law of the foreign State respectively. This fully corresponds with the emerging trend in contemporary Russian law of abandoning the principle of 'absolute immunity' in cases where a State is a party to international civil and commercial transactions (although such abandonment has not yet been finally effected in Russian law in force).

IV. The Law Governing Property and Personal Non-material Relations (Chapter 68)

The number of rules contained in Chapter 68 has increased significantly compared with the previous law. The following rules are new in Russian law.

Pursuant to paragraph 2 of Article 1205 (General Provisions on the Law Governing Rights in Rem), property shall be classified as immovable or movable according to the law of the country where the property is located. Also significantly updated, paragraph 1 of Article 1205 now provides that the content of ownership rights and other rights in rem to immovable and movable property, as well as their exercise and protection are to be determined according to the law of the country where the property is located. The old rule of Article 164 of the FCL 1991 provided only briefly and in general terms that the right of ownership to property is governed by the law of the country where the property is located.

As specified in paragraph 3 of Article 1206 (The Law Governing the Emergence and Termination of Rights in Rem), the emergence of ownership rights and other rights in rem on the grounds of acquisition by prescription shall be determined by the law of the country where the property was located at the time of expiry of the prescription term.

While paragraphs 1 and 2 of Article 1206 repeat the former rules of Article 164 of the FCL 1991, they also extend their scope. Accordingly, the new provisions apply not only to the right of ownership, but also to in rem rights in general. Moreover, the former rule made it possible for the parties to select a national law to govern the right of ownership to *res in transitu.* Now paragraph 2 of Article 1206 does not directly provide for such possibility.

Article 1207 (The Law Governing Rights in Rem to Aircraft, Vessels and Spacecraft) provides that the right of ownership and other rights in rem to aircraft and marine craft, internal waterways vessels and spacecraft subject to state registration, as well as to the exercise and protection of these rights, shall be governed by the law of the country where the aircraft, vessels and spacecraft are registered.

Part 1 of paragraph 1 of Article 1209 (The Law Governing the Form of a Transaction) repeats the general rule of former Article 165 of the FCL 1991, according to which the formal requirements of a transaction are governed by the law of the place where the transaction was concluded; however, a transaction concluded abroad cannot be held invalid on grounds of formal requirements if the requirements of Russian law are satisfied. Part 2 of paragraph 1 of Article 1209 applies only to the form of a power of attorney without reference to the period of its validity, whereas Article 165 of the FCL 1991 subjected both the form of a power of attorney and its period of validity to the *lex loci actus*.

An exception to the general rule is provided in paragraph 2 of Article 1209: if one of the parties to a foreign commercial transaction is a Russian legal person, the formal requirements shall be governed by Russian law, regardless of the place of conclusion. The second sentence of this paragraph extends the application of

this provision to cases where at least one of the parties to the transaction is a natural person performing a business activity whose personal law under Article 1195 of the RF CC is Russian law.

Pursuant to paragraph 3 of Article 1209, the formal requirements of transactions relating to immovable property are governed by the law of the country where the property is located; however, immovable property recorded in the state register of the Russian Federation is governed by Russian law. Under Article 165 of the FCL 1991, the formal requirements of transactions relating to buildings and other immovable property located in the USSR were governed by Soviet law.

Finally, Article 1208 (The Law Governing the Statute of Limitation) provides that the statute of limitation shall be determined according to the law of the country applicable to the relevant relationship. This provision repeats former Article 159 of the FCL 1991. However, the latter also provided that claims not subject to a statute of limitation were to be governed by Soviet law. The drafters of the RF CC concluded that such a provision was no longer needed.

On the whole, Chapter 68 does not introduce any serious changes into Russian PIL. At the same time, the regulation of conflict of laws issues in this Chapter has became more detailed and accurate.

V. Contractual Obligations

The regulation of contractual obligations has undergone considerable changes in the new provisions on private international law in Section VI of the RF CC. Whereas the former FCL 1991 contained only one article on this subject matter, there are currently nine articles regulating contractual obligations in the slightly modified.

Of paramount importance is the principle of the *lex voluntatis*, i.e., party autonomy, which is now set out more clearly and in field of PIL. The structure and contents of the new provisions in Section VI may have been significantly influenced by the Rome Convention on the Law Applicable to Contractual Obligations of 19 June1980. While some provisions closely follow the text of the Rome Convention, others have been greater detailled than in the FCL 1991, where there was only one sentence in paragraph 1 of Article 166: 'Rights and obligations of the parties to international commercial transactions shall be determined on the basis of the law of the country selected by the parties at the time of contracting or by virtue of a subsequent agreement.' Today, Article 1210 of the RF CC regulates issues relating to party autonomy in five paragraphs.

Traditionally, unlimited party autonomy has been recognized in Russia; the parties have been able to choose the law of any country without being subject to any of the restrictions sometimes found in other legal systems. For example, the law chosen by the parties need not have a close connection with the contract, nor

must it be the law of either of the contracting parties, etc. There is, however, one restriction in paragraph 5: If it arises from the circumstances of a case, existing at the time the choice of law was made by the parties, that the contract is actually connected with only one country, the parties' choice of the law of another country shall not affect the mandatory rules of the country with which the contract is actually connected. Such a restriction is also known in multilateral conventions on choice of law issues in contractual obligations, for example, in Article 3(3) of the Rome Convention. Furthermore, by virtue of mandatory rules, the parties may not choose the law applicable to contracts on immovable property in the territory of Russia (Art. 1213(2) RF CC) or to contracts establishing legal entities with foreign participation (Art. 1214 RF CC).

As to the form of the parties' agreement on the choice of the applicable law, paragraph 2 of Article 1210 requires that it be expressly stated or clearly arise from the terms and conditions of the contract or set of circumstances of the case. Until recently, courts and arbitral tribunals proceeded from the presumption that the agreement of the parties on the choice of law had to be expressly stated; therefore, they did not attempt to ascertain an implied choice or 'hypothetical' will of the parties. However, at the International Court of Commercial Arbitration at the Chamber of Commerce and Industry of the RF the practice was to recognize an implied choice of law, if both the plaintiff and the defendant referred to the legislation of one and the same country in the complaint and answer. For example, in its award of 26 February 1998, the Arbitral Tribunal proceeded from the fact that the parties had agreed on the applicable substantive law.[16]

Under the new provisions, the agreement of the parties on the choice of law may also be reasonably ascertained from the terms and conditions of the contract or from the facts of the case. Similar wording is found in Article 3(1) of the Rome Convention; however, the deficiencies of this wording have already been pointed out in domestic literature:

> 'In certain most recent conflict of law conventions the relevant provisions […] have been formulated so 'elastically' as to lead to washing out the borderlines between the agreement as a legal fact – actual coincidence of will of the parties – and fiction, behind which stands the court's own 'assumption' of the intentions that some abstract 'reasonable persons' should have, had they been in place of the given specific parties […]. In my opinion, definiteness, as the main functional objective of the principle of autonomy of will of the parties, is believed to be better ensured by a more precise exclusion in the future convention of any prerequisites for interpreting this

[16] See, e.g,, case No. 242/1996, award of 26 February 1998, in: *Arbitration Cases of the International Court of Commercial Arbitration at the RF CCI in 1998,* compiled by ROSENBERG M.G., Moscow 1999, pp. 63-65.

> principle from the viewpoint of the above-mentioned concept of "hypothetical" will'.[17]

In our opinion, the wording of the 1986 Hague Convention on the Law Applicable to International Sales of Goods is more successful. According to Article 7(1) of this Convention, the agreement of the parties on the choice of law has to be expressly stated or follow directly from the terms and conditions of the contract and conduct of the parties considered in their entirety. Such approach restricts the freedom of judicial discretion and comes closer to expressing the intention of the concept of party autonomy. The Russian legislator, however, chose a different way.

It is interesting to note that Article 414 of the Code of Merchant Shipping of the RF, which entered into force on 1 May 1999, contains no rules regarding the form of the agreement of the parties on the choice of law. However, this does not mean that, in cases relating to merchant navigation, the courts will only recognize an express choice of law by the parties. Pursuant to paragraph 2 of Article 2 of the RF CC, provisions of civil law contained in other laws must comply with the Civil Code. In addition, Article 4 of the Federal Law of the RF on the Enactment of Part Three of the Civil Code of the RF provides that, pending the adoption of laws and other normative acts effective in the territory of Russia, the laws and other legal acts of the RF shall apply insofar as they do not contradict Part 3 of the RF CC. As a result, the courts will most likely apply Article 1210 of the RF CC subsidiary to Article 414 of the Code of Merchant Shipping of the RF, thus taking into account the terms and conditions of the contract or the facts of the case in their entirety, when determining the agreement of the parties on the choice of law.

Among other innovations in respect of party autonomy, it should be noted that: 1) the choice of law by the parties shall apply to the emergence and termination of the right of ownership and other real rights to movable property without prejudice to third party rights; 2) it is expressly stated that a choice of law by the parties made after the conclusion of contract has retroactive effect and is deemed valid from the time of the conclusion of the contract without prejudice to third parties; and 3) the parties may choose the applicable law both for the contract as a whole and for parts thereof.

Article 1211 of the RF CC (The Law Governing a Contract in the Absence of an Agreement of the Parties on the Choice of Law) is devoted to determining the applicable law in the absence of a choice of law by the parties. As indicated by its title, this Article deals with contracts in general, whereas Article 166 of the FCL 1991 (Obligations arising from International Commercial Transactions) dealt only with international commercial contracts. This difference is significant because the view prevailed in both Soviet and Russian literature that an international

[17] LEBEDEV S.N., 'On the Revision of the Hague Convention of 1955', in: *Legal Aspects of the Exercise of Foreign Economic Relations. Collected Scientific Works*, ed. by LEBEDEV S.N./ KABATOV V.A./ NARYSHKINA R.L., Moscow (MGIMO) 1985, pp. 62-63.

commercial transaction is onerous. Thus it followed that gratuitous transactions did not fall under the scope of Article 166 of the FCL 1991, although it applied to contracts of donation (a gratuitous transaction) by virtue of direct provision. The new provision of Article 1211 eliminates this contradiction by widening its scope to contracts in general.

One of the novelties of PIL legislation in Russia is the introduction of the criterion of the closest connection in paragraph 2 of Article 1186. According to the general rule laid down in paragraph 2, the law with which the contract is most closely connected shall apply if the applicable law cannot be determined on the basis of international treaties of the Russian Federation,[18] the RF CC, other laws and customs recognized in the Russian Federation. In regard to contracts, the general rule in Article 1211 of the RF CC specifies that, in the absence of an agreement by the parties on the choice of law, the law with which the contract is most closely connected shall apply. Under the FCL 1991, the subsidiary connecting factor was the characteristic performance: in the absence of a choice of law by the parties, contractual obligations were governed by the law of the country where the party carrying out the characteristic performance had its habitual residence. First proposed by Schnitzer,[19] the concept of characteristic performance was incorporated into the PIL legislation of a number of countries, in particular Hungary, and then into the FCL 1991.

In this regard, it can be presumed that Article 4 of the Rome Convention influenced the Russian legislator's decision. Actually, Article 4 of the Rome Convention is regarded as having achieved a compromise between proponents of the characteristic performance and those of the closest connection. In this sense, both Article 1211(2) of the RF CC and Article 4 of the Rome Convention of 1980 establish the general presumption that the law of the country with which a contract is most closely connected is deemed to be the law of the country where the party whose performance is crucial to the content of the contract has its place of residence or main place of business, unless otherwise arises from the law, the terms or substance of the contract or the group of circumstances of the case. Paragraph 3 of Article 1211 elaborates in greater detail the very concept of crucial performance: the contracting party responsible for the performance that is of crucial significance for the content of the contract is, for example, the seller in a sales contract, the donor in a donation contract etc. (except as otherwise ensuing from the law, the

[18] In several treaties there is a direct rule on the law applicable to contracts. For instance, according to Art. 11 of the Agreement between Member States of the Commonwealth of Independent States 'On the Settlement of Disputes Arising in Connection with Economic Activities' (Kiev, 1992), the rights and obligations of the parties to a transaction are determined according to the law of the place of its conclusion, unless otherwise agreed by the parties.

[19] SCHNITZER A., *Handbuch des internationalen Privatrechts*, 4th ed., Basel 1957, Vol. 2, pp. 639 *et seq*.

terms or substance of the contract or the group of circumstances of the case in question).

The FCL 1991 contained a catalogue of 13 types of contracts; as for other contracts, it was generally pointed out that they were to be governed by the law of the country of the party carrying out the performance crucial for the contract. Article 1211 of the RF CC has incorporated six additional types of contracts: contract of gratuitous use; independent contractor agreement (the FCL 1991 referred only to construction and installation works); factoring – contract of financing against the assignment of money claim; bank account contract; contract of franchising – commercial concession.

Some 'formalized' factors of the FCL 1991 have been added to Article 1211. Coming back to the principle of the closest connection, paragraph 4 of Article 1211 of the RF CC contains conflicts rules that make a presumption about the law most closely connected with three groups of contracts. The following presumption rules apply unless otherwise provided by law, the terms or substance of the contract or the circumstances of the case: contracts of independent building contractor work and contracts of independent design and prospecting contract work shall be governed by the law of the country where the performance stipulated by the contract is carried out in its entirety; general partnership agreements shall be governed by the law of the country where the activity of the partnership is pursued in its entirety; and contracts relating to an auction, tender or commodity market shall be governed by the law of the country where the auction or tender is held or the commodity market is situated.

The criterion of the closest connection has a dual character. On the one hand, it may act as the connecting factor in a bilateral conflicts rule, and on the other, as the underlying principle on which the content of a conflicts rule is based. The demarcation line determining whether the closest connection is a principle or a connecting factor is the purpose of the criterion in the particular conflicts rule. If it is used for direct application by the court or other law enforcement authority and states that the law most closely connected with the contract shall apply, then we are apparently dealing with the connecting factor of a conflicts rule. In the event, however, that the intention is to create a new conflicts rule on the basis of the principle of the closest connection, it is then used for forming the content of a conflicts rule.

In the context of Section VI of the Civil Code, the criterion of the closest connection served as the guiding principle for the legislator when forming the content of the conflicts rules. Thus, when designating the law of the country of the seller as applicable to a sales contract in the absence of an agreement by the parties on the choice of law, the legislator proceeded from the presumption that the contract is most closely connected with that country. Back in Russian pre-Soviet literature Professor Baron B.E. NOLDE wrote: 'Each conflict rule contains a certain task and clue to resolving the problem; this clue being that obligatory connection is established between certain legal relations and a substantive civil rule (sometimes, several of them). The vital nerve of the rule is exactly in the formula that defines

this connection.'[20] Thus, the availability of the 'closest connection' in a legal relation is necessary and unconditional, and in this case the conflicts rule becomes complete.

The application of the principle of the closest connection as a basis for forming conflicts rules is the legislator's point of departure (in Soviet times the conflicts rule of *lex loci contractus* was, although notable for predictability of the outcome, uniform in nature). Applying the principle of the closest connection, the legislator proceeds from the fact that regulating relations by the law of the country with which the contract is most closely connected should satisfy the objective of conflicts legislation**.** 'The combination of a "flexible" conflicts rule, which, as a general rule, refers to the law of the country with which the contract is most closely connected (this general rule was not known in the FCL 1991, but the model Civil Code for CIS countries addresses it when referring to contracts not listed therein), and "formalized" connecting factors, which determine for various types of contracts "the party whose performance is of crucial significance for the content of contract", enables conflicts issues to be resolved in accordance with the circumstances in each particular situation and, at the same time, restricts the extent of judicial discretion.'[21]

Summing up the above, let us note once again: Article 1211 may be regarded as a reasonable convergence of two concepts: crucial performance and closest connection. Therefore, the logical conclusion is the introduction of provisions into paragraphs 2 and 5 of Article 1211 to the effect that, if it arises from the law, the terms or substance of the contract or the circumstances of the case that the contract is more closely connected with the law of another country, the law of that country shall apply. The initial draft of the section on Private International Law contained no rules for applying the law of the country more closely connected with the contract, regardless of the presumption of crucial performance. However, taking into account the comments of foreign reviewers, the legislator incorporated such a rule into Article 1211.[22] From the technical point of view of legislative drafting, it would probably be more expedient to avoid the multiple repetition of the clause 'except as otherwise arising from the law, the terms or substance of the contract or the circumstances of the case in question' in paragraphs 2-5 by placing this in a separate paragraph under Article 1211, as was done in paragraph 5 of Article 4 of the Rome Convention; this would then extend its application to all contracts.

The shortcomings of the concept of crucial performance were already noted in Russian and Soviet literature. For example, it is impossible to determine the law

---

[20] LIST F., *International Law in Systematic Presentation,*. ed. by Prof. V.E. GRABAR, with additions of the editor and author of the Section on Private International Law, compiled by Prof. Baron B.E. NOLDE, Yuriev 1909, p. 471.

[21] MARYSHEVA N.I./ ZVEKOV V.P. (note 8), p. 6.

[22] See IVANOV G.A. and ROMANOVA S.M., Discussion of the Draft of Part 3 of the CC: 'Private International Law', in: *Zakonodatelstvo Journal* 1997, No. 4.

applicable to barter transactions or contracts of change, since the performance by both parties is deemed equivalent.[23] In the new legislation this lacuna has been eliminated in paragraph 5 of Article 1211, which states that a contract possessing the features of various types of contract shall be subject to the law of the country with which that contract is most closely connected, unless otherwise arises from the law, the terms or substance of the contract or the circumstances of the particular case.

An absolute novelty in Russian PIL legislation is the introduction of special conflicts rules for determining the law applicable to relations with consumers in Article 1212 of the RF CC. The FCL 1991 contained no special conflicts rules on this subject matter, nor did the RF Law on the Protection of Consumer Rights. Two aspects of this provision should be emphasized.

First, it provides that a choice of the law applicable to a contract involving a consumer shall not deprive the natural person (consumer) of remedies provided by mandatory rules of the law of the country where the consumer has his/her residence, if any of the following circumstances occurred: prior to the conclusion of the contract, an offer had been addressed to the consumer in that country; a contract partner of the consumer received an order from the consumer in that country; or an order for the acquisition of movables, performance of works or provision of services had been made by the consumer in another country visited on the initiative of a contract partner of the consumer, if such initiative aimed at encouraging the consumer to enter into the contract.

Secondly, in the absence of a choice of law by the parties, the law of the country of the consumer's residence shall apply. However, the above provisions do not apply to contracts of carriage and to contracts for the performance of works or the provision of services, if the works or services designated therein were performed exclusively in another country other than the country of residence of the consumer. It is not difficult to notice that Article 1212 reproduces Article 5 of the Rome Convention practically word for word.

Also new in Russian PIL legislation, Article 1213 of the RF CC deals with the law governing contracts relating to immovable property. The principle of party autonomy plays a major role in such contracts. In the absence of an agreement by the parties on the choice of law, the law of the country with which the contract is most closely connected shall apply (Art. 1213(1)). Paragraph 1 also establishes the presumption that the country where the immovable property is located is most closely connected with the contract, unless otherwise arises from the law, the terms or substance of the contract or the circumstances of the case. Thus, when applying Article 1213 by virtue of the presumption established in paragraph 1, the court will apply the bilateral conflicts rule of the *lex rei sitae.*

[23] See MUSIN V.A., 'UN Convention on Contract for the International Sale of Goods of 1980 and Certain Issues of Civil and Private International Law', in: *Private International Law Journal* 1993, No. 1, p. 10.

A unilateral conflicts rule is laid down in paragraph 2 of Article 1213 of the RF CC: contracts relating to plots of land, tracts of sub-soil, isolated bodies of water and other immovable property located in the territory of the Russian Federation shall be subject to Russian law. This provision is to be interpreted in conjunction with Articles 130 and 1205(2) of the RF CC. Pursuant to paragraph 2 of Article 1205, property shall be classified as immovable or movable in accordance with the law of the country where the property is located. An exception is made in Article 1207 in respect of rights in rem to aircraft, sea vessels, inland navigation vessels, and spacecraft subject to state registration, all of which are governed by the law of the country where they are registered. Thus, if property is located in the territory of Russia, its classification as movable or immovable will be determined under Russian law.

As specified in Article 130 of the RF CC, immovable property includes plots of land, tracts of sub-soil, isolated bodies of water and all land fixtures, i.e., objects whose relocation would cause incommensurable damage to their purpose, such as forests, perennial plantations, buildings and structures. Immovable property also includes aircraft, sea vessels, inland navigation vessels, spacecraft subject to state registration, as well as other property qualifying under law as immovable. All things not classified as immovable property are recognized as movable property in Russia. Consequently, the RF CC introduces two criteria for the classification of immovable property: 1) physical – things that are inseparably attached to land and their relocation is impossible without causing incommensurable damage to their purpose; and 2) legal – things that are regarded as immovable property by virtue of a direct provision of law, such as sea vessels.[24] In addition, paragraph 2 of Article 1213 of the RF CC is a mandatory rule, thus excluding a choice of law by the parties in contracts relating to immovable property located in the territory of Russia.

The definition of contract statute in Article 1215 of the RF CC is to be regarded as a positive phenomenon in the new Russian PIL legislation. Article 1215 of the RF CC provides that, in keeping with the rules of Articles 1210 - 1214 and 1216 of the RF CC, the law governing a contract determines:

1) the construction of the contract;
2) the rights and obligations of the contracting parties;
3) performance under the contract;
4) the consequences of a default in performance or improper performance under the contract;
5) the termination of the contract;
6) the consequences of invalidity of the contract.

[24] See *Civil Law in 2 Volumes,* Volume 1: *Manual* (ed.-in-chief: Prof. E.A.SUKHANOV), Moscow 1998, p. 304.

Unlike the Rome Convention (Art. 9(2)), the contract statute does not apply to the form of the contract, which is determined under the *lex loci contractus*, not the *lex causae*.

VI. Some Institutions of the Law of Obligations

The following institutions of the law of obligations are regulated in special provisions in Section VI of the RF CC on Private International Law: assignment of claim, obligations arising under unilateral transactions, power of attorney and payment of interest.

Pursuant to Article 1216 of the RF CC, the law governing an assignment of claim (*cessio*) between the assignor and the assignee shall be determined in accordance with paragraphs 1-2 of Article 1211, i.e., by the law of the country most closely connected with the contract on the basis of the presumption of 'crucial performance'. Dealing with the relations between the parties, paragraph 2 provides that the admissibility of a claim assignment, the relations between the new creditor and debtor, the conditions under which the claim may be presented to the debtor by the new creditor and the debtor's appropriate performance under his obligation shall be determined by the law applicable to the subject matter of the claim assignment.

The issue of the assignment of claim in cases with a foreign element was recently the subject of review by the Presidium of the Supreme State Court of Arbitrazh of the RF. In Resolution No. 1533/97[25] of 17 June 1997, the Presidium of the Supreme State Court of Arbitrazh affirmed the conclusion of Arbitrazh lower courts to the effect that the conditions under which the rights of the original creditor pass to the new creditor also include the designation of a certain arbitral tribunal for the settlement of possible disputes between the contracting parties. The view that, in cases of assignment, the new creditor (assignee) is not bound by the arbitration agreement between the debtor and the old creditor (assignor) had already been refuted by some authors in Soviet legal scholarship.[26] It is very gratifying that this conclusion has now been confirmed by one of highest judicial authorities of Russia.

According to Article 1217 of the RF CC, obligations arising from unilateral transactions shall be governed by the law of the country where the party assuming the obligations has its place of residence or main place of business, unless otherwise provided by law, the terms or substance of the transaction or circumstances of the case. However, in regard to testaments, paragraph 2 of Article 1224 of the RF CC provides that the capacity of a person to make or revoke a testament,

[25] See *Vestnik* 1997, No. 9, pp. 66-67.

[26] See LEBEDEV S.N., *International Commercial Arbitration*, Moscow 1965, p. 78.

especially in regard to immovable property, and the form of the testament or act of revoking the testament shall be governed by the law of the country where the testator had his/her place of residence at the time the testament was made or revoked. Although a testament is a unilateral transaction, it is subject to the law of the country where it was made, not the law of the country of residence of the heir as the party assuming obligations under the unilateral transaction.

On the other hand, the effective mandate of a power of attorney and the grounds for declaring it null and void shall be determined by the law of the country where the power of attorney was issued (Art. 1217(2) RF CC).

As to the payment of interest, Article 1218 of the RF CC provides that the grounds for collecting interest, the calculation procedure and the interest rate on pecuniary obligations shall be determined according to the *lex causae*. A number of questions arise when applying the rules on interest.

First, in some cases subsidiary application of the national substantive law is required to calculate the amount of interest due. This is also the case in Article 78 of the UN Convention on the International Sale of Goods (Vienna, 1980), which does not specify how the interest rate is to be determined. Accordingly, this issue will be resolved in accordance with the applicable national law.

Secondly, the court practice in Russia proceeds from the premise that, by its legal nature, annual interest incurred as a result of overdue payment of pecuniary debts (whose rate is to be determined in each case) constitutes a separate ground for liability along with liability for damages and agreed and liquidated damages.[27] This leads to the conclusion that, if Russian law applies to the case, the creditor has the option of suing the debtor either for interest due or for agreed and liquidated damages; this is in keeping with the principle *nemo debet bis puniri pro uno delicto* – no one can be punished twice for the same wrong. Moreover, both interest (Art. 395(2) RF CC) and agreed and liquidated damages (Art. 394(1) RF CC) have the effect of offsetting claims for damages, i.e., damages caused by the violation of an pecuniary obligation shall be compensated in that part not covered by interest. In regard to agreed and liquidated damages, damages shall be compensated in that part not covered by the agreed and liquidated damages, unless otherwise agreed by the parties. However, some international agreements make it possible to recover interest without forfeiting the right to other remedies. For example, Article 78 of the Vienna Convention provides that, if a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under Article 74. Therefore, if the courts apply the Vienna Convention of 1980 or any foreign substantive law that allows interest to be recovered along with other remedies, they will have to recover interest together with the agreed and liquidated damages, and not include the interest in the total amount of damages due. In the practice of the International Court of Commercial Arbitration at the Chamber of Commerce and Industry of Russia,

[27] See *Vestnik* 1998, No. 11.

awards have been rendered granting compensation of interest together with another remedy, such as damages for lost profit, without offsetting the latter,[28] or together with compensation of agreed and liquidated damages.[29]

Thirdly, an issue not regulated under Article 1218 is the currency of the debt. In cases relating to payment of interest, problems can arise if the transaction specifies the currency of payment, but not the currency of debt, if the currency of debt is not indicated expressly, but by the name of a monetary unit used in several countries (dollar), and if the debt is expressed in several currencies (multiple parities). In this respect, L.A. LUNTZ wrote: 'From the conflicts viewpoint the issue of establishing the currency of debt is always resolved under the law to which the content of obligation subordinates (*lex causae*)'.[30] In our opinion, such a rule deserves to be included in Section VI of the RF CC.

VII. Obligations Arising from Unjust Enrichment

Following Article 168 of the FCL 1991, the Russian legislator retained in paragraph 1 of Article 1223 of the RF CC the main connecting factor for determining the law applicable to obligations arising from unjust enrichment, i.e., the place where the enrichment occurred. It is noteworthy that a prominent Russian (Soviet) conflicts scholar, L.A. LUNTZ, had criticized using the place of enrichment as the primary connecting factor. In our opinion, his reasons and criticism still fully apply today:

> 'It should be recognized that cases of unjust enrichment are quite diverse. Nevertheless, we believe that this in itself does not prevent the application of a uniform factor connecting these individual cases: diminishing of one person's property and saving or acquisition of property by another are mutually conditioned precisely because they result from this action or event. This action or event, as a rule, may be localized. However, it is only the action or event that can be localized (payment of undue amounts, processing alien material etc.), not its effect, i.e., the unjust enrichment proper. Therefore, the

[28] See case No. 347/1995, award of 15 April 1996, *Arbitration Cases in 1996-1997*, compiled by M.G. ROSENBERG, Moscow 1998, pp. 60-64.

[29] See case No. 152/1996, award of 12 January 1998, *Cases of the International Court of Commercial Arbitration at the RF CCI in 1998*, compiled by M.G. ROSENBERG, Moscow 1999, pp. 18-20.

[30] LUNTZ L.A., *Money and Pecuniary Obligations in Civil Law*, Moscow 1999, p. 215.

> theory of the place of enrichment as a connecting factor cannot be adopted.'[31]

On the other hand, Article 1223 of the RF CC also contains novelties not found in former legislation. For instance, the parties may agree to apply the law of the court to obligations arising from unjust enrichment. Furthermore, if unjust enrichment occurs in connection with a legal relation that exists or is presumed to exist and as a result of which property was acquired or saved, the obligations arising from the unjust enrichment shall be governed by the national law that was or could have been applicable to that legal relation.

VIII. Choice of Law in Torts

The new provisions on choice of law in tortious liability in the Part Three of the Civil Code differ significantly from those of the former legislation (Art. 566(4) RSFSR CC and Art. 167 FCL 1991). Nonetheless, the starting point remains the same. Paragraph 1 of Article 1219 is based on the common, most widespread and well-established principle of determining the applicable law in torts – the law of the place of the tort. However, a clarification has been added as a result of a relatively new problem. Recent developments in science and technology have made it sometimes difficult to define the 'place of the tort'. Is this the place where the tort is committed or the place where the damage occurs? The answer to this question will determine the law applicable to specific legal relations between the tortfeasor and the injured party. Different legal systems approach this problem differently. Regardless of the solution proposed – the law of the place where the damage occurs, the choice of law most favorable to the injured party or granting the right of choice of law to the plaintiff etc. – it digresses from the stringent basic rule and offers certain alternatives.

Strict adherence to the place of the tort does not always resolve all problems adequately and protect the interests of the tort participants. It was precisely in the area of torts that the so-called flexible choice-of-law rules were first applied. Frequently situations occurred in which the results of the civil delict manifested themselves in a country other than the one where the delict occurred. The basic choice of law rule – the *lex loci delicti* – made it impossible to apply a different law, tying the situation to the law of the place where the tort occurred, although this did not always resolve the problem reasonably and fairly.

The Russian legislator has provided the necessary flexibility by including a provision in Article 1219 specifying that the law of the country where the damage

[31] LUNTZ L.A., *Private International Law Course. Special part,* Moscow 1975, p. 380.

occurred shall apply, if this is not the country where the tort was committed. However, the application of this provision is subject to an important condition: the basic rule can be displaced only in cases where the tortfeasor foresaw or could have foreseen the damage in that country. It will not always be easy to prove whether the actor could or should have foreseen such consequences. When determining the applicable law, the injured party and the court should take account of all relevant facts and respect the principle of reasonableness and good faith.

Paragraph 2 of Article 1219 provides a solution to a relatively new problem that has been widely discussed and dealt with in recent legislation of numerous foreign countries. The issue at hand is how to determine the applicable law in cases where the tortfeasor and the injured party have the same nationality or – as is commonly said today – the same habitual residence. At the end of the twentieth century the following approach was adopted by the legislation and practice of many countries: if a tort is committed in one country and parties to the tort are nationals or residents of another country, it is reasonable to apply the law of the other country instead of the *lex loci delicti.* Practice has shown that such approach provides a reasonable sharing of responsibility between tort participants, subjecting it to the law of the common nationality or residence of the tort participants.

This problem was touched upon in the Civil Code of the RSFSR of 1964 in Article 566-4**,** adopted in 1977, albeit in a reduced form. The provision provided that, where Soviet citizens or Soviet organizations became parties to a tort committed abroad, Soviet law applied, i.e., a unilateral choice of law rule was in effect. In other words, the idea of displacing the strict conflicts principle of *lex loci delicti* was already known in Soviet law, just like the possibility of applying the law of the common nationality of the parties to the tort. However, the possibility of displacing the basic rule was not formulated as a general rule; its use was clearly defined and limited to a small number of cases where the tort was perpetrated abroad and the participants were Soviet citizens or organizations. The same provision was included in the FCL 1991 without modification.

Recent changes in tort legislation in many countries show the reasonableness of applying the law of the country of the common citizenship or residence of the parties to the tort, in addition to the basic principle of *lex loci delicti.* In the new Russian legislation, the common citizenship of the parties need not to be Russian and their common residence need not to be in Russia. The principle applies regardless of the country of their nationality or residence. However, the rule applies only to torts committed abroad, i.e., outside the Russian Federation.

Paragraph 3 of Article 1219 is also innovative in that it introduces party autonomy into Russian PIL legislation on torts: after the tort has been committed, the parties may agree to apply the *lex fori*. Unlike contractual relations, the parties may agree on the applicable law only after the tort has been committed or the damage caused. In this case, a choice of the *lex fori* by the parties waives the application of law otherwise applicable under the relevant choice of law rule.

It should be noted that the new legislation has deleted the old provision on the non-application of foreign law if the act or other circumstance, on which the

claim for compensation is based, was not unlawful under Soviet law (Art. 566-4 RSFSR CC). Waiver of this provision is a sign of the attempt to improve and modernize Russian PIL legislation. The mentioned provision was used in the past mostly to reject moral injury claims, which were not recognized under Soviet law. Now that the moral injury claims are actionable, the old provision has lost its meaning.

The new legislation (Art. 1220 RF CC) also defines the scope of the applicable law in respect of torts. The list of issues governed by the applicable law is not exhaustive, as confirmed by the use of the phrase 'in particular'. Issues relating to the rights and obligations of the parties to the tort, the extent of possible liability, as well as the amount of compensation and methods of calculation are covered by this article.

Former legislation contained only one choice of law rule for various types of torts. Modern practice has convincingly shown that torts may occur in such a variety of areas that a general rule for all cases cannot lead to adequate and reasonable results. Traffic accidents, injuries caused via the Internet, products liability – these and other forms of liability require special rules.

Examples of different choice of law rules to be applied in different circumstances can be found in the Hague Convention on the Law Applicable to Traffic Accidents (1971) and the Hague Convention on the Law Applicable to Products Liability (1973). A comparison of the provisions of the 1973 Convention and Article 1221 of the RF CC on products liability reveals similarities. In addition to the basic principle of the *lex loci delicti*, the Convention sets out additional requirements that can lead to the application of alternative rules (Articles 4-6).

Although Russia is not a party to the 1973 Convention, the alternative rules in Article 4 of the Convention are included in Article 1221 RF CC; however, unlike the Convention, the choice of alternatives is made by the injured party. In paragraph 3 of Article 1219, the legislator empowered the parties to choose the applicable law (though to a limited extent thus far); in Article 1221, the choice of the applicable law is made by one party – the injured party. If the injured party fails to choose the applicable law, the rules of Article 1219 apply.

IX. Choice of Law in Successions

The first paragraph of Article 1224 of the RF CC, which repeats paragraph 1 of Article 169 of the FCL (an exact rendering of Article 567 of the RSFSR CC), provides that the law of the country where the testator had his/her last residence shall apply in respect of inheritance. The deletion of the term 'permanent', which was used in earlier legislation as one of the characteristics to define the place of residence, does not affect the interpretation of the rule in practice, since 'place of

residence' is defined in Russian legislation as the place where an individual permanently or habitually resides (Art. 20 RF CC).

There is one exception to this general choice of law rule in paragraph 2 of Article 1224 on the inheritance of immovable property, which is governed by the law of the country where the property is located (*lex rei sitae*), and property included in the state register of the Russian Federation, which is governed by Russian law. The FCL 1991 also contained a special choice of law rule for determining the law applicable to the inheritance of immovable property; however, it applied only to immovable property in the territory of the USSR, i.e., it was a unilateral choice of law rule.

As specified in paragraph 2 of Article 1224, the capacity of an individual to make or revoke a testament is determined by the law of the testator's place of residence at the time the testament was made or revoked. While this follows the previous legislation (Art. 169(2) FCL), the scope of the rule has been widened to apply to the inheritance of immovable property as well.

In accordance with paragraph 2 of Article 1224, the formal requirements of a testament or act of revocation are governed by: 1) the law of the testator's place of residence at the time the testament was made or revoked, 2) the law of the place where the testament was made or revoked or 3) the law of the Russian Federation. For example, if a testament or act of revocation is declared void as to its form in accordance with the law of the place of testator's residence, it may be declared valid if it meets the requirements of the law of the place where the testament was made (or revoked) or of Russian law. These possibilities were available in earlier legislation as well (Art. 169(2) FCL 1991).

The Minsk Convention 1993 contains the same basic rule as in paragraph 1 of Article 1224: inheritance is governed by the law of the country of the testator's last permanent residence (Art. 45); inheritance of immovable property is governed by the law of the country where the property is located. Bilateral treaties of the Russian Federation on Legal Aid contain the same choice of law rules designating the law of the place where the immovable property is located. As to the inheritance of movable property, some treaties contain the choice of law rule designating the law of the place of the testator's nationality instead of the law of his last place of residence (e.g. Bulgaria, Hungary, Rumania).

BRIEF DESCRIPTION OF THE DRAFT BELGIAN CODE OF PRIVATE INTERNATIONAL LAW

Johan ERAUW*

I. Introduction

The proposal for enactment of the Draft Code of Private International Law (hereinafter: Draft PIL Code)[1] was submitted to the Belgian Senate on 1 July 2002. Work on the text of the Draft PIL Code dates back to 1995, when a group of professors of private international law began drawing up a draft. Several judges and other

* Professor at the University of Ghent.

[1] Belgian Senate, Documents (Session 2001 – 2002), No. 2-1225/1. The document is accessible in Dutch and French on the website of the Belgian Senate at the URL: <http://www.senate.be/www/?MIval=/Dossiers/DossierFiche.html&LEG=2&NR=1225&LANG=nl>; see also the database for Belgian Private international law at: <www.privateinternationallaw.com> go to > 'Code of Belgian PIL' > 'Draft Bill' and at that site also in the Revue@dipr.be, 2002, No. 3, p. 39.

Yearbook of Private International Law, Volume 4 (2002), pp. 145-161
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

interested parties were consulted. Completed in February 1998,[2] the draft was forwarded to the Ministry of Justice together with an Explanatory Note in Dutch and French. After making only minor changes, the Ministry of Justice proposed a first draft bill to the Council of Ministers on 26 March 1999. The draft bill received government support and was sent to the Legislation Section of the State Council *(Raad van State/Conseil d'Etat)* for its advice on the quality of legislation. In July 1999 the coalition government changed and a new Minister of Justice was appointed. After initiating informal talks and written exchanges with representatives of the Ministry of Justice, the State Council presented a lengthy report in February (French) and August (Dutch translation) of 2001, on the basis of which amendments were made by November 2001. Following deliberations by the coalition partners in the Government, a working group of lawyers from the ministerial cabinets of the six vice-premiers formalised the draft in April. Acting on a proposal of the Minister of Justice, the Council of Ministers decided on 7 May 2002 that the coalition partners would introduce the bill before the Senate.

II. General Characteristics of the Code

1. Strength from Synthesis

Belgium never had a complete set of rules in the field of private international law. Never before had it been possible to reach such agreement between practically all the scholars in this field and practitioners.

The Draft Code contains 136 articles (including the final provisions). Reference is made, *inter alia*, to uniform conflicts rules in treaties binding Belgium, *viz*. on contractual agreements, last wills and traffic accidents, as well as to treaties on bills of exchange and promissory notes, thus effectively increasing the number of relevant rules in force in Belgium. In addition to the newly proposed

[2] The group consisted of professors Johan ERAUW (University of Ghent), Marc FALLON (Université Catholique de Louvain-la-Neuve), Monique LIÉNARD-LIGNY (Université de Liège), Johan MEEUSEN (Universiteit Antwerpen), Hans VAN HOUTTE (Katholieke Universiteit Leuven) and Nadine WATTÉ (Université Libre de Bruxelles). The initiative was started by the first two named and was also carried out by them, after 1998, in cooperation with the Ministry of Justice. At the Ministry the project was led by Director-General Rosaline DEMOUSTIER. The work further profited from the collaboration of professors of private international law Alfons HEYVAERT (Universiteit Antwerpen) and Michel VERWILGHEN (Université Catholique de Louvain-la-Neuve) and of Erna GULDIX. Assistant professors from Ghent University and KULeuven supported the work: Martha PERTEGÁS SENDER and Patrick WAUTELET, who in the meantime have become professors at Antwerp and Liège, respectively.

rules there is a lengthy Explanatory Report (in French and Dutch), which will become an authoritative commentary and guide to the future PIL Code.

The strength and attractiveness of this Draft Code lies in part in the cohesion of its provisions, the simplicity and power of its structure, as well as the concision and consistency of its wording.

2. Structure of the Code

The Code commences with a General Part containing principles and techniques. This is followed by Chapters arranged in a sequence similar to that of handbooks leading the reader from general to specific. Each Chapter is divided into sections containing the jurisdictional rules for that chapter, the relevant choice-of-law rule(s) and, where necessary, a special rule on the recognition of foreign judgments. All this is clarified by titles and subtitles.

The international community is already familiar with this structure, which is used in the Swiss Statute on Private International Law of 1987. For each subject matter it hammers in the distinctive elements of jurisdiction, choice-of-law and recognition by referring to the general rules and spelling out the specific ones.

The model of a 'Code' as a coherent document also has a pedagogical advantage in that definitions are presented and a consistent and clear language and suitable terminology are introduced.

3. Legislative Techniques and Language

The Code follows classical Belgian drafting practices – out of necessity. However, every section or 'article' is given a title, as is often done in many countries. This practice was introduced in Belgium via the treaties on uniform international rules (such as the CISG Convention of 11 April 1980).

The transparency of the Code is enhanced simply by the fact that the three topics of private international law are contained in a single enactment: (1) jurisdiction and procedural matters, (2) conflict of laws and (3) recognition and enforcement of foreign judgments or 'exequatur'.[3] The Minister of Justice favoured this unity, as a result of which a small number of antiquated rules will disappear from the Civil Code and the Code of Civil Procedure. Since procedural rules are involved, the Draft Code will have to be approved by the Belgian Senate, as well as the Chamber of Representatives.

The Code contains a few articles that refer to treaties that are binding because Belgium is a member State. This technique was used earlier, for instance, in the Italian Code, and is currently used in U.S. federal codes. The articles refer-

[3] A separate article will remain in the Code of Civil Procedure for Service abroad because this is so intertwined with other provisions on that matter.

ring to treaties on contractual agreements, last wills and the other fields mentioned above were permitted by the State Council because the relevant provisions either note an exception to a rule or the field of application of the particular international rule was broadened (as was the case in respect of the Rome Treaty of 19 June 1980 on contractual conflicts and the Hague Treaty of 5 October 1961 on last wills). Therefore, none of those norms was regarded as merely pedagogical or reference rules.

While these references result in a form of 'incorporation' with an informative value, there is not the least implication that those international autonomous rules are to be treated as if they were part of national law. The Explanatory Report duly notes how this affects questions of interpretation and uniform application.

The terms of both official language versions are precise. In keeping with the Belgian tradition of clarity, the provisions are short and well organized. In this respect the drafters also took account of the Swiss drafting guidelines emphasizing concision and clarity. Both official language versions use a direct style in which the strict parallelism in syntax is sometimes set aside, allowing the spirit of each language to shine through. The terminology is now well elaborated in both versions. Since this field of law had been only sparsely regulated in the past, there was a need to elaborate technical terminology.

The Explanatory Report of the Draft PIL Code, which is one hundred pages in length, will serve as a quasi-official handbook when the law enters into force. The Ministry of Justice and the State Council had requested a reasonably detailed commentary. The new rules are explained, as are the reasons for their inclusion. The existing court practice is mentioned, including references to Supreme Court and other court decisions, as well as to doctrinal sources providing argumentation or illustrations.

4. Room for Flexibility

In light of the concise formulation, applying this set of principles and rules to an infinite variety of factual situations and foreign laws will undoubtedly require some interpretation and even more flexibility. The objective set by the framers of the Code – in conjunction with professors Rigaux and Van Hecke, who served as senior advisors – was to elaborate a normative set of rules, yet exercise constraint to allow for flexibility in each individual case. The Swiss Statute served as a model in this respect as well. In this sense, judicial discretion is allowed or required in several situations: judicial competence for the purpose of preventing denial of plaintiff's rights; the application of the mandatory rules of a foreign state (as in Article 7 of the European contracts convention), cases pending abroad, deviation from the formal requirements for the recognition of foreign judgments, and, most prominently, the general power of the judge to deviate from the conflicts rule when a more closely connected national law is apparent.

Introduced and tested in Switzerland, the latter principle should even allow a court to deviate from its own choice-of-law rules in the exceptional case that there is reason to doubt that the application of those national conflicts rules is justified *in se*.

5. Characteristics of the Draft Code

The Explanatory Report elaborates the goals and guiding principles of the Code. First, the Code aims to achieve 'transparency', which is of course inherent to codification. Secondly, it aspires to meet the demands of a society in a strong evolution towards internationalisation. Thirdly, the Code manifests the desire of the Belgian legislature to strengthen and maintain an open, receptive and internationalist approach to foreign law and international doctrinal views by incorporating multilateral rules and using connecting factors and techniques that are praised and accepted by leading international scholars. This internationalist inspiration can also be found in the well-balanced rules under which Belgian courts will accept jurisdiction – without preferences for nationals – and in the generous rules on the recognition of foreign judgments in Belgium.

III. More about the Main Subdivisions

1. General Part and Methodology

The Code adheres to a conventional, continental methodology or approach. All persons are to be treated objectively and as equals under the rules: foreigners and Belgian citizens, persons residing in the country and those residing abroad. The choice-of-law rules accept a foreign country's national law virtually on an equal basis with Belgian law in cases having the required connections with that foreign country. This illustrates the openness of the system.

Of course, there will be greater use of the residence of the parties as the connecting factor, thus leading to the application of Belgian law (e.g., in family relations) more often than under the present system, which frequently refers to the law of the nationality. However, in cases where the parties reside abroad, the foreign law of their country of residence will be called on as well.

The general theory is laid down in a few simple rules and the technical aspects are described with concision. In this way the Code helps establish a fixed terminology, for example, by clarifying confusing notions such as '*lois de police*' and designating the accepted Dutch terms.

As regards the court's obligation to determine *ex officio* the content of foreign law, the Draft Code has chosen to formalise the present practice, which

requires the courts to find the applicable foreign law. However, they may request assistance from the parties and if due efforts fail to produce results, then Belgian law can fill the gaps. The old hobbyhorse of theoreticians – *renvoi* – has been critically revised and will be largely set aside. This technique made it necessary to examine the conflicts rules of the foreign law designated by the Belgian rules; then with some luck those rules referred back to the *lex fori* and the court could apply its own national substantive rules (on the basis of foreign, not Belgian private international law). Now this particular trick will be required only in two specific areas: (1) succession and (2) validity of the incorporation of legal entities, where the control under foreign law is deemed a sensible solution (Article 16 Draft Code). This will give law professors the opportunity to expound on this daunting bit of theory.

The most important innovation in the domain of general theory is the introduction of a general exception to the application of the designated choice-of-law-rules, as inspired by the Swiss Statute on private international law (Article 19 Draft Code). The advisers of the Legislation Section of the Belgian State Council requested that this rule be worded in detail, requiring well-founded grounds on the part of a judge who dares to invoke this escape device. The rule permits the court to refuse to apply a conflicts rule if the country and national law designated do not have a sufficiently close connection with the case, whereas a very close connection can be established with another country.

The Code introduces a rule on resolving conflicts of nationality (Article 3(2) Draft Code), which confirms the present practice of giving preference to Belgian nationality when a person is a dual national of Belgium and another country. In cases where a person is a citizen of two foreign countries, his/her most effective nationality shall be followed. These rules are permissible under the Hague Treaty of 1930.

2. International Jurisdiction

The rules on international jurisdiction are more detailed and better structured than in the past. The rules of general application are stipulated in the first sections of the Draft Code. As in the 'Brussels I Regulation' on civil and commercial matters, the domicile of the defendant in the country suffices as a ground for jurisdiction, as does the defendant's habitual residence (Article 5 Draft Code). According to the definitions set forth in the Draft Code, *domicile* requires formal registration in the administrative registers of a community (Article 3), whereas *habitual residence* is acquired when 'a durable factual presence' is maintained in the country where the person performs his rights and obligations (Article 4).

Another general ground for jurisdiction is the choice expressed by the parties: forum by agreement. The choice is also honoured when parties derogate from the Belgian forum, thus requiring the judge to deny jurisdiction. Similarly, Belgian law obliges its judges to refrain from intervention when the parties to a

dispute have agreed on arbitration, placing themselves outside the competence of Belgian (and other) national courts. The latter is based on the New York Convention of 15 June 1958 (Article 2). The choice of the parties to 'prorogate', i.e. to make Belgian courts or a particular Belgian court internationally competent, is also accepted. In this regard, there is a novelty: for the first time, the court may use its discretion to deny jurisdiction when it deems the connection to Belgium to be insufficient. This is a limited apparition of the *forum non conveniens* approach. Article 6 of the Draft Code provides that a judge may refuse to accept jurisdiction based specifically on party agreement, if the case has no significant connection to Belgium except the choice of the parties. That could make the forum unsuitable, thus justifying the denial of an otherwise valid ground for jurisdiction. Those familiar with the doctrine will see its limited application here. Furthermore the conditions developed in case law for its use in the U.S. are far more elaborate than here; as such, the one ground for denial does not leave the Belgian courts a great amount of discretion.

There is also a new type of judicial jurisdiction that provides an exceptional supplementary forum: a Belgian forum is possible if the claimant runs the risk of not finding its day in court. If justice could be denied because of the impossibility to commence proceedings abroad or if it is unreasonable to require the claimant to take action elsewhere, then a Belgian judge must accept jurisdiction (Article 11 Draft Code), provided the case is closely connected with Belgium.

Furthermore, the Draft Code contains a rule on filling gaps in the field of domestic local (territorial) jurisdiction. The applicable rules of the Code of Civil Procedure designate the suitable internal venue. However, under the scrutiny of the State Council, it was discovered that there will not always be a domestic court with local competence when international jurisdiction is accepted, for example, on the basis of the Belgian nationality of both or one of the parties. Therefore, the Draft Code provides that the criterion for accepting international jurisdiction shall apply internally or, if that is impossible, alternatively the courts of Brussels shall have venue (Article 13 Draft Code).

This general section is often referred to by provisions in separate detailed chapters; some chapters add other *fora* suitable to the subject-matter (e.g., a dispute over validity relating to a patent application made in Belgium or a divorce where the claimant has resided in Belgium one year). In other chapters, however, the general jurisdictional grounds may be excluded and replaced by specifically required (territorial) connections (e.g., a request for a judicial decree to homologate an adoption or in matters of exclusive jurisdiction, such as a dispute over the validity of a body with legal personality: a legal entity or a corporation in particular).

3. Recognition and Enforcement of Foreign Judgments and Authentic Acts

As in other areas, the law on recognition and enforcement is clarified and elaborated. The liberal practice of permitting recognition without prior judicial control or special procedure will be extended beyond its traditional field of application (viz. decisions relating to personal status). Foreign monetary judgments will also benefit from the recognition by virtue of the operation of law (*de plano*). However, there are requirements that must be satisfied irrespective of whether an authority or a court rules on the recognition. This liberal approach is well known from the flexible recognition practice in Europe under the Brussels Treaty, presently the Brussels I Regulation.

The proposed Code will actually increase the number of requirements for recognizing foreign judgments. The old law (of 1857) was extremely brief, stipulating in Article 570 of the present Code of Civil Procedure two formal conditions and two grounds for refusal: incompatibility with public policy and violation of the rights of defence. An additional ground for refusal is currently provided if the foreign court accepted jurisdiction simply on the basis of the claimant's nationality (an old defence against the French neighbour's exorbitant ground of jurisdiction). The specifications elaborated by the case law clarified to some extent what is acceptable and what is not. However, insecurity exists because courts differ in their treatment, for example, of foreign divorce decrees and particularly on how to position themselves against a rising tide of foreign divorce decrees based on unilateral repudiation by the husband.

The procedural formalities prescribed by the Code for submitting an application for recognition are similar to those in the European Regulation (Brussels I): The applicant submits a unilateral request and thereafter the judge is permitted to hear the parties. The procedure should be inexpensive and expedient. Nonetheless, some reservation will be practiced and caution is advisable when dealing with judgments from countries not known for administering justice objectively. The grounds for refusal are cited in a precise catalogue; the judge may dispense with some formal requirements. If interlocutory measures are requested based on a foreign enforceable judgment, the judge may delay his decision on recognition until all foreign appeals are settled. Specific provisions deal with the recognition of foreign repudiations, foreign adoptions and judgments concerning the validity of foreign legal entities and foreign bankruptcy decrees.

The recognition of foreign authentic instruments is also treated systematically. In the past, practitioners were not always certain about the requirements for the recognition of foreign administrative documents, such as foreign marriage licenses or other authentic acts.

The Belgian administration of the status of citizens and residents (personal and family) proudly carries the weight of a long tradition. The administration of the status of citizens (called '*Burgerlijke Stand/Etat civil'*) is supported by the Ministry of Justice, which controls the prosecuting judges, who in their turn supervise the

application of the law in those administrative departments. The city and town administrations enjoy considerable independence in this field – under the supervision of the advocate general and the courts. As mentioned above, uncertainty exists because of local differences and unequal treatment. The new Code should clarify this matter for those administrative departments by clearly stipulating the conditions of formal validity of foreign documents. More importantly, the proposed Code specifies that each foreign instrument must comply with the *loi convenable*, as it is called in the French doctrine. This means that the foreign documents must satisfy the same conditions that would have to be fulfilled under the new conflicts rules if the administrative action were taken in Belgium (Article 27 Draft Code). In essence, the result to be imported with the foreign instrument must be possible in Belgium. The Code will specify that public policy needs to be checked, and there should be no intension of evading the law by going abroad.

To be mentioned in registries for the administration of the status of citizens or to be cited in a Belgian administrative or authentic document, a foreign instrument must past the test of compatibility or 'legality' (Article 32 Draft Code). Indeed, the present situation has allowed great freedom, but has also delegated considerable responsibility to the city or town administration. I myself have also criticised the uncertainty this has caused. Thus the change will be welcome for the sake of objectivity and predictability. Moreover, it is hoped that it will greatly reduce the number of fraudulent transactions (marriage, recognition of children, adoption, birth certificates) in connection with trafficking in illegal immigrants.

The Draft recommends that the Minister of Justice elaborate a centralised system of information on foreign judgments and their recognition in Belgium (Article 31(3) Draft Code). At present, the future of this project is uncertain due to budget restraints. Ideally one needs a Belgian electronic copy of a judgment based on a foreign judgment, which could be easily accessed by the civil administrations of persons. The data would show whether judicial recognition was granted in Belgium in the absence of judicial intervention (a so-called undisputed recognition), or pending judicial intervention.

4. Choice-of-Law Rules

The Draft Code does not disregard any of the current debates on determining the applicable law. The approach remains conventional within the continental tradition of formulating rules for particular situations rather than prescribing a general approach. The aim of the framers of the Draft Code was not to regulate all possible matters in full detail. However, since every known category of question is covered by a principle or set of rules, most questions arising in practice will be answered. The method of applying the choice-of-law rules is set forth in the first chapter containing the general rules.

In addition to a choice-of-law rule, each chapter contains a provision specifying an indicative list of legal topics that fall under the scope of application of the particular legal system applicable. No such rules existed until now; they determine the extent of the rule's application by defining or illustrating the matters covered by the particular rule; these are always to be regarded as the minimum**.** The use of so-called scope rules allows the Code to skip the high theoretical hurdle of classification (qualification), resolving such issues efficiently and purely by practical means. The Explanatory Report contains further clarifications in this regard. In cases where a double rule is introduced or a rule plus an exception, the scope of each is well defined, thus enabling a sharp distinction to be made between them.

Furthermore, each choice-of-law rule avoids '*conflits mobiles*', questions concerning the application of the connecting factor, if it changes over time. The reference to a certain law is determined by the connection existing at a specific point in time. Each choice-of-law rule removes any doubts as to possible changed circumstances, thus completing the rules.

5. Transitory Rules (Entry into Force)

Following the comprehensive catalogue of rules, the Code prescribes when each section or – as circumstances dictate – each rule will enter into force (see Articles 126-127), specifying how it is to apply to new actions and factual situations and to some new legal consequences arising from existing relationships after the Code enters into force.

The transition to the new Belgian Code of Private International Law shall be made as follows:

- Jurisdictional rules will apply to legal actions introduced before courts after the entry into force;

- Rules on recognition and enforcement apply to foreign judgments and foreign authentic instruments made after the entry into force of the new rules; however, the principle of benign treatment exists (Article 126 Draft Code). Previously made judgments and acts are recognizable under the old rules of recognition; however, if they satisfy the conditions under the new rules, then old judgments may also enjoy the advantage of being attributed cross-border effect under the new regime;

- In accordance with the principle of immediate application, the choice-of-law rules apply to new acts and factual situations occurring after the entry into force; new consequences of transactions and facts that occurred earlier are covered by the new rule (Article 127 Draft Code),

with the exception of contractual disputes, actions based on unilateral declarations of intent, torts and quasi-contractual actions.

Some matters deserve special attention, such as the principle of party autonomy, which has now been incorporated into the Draft Code; however, if the parties had made their intent known earlier, their choice of law may be validated.

While this is the first detailed set of rules in an area dominated by case law, the 'new' rules will not always result in 'new' or deviant solutions, compared to the 'old' practice. Sometimes the rules are similar and frequently the relevant connecting factors even lead to the same applicable law. 'No-conflict' situations between the 'old' and 'new' may also occur, in which cases the question of transitional application does not arise.

IV. Brief Overview of the Choice-of-Law Rules

1. Status and Capacity of Persons

The authors of the Draft Code have not taken a dogmatic stance on favouring nationality or domicile / habitual residence as the connecting factor for determining the law applicable to the status of persons. A practical – if not opportunistic – approach can be discerned.

'Nationality' continues to lose ground as a connecting factor. In Belgium the concept of nationality has changed remarkably in content and practical impact. This is due partly to the significant increase in the number of persons holding multiple citizenships. We now realize that nationality has been used primarily as a tool in the immigration policies of governments.[4] The inability to resolve the problem of dual nationality even exists in cases where an individual acquires Belgian nationality by personal choice; in such cases Belgium neglects to apply its treaty obligations to reduce dual nationality (Treaty of Strasbourg of 6 May 1963 with Additional Protocol of 24 November 1977). The increase in the number of cases of plural nationality makes it necessary to use other criteria to resolve the conflict. Moreover, it is acknowledged that 'nationality' is a remarkably incongruous connecting factor; it is an entirely different matter to speak, for example, of a 'citizen of Egypt' or a 'citizen of Switzerland'.

Nationality is gradually being replaced by the place of habitual residence as the factor indicating a close connection between the individual and the social and economic environment in which he lives (the principle of 'proximity' or 'closest

[4] J. ERAUW, 'De nationaliteit en de toepassing van de nationale wet van de persoon', in M. Cl. FOBLETS et al., (eds.) *Devenir belge – un an d'application de nouveau code de la nationalité belge*, Brussels, E. Bruylant, 2002, pp. 411-440 (427-430).

connection'). Nevertheless, nationality remains the preferred connecting factor for matters of personal status requiring the intervention of administrative operatives in Belgian law, such as the family name, validity of marriage and registered partnership, and filiation. However, in the future, the law applicable to matters relating to marital relations, the marital agreement, the matrimonial property regime between spouses as well as vis-à-vis third parties, plus divorce (admissibility and grounds) will be governed primarily by the law of the common marital residence and in subsidiary order by their common nationality. This will bring welcome relief to judges and administrative authorities that could be called on to intervene in matters concerning an existing relationship. Since the rule is multilateral, in theory foreign law could be invoked. In practice, however, most frequently the law of the forum will apply where both parties reside or last resided in Belgium.

Typically, the validity of marriage is still governed by the national law of each partner (Article 46 Draft Code). Engagement to marry and matters relating to the admissibility and validity of a registered partnership are also governed by the law of the country of each partner's nationality (Articles 45, 58-60 Draft Code). As soon as Belgium recognizes real 'marriage' with 'status' effect between persons of the same sex (meaning a relationship to the exclusion of all others that could be dissolved only by court intervention), such same-sex-marriage would be subject to the present conflicts rules on marriage.[5]

Under the proposed Draft Code, affiliation or parenthood is governed by the law of the nationality of the parent (Article 62 Draft Code). Thus a change will occur in disputes relating to fatherhood because the national law of the child is presently applied,[6] which is usually that of the mother**.** In cases where two men with different nationalities claim paternity, a more detailed rule of preference is elaborated: parentage by operation of the law prevails over voluntary recognition, and the validity of the second recognition is governed by law applicable to the first recognition.

As regards the protection of minors and wards, the national law is to be replaced by the law of the place of habitual residence of the minor (Article 35 Draft Code). This also applies to maintenance payments (Article 74 Draft Code) but some alternatives apply. Matters relating to adoption and the validity of adoption will be governed by the national law of the adopting parent or parents.[7] However, the consent of the child, its biological parents or persons with custody must be obtained under the law of the country where the child resided before being displaced across the border for the purpose of adoption. This rule is clearly inspired

[5] Indeed, as this comment went to press, the Judiciary Committee of the Belgian Senate voted to accept the bill on same-sex-marriage.

[6] Except when the legal presumption of fatherhood is rebutted by the father – in which case his law presently applies.

[7] For two adopting persons with no common nationality, the law of their residence is to apply.

by the Hague Treaty of 29 May 1993, which Belgium is still preparing to ratify (Articles 67-68 Draft Code).

2. Obligations of Married Partners and Registered Partners; Divorce

Party autonomy will be emphasized in matters of matrimonial property. The parties will have the right to choose the law to govern their marital agreement and marital property regime in respect of their property and substantive rights. This freedom is limited at the level of private international law: they can choose to make their future property subject to the law of their common marital residence, the law of the place of residence of one of them or the law of the nationality of one of them (Articles 49, 50 and 52 Draft Code). Such a choice of law must apply to the entire property.

In the absence of a choice of law by the partners, the law governing the rights and obligations of the partners in a marriage is determined by a three-step conflicts rule (Kegel's ladder), according to which habitual residence prevails over common nationality. Belgian law applies if the parties have neither a common residence nor common nationality. It should be noted that several major financial consequences that are obligatory under Belgian marriage law will be regulated by detailed conflicts rules. The protection of the home serving as the marital residence will be governed by the law of the place where the home is located (Article 48(3) Draft Code). When both or one of the partners assumes an obligation towards a third party, the question whether a debt is presumed to have been made for the household (and as such is binding on both partners) will be governed by the law of the place of habitual residence, if the third party has its habitual residence in the country where the contracting spouse resides (Article 54).

In divorce, the above rule is complemented by the introduction of a limited form of party autonomy. If both spouses clearly agree before the court seized of the matter, they may choose either Belgian law or the law of their common nationality (Article 55 Draft Code). This could lead to the application of foreign national law in a greater number of cases than under the existing Belgian law.[8] This offers the spouses the opportunity to establish a connection with their common national law, enabling those who anticipate their return or are concerned about recognition of their status to voluntarily adhere to their national law. Such a choice of law will be controlled by the courts to prevent undue influence by one partner, as in Muslim law where the male dominates.

[8] Under the existing law, national law applies only to mutual consent decrees; otherwise Belgian divorce law applies.

3. Succession and Wills

No fundamental change is proposed in the field of succession. Belgium is party to The Hague Convention on Wills (5 October 1961), which governs the formal validity of the last will in all cases brought before Belgian courts, regardless of reciprocity.

This means that, in principle, there may be a general split with one law governing the movable property – the law of the country of the habitual residence (formerly the domicile) of the deceased person – and another law the immovable property – the law of the *situs* – thus breaking the inheritance into several parts, depending on the number of countries in which property is located (Article 78 Draft Code).

There will, however, be an opportunity to choose one law to govern the entire succession if the deceased makes a choice of law in the form required for a valid will. In this way unity may yet be achieved – i.e., if the choice of law is made before a notary in Belgium (or other counsellor abroad). The choice is limited in the sense that only a choice will be validated that: (1) is intended to apply to the entire succession and (2) is either the law of the nationality or the law of the habitual residence of the deceased at the time of death or when the choice was made.

4. Property

The Belgian Draft Code of Private International Law provides notable detail and sophistication in regard to matters concerning property. Immovable property and chattels are invariably governed by the law of the place where they are situated (Article 87). This means that chattels that are moved across a national boarder are governed by the law of the place where the chattel is situated when the final phase of acquisition or loss of title to the goods occurs.

A rule on the transfer of property in cultural goods provides that a public authority may exercise its right to reclaim such property under the law of the present location of the good or that of the country from which it was illegally exported. If the *bona fides* possessor's right of protection is provided by the law of the present *situs* (Article 90 Draft Code), then such protection may not be diminished by application of the law of the country from which the cultural good was exported. There is a similar rule for stolen and subsequently displaced goods (Article 92 Draft Code).

A special rule is also provided for commercial instruments. The validity of the transfer of such property may be governed by the place where the document proving the existence of the security or asset is situated (i.e., commercial instruments made out 'to bearer') or by the law of the place where the security is registered, if it is subject to registration, making a transfer valid vis-à-vis third parties (Article 91 Draft Code).

Intellectual property rights are governed by the law of the place for which protection is sought (Article 93 Draft Code). An exception is made for the original title to industrial property rights, which is governed by the law applicable to the relationship under which the creative work giving rise to this right (e.g., a research agreement) was carried out (Article 93(2) Draft Code). This is the exception to an otherwise broad scope of application of the *lex protectionis*. As mentioned earlier, every rule is complemented by a scope rule, which cannot be dealt with in this brief description.

5. Obligations – Contractual, Quasi-Contractual and Tortious

Contractual obligations are fully covered by the Rome Convention of 19 June 1980, which provides the conflicts rules for Member States of the European Union. For the sake of clarity, the reference to the Convention is as brief as possible. Since the Convention leaves a few gaps and those matters are not treated separately in the Belgian Draft, the Code provides that the rules in the Rome Convention shall apply to all remaining questions (Article 98).

Rules on quasi-contractual obligations are provided; the choice of law by the parties prevails.

Non-contractual obligations will undergo a substantial change. Presently Belgium simply applies the law of the place where the wrong occurred (civil wrong or wrong punishable by criminal law). There is a tendency to allow the claimant to choose the law applicable to his compensation in cases where the place of the action causing the damage is not the same as the place where the damage occurred (e.g., pollution originating upstream causes damage downstream).

The new rule, which is based on several types of torts, will be more elaborate and much more subtle. This rule largely provides solutions parallel to the rules made public by the European Commission in its paper requesting comments (by September 2002) on a proposal or a European regulation on the private international law aspects of non-contractual obligations.[9] The Belgian Draft was influenced by the work of the 'European Group' of scholars of private international law; professor Marc Fallon was a member of that group and of the Belgian drafting group. If a European regulation would be adopted, the Belgian rule would be superseded by the European one. In my opinion, however, the legislative authority of the EU is limited to cases connected with the European market, as a result of which the Belgian rule would apply in cases where the damage occurred outside the Community. In any case, the rules are parallel.

Party autonomy is established. In the absence of a choice of law by the parties, the applicable law is determined in three steps: (1) if the tortfeasor and the injured party both have their habitual residence in the same country, that law shall apply; (2) if not, then the law of the place where the wrong occurred shall be

[9] See the URL: < http://www.europa.eu.int/comm/justice_home/index_en.htm >.

applied, however, only if *locus acti* and *locus damni* are in the same country; (3) if not, then the law of the place with the closest connection with the transaction or relationship shall apply (Article 99 Draft Code). An additional rule specifies that a previously existing legal relationship may provide an accessory connection for determining the law applicable to the tort (Article 100 Draft Code).

In this context it should be noted that traffic accidents are settled under the Hague Treaty of 4 May 1971 (applicable in all cases before Belgian courts).

Four rules are introduced for four special torts (Article 99(2) Draft Code): (1) libel and slander, (2) unfair competition, (3) environmental damage and (4) product liability. Generally speaking, the law of the place where the cause of the damage originated is applicable; however, an exception is provided for the first and fourth types, precluding the application of local law in cases where the farreaching effects of the damage could not have been foreseen and if this would have surpassed the normal expectations of the person making the personal remarks or distributing the goods. This approach may result in the fragmentation of a case and in the application of different laws of several countries where the damage occurred.

The rule allows a particular local rule to apply not only when damage has occurred, but also when the plaintiff takes steps to prevent the impending damage.

6. Trust Relationships

Although Belgium does not have a true trust construction on its books, the Draft Code contains a chapter on trusts in private international law. The intention is to confirm the practice of respecting trusts and to define the extent and limits of such cooperation by Belgian courts.

Articles 122-125 of the Draft Code are undoubtedly inspired by the Hague Treaty of 1 July 1985 on the law applicable to trusts and the recognition of trusts. The Draft commences by defining the notion of trust in terms that can be understood by Belgian lawyers. As pointed out in the Explanatory Report, the intention is to honour only true trusts with legal title for the trustee.

The approach resembles that for contracts: party autonomy is emphasized; the method of determining the applicable law in the absence of a choice of law is much simpler than in the Convention (the focus is on the place of establishment of the trustee). The reader is reminded of the many instances in Belgian law where the rules on marriage, guardianship, inheritance, property and others set limits to the law of trust. No particular rules are formulated on recognition; that part of the Hague Convention causes confusion because a valid trust is ‘recognized’ precisely within the limits just mentioned.

7. Legal Entities and Insolvency

The Belgian Draft Code of Private International Law does not intend to completely upset the present Belgian practice regarding the law applicable to corporations and other legal entities. Of course, the rule regulating the transfer of securities in the chapter on property law includes property in corporate shares and corporate bonds – that may be a welcome classification. An additional rule on the public issue of securities is provided in this chapter (Article 114 Draft Code).

The existing conflicts rule presently designates the law of the 'real seat' as the applicable law. This notion has come under pressure because, in the European Community, corporations incorporated in or having their principal place of establishment in a Member State are entitled to full equal protection and mobility.

This motivated the Belgian legislator to make the principal place of establishment of legal entities similar to the habitual residence of natural persons (see Article 4(2) Draft Code). Instead of domicile or habitual residence, the grounds for judicial jurisdiction in cases involving legal entities are 'statutory seat' and 'place of principal establishment' respectively (Article 109 Draft Code). Only the latter notion is used in respect of the applicable law, which is first determined by the law of the place of the control centre responsible for managing the corporation, then by the effective centre of the business, commercial, industrial or other activity. Lastly, but only in subsidiary order, the statutory seat may also be regarded as providing an indication of the place of the principal establishment (Article 4 Draft Code).

The Code provides rules on the merger of corporations (cumulative application, Article 113) and on the transfer of the principal establishment (Article 112 Draft Code). Once again the scope rule proves to be a valuable tool for resolving several issues by showing whether they are part of the *lex societatis.*

An international jurisdictional rule grants exclusive jurisdiction to the courts of the country whether the statutory seat or the principal establishment is located in cases involving the validity, functioning or dissolution of a corporation. This occasioned the drafters to take issue with foreign court decisions on these issues: recognition of such decisions will effectively be possible only if the foreign court's jurisdiction was based on such a ground. It should be noted that special jurisdiction is also permitted in Belgium in cases where the claim concerns actions undertaken in Belgium by a branch office or other establishment located in Belgium. The Brussels Convention has clearly been the source of inspiration for all this.

In regard to insolvency, the drafters of the proposed Code attempted to construct a perfect extension of the European Regulation of 29 May 2000 (Regulation 1346/2000/EC) by applying it to legal entities(in particular to corporations) with their seat or principal establishment in EU Member States, and then to their assets located either inside or outside the EC. The provisions are an exercise in filling gaps (Articles 116-121 Draft Code). Support was sought by consulting some of the questions raised or solutions proposed in the UNCITRAL Model Law on cross-border insolvency of 1997.

THE CONFLICT OF LAWS BETWEEN MAINLAND CHINA AND THE HONG KONG SPECIAL ADMINISTRATIVE REGION: THE CHOICE OF COORDINATION MODELS

Yongping XIAO*

* Professor of Private International Law and Dean of the Faculty of Law of the Wuhan University, Executive Director of the Wuhan University International Law Institute.

Yearbook of Private International Law, Volume 4 (2002), pp. 163-201
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

I. Introduction

Hong Kong[1] terminated the 100-year rule by Britain on 1 July 1997 and returned to the embrace of the People's Republic of China (PRC). In accordance with the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (hereinafter: the Basic Law),[2] Hong Kong is a Special Administrative Region with a high degree of autonomy. As provided by Article 160 of the Basic Law,[3] the laws previously in force in Hong Kong (i.e., the common law, rules of equity, ordinances, subordinate legislation and customary law) have been adopted as laws of the Hong Kong Special Administrative Region (HKSAR), save for those which the Standing Committee of the National People's Congress (NPC) declared to be contrary to the Basic Law in its Decision of 23 February 1997.

The Decision of the NPC Standing Committee on the Handling of Hong Kong's Existing Laws (hereinafter: the Decision)[4] contains an introduction, six articles and three appendices. Article 1 of the Decision restates the principles laid down in Article 160 of the Basic Law, on the basis of which the NPC has 'adopted' original Hong Kong laws as laws of the HKSAR. Article 2 of the Decision provides that all 14 ordinances listed in the first appendix were not to be adopted because they had lost their practical value after the change of sovereignty and jurisdiction over Hong Kong.[5]

---

[1] The terms 'Hong Kong' and 'HKSAR' are used in different meanings in this article. 'HKSAR' refers to Hong Kong after 30 June 1997, while 'Hong Kong' does not have such a limitation.

[2] The Basic Law is the constitutional act of the Hong Kong Special Administrative Region. See the text in 'Laws and Regulations of the People's Republic of China Governing Foreign-Related Matters' (in Chinese and English), compiled by the Bureau of Legislative Affairs of the State Council of the People's Republic of China, Beijing (China Legal System Publishing House) 1992, pp. 361-385.

[3] 'Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of the Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law.'

[4] See the Chinese and English texts of the decision in the 'Laws and Regulations of the People's Republic of China Governing Foreign-Related Matters', compiled by the Bureau of Legislative Affairs of the State Council of the People's Republic China, Beijing (China Legal System Publishing House) 1997, pp. 14-23. The Decision is based on the Recommendation on How to Handle the Original Laws of Hong Kong of 1 February 1997, passed by the Preparatory Committee on the basis of a study undertaken by the Preliminary Working Committee.

[5] These ordinances include the British Nationality (Miscellaneous Provisions) Ordinance, the British Nationality Act 1981 (Consequential Amendments) Ordinances, the

Pursuant to Article 3, parts of the sections of the ordinances listed in the second appendix were not adopted. For instance, the definition of 'Hong Kong permanent residents' in the Immigration Ordinance had to be revised in accordance with the Basic Law and other relevant laws.[6] The provisions in various ordinances implementing the British Nationality Act in Hong Kong are no longer applicable. The same is true in regard to provisions on elections in the Urban Council Ordinance, the Regional Council Ordinance and the District Board Ordinance, as well as those on election expenses in the Corrupt and Illegal Practices Ordinance, all of which were regarded as components of Chris Patten's political reform program. Whereas the main part of the Hong Kong Bill of Rights Ordinance reproducing the International Covenant on Civil and Political Rights [ICCPR] has been retained, three provisions were repealed: Section 2(3), Section 3 and Section 4.[7] In his report[8] to the NPC on the work of the Preparatory Committee for the HKSAR, Vice Premier Qian Qichen stated:

> 'According to the Basic Law and the Decision of the National People's Congress on the Basic Law, only the Basic Law is superior to all other laws in Hong Kong. Therefore, the provisions of the Hong Kong Bill of Rights Ordinance regarding the paramount status of that ordinance contravene the Basic Law. Moreover, British Hong Kong Authorities, on the basis of the paramount status of this

---

Army and Royal Air Force Legal Service Ordinances, the Royal Hong Kong Regiment Ordinances, the Compulsory Service Ordinance, the Secretary of State for Defense (Succession to Property) Ordinances, the Foreign Marriage Ordinance, the Chinese Extradition Ordinance, the Colony Armorial Bearings (Protection) Ordinance, the Trustees (Hong Kong Government Securities) Ordinance, the Application of English Law Ordinance, the Electoral Provisions Ordinance, the Legislative Council (Electoral Provision) Ordinance, and the Boundary and Election Commission Ordinance.

[6] Mainly Articles 24 and 26 of the Basic Law, the Nationality Law of the People's Republic of China, interpretation of the NPC Standing Committee on Some Questions Concerning the Implementation in the HKSAR of the Nationality Law of the People's Republic of China (adopted on 5 May 1996), and Opinion of the NPC HKSAR Preparatory Committee on the Implementation of Clause 2 of Article 24 of the Basic Law of the HKSAR of the People's Republic of China (adopted on 10 August 1996).

[7] Section 2(3) specifies that, in interpreting and applying the Bill of Rights Ordinance, regard shall be had to the fact that the purpose of the Ordinance is to provide for the incorporation of the ICCPR into the law of Hong Kong. Section 3 provides that laws enacted before adoption of the Bill of Rights Ordinance shall be interpreted conforming to the Bill of Rights Ordinance as far as possible, but where such laws are inconsistent with the Bill of Rights Ordinance, they shall be regarded as having been repealed by the Ordinance. Section 4 provides that any law enacted after the adoption of the Bill of Rights Ordinance shall be interpreted conforming to the ICCPR as far as possible.

[8] See the Work Report submitted by Qian Qichen to the NPC on behalf of the HKSAR Preparatory Committee in *Wen Wei Po* of 11 March 1997, p. A8.

> Ordinance, unilaterally made substantial amendments to the original laws of Hong Kong. Such acts on the part of the British side were in violation of the provision in the Sino-British Joint Declaration and the Basic Law specifying that 'the laws currently in force in Hong Kong [would] remain basically unchanged'.'

An interpretative provision, Section 3(2) of the Personal Data (Privacy) Ordinance has been repealed for similar reasons as it is held to have given the ordinance priority over other Hong Kong laws. Finally, the 'major amendments' to the Societies Ordinance (specifying the scope of freedom of assembly and demonstration) and the Public Order Ordinance made after enactment of the Hong Kong Bill of Rights Ordinance were repealed. The revision of the two ordinances in the 1990s had already relaxed the then existing legal controls over the exercise of these freedoms. However, Chinese officials said that the repeal of the amended provisions did not necessarily imply the restoration of the original provisions; instead the Government of the HKSAR could enact its own legislation to fill the resulting gap.

Apart from setting forth the general principle of adaptation,[9] Article 4 introduces additional provisions to deal with the laws relating to foreign affairs, the law granting special privileged treatment to British Commonwealth countries, the laws on British troops stationed in Hong Kong, provisions on the superior status of English over Chinese, and provisions containing references to British law. Referring to the third appendix, Article 5 provides a set of principles for replacing certain words and phrases in the original laws. For example, any provision of the original laws referring to 'Her Majesty', 'Crown', 'British Government' or 'Secretary of State' or a similar term or expression is to be construed as referring to the Government of the HKSAR. Similarly, if the content of the provision relates to the ownership of land in Hong Kong or concerns affairs that are the responsibility of the Central Authorities under the then Basic Law or the relationship between the Central Authorities and the HKSAR, such a term or expression is to be construed as the Central Government or other relevant authorities of China.

Finally, Article 6 provides that, if any original law adopted as a law of the HKSAR is later discovered to be in contravention of the Basic Law, it is to be amended or cease to have force in accordance with the procedure prescribed by the Basic Law. This principle is derived from Article 160 of the Basic Law.

The above changes show that the return of Hong Kong to China has had a minor impact on Hong Kong's original legal system. In terms of civil and commercial laws, criminal law, some areas of public law, or even the law of human rights, the original laws of Hong Kong may be regarded as 'remaining basically

[9] I.e., making application of the adopted law 'subject to such modification, adaptation, restriction and exception as is necessary to render it compatible with the status of Hong Kong after the People's Republic of China resumes the exercise of sovereignty over Hong Kong, and with the relevant provisions of the Basic Law'.

unchanged'. As a result, there are now two independent legal regions[10] on the territory of China. On the other hand, exchanges between Mainland China and the HKSAR are increasing daily in political, economic, cultural and social areas, thus confronting China with the urgent task of coordinating the laws between Mainland China and the HKSAR. This Article focuses on the unique characteristics of the conflicts of laws between Mainland China and the HKSAE resulting from the PRC's policy known as 'One Country, Two Systems'. By examining models of coordination, this Article presents a number of specific methods for resolving these conflicts problems. It is essential for China to establish a system for coordinating the laws of Mainland China and the HKSAR as soon as possible.

II. Characteristics of the Conflicts of Laws between Mainland China and the HKSAR

Compared with interregional conflicts of laws in the United States, the United Kingdom, Canada, Australia and so on, the conflicts problems between Mainland China and the HKSAR are unique in several respects.

A. Two Different Socio-Economic Systems

After the founding of the People's Republic of China, Mainland China gradually established socialist political and economic systems, carrying out a series of reforms after 1978. As regards its economic system, Mainland China began developing a socialist market economy in 1993; however, the basis of the socialist economic system – socialist public ownership of the means of production – has remained unchanged. In contrast, Hong Kong practiced capitalism under British rule.

The Sino-British Joint Declaration signed in 1984 and the Basic Law approved in 1990 both embody the principle of 'One Country, Two Systems'. In essence, this guarantees that, within the territory of the People's Republic of China, the 1.2 billion people on Mainland China will continue to practice socialism while the HKSAR practices capitalism. The preamble of the Basic Law expressly provides: 'China has decided that, upon China's resumption of the exercise of sovereignty over Hong Kong, a Hong Kong Special Administrative Region will be established in accordance with Article 31 of the Constitution of the People's

[10] In the conflict of laws, various terms are used to describe the basic territorial unit of a legal system, such as 'country', 'legal district' or 'state'. These terms do not necessarily coincide with those in public international law. This article frequently uses the term 'region' or 'legal region' synonymously with 'legal district'.

Republic of China and under the principle of "One Country, Two Systems", the socialist system and policies will not be practiced in Hong Kong.' Article 5 of the Basic Law further emphasizes: 'The socialist system and policies shall not be practiced in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years.'

Therefore, the conflict of laws between Mainland China and the HKSAR is a conflict between two completely different socio-economic systems, whereas the interregional conflicts of laws of most other countries have arisen within the context of a unified socio-economic system.

B. Two Different Legal Families

For the purpose of comparative study, many scholars classify the laws of all countries, enacted or customary, by dividing them into a number of families, each of which constitutes an original system of law. Because of the different criteria used, scholars have proposed various divisions of legal families.[11] Nonetheless, it is generally agreed that civil law, common law and socialist law belong to the main legal families in the world today.[12]

The PRC experienced numerous complications in establishing its legal system. Historically, four phases are recognized: the evolution of China's socialist legal system (1949-1954), the consolidation of socialist law (1954-1966), the eclipse of law (1966-1976) and the flowering of law in modern China (1978-present).[13] In accordance with the basic principles of Marxism-Leninism practiced prior to the 1980s, the Communist Party was given exclusive power over the state and society, the exploiting class of large landholders and enterprises was abolished, and law was completely subordinated to politics. Numerous institutions of the former Soviet Union (for example, the judicial system) were adopted, and reference was commonly made to former Soviet laws.

Summing up lessons learned since the founding of the PRC, especially during the decade-long turmoil of the Cultural Revolution, the third Plenary Session of the 11th Party Congress stressed the importance of strengthening and legalizing democracy by enacting laws that are stable, continuous and authoritative: '[T]here will be laws to follow; there will be affairs to be handled according to law; there will be laws to be strictly enforced; and there will be violations of laws to be investigated.' Furthermore, it was emphasized that 'legislative work must be

[11] For a detailed discussion, see ZWEIGERT K. and KÖTZ H., *An Introduction to Comparative Law*, 3rd revised ed., Oxford (University Press) 1998, pp. 63-73.

[12] GLENDON M.A., GORDAN M.W and OSAKWE CH., *Comparative Legal Traditions*, St.Paul, Minn. (West) 1985, mainly discuss these three legal families, pp. 1-10.

[13] Wu JIANFAN, 'Building New China's Legal System', in: OLDHAM J.R. (ed.) *China's Legal Development*, Armonk-London (M. E. Sharpe, Inc.) 1986, pp. 1-40.

regarded as an important item on the agenda of the NPC [...] that procuratorial and judicial organizations must maintain their own independence; […] they must guarantee that everyone is equal before the law, no one is allowed to be above the law.'[14] During the last two decades, democracy has been established and the legal system has moved firmly forward, gaining the attention of the world. To meet the objectives of developing a socialist market economy and democratic politics, the Chinese Communist Party vowed at its 15th Congress 'to administer the state by law and build a legally governed socialist country'.[15] While this marked a new development, China's legal system remains in the socialist family of civil law countries.

Hong Kong practiced the laws of the Qing Dynasty before being occupied by Britain in 1841. From that time on, British colonialists proclaimed that all British laws would apply to Hong Kong. In this sense, the Supreme Court Ordinances of 1873 stipulated that '[a]ll existing laws in Britain apply to Hong Kong as from 5 April 1843, when the Hong Kong legislature was established, with the exception of laws that do not suit the Hong Kong local situation or residents and laws that have been revised by Hong Kong legislature'. In addition, the Application of English Law Ordinance in Hong Kong provided that all British common law and rules of equity applicable to the circumstances of Hong Kong or its inhabitants apply to Hong Kong just as written laws do, subject to any amendments by the order of the British Privy Council and the British legislator competent for legislation applying to Hong Kong or by Hong Kong's local legislature.

Hong Kong's legislature has been very active over the past decades. By 1997, the laws of Hong Kong constituted 36 volumes, including at least 640 chapters of ordinances and 1,160 pieces of subordinate legislation. At that time, the number of British statutes applicable to Hong Kong cited in the Application of English Law Ordinance had decreased from 70 to 29.[16] Accordingly, local laws constituted the principal source of Hong Kong's written law. Hong Kong has also developed its own case law on the basis of British legal precedents. Since 1905 Hong Kong has compiled important or typical cases in the *Hong Kong Law Reports*, which now consists of at least 200 volumes. These legal precedents constitute Hong Kong's most important case law. In addition, a small number of

[14] See Tang DEHUA, 'The Transformation from Focusing on Legal system to Emphasizing Administration by Law', in: 3 *China Law* 1998, p. 57.

[15] See Article 13 of the *Amendment to the Constitution of the People's Republic of China,* which reads: 'A new paragraph is added to Article 5 of the Constitution as the first paragraph, which provides: 'The People's Republic of China governs the country according to law and makes it a socialist country ruled by law'.'; published in *Laws of the People's Republic of China*, Changchun (Jiling People's Press) 2000, p. 49.

[16] Xi WEN, 'A milestone in the Development of Laws in Hong Kong: on the Resolution of the Standing Committee of the NPC on Handling Hong Kong's Original Laws', in: 2 *China Law* 1997, pp. 65-66.

customary laws dating from the Qing Dynasty are also considered a source of Hong Kong law.

Summing up it can be said that Hong Kong law has developed over a period of more than 100 years, resulting in a legal system totally different from that of Mainland China. As a result, the conflict of laws between Mainland China and HKSAR is basically a conflict of two different legal families, a rare situation in other countries.[17]

C. Unique Central/Local Relations in a Unified Country

Based on the model provided by the Basic Law – One Country, Two Systems – the autonomy enjoyed by the HKSAR is unique worldwide in terms of the special central/local relations between Mainland China and the HKSAR. This uniqueness is manifested mainly by the following facts:

1. Although the HKSAR enjoys a high degree of autonomy, it is a local entity within a unitary political system. As an expression of the central/local relations, the HKSAR is directly under the Central People's Government of Mainland China, whose sovereignty is not just symbolic but is laid down in the legal framework of the Basic Law. As professor Xiao Weiyun, one of the drafters of the Basic Law, pointed out:

   > 'There should be no doubt that the Central Government should have supervisory power over the manner in which the HKSAR exercises its autonomy. Naturally, the supervision by the Central Government over the HKSAR does not cover all matters. Principally, the Central Government's supervision is over whether the HKSAR is exercising its autonomy in accordance with the Basic Law. In addition, such supervision is itself carried out in accordance with the Basic Law. The Central Government will not interfere with particular affairs of the HKSAR.'[18]

2. Compared with federal states, the HKSAR's autonomy is as large as or even larger than that commonly enjoyed by the territorial units of a federation. The fact that the HKSAR's Court of Final Appeal has the right of final adjudication shows that the HKSAR enjoys more autonomy in the exercise of judicial power than the states of the United States. On the other hand, unlike

[17] In North America, there are two such areas (Louisiana and Quebec), where the French legal tradition is still vital. Both are members of federal states dominated by the common law.

[18] See Wu JIANFAN, 'Several Issues Concerning the Relationship between the Central Government of the PRC and the HKSAR', in: 2 *China Law* (1988), p. 68.

the territorial units of federal states that possessed sovereignty before joining the federation, Hong Kong was never a sovereign state or independently governed entity before acquiring its unique status under the model 'One Country, Two Systems'. To put it briefly, Hong Kong has been a part of China since ancient times.

3. Unlike other autonomous areas in the PRC, the autonomy of the HKSAR is not merely a domestic arrangement but also China's commitment under the Joint Declaration. Thus, to implement the policy of 'One Country, Two Systems', the HKSAR needs more authority than a normal Chinese autonomous region, both quantitatively and qualitatively. As a result, the relations between the Central Government and the HKSAR are based on the division of power, not on the division of function. Hence, the HKSAR is not merely an administrative body primarily responsible for implementing the Central Government's policies under local conditions; instead it possesses a wide scope of autonomy that defies interference by the Central Government at will. This special autonomy is guaranteed not only by the Chinese Constitution but also by the Basic Law of the HKSAR.

4. The relationship between the laws of Mainland China and those of the HKSAR is characterized by the duality of equality and inequality. They are equal in the sense that, like Mainland China, the HKSAR is a legal region whose laws (original laws and those enacted by its legislature) enjoy objectively the same legal status as those enacted by the NPC and its Standing Committee (except for the Basic Law). Moreover, the judgments rendered by the judicial bodies of the two legal regions are both authentic and should enjoy mutual recognition. At the same time, the laws are characterized by inequality because the laws of the HKSAR are local laws and as such are inferior to the national laws of Mainland China. This is illustrated by the following:

   (1) Partial national laws cited in Annex III of the Basic Law[19] must be applied in the HKSAR. Under Article18 of the Basic Law, the NPC

[19] Annex III of the Basic Law entitled 'National laws to be applied in the Hong Kong Special Administrative Region' includes: (1) Resolution on the Capital, Calendar, National Anthem and National Flag of the PRC; (2) Resolution on the National Day of the PRC; (3) Order on the National Emblem of the PRC proclaimed by the Central People's Government, Attached: Design of the national emblem, notes of explanation and instructions for use; (4) Declaration of the Government of the PRC on the Territorial Sea; (5) Nationality Law of the PRC; (6) Regulations of the PRC Concerning Diplomatic Privileges and Immunities. On 4 November 1998, at its Fifth meeting, the Standing Committee of the Ninth National People's Congress voted to add the national law on the Exclusive Economic Zone and Continental Shelf of the People's Republic of China to Annex III. See *supra* note 2, 1998, pp. 32-33.

Standing Committee may add or delete laws from the list in Annex III after consulting its Committee for implementation of the Basic Law of the HKSAR and the Government of the Region. Laws cited in Annex III are confined to matters relating to defense and foreign affairs, as well as to other matters outside the scope of the autonomy of the region. Furthermore, the Central Government may issue an order to apply relevant national laws in the Region if the Standing Committee of the NPC declares a state of war or a state of emergency in the Region. This could occur in the latter case if turmoil broke out in the HKSAR that endangers national unity or security and is beyond the control of the Government of the Region. For this reason, partial national laws of Mainland China may be applied directly in the HKSAR, but no HKSAR law may be applied directly in Mainland China.[20]

(2) HKSAR courts have jurisdiction over all cases in the Region, with the exception of any restrictions imposed by the laws and principles previously in force in Hong Kong. Moreover, the courts do not have jurisdiction over acts of state in matters relating to defense and foreign affairs.[21]

(3) Laws enacted by the HKSAR legislature must be reported to the NPC Standing Committee for the record. If the Standing Committee considers a law to be incompatible with provisions of the Basic Law regulating relations between the Central Authorities and the Region, it may reject the law in question but not amend it. Any law rejected by the Standing Committee is immediately invalid.[22]

(4) The power to amend the Basic Law belongs to the NPC; however, the NPC Standing Committee, the State Council and the HKSAR are empowered to propose amendments to the Basic Law. Amendments proposed by the HKSAR are to be submitted by the delegation of the Region to the NPC.[23] The Committee for the Implementation of the

[20] The Basic Law is a national law; it sets forth the basic principles of HKSAR law and is also applicable in Mainland China.

[21] See Article 19 of the Basic Law. Whenever such questions arise, the court should obtain a certificate from the Chief Executive on questions of fact concerning acts of state in the areas of defense and foreign affairs. Such certificates, which must be certified by the Central Government, are binding on the courts.

[22] See Article 17 of the Basic Law.

[23] First it is necessary to obtain the consent of two-thirds of the deputies of the Region to the NPC, two-thirds of all members of the Legislative Council of the Region, and that of the Chief Executive of the Region.

Basic Law of the HKSAR must submit its views before any proposal to amend the Basic Law is put on the NPC's agenda.[24]

(5) The power to interpret the Basic Law is vested in the NPC Standing Committee, which is bound by the Chinese Constitution when making its decisions. The Standing Committee authorizes HKSAR courts to interpret any provisions of the Basic Law falling within the scope of the autonomy of the Region. However, if HKSAR courts need to interpret provisions of the Basic Law concerning affairs under the jurisdiction of the Central Government or the relations between the Central Authorities and the Region, they must first request the NPC Standing Committee to interpret the relevant provision. The query must be made before giving a final judgment without a possibility of appeal if such interpretation could affect the outcome. The interpretation of the Standing Committee is binding on HKSAR courts whenever the relevant provision is applicable.[25]

To sum up, the conflict of laws between Mainland China and the HKSAR is a unique interregional conflict between national and local laws that is neither totally horizontal nor vertical. This makes it entirely different from national and local conflicts of laws in other countries with more than one territorial system of law.

D. Unique International Dimension

The conflict of laws between Mainland China and the HKSAR also has an international dimension not found in other legal systems. An international free port, Hong Kong plays an important role in international trade and finance. Enjoying close economic and trade relations with many countries and regions, Hong Kong had joined a number of bilateral and multilateral treaties or conventions, however, only in the capacity of a British delegation or a regional economy entity. As such, it did not exercise the rights and obligations of a member state; it was permitted to express its opinions on issues concerning Hong Kong but had no right to vote.

[24] See Article 159 of the Basic Law.

[25] See Article 158 of the Basic Law. The question arises whether the Court of Final Appeal of the HKSAR has the power of constitutional review when it is of the opinion that an interpretation of the NPC contravenes the Basic Law. The case *Ng Ka ling v. Dir. of Immigration*, 1 HKC 425 (Court of Final Appeal, 26 Feb. 1999) led to a worldwide debate on this issue. See Yongping XIAO, 'Comments on the Judgment on the Right of Abode by Hong Kong CFA', in: 3 *Am. J. Comp. Law* 2000, pp. 471-480; CHEN J., 'Judicial Independence: Controversies on the Constitutional Jurisdiction of the Court of Final Appeal of the Hong Kong Special Administration Region', in: 4 *The International Lawyer* 2000, pp. 1015-1023; CHEN A., 'Constitutional Crisis in Hong Kong: Congressional Supremacy and Judicial Review', in: 4 *The International Lawyer* 2000, pp. 1025-1040.

Since it was not an independent political entity, Hong Kong had no authorization to sign an international treaty in its own name and, even less, to approve the application of multilateral conventions in the region. Instead, Hong Kong developed bilateral ties and signed bilateral treaties in the name of the United Kingdom of Great Britain. This meant that foreign countries had to get approval from Britain to set up offices in Hong Kong, and Hong Kong had to seek assistance and approval from Britain to establish offices in other countries. As a result, Britain's participation in an international activity was a precondition for Hong Kong's participation. Nonetheless, Hong Kong enjoyed a limited degree of autonomy in specific matters, enabling it, to a certain extent, to have a special status. For example, although Hong Kong joined the GATT (now the WTO) in the name of a British Dependent Territory (BDT), it was recognized as a separate tariff unit, thus qualifying it for 'most favored region treatment' in international trade. Most of Hong Kong's international activities were related to trade, not politics and military affairs. In fact, Hong Kong was not permitted to participate in any political or military alliances.

From the principle of state sovereignty it follows that the international treaties signed by the British Government should have ceased to be effective after Hong Kong's return to China. However, a realistic solution to this problem was reached in the Sino-British Joint Declaration (Appendix I) that takes account of Hong Kong's history and reality. It was decided that international treaties to which the PRC is not a party but which were implemented in Hong Kong could continue to be implemented in the HKSAR.[26] This solution, however, is only a principle. In practice, it was necessary to take a different approach to different treaties or conventions, having regard for the Basic Law, state sovereignty and Hong Kong's interests.

The question whether a specific treaty or convention would continue to be applied, fully or in part, or not applied at all, is very complicated. When the Sino-British Joint Declaration was signed in 1984, both sides agreed to set up a Sino-British Joint Liaison Group. As stipulated in Annex II of the Joint Declaration, one of the Group's tasks was to examine and determine the action to be taken by both sides: (1) to ensure Hong Kong's participation in the GATT, the Multi-fibre Arrangement (International Textile Product Trade Agreement) and other international arrangements; (2) to ensure the contiued application of international rights and obligations affecting Hong Kong; and (3) to assist the HKSAR to maintain and develop economic and cultural relations and conclude agreements on these matters with states, regions and relevant international organizations. After deliberation, both sides later agreed that the HKSAR should contiue to participate in the intergovernmental activities of 34 international organizations. The HKSAR was permitted to join 19 intergovernmental international organizations, including the International Civil Aviation Organization and the International Monetary Fund,

[26] Liu WENZONG, 'The Issues Concerning the Application of International Treaties in Hong Kong after 1997', in: 4 *China Law* 1997, pp. 79-81.

and to attend their meetings in the capacity of a 'member of the delegation of the Chinese Government'. As a member or associate member and in the name of Hong Kong, China, the HKSAR continues its membership in 15 intergovernmental international organizations, including the Asia Development Bank and the International Maritime Organization. Of the 300-plus international treaties once applicable in Hong Kong, 214 continue to be applied after 1 July 1997. These include ones to which China is a party (e.g., the International Convention on the Elimination of All Forms of Racial Discrimination), as well as treaties or conventions that China has not yet joined (e.g., the International Agreement on the Ban on White Slave Trade).[27]

In addition, Article 151 of the Basic Law provides that, using the name 'Hong Kong, China', the HKSAR may maintain relations and conclude agreements with foreign states, regions and relevant international organizations in matters concerning commerce, trade, finance, shipping, communication, tourism, culture and sports. In view of this, it follows that conflicts arise not only between the laws of the two regions but also between the regional laws and international treaties applicable to a certain region. In addition, conflicts also occur when international agreements in a particular field are applicable in both Mainland China and HKSAR.

E. No Common Supreme Judicial Body

Unlike other legal systems with more than one territorial system of law, China has no common supreme judicial body to coordinate and resolve conflicts of laws between Mainland China and the HKSAR. Prior to 1997, the Supreme Court of Hong Kong had no power of final appeal. Parties wishing to appeal a judgment of the Supreme Court had to do so before the House of Lords, more precisely, the Committee of the Lords of Law. Under the Basic Law, a Court of Final Appeal has been established (Article 81) by vesting the power of final adjudication in the HKSAR in the Supreme Court of the HKSAR, now called the Court of Final Appeal (Article 82). It is indeed a rare situation in the world for a court of an administrative region to enjoy the power of final appeal.

[27] Generally speaking, HKSAR 's participation in the activities of international organizations may take one of the following forms: (1) The basic method is to guarantee Hong Kong's rights and interests by maintaining its status and manner of participation before its return to the PRC; (2) the past manner of its participation may be changed by raising Hong Kong's status in an international organization, enabling it to enjoy all legitimate rights and interests; (3) Hong Kong's name and the manner of its participation in an international organization may be changed, without harming its rights and interests. See Rao GEPING, 'Status and Ways of Participating in International Organization after the Return of Hong Kong', in: 4 *China Law* 2000, p. 59.

The appointment of justices is subject to a number of conditions set forth in the Basic Law. For instance, the Chief Justice of the Court of Final Appeal and the Chief Justice of the High Court of the HKSAR must be Chinese citizens who are permanent residents of the Region and have no permanent residence in a foreign country (Article 90). The appointment or removal of justices of the Court of Final Appeal and the Chief Justice of the High Court of the HKSAR should be reported to the Standing Committee of the NPC for the record (Article 90). While the Chief Justice of the Court of Final Appeal or the High Court cannot be a foreigner, Article 131 of the Basic Law permits the Court of Final Appeal, if necessary, to invite judges from other common law areas to sit on the Court of Final Appeal. This measure was deemed necessary to ensure a sufficient number of qualified judges on the bench after July 1997.

Prior to 1997, a British proposal to establish a Court of Final Appeal was accepted by the Chinese and the first Sino-British Joint Liaison Group held successful negotiations in September 1991. However, the negotiations were discontinued by the British after the Legislative Bureau of Hong Kong voiced its opposition to the proposal. Preparations for establishing the Court of Final Appeal resumed in 1995 under the guidance of the Government Affairs Subject Team of the Preparatory Committee of the HKSAR, which issued an eight-point proposal for establishing a Court of Final Appeal on 16 May 1995.

As specified by the guiding principles laid down in Point 1, the Court of Final Appeal was established in accordance with the Sino-British Joint Declaration and the provisions of the Basic Law; the Court must adhere to the principles of judicial independence and final appeal in Hong Kong; and the purpose of the Court is to build confidence in the Hong Kong people and the international society that the rule of law shall prevail in Hong Kong.

Dealing with the formation of the Court of Final Appeal and the composition of trial tribunals, Point 2 proposed that the Court consist of four permanent justices, one of whom is the Chief Justice, and a number of nonpermanent justices. The latter may include Hong Kong native justices and overseas justices and should not exceed 30. A trial tribunal consists of five justices, four permanent and one nonpermanent, the latter being appointed by the Chief Justice from the list of nonpermanent justices.

Point 3 set forth the qualification of justices,[28] Point 4 the appointment of

[28] According to the proposal, permanent justices were to be selected from justices of the High Court of the HKSAR or from barristers having more than ten years of professional experience in Hong Kong. After the Court commenced its work, the selection scope could be extended to retired justices of the former Supreme Court. Nonpermanent justices could be selected from retired Chief Justices of the Supreme Court, present or retired judges of the Appellate Court of the Supreme Court, retired permanent judges of the Court of Final Appeal, barristers having more than ten years of professional experience in Hong Kong, or present or retired judges from other common law areas. The Chief Justice of the Court of Final Appeal must be a Chinese citizen who is a permanent resident of the Region with no residence abroad.

justices and trial procedures, Point 5 the office terms and procedures for the removal and resignation of justices. Point 6 specified that the jurisdiction of the Court of Final Appeal is laid down in Articles 16 and 158 of the Basic Law. Point 7 recommended that the Court of Final Appeal follow the judicial procedures practiced in Hong Kong and other procedures enacted by the legislative and/or quasi-legislative process or other methods. Point 8 set 1 July 1997 as the date of establishment. After the election of the Chief Executive, he or she appointed the Judicial Personnel Recommendation Committee. Justices of the Court of Final Appeal were selected by the Chief Executive from the names on a list provided by the Recommendation Committee with the consent of the provisional Legislative Committee.[29]

Apart from the Court of Final Appeal, the HKSAR has a High Court, District Courts, Magistrates' Courts and other special courts. The High Court includes appellate and tribunals of original jurisdiction. HKSAR courts have jurisdiction over all cases in the Region, with the exception of matters concerning *acts of state such as defense and foreign affairs*. The scope of the latter clause raises due concern, particularly its ambiguity as to which acts qualify as an 'act of state'. Furthermore, the decision whether a matter actually relates to defense or foreign affairs is to be made solely by the Chief Executive and cannot be challenged in the courts. Therefore, questions arising from conflicts of judicial jurisdiction between Mainland China and the HKSAR still constitute a key conflicts problem.

F. Two Different Legal Cultures and Languages

1. Two Legal Cultures

Hong Kong's legal culture is derived from a western epistemology based on notions of rationality, scientific thinking and truth. Its methodology applies reason and rational thinking to facts and law. The scientific tools of investigation separate legally material facts of the case from irrelevant or background facts. Coherently structured and organized, the system has its own internal logic. The application of reason and scientific analysis is commonly believed to result in a clear understanding of the truth of the case, which, when applied to the law, means justice is served. The scientific method elevates law and legal process above other forms of knowledge and methods of administering justice.

The common law has its roots in objective legal procedures that are applied equally to everyone, including government officials. The rule of law has been accepted by the majority of Hong Kong's people, who respect the power of the law

[29] Xiao WEIYUN, 'On the Court of Final Appeal in the HKSAR and Other Judicial Institutions', in: 1 *China Law* 1997, pp. 90-91.

and common law legal institutions.[30] Their common law heritage has given Hong Kong much more than a set of rules; it has given the people a mentality that respects not only the rule of action but also ways of acting, thus emphasizing not merely 'rule by law' but above all 'rule of law'. These attitudes and forms of conduct, as well as the spirit of the rule of law are extremely difficult to translate into legal norms, especially in a context where radically different principles and attitudes are espoused by the sovereign authority.[31] Whereas the people of Hong Kong expect the law to protect them from the abuse of political power, these attitudes and values are not present in the legal system of Mainland China.

China does not have a legal culture in the western sense, i.e., a set of cultural beliefs according to which the primacy of law is regarded as an instrument of social control and legal institutions as the appropriate forum for enforcing correct social behavior. Instead, Chinese culture is based on concepts of the rule of etiquette and no litigation. The traditional Chinese means of social control is based on Confucianism, which is manifested in complicated sets of rituals and practices, as well as in class and gender codes of conduct (***'Li'***). The closest approximation of law in the Western sense found in Confucian culture is a set of criminal sanctions ('*fa*') in the pre-socialist Qing Code.

Since the initiation of the modernization campaign in 1979, Mainland China has made numerous attempts to create a rule-of-law culture. Despite the promulgation of hundreds of new laws, Mainland China remains a system characterized by 'rule by law' instead of 'rule of law'. Orthodox Marxist-Leninist theory regards bourgeois law as a tool of the ruling classes used against the people, while socialist law is an instrument of the people. As an outgrowth of the socialist distrust of law, the Chinese system is characterized by legal flexibility, lack of procedural regularity and priority of the policy[32] of the Chinese Communist Party. Not surprisingly, the Chinese people have a high degree of distrust, if not disdain for the law and prefer to settle conflicts privately, even victims of criminal acts.

From the above it follows that notable differences exist in the traditional Chinese and the common law attitudes towards law. These are the result of marked differences in the Chinese and the common law legal systems with respect to individual rights, the rule of law, judicial independence, the adversarial system, an independent legal profession, the jury system, the right of silence and the presumption of innocence, etc.

---

[30] JORDAN A. D., ' Lost in the Translation: Two Legal Cultures, the Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region', in: 30 *Cornell International Law Journal* 1997, pp. 337-338.

[31] CHANG D., 'Towards a Jurisprudence of a Third Kind – "One Country, Two Systems"', in: 20 *Case W. Res. J. Int'l L* 1988, pp. 99-110.

[32] 'Policy' is used here to include both party policy and state policy; in China's one-party state they are treated synonymously, see WACKS R. (ed.), *The Future of the Law in Hong Kong*, Oxford (University Press) 1989, pp. 41-43.

2. Two Legal Languages

The language of the law of a country or region is a living language with a history, vocabulary and point of view. Mainland China's and Hong Kong's languages of the law are no exception. Once the same, their legal histories and jurisprudence have developed along different paths since Britain's colonization of Hong Kong and Mainland China's transformation to socialism. As a result, the two jurisdictions now have distinct legal cultures and mutually unintelligible languages. After more than 100 years of colonial rule and the common law, the meanings Hong Kong people attach to legal terms in the Chinese languages are imbued with common law associations and references. Similarly, more that fifty years of socialism has succeeded in altering the meaning of legal terms in Mainland China. Although the Chinese people on both sides of the border utter the same legal words, they do not speak the same legal language. Accordingly, legal discussions between people in Hong Kong and Mainland China are often no more than uninformative cross-talk. In fact, Hong Kong people are really in no better position to understand Mainland China's legal system than people who do not speak or read Chinese.

Certainly, Chinese terms exist for common law terms, but translation is much more than merely finding equivalent terms. Properly executed, translation captures the essence of the language ensuring that the message imbedded in those terms is correctly transmitted. Successful translation exposes, rather than submerges, cultural differences. It creates dialogue instead of lulling the recipient into complacency. It does not permit the recipient to assume that he or she understands the speaker's intended meaning. For example, when the two sides declared in their own culture-specific languages that Hong Kong's judiciary would be 'independent', they appeared to be in agreement. However, the meaning of 'independent' in Mainland China differs radically from the meaning in Hong Kong; the use of the same word conceals the difference.

Article 9 of the Basic Law provides that, '[i]n addition to the Chinese language, English may also be used as an official language by the executive authorities, legislature and judiciary of the Hong Kong Special Administrative Region'. Thus the HKSAR remains a bilingual region. To date, the judiciary in the HKSAR operates mainly in English.

The various aspects mentioned above show that the conflicts existing between Mainland China and the HKSAR constitute a truly unique interregional system of conflicts in the world. In this respect, Professor Han Depei, an esteemed jurist of private international law in China, has correctly emphasized that, 'except for the factor of sovereignty, the conflict of laws between Mainland China and the HKSAR has more in common with international conflict of laws'.[33]

[33] Han DEPEI, 'On the Interregional Conflict of Laws in China', in: 6 *Chinese Legal Science* 1988, pp. 5-6.

III. Coordinating Principles

A. Unitary State and Integrated Territory

Although the HKSAR enjoys a high degree of autonomy, it is an inalienable part of China (Article 1, Basic Law) and cannot declare its independence from China. China is a unitary state with one central government, one constitution, one supreme national parliament, and all nationals have the same citizenship – Chinese.

Since the founding of the PRC, the Chinese people share the common task of bringing prosperity to the country and making it powerful enough to stand like a giant in the world. The fact that most of the country's citizens are scattered and live in small groups has been decisive in China's choice of a unitary system instead of federalism. A unitary state since the Qin and Han dynasties, China has been ruled by one central government most of the last thousand years, even though the state was split into several dynasties. The impact of this situation is still evident today.

Following this tradition, legal coordination between Mainland China and the HKSAR must be based on the common goal of promoting and maintaining the national unity of China. Therefore, when coordinating legal activities, the judicial authorities of Mainland China and of the HKSAR may neither tamper with the sovereignty and fundamental interests of the country, nor treat the legal relations between the two sides as if they were dealing with sovereign states in a disguised form.[34]

B. Equality and Mutual Benefit

Protecting national sovereignty and integrating the HKSAR into China constitute one of the main goals of the policy 'One Country, Two Systems'. As a means of achieving this goal, the Basic Law gives priority to maintaining the high degree of autonomy exercised by the HKSAR, as explicitly authorized by the NPC (Article 2). This new local autonomy grants executive, legislative and judicial powers to the Region. Particularly important is the independence of the judiciary, which is not subject to central judicial bodies and enjoys the power of final adjudication. The fact that the number of national laws applied in the HKSAR is relatively small puts HKSAR law on equal footing with the law in Mainland China, although the HKSAR is an inalienable part of the PRC. For this reason, the People's Courts – not even the Supreme People's Court in Mainland China – have no authority to issue orders or give instructions to HKSAR courts on how to resolve conflicts of laws between the two regions. Courts in other regions resolve their conflicts problems independently by applying their own choice-of-law rules.

[34] See Gao SHAWEI, 'Mainland China and the HKSAR Have Rules to Follow in Mutual Enforcement of Arbitral Awards', 4 *China Law* (1999), p. 68.

Thus the principle of equality and mutual benefit prevails when dealing with the conflict of laws between Mainland China and the HKSAR.

C. Mutual Learning and Common Development

In view of the diverse social systems, ideologies, and level of development of the economic and legal systems of Mainland China and the HKSAR, the policy 'One Country, Two Systems' can be correctly implemented only if both sides adopt an attitude of mutual respect and equal treatment. In the interest of achieving a common development, judicial circles in Mainland China and the HKSAR should open up new areas of exchange with a view to deepening understanding through increased cooperation. We should learn from each other, learn to use the other's strong points to offset one's weaknesses and seek common ground as a means of perfecting both legal systems.

D. Promoting Communication and Gradual Union

Legal exchanges between Mainland China and the HKSAR should be promoted for the purpose of coordinating laws and eliminating as many conflicts as possible. Confronted with the arduous task of developing the economy, Mainland China and the HKSAR should put the law to work to regulate the economic order, resolve economic disputes, promote economic development, etc. The law's authoritative role should be given full play to encourage impartial settlement of civil, economic, intellectual property and maritime disputes, improve the investment environment, open the marketplace, promote scientific development and widen the scope of economic cooperation, all with the aim of achieving equality, mutual benefit and common prosperity.

Both Mainland China and the HKSAR are currently confronted with various challenges in the form of environmental pollution, drug crimes and terrorism. Since these are mainly cross-border issues, their settlement requires close interregional cooperation, sincere observation of common standards and enhanced legal cooperation in order to achieve a healthy development. To this end, joint efforts should be devoted to establishing judicial assistance that will provide effective judicial service and legal protection to both Mainland China and the HKSAR.

As emphasized above, the laws of the HKSAR are fundamentally different from those of Mainland China, and this situation will last at least 50 years. Thus it is not appropriate to be overhasty by attempting to resolve the conflict of laws between Mainland China and the HKSAR by enacting unified substantive laws. Instead, it is advisable, at least in this moment, to use other methods to resolve conflicts in various fields of law. These will be discussed in detail in the following parts of this article. By now it should be clear that unification of the legal systems in Mainland China and the HKSAR will be a very long process.

IV. Models of Legislative Coordination

The complexity and novelty of the conflict of laws between Mainland China and the HKSAR make it extremely difficult to find viable solutions. In an attempt to make a contribution towards this goal, this Article proposes special methods in two areas: legislative coordination and legal cultural communication. This part deals with models of legislative coordination.

A. Methods to Unify Substantive Laws

1. Direct Application of Partial National Laws in the HKSAR

Before the partial national laws cited in Annex III of the Basic Law are applied in the HKSAR, they need to be properly revised and adapted to the situation at the time of application. For example, as regards the Nationality Law of the PRC, the NPC Standing Committee issued Explanations concerning the eligibility for citizenship and special rights. As explained therein, all Hong Kong residents with Chinese blood, persons born on Chinese territory (including Hong Kong) and other persons who satisfy the requirements for acquiring Chinese citizenship set forth in the Nationality Law of the PRC are Chinese citizens. Furthermore, all Chinese compatriots in Hong Kong holding British dependent states citizen passports or British national (overseas) passports are Chinese citizens. While these persons may continue to use their valid British passports to travel abroad after 1 July 1997, they have no right to British consular protection in the HKSAR and other regions of the PRC. On the other hand, British citizenship acquired by Chinese citizens in Hong Kong under the plan 'the right to live in Britain' is not recognized under the Nationality Law of the PRC. Such persons are Chinese citizens and may not seek British consular protection in the HKSAR and other regions of the PRC. Finally, Chinese citizens in the HKSAR who possess residence rights in a foreign country may travel abroad with the appropriate documents signed and issued by the foreign government. Holders of such documents have no right to British consular protection in the HKSAR and other regions of the PRC. Chinese citizens in the HKSAR who wish to change their citizenship may do so at the HKSAR Territory Entry Office, which processes all applications in accordance with the Nationality Law of the PRC and the said Explanations.[35]

The NPC Standing Committee has the right to add or delete laws from the list in Annex III but only after consulting the Committee for the Basic law of the

[35] Explanations by the NPC Standing Committee on the Implementation of the Nationality Law of the People's Republic of China in the HKSAR (passed at the 19th Plenary Session of the Standing Committee of the Eighth NPC on 15 May 1996), in: 3 *China Law* 1996, p. 40.

HKSAR and the Government of the Region. Any law added to the list must be confined to defense and foreign affairs or other matters outside the jurisdiction of the HKSAR. One of the laws added to the list is the Law on the Stationing of a Military Garrison in the HKSAR by the PRC[36] (the Garrison Law). Stationing a garrison in Hong Kong is an important embodiment of China's resumption of sovereignty over Hong Kong. The basic principles governing the relations between the garrison and the Government of the HKSAR are set forth in the Garrison Law.

Since the garrison is part of the military and the Government of the HKSAR part of the administration, neither is subordinate to the other and thus they do not interfere with one another. Responsible for the defense of the Region, the garrison is under the command of the Central Military Committee, whereas the Government of the HKSAR is directly under the Central People's Government and is responsible for the administration of the Region. As stipulated by the Garrison Law, the military forces are not to interfere with local affairs and garrison personnel are not permitted to join political, religious and social organizations of the HKSAR. Accordingly, the military shall not participate in any decision-making and/or social activities of the HKSAR Government, as the British garrison did; nor are they to become involved in government and political affairs, although the Army may do so on Mainland China. For its part, the law enforcement personnel of the HKSAR is not permitted to examine or seize weapons and property of the garrison and its personnel nor to search vehicles with identify cards and documents issued by the garrison. When making laws and regulations, the HKSAR Government must consult the garrison concerning any provisions involving the military stationed in the Region, but not interfere with its internal affairs and matters of defense. The Government must support the military and protect the legal rights and interests of the garrison and its personnel.[37]

As mentioned earlier, the Central People's Government may order special measures to be taken in the HKSAR if there is a state of emergency, if unrest in the HKSAR endangers national unity or security and is beyond the control of the HKSAR Government, or if the NPC Standing Committee declares a state of war. Fortunately, no use has been made of this possibility to date.

---

[36] This law was passed by the Standing Committee of the Eighth NPC at its 23rd session on 30 December 1996. Another recent example is the Decision of the NPC Standing Committee on Adding a Law to the List of the National Laws in Annex III to the Basic Law, adopted at the Fifth Meeting of the Standing Committee of the Ninth NPC on 4 November 1998 (Law on the Exclusive Economic Zone and Continental Shelf of the PRC). See *supra* note 2, 1998, pp. 32-33.

[37] Wang XINJIAN, 'The Garrison Law is a Very Important Legal Action in Carrying Out the Principle of 'One Country, Two Systems' ', in: 1 *China Law* 1997, pp. 58-59.

2. Application of International Treaties

There are two methods of determining how international conventions or treaties should be applied in the HKSAR after 1997. If the goal is to maintain Hong Kong's rights and interests in a treaty or convention, the former mode of application may basically be retained and the name under which Hong Kong joined the instrument changed to 'Hong Kong, China'. In other cases, the former manner, level or status used by Hong Kong to join a convention or treaty may be changed with a view to safeguarding or increasing Hong Kong's rights and interests in the respective convention or treaty. Take the GATT for example, which Hong Kong joined through Britain, attended meetings in the name of a British delegation and delivered speeches as a British representative prior to 23 April 1986. Due to the rapid development of trade in Hong Kong, Britain granted autonomy to Hong Kong in matters of foreign trade, as a result of which Hong Kong attained the status of an independent tariff territory. On 23 April 1986, the British Government requested the Secretariat of GATT to recognize Hong Kong as a signatory party. At the same time, the Chinese Government issued a declaration confirming that Hong Kong would continue to perform its duties as a signatory party under Paragraph 5 of Article XXVI of the GATT but that, as of 1 July 1997, it would act under the name of 'Hong Kong, China'.

There is an ongoing debate among Chinese scholars as to whether international conventions may now be applied to relations between Mainland China and the HKSAR. Scholars taking the negative view argue that many international conventions previously applied in Hong Kong have remained effective after 1997 and that the HKSAR may conclude and implement agreements with foreign states, regions and international organizations in a particular field, but as a non-sovereign region using the name 'Hong Kong, China'. In view of Hong Kong's special status in the international community and its close relations with many states, the Central People's Government of the PRC has permitted the HKSAR to apply international conventions independently. In their opinion, such conventions apply exclusively to relations between the HKSAR and foreign states or regions, not to relations between Mainland China and the HKSAR.[38] Since the Basic Law makes a distinction between international and interregional relations, they maintain that the two should not be confused. While Article 95 of the Basic Law permits the HKSAR to maintain interregional relations on its own accord, Article 96 specifies that the assistance or authorization of the Central People's Government is required when making arrangements with foreign states regarding reciprocal judicial assistance.[39]

[38] Huang JIN and Huang FENG, 'Study on the Interregional Judicial Assistance', in: *Chinese University of Politics and Law Press* 1993, p. 150.

[39] Article 95 of the Basic law reads: 'The Hong Kong Special Administrative Region may, through consultations and in accordance with law, maintain judicial relations with the judicial organs of other parts of the country, and they may render assistance to each other.' Article 96 reads: 'With the assistance or authorization of the Central People's Government,

Because of these 'different arrangements', they contend that international conventions cannot be applied to relations between Mainland China and the HKSAR, even if the conventions are in force in the two regions.

Taking the opposite view, I believe that we should not restrict ourselves to traditional theories. Instead, in keeping with the uniqueness of the policy 'One Country, Two Systems', we should act in the spirit of creativeness, using creative minds to find new solutions to the conflicts problems between Mainland China and the HKSAR.

Although the HKSAR is not a subject in public international law, the Hong Kong issue definitely has international dimensions: Hong Kong's return to the PRC was made possible by the Sino-British Joint Declaration and the Basic Law, both of which came about as a result of negotiations between China and Britain. Respecting the general theme of continuity of previous laws and systems, the Joint Declaration and Basic Law set up a special regime of treaty succession that differs in important aspects from the general international norms on state succession. For example, the Vienna Convention on Succession of States in Respect of Treaties (1978) provides that, when the territory of a state, or when any territory for the international relations of which a state is responsible, not being a part of that territory, becomes a part of the territory of another state, *the international agreements of the predecessor state shall cease to apply to that territory while the agreements of the successor state shall begin to apply to the incorporated territory*, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.[40] Taking a different approach to the Moving Treaty Frontier Rule, the Basic Law provides that international agreements to which the PRC is not a party but which are implemented in Hong Kong may continue to be implemented in the HKSAR. As for treaties to which the PRC is or becomes a party, the Central People's Government will decide whether they shall apply in the HKSAR, taking account of the circumstances and needs of the Region and after seeking the views of the Government of the Region.

From this it follows that the Basic Law regime departs from the Vienna Convention by making the continued application of a treaty discretionary instead of automatic. Furthermore, it neither completely discontinues the application of all treaties of the previous sovereign nor applies all those of the new sovereign. Although the situation is complicated by the fact that Britain applied numerous treaties in Hong Kong to which the PRC is not a party, it is evident that the regime of the Basic Law is more logical and sensible. The HKSAR cannot adequately exercise its autonomy unless it has its own treaty regime. As indicated above, Hong Kong's economic system is not only independent from that of Mainland

---

the Government of Hong Kong Special Administrative Region may make appropriate arrangements with foreign states for reciprocal judicial assistance.'

[40] See Article 15 of the Convention.

China but also requires a series of international agreements to sustain it. Similarly, the maintenance of Hong Kong's distinctive legal system necessitates separate agreements.[41] Therefore, the Basic Law confers a special status on the HKSAR in the international community, on the basis of which the HKSAR is permitted to join international conventions in its own name.

In my opinion, making use of international conventions to resolve conflicts of laws between Mainland China and the HKSAR does not pose a threat to national unity and territorial integrity. On the contrary, since both regions are party to numerous international conventions that were applied to relations between Mainland China and Hong Kong prior to 1997, preventing the application of these conventions to relations between Mainland China and the HKSAR is harmful to normal communication and implementation of the policy 'One Country, Two Systems'.

The fact that the Basic Law deals with international and interregional judicial assistance in different Articles does by no means mean that they should not be incorporated into the same model and that international conventions should not be applied to interregional relations. On the other hand, the Basic Law does not prohibit the application of international conventions to relations between Mainland China and the HKSAR. As specified in Article 153, it is up to the Central People's Government to decide whether an international agreement to which the PRC is or becomes a party shall apply in the HKSAR. Thus it follows that some international conventions may be applied in the two regions simultaneously. This is the legal basis on the grounds of which international conventions may be applied to relations between Mainland and the HKSAR.

Taking a look at the practice, we see that courts in Mainland China still regard cases involving Hong Kong as international cases, as they did prior to 1997. This is the practical basis for applying international conventions to relations between Mainland China and the HKSAR.

If international conventions cannot be applied to relations between Mainland China and the HKSAR because Hong Kong is part of the PRC, then there is no doubt that international conventions cannot be applied to relations between the HKSAR and Macao and between the HKSAR and Taiwan – because Macao and Taiwan are also parts of the PRC. This would make it difficult for the HKSAR to establish clear and coherent external relations with Macao and Taiwan, with whom Hong Kong has had extensive commercial relations and exchanged some form of representation.

Of course, if some provisions of an international convention are incompatible with the Basic Law or the situations in the HKSAR and Mainland China, it is necessary to come up with a different solution for the interregional relations in question.

---

[41] Yash GHAI, *Hong Kong's New Constitutional Order*, Hong Kong (University Press) 1997, pp. 452-455.

This, however, is not the end of the debate; it would be oversimplifying things to regard the matter as settled at this point. When determining whether international conventions may be applied to relations between Mainland China and the HKSAR, it is also necessary to distinguish between 'foreign affairs', which are quintessentially matters of state and international diplomacy, and 'external affairs', which appear to be concerned with economic and cultural matters. In our context, the former expression is used to refer to the responsibilities of the Central People's Government, the latter to the powers of the HKSAR. Being the broader concept, 'foreign affairs' presumably includes 'external affairs'. Competent for foreign affairs relating to the HKSAR, the Central People's Government authorizes the HKSAR to conduct its own external affairs. This distinction is confirmed by Article 150 of the Basic Law, which provides that representatives of the Hong Kong Government may participate in 'negotiations at the diplomatic level' as members of delegations of the Government of the PRC. But in practice it is difficult to maintain such distinction. In an attempt to do so, one must define the exact scope of 'external affairs' and determine which of those powers belong to the jurisdiction of the Central Government, which is competent for foreign affairs and defense. Although the scope of the HKSAR's jurisdiction over external affairs can be justifiably inferred from its autonomy, it is unclear to what extent such powers also qualify as foreign affairs of the PRC (for example, extradition in relation to the HKSAR or consular protection of its residents in third countries) and, more importantly, to what extent the HKSAR's powers may be overridden by the Central Government.

On the one hand, the authority vested directly in the HKSAR by the Basic Law cannot be taken away except by an amendment to the Basic Law. However, foreign affairs is a flexible concept whose scope broadens as more and more matters previously considered to be exclusively of domestic concern are regulated by international instruments. Thus the question arises whether the Central People's Government may intrude upon the powers conferred on the HKSAR under the Basic Law by concluding and implementing treaties concerning matters within the autonomy of the HKSAR. Can a distinction be made between foreign and external affairs to suggest that they cover different areas without allowing the scope of external affairs to be reduced by the increasing tendency of the Central Government to accept international obligations that affect domestic affairs? Similarly, to what extent can the Central Government use its 'defense' powers to override the HKSAR's autonomy? These questions are novel for the PRC since China is a unitary state and until now there have been no restrictions on the Central Governments' jurisdiction over any part of the country.[42]

Further problems may arise as a result of the interaction between the provisions governing the treaty regimes of the PRC and the HKSAR. First, there are different ways of giving effect to a treaty. In Mainland China, once a treaty has

[42] *Ibid*., p. 442.

been properly ratified by the NPC, it automatically becomes part of the Chinese legal system (at least in theory) and supersedes national law (except presumably the Constitution) in case of conflict. In the HKSAR, there is no formal process for the ratification of treaties by the legislature (although treaties may be tabled in the Legislative Council for the information of its members); a treaty has no legal effect internally until it is incorporated into local law. What about treaties to which the PRC is a party and which have been extended to the HKSAR? Do they require express incorporation before becoming effective in the Region or does the mere fact suffice that such treaties also apply in the HKSAR? In this context it should be noted that Article 18 of the Basic Law, which defines the sources of law in the HKSAE, does not recognize treaties as an independent source of law. Assuming that the effect of a 'Hong Kong' treaty continues to be governed by the previous requirement of express incorporation, it would be better to have the same requirement for a 'PRC' treaty, thus ensuring that it is properly accommodated within the local law so as to avoid confusion that could otherwise arise if different methods were used to give effect to a treaty depending on its origin.[43]

Another problem arises because, in accordance with the general principles of treaty law, a treaty signed by the PRC would normally be binding on its entire territory. Consequently, when the PRC signs a treaty and is not certain whether it should also apply to the HKSAR and has had no time to discuss the matter with the HKSAR authorities, it would be desirable to specify that the treaty would not (at least at the beginning) also apply to the HKSAR. This could be done either in the form of a reservation or by using the 'federal clause'.[44] If the particular treaty does not permit reservations of a territorial nature, there would be no choice but to apply it to the HKSAR. All these circumstances suggest that China should consult with the HKSAR before entering into treaty obligations instead of deciding at a later phase whether the treaty extends to the HKSAR under Article 153.[45]

Finally, problems may arise if a PRC treaty in which a distinction is made between developed and developing countries is extended to the HKSAR. For example, in the conventions on biodiversity and climate change adopted at the Rio Earth Summit (UN Conference on Environment and Development), a distinction is made between developed and developing countries in their obligations, requiring States with advanced economies to help developing countries achieve the

[43] *Ibid.*, p. 450.

[44] In federal states, the federal authorities who negotiate treaties on subjects within the jurisdiction of provinces/regions sometimes include a 'federal clause' whereby they assume only those obligations which the federal authorities can perform but undertake to recommend to the provinces/regions that they implement those obligations within their jurisdiction (even though the federal authorities may be empowered to implement treaties regardless of the subject matter). China declares itself a unitary state, but the Basic Law provides constitutional guarantees for Hong Kong; in light of this, China's treaty partners would most likely accept a federal clause type of reservation.

[45] See *supra* note 41, p. 450.

objectives of the conventions by providing them financial and technological aid. Although Britain ratified the conventions, they were not extended to Hong Kong. According to a spokesman of the previous government, it was not clear whether Hong Kong should be designated as a developed or developing country, given the imminence of its status as a Special Administrative Region of China.[46] China is a signatory, qualifying as a developing country. It appears that China would have to extend the application of the Biodiversity Convention to the HKSAR since it applies to all areas within the national jurisdiction of a signatory state without reservation. If the Climate Convention were also extended, it must be decided whether the HKSAR's obligations as to the control of the emission of greenhouses gases would differ from those of the rest of China and whether they would be determined by the criteria for a developed country.[47]

3. Application of Interregional Agreements

In this Article an interregional agreement is regarded as an agreement between Mainland China and the HKSAR for the purpose of achieving unification in a particular area of law. The special authority of the HKSAR to independently enact various forms of legislation to apply in the Region includes agreements with Mainland China. Thus the conclusion of interregional agreements is compatible with the Basic Law, and nearly all Chinese scholars consider this to be a viable method.[48] While this in itself is not disputed, it is important to take account of several relevant factors.

When entering into an interregional agreement, Mainland China must be recognized as the sole legal region authorized to unify the laws between the two regions on the level of national legislation. Accordingly, only the Central Authorities are empowered to represent the Mainland and sign such agreements, not authorities of the provinces of Mainland China. The purpose is not to unify the laws of the HKSAR and other provinces, as this would complicate the conflicts problems at that level even more. Therefore, interregional agreements may be concluded only by the NPC and its Standing Committee and by other Central Authorities authorized by the NPC.

Although the Legislative Council of the HKSAR is empowered to enact laws, it is not the sole lawmaking body. Bills passed by the Council do not become law until they are signed by the Chief Executive, who may refuse to sign if he or she considers a bill incompatible with 'the overall interests of the Region'.[49]

---

[46] Legislative Council Debates, 2 December 1992, p. 1114.

[47] See *supra* note 41 p. 451.

[48] See Su YUANHUA, 'Opinions on the Making of China's Law of International Conflict of Laws', in: 2 *China Law* 2000, pp. 77-80.

[49] See Article 49 of the Basic Law.

Moreover, the scope of the Council's lawmaking powers is limited by the Basic Law: All laws must be compatible with the Basic Law, having regard for the division of legislative powers between the HKSAR and the Central Authorities and eventual restrictions in areas within the Council's jurisdiction. As mentioned earlier, national laws enacted by the Central People's Government in emergency situations may be applied in the HKSAR without intervention by the Council. Finally, subordinate legislation may be made by the executive[50] or other bodies authorized by virtue of a particular ordinance. The Council may control the content of subordinate legislation by prescribing its scope in the parent legislation and requiring that it have prior consent or subsequent disapproval.[51]

4. Enactment of Common Legislation

Common legislation is identical or similar legislation enacted by the respective legislative bodies in the two regions for the purpose of unifying rules in a particular field. When Mainland China and the HKSAR cannot reach an agreement, the respective legislative bodies may enact the same or similar rules by direct consultation or by adopting model laws drafted by some research institution or academic society. This is a valid and effective method to coordinate conflicts of laws between Mainland China and the HKSAR; however, unification would be achieved only over a long period of time and there must be full respect for the independence of the two legal systems. As Yaozhu Liao, a well-known member of the Hong Kong legal profession, put it: 'The unification [of substantive laws and conflict of laws rules] would certainly be gradual. As a matter of fact, it can only take the form of a kind of coordination.'[52] According to Ms. Liao, the possibilities of unifying or coordinating laws will also depend on the subject matter. Unification is most likely to be achieved in substantive areas such as international trade, bills of exchange, international transportation, trademarks and patent registration. The pressure for uniform laws in these areas is reflected by the large number of existing and proposed international agreements on these subjects. Achieving uniformity in laws governing purely internal affairs (for example, family relations and duties and obligations of citizens) could take much longer, since such laws are based on the more intimate local socio-economic composition of each region. Nevertheless,

[50] See Article 62(5) of the Basic Law.

[51] Under the Interpretation and General Clauses Ordinance, all subsidiary legislation must be brought before the Legislative Council, which may within 28 days amend or repeal such legislation 'in any manner whatsoever consistent with the power to make such subsidiary legislation'. The Council may also stipulate in the relevant ordinance that it would not come into effect unless approved by the Council (which may amend it before the approval is given). See *supra* note 41, p. 252.

[52] Yaozhu LIAO, 'A Plan for the Gradual Unification of Laws', in: *Da Gong Daily* (Hong Kong), 11 April 1986.

some Hong Kong lawyers believe that family law may be among the first to be unified or coordinated because the cultural traditions and racial origins in the HKSAR are identical to those in Mainland China. Above all the models for unifying substantive laws aim at closing socio-economic gaps and promoting better understanding.[53]

B. Models for Unifying Interregional Conflicts of Laws[54]

Generally speaking, a country with more than one legal region has five options when adopting rules for resolving interregional conflicts of laws: (1) conflicts rules may be applied by each region by analogy; (2) interregional conflicts rules may be formulated by each region; (3) a uniform set of national rules governing interregional conflicts of laws may be established; (4) the same rules governing international conflicts of laws may be applied to domestic interregional conflicts; and (5) international conventions or treaties containing conflicts rules may be adopted for the purpose of unifying the conflicts rules of different legal regions.[55] Adopting conflicts rules is likely to be a more effective method of resolving interregional conflicts of laws between Mainland China and the HKSAR than unifying substantive laws. However, allowing each region to enact its own conflicts rules would probably result in widely divergent provisions, thus causing further conflicts. This, in turn, would lead to problems of *renvoi* and transmission, inducing forum shopping and making characterization more complicated than ever.[56]

In order to avoid such situations, the two legal regions should coordinate their efforts, using other methods to enact or adopt conflicts rules. One possibility is to use methods similar to those for unifying substantive laws: international conventions,[57] interregional agreements [58]and common legislation.[59] However, in my

[53] Jin HUANG and Andrew Xuefeng QIAN, 'One Country, Two Systems, Three Law Families, and Four Legal Regions: The Emerging Interregional Conflicts of Law in China', in: 5 *Duke Journal of Comparative & International Law* 1995, p. 308.

[54] Chinese scholars often use the term 'interregional conflict of laws' to refer to the conflicts of laws within the territory of one country.

[55] Jin HUANG and Andrew Xuefeng QIAN (note 53), pp. 309-410.

[56] *Ibid.*

[57] International treaties and conventions in the field of private international law can generally be divided into two categories: (1) those providing conflicts rules and international civil procedural rules and (2) those enacting substantive laws. The first category comprises over 31 international treaties or conventions, of which 18 are in force. Most of the treaties and conventions still in force were adopted within the framework of the Hague Conference on Private International Law from 1893 to1987. What I mean here is that Mainland China and the HKSAR may become parties to some conventions or treaties containing conflict of laws rules for various subject matters.

opinion, the best method of resolving conflicts of laws problems between Mainland China and the HKSAR is to enact uniform conflict of laws rules at national level. Such an approach has several benefits. First, uniform rules would eliminate forum shopping since the courts of both regions would apply the same conflicts principles, thus ensuring that a case would be handled in the same way in each region. Secondly, enacting uniform conflicts rules could be achieved more easily than unifying substantive and procedural rules, which currently differ considerably between the regions. Thirdly, this approach would prevent clashes between interregional conflicts rules, thus avoiding problems of *renvoi*. Furthermore, enacting uniform national conflicts rules would lay the foundation for a possible unification of the substantive law of the two regions in the future.

The fact that the two legal regions are not empowered to enact their own interregional conflicts rules is another argument in favor of Mainland China and the HKSAR enacting uniform national conflicts rules on the basis of full negotiations and coordination. This would also be a gradual process. Until its completion, each region should use its own existing conflicts rules to address problems relating to the conflict of laws. In Mainland China, there are provisions regulating the choice of law in civil relations with foreign parties[60] and some special statutory provisions on determining the applicable law in specific situations.[61] In Hong Kong, international conflicts rules are taken from the English common law and statues. This, however, is recommended only as a temporary and hence transitional measure until a set of uniform national conflicts rules is enacted to resolve the interregional conflicts of laws. Considerable progress has already been made on this front. After five years of intense research and preparatory work, the Chinese Society of Private International Law[62] completed drafting a *Model Law of Private*

[58] This means that Mainland China and the HKSAR may conclude their own agreements containing conflicts rules for subject matters not covered by conventions.

[59] This means that Mainland China and the HKSAR may enact a number of identical or similar conflicts rules after consultation.

[60] For a discussion of China's general principles of Civil Law, see ZHENG H. R., 'China's New Civil Law', in: 34 *Am. J. Comp. Law* 1986, p. 669. For new developments in Chinese Private International Law, see Huang JIN/ Lu GUOMIN, 'New Developments in Chinese Private International Law', in this *Yearbook* 1999, pp. 135-156.

[61] E.g., see the Law of Inheritance of the PRC, Article 36 (1986); the Procedure of the Bank of China for Extending Loans to Enterprises with Foreign Investment, Article 25 (1987); the Maritime Act of the PRC, Chapter XIV, Articles 268-276 (1992); Company Law Act of the PRC, Chapter 9, Article 199-205 (1993); Negotiable Instruments Act of the PRC, Chapter V, Articles 95-102 (1995); Civil Aviation Act of the PRC, Chapter 14, Articles 184-190; Law of Contract of the PRC, Article 126 (1999) and others.

[62] The Chinese Society of Private International Law is a national non-profit academic institution established in 1987 under Chinese Law and regulations. Professor Han Depei is the director, professor Huang Jin is now the first vice-director, and Professor Yongping Xiao acts as Secretary; all are from Wuhan University International Law Institute.

International Law of the People's Republic of China on 16 November 1997. Published by the Law Press of China and in the *Yearbook of Private International Law*,[63] the Model Law has already had a considerable impact on Chinese scholars and judges, and I am confident that it will serve as the basic text for the future uniform national law on private international law in China. In keeping with the principle of 'One Country, Two Systems', the new conflicts rules would remain effective for a fairly long time, at least until 2047.

V. Legal Cultural Communication

Legislative coordination is based on legal cultural communication between Mainland China and the HKSAR. This is in keeping with the belief that a legal system that takes account of the cultural conditions of a society is more acceptable to the people than one dictated by the ideals of a few individuals. If the law is not in harmony with culture, it can hardly survive on its own or meet the needs of the people.[64] Thus it is necessary to take various measures to enhance the legal cultural communication between the legislatures, judiciaries, social institutes, public servants, and common people in Mainland China and HKSAR. The scope of this communication should include a variety of forms; however, the following two are particularly important at present.

A. Bilingualism of HKSAR's Legislation and Judicature

For most of its colonial period, the language of the law and administration was English. The main sources of the law – the common law and UK statutes – were in English, and legislation enacted in Hong Kong was also in English. Elements of Chinese customary law applied in practice were also enforced in English. On the other hand, following the Joint Declaration, the Basic Law designates Chinese, if somewhat obliquely, as the official language but authorizes the use of English as well. It is unclear whether the official Chinese is to be Cantonese or Mandarin. Since almost 95% of the residents of Hong Kong speak Cantonese, it would make

---

The Society has about 500 members from universities, research institutes, courts, arbitration commissions, law firms, and governmental departments throughout the PRC (including HKSAR, Macao, and Taiwan).

[63] The Chinese and English texts of the Model Law were published by Law Press (China) on August 2000; the English text was also published in this *Yearbook* 2001, pp. 349-390.

[64] Berry Fong-Chung HSU, *The Common Law System in Chinese Context: Hong Kong in Transition*, Armonk-London (M. E. Sharpe, Inc.) 1992, p. 10.

sense for Cantonese to be the official language (the written form is also different; Hong Kong uses the classical and Mainland China the simplified characters). On the other hand, state policy in China promotes the use of Mandarin and thus communications between Mainland China and the HKSAR will certainly be in that language. Even if Mandarin is the official language, there will still be extensive use of Cantonese, in both the administration and court proceedings, although increasing numbers of Hong Kong residents will start to learn Mandarin. As for the use of English, the Basic Law seems to leave it to the HKSAR to determine the scope of its use, as well as the pace of changing to the exclusive use of Chinese. It is likely that English will continue to be used in the foreseeable future, at least for the purpose of the law, although Chinese will become the dominant language.

The Hong Kong administration had foreshadowed these developments by initiating new language policies in the 1970s. At that time a committee was appointed to make recommendations as to whether and to what extent Chinese should be given the status of an official language. Though not accepted in their entirety, the reports formed the basis of the policy adopted in the Official Language Ordinance of 1974, which provided that English and Chinese were the official languages for the purpose of communication between the government and the public. Both languages were to 'posses equal status and, subject to the provisions of this Ordinance, enjoy equality of use'. Progress in elevating Chinese to an official language for the purpose of the law was slower due to the lack of resources for translating legislation and using Chinese in judicial proceedings. The Ordinance therefore provided that all ordinances were to be enacted and published in English, but it did not exclude the publication of a translation of any ordinance in Chinese. Advantage was taken of this proviso to initiate informal translations of some key laws for general guidance, an exercise that provided valuable experience in legal translation.

A formal change of policy took place after the Joint Declaration. After investigating the feasibility of translating the laws into Chinese, the government amended the Royal Instructions in 1986, authorizing the enactment of laws in English or Chinese. This paved the way for the Official Language (Amendment) Ordinance 1987 and the Interpretation and General Clauses (Amendment) Ordinance 1987. The former replaced section 4, providing that 'All ordinances shall be enacted and published in both official languages'. It also established a procedure for authenticating the Chinese translations of some 500 ordinances that had been previously enacted. At the time of the transfer of sovereignty in 1997, Hong Kong legislation was completely bilingual with authentic texts of all ordinances in both languages.

The amendments to the Interpretation and General Clauses Ordinance provide that the English and Chinese texts of an ordinance are equally authentic and that all provisions are 'presumed to have the same meaning in each text'. It goes on to state that, 'where a comparison of the authentic texts of an Ordinance discloses a difference of meaning which the rules of statutory interpretation do not resolve, the meaning which best reconciles the texts, having regard to the objects and purpose

of the Ordinance, shall be adopted'. This provision excludes exclusive reliance on one language version to resolve an ambiguity in the other text. Until now, however, priority has usually been given to the English text, for both legal and practical reasons. In regard to technical terms, the Interpretation Ordinance provides that an expression of the common law used in the Chinese text 'shall be construed in accordance with the common law meaning of that expression'. There are two practical reasons for this: Drafts of ordinances are first prepared in English because instructions from government departments are in English and most drafters are not familiar with Chinese. Accordingly, the Chinese version is a translation of the English. Secondly, most judges and legal practitioners, even Chinese, are more at home with legal English than legal Chinese.

Progress has also been made in the use of Chinese in judicial proceedings. Originally the Official Language Ordinance provided that proceedings in the Court of Appeal, the High Court, the District Court and any other non-scheduled 'court' must be conducted in English. In scheduled courts (magistrates' courts, inquiries by a coroner, juvenile court, labor tribunal, immigration tribunal), proceedings could be in either language, at the discretion of court. The reason for this distinction was that higher courts had to contend with complex questions of law, which could be problematic, whereas important issues in the other courts are factual and evidentiary, thus allowing them to be handled satisfactorily (and in fact better) in Chinese. While Chinese was sometimes used in the latter courts and tribunals, the fact that most presiding officials were expatriates unacquainted with Chinese was a major constraint at least initially. The localization of the judiciary at all levels resulted in an increased number of local lawyers, improving the situation notably. As a result, the ban on the use of Chinese in the higher courts has been repealed. Even prior to the change of sovereignty, trials in the High Court were held in Chinese when it was clear that the plaintiff would not be able to follow the proceedings in English.[65]

Although both Chinese and English are official languages, and Chinese is the primary official language under the Basic Law, to date most judicial proceedings in the HKSAR are still conducted in English, with translations of some judgments being made available in Chinese. The higher the court, the percentage of its proceedings rendered in Chinese is proportionally lower. Except for judgments of the Court of Final Appeal, judgments of lower courts rendered in English are not necessarily translated into Chinese. As for arbitration, all cases are probably conducted in English and the award rendered in English without a Chinese translation. The possibility of Chinese being used in either litigation or arbitration proceedings by judges, arbitrators and solicitors/barristers seems to be highly remote in the foreseeable future. This is not only because most of them are not bilingual, but also because there is no detailed plan for using both languages on an equal basis in the

[65] See GHAI Y.P., 'Hong Kong's New Constitutional Order', Hong Kong (University Press) 1997, pp. 324-325.

long run.[66] It will take a long time to translate the case law of Hong Kong into Chinese and even longer before Chinese is used in all legal proceedings.

B. Comparison of the Legal Terminology of the Two Jurisdictions

The translation of Hong Kong laws into Chinese is particularly difficult because of the differences in legal cultures. Since Hong Kong laws contain numerous legal terms denoting concepts that do not exist in the laws of Mainland China, it follows that there are no Chinese equivalents for such terms. On the other hand, some terms may be the same but have different meanings in the two jurisdictions, such as individual rights, the rule of law, judicial independence, the adversarial system, an independent legal profession, and the right of silence. [67]

Generally speaking, it is difficult to translate legal concepts from one language into another because they are identified and expressed in terms of the objects to which they refer and bear their own particular meaning. The legal terms and concepts of a legal system are peculiar to the society in which that system exists. For example, concepts of English land law such as 'a fee simple' and 'a fee tail' have no adequate equivalents in any other language. Since the language of the common law is English, it is natural that a law student receives his legal training in English and that this determines his comprehension of legal concepts. Expressions such as 'charge by way of mortgage', 'assignment of choses in action' and 'beneficial interest of the tenant for life' are difficult to express in Chinese.[68] Therefore, it is very important to compare the basic legal terms in Mainland China and the HKSAR. This is the essential presupposition of legal cultural communication between Mainland China and the HKSAR.

VI. Conclusion

The policy of 'One Country, Two Systems' is a unique undertaking proposed by China to settle outstanding issues relating to Hong Kong. The conflicts of laws resulting from this model have numerous new characteristics not found in the inter-regional conflicts in other countries. Since no ready model exists for resolving such conflicts, Chinese jurists are called upon to meet this challenge by being creative in theory and practice. This should be regarded as an opportunity for China to make a

[66] See Song Sio CHONG, 'Can Hong Kong be a Litigation and Arbitration Center for Mainland's Foreign-Related Contracts?', in: 1 *China Law* 2002, pp. 84-85.

[67] See Berry Fong-Chung HSU (note 64).

[68] See WACKS R. (ed.), *The Future of the Law in Hong Kong*, Oxford (University Press) 1989, pp. 173-177.

contribution to the science of private international law – not only at the national but also at the international level.

The process of coordinating the laws of Mainland China and the HKSAR will be long and complicated. Based on the principles of national sovereignty, territorial integrity, equality and mutual benefit, it should aim to promote normal communication and perfect the legal systems, while contributing to the economic prosperity and social development of the two regions. An effective system can be created only by drawing on a variety of coordinating models at the same time: models for unifying legislation, adopting separate legislation,[69] applying international conventions, concluding interregional agreements and adopting common legislation laid down in Model Laws. Each model has its own theoretical and practical advantages, and each may play an instrumental role at a particular time in the coordination process.

A. Interregional Agreements

The conclusion of interregional agreements appears to have been the dominant coordinating model during the period between 1997 and 2002. For example, the *Arrangement of the Supreme People's Court on the Mutual Commissioning of the Service of Civil and Commercial Documents by the Courts in Mainland China and the HKSAR* was signed on 30 March 1999 by the Supreme People's Court and representatives of the HKSAR. It became effective in the HKSAR the same day as the revised regulations of the High Court.[70] Another arrangement was reached on 21 June 1999 by the Supreme People's Court of the PRC and representatives of the HKSAR: *Arrangement for the Mutual Execution of Arbitral Awards between Mainland China and the HKSAR.* Signed jointly by Sun Deyong, vice president of the Supreme People's Court, and Elsie Leung, Secretary of Justice of the Hong Kong Government, the Arrangement elaborately defines the procedures for mutual enforcement of arbitral awards by tribunals in Mainland China and the HKSAR.[71]

[69] Here the two regions enact separate laws to resolve existing interregional conflicts of laws.

[70] See *The arrangement of the Supreme People's Court on the Mutual Commissioning of the Service of Civil and Commercial Documents by the Courts in Mainland China and the HKSAR*, adopted by the 1038th meeting of the trial committee of the Supreme People's Court on 30 December 1998, 2 C*hina Law* (1999), p. 64. The Arrangement provides that judicial documents in civil and commercial matters shall be served by the superior people's courts of China and the High Court of the HKSAR. Judicial documents commissioned for service shall take the exchanged sample documents as standard; the documents are to be served in conformity with the procedure specified by the law of the place where the commissioned court is located. The commissioned court is not responsible for the content of the documents; the documents must be served within two months of receipt of the certificate of commission.

[71] See Gao SHAWEI (note 34), pp. 67-68.

Although interregional agreements dominated the coordination efforts during the first five years after the return of Hong Kong to the PRC, to date no arrangement has been reached for the mutual recognition and enforcement of judgments. This subtle and important matter involves two rather complicated issues. First of all, there are legal differences: The courts of Mainland China have no right of final decision, while courts in the HKSAR have no right of reversal. Secondly, there is a possibility that the PRC, together with the HKSAR, will join the *Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters* drafted by the Hague Conference on Private International Law. More recently, however, progress has been made in consultations between the PRC and the HKSAR with respect to the enforcement of judgments in commercial matters. As indicated by Elsie Leung, Secretary of Justice of the HKSAR, 'Hong Kong and Mainland China are expected to reach an arrangement on mutual enforcement of commercial awards next year. Foreign businessmen in Mainland China may choose Hong Kong as the place for settling their commercial disputes.'[72] Again the conclusion of interregional agreements asserts itself as a suitable model for resolving conflicts of laws between Mainland China and the HKSAR.

B. International Treaties

As emphasized above, I also regard the use of international treaties as a suitable model for coordinating the laws of Mainland China and the HKSAR. In particular, China's accession to the WTO provides an opportune moment, as well as a legal basis for resolving interregional conflicts problems by this method. Although the two regions have different political and legal systems, some civil and commercial laws of Hong Kong have numerous similarities with those of Mainland China. For instance, Mainland China once drew heavily on Hong Kong's experience in the area of company law. After China's entry into the WTO, the civil and commercial laws of Mainland China and the HKSAR will probably become more similar; international trends will inevitably dominate the development of Mainland China's commercial laws.

Similarities in civil and commercial laws also provide a solid legal basis for resolving conflicts of laws by the application of international treaties. Let's take the *TRIPS*[73] as an example. After China's accession to the WTO, it has become increasingly important to coordinate intellectual property rights in Mainland China and the HKSAR with a view to protecting the rights of holders of intellectual property in both regions. Now that China is a formal member of the WTO, Mainland China and the HKSAR are equal within the organization and are both obliged to

[72] Gu MINGKANG, 'Judicial Assistance between the HKSAR and Mainland China', in: 2 *China Law* 2002, pp. 84-85.

[73] The full name is 'Agreement on Trade-Related Aspects of Intellectual Property Rights'.

enforce the agreements of the organization. Enforcement of the relevant provisions of the *TRIPS Agreement* is bound to lead to new relations and issues between Mainland China and the HKSAR in the area of intellectual property rights. For example, there is a dispute over whether the most-favored-nation principle, priority rights and the dispute settlement mechanism under the *TRIPS Agreement* are to be applied to issues between Mainland China and the HKSAR involving the protection of intellectual property rights. This is a new situation not only for the WTO but also for China because of the special social, economic, political and legal relations between the two regions. Continuous efforts must be made to explore and settle these issues in conformity with the policy of 'One Country, Two Systems'. In light of the need for better coordination of the intellectual property regimes of Mainland China and the HKSAR, it is not correct to deny the usefulness of international treaties as a model for coordinating legislation.

C. Common Legislation Through Model Laws

In my opinion, it is important for China to implement the Basic Law correctly; it empowers each region to make its own laws and provides the legal basis for adopting common legislation laid down in model laws. Academic associations are encouraged to engage legal experts and scholars to do joint research and draft model laws in an effort to coordinate and unify the legislation of the two regions. The experience in the U.S. shows that this model can be used effectively to resolve conflicts of laws. In my opinion, the *Model Law of Private International Law of the PRC* is a good beginning in China.

D. Unifying Legislation and Separate Legislation

As for unifying substantive legislation and enacting separate legislation, both Mainland China and the HKSAR should be prudent about using these models at the present time. Early attempts to unify substantive law could easily interfere with the autonomy of the HKSAR, while enacting separate legislation could lead to new conflicts and other complicated legal problems.

E. Legal Cultural Communication

Diversity of legal culture is the root of the conflict of laws. Thus extensive and lasting communication is necessary to bridge cultural gaps. At present the main tasks are to achieve bilingual legislation and bilingual judicature in the HKSAR and to develop comparative studies on the legal terminology in Mainland China and the HKSAR.

F. Establishing a Coordination Institution

Adding to the extensive conflicts between Mainland China and the HKSAR, disputes between the two regions may arise in the fields of constitutional, criminal, civil and commercial law as a result of different interpretations of some provisions of the Basic Law. Different interpretations of the Basic Law by the NPC and the HKSAR could result in a crisis, similar to that occasioned by the judgment of the Hong Kong Court of Final Appeal of 29 January 1999 on the right of abode. To avoid such situations, I propose that China establish a special coordination institution under the NPC, which would be composed of an equal number of members from Mainland China and the HKSAR. Its main functions would be to draft model laws, improve legal communication, mediate potential disputes, formulate and publish advisory opinions on the Basic Law approved by a majority of its members. I firmly believe that most (if not all) disputes could be settled by means of such a coordination system.[74]

G. Proposal for a Three-Step Coordination Process

Professors Han Depei and Huang Jin have proposed a three-step process for coordinating the laws of Mainland China and the HKSAR. The first step consists of a brief transition period during which both Mainland China and the HKSAR resolve existing interregional conflicts of laws by applying their respective statutes on private international law by analogy. At this stage the two regions may amend any of their private international law provisions that are inappropriate for resolving interregional conflicts. The second step is to enact, on the basis of full negotiation and coordination between the two regions, a set of uniform national rules for interregional conflicts of laws. These rules would apply for a fairly long period of time in accordance with the principle of 'One Country, Two Systems', which will not change for at least fifty years. The third step is to draft uniform national substantive laws in specific areas, or the regions themselves may adopt identical or similar substantive laws to avoid and eliminate interregional conflicts of certain laws. This could take place simultaneously with step two if the prerequisite conditions are fulfilled, but should not replace it. The complete unification or coordination of the national legal system could be completed at the earliest, fifty years after 1997.[75]

In closing I would like to quote the English jurist R. H. Graveson: 'All history and experience illustrates the living and growing character of private

[74] See Yongping XIAO, 'Comments on the Judgment on the Right of Abode by Hong Kong CFA', in: 3 *Am. J. Comp. Law* 2000, pp. 479-480.

[75] Han DEPEI, *Selected Essays of Han Depei*, Wuhan (University Press) 1996, pp. 247-248.

international law. As a system it is not God-given but man-made, and it rests with all of us to help to make it more capable of solving contemporary problems.'[76]

[76] GRAVESON R. H., *Comparative Conflict of Laws: Selected Essays*, Vol. I, Amsterdam-New York (North-Holland) 1977, p. 360.

REPORTS ON COURT DECISIONS

FROM CENTROS TO ÜBERSEERING

EC Right of Establishment and the Conflict of Laws

Tito BALLARINO*

1. In *Centros*[1] the European Court of Justice ruled that the refusal of the authorities of a Member State (Denmark) to register a branch of a company formed under the law of another Member State (United Kingdom), in which it had its registered office but where it has never carried out any business, is contrary to Article 52 (now Article 43) and Article 58 (now Article 48) of the EC Treaty.

The question was raised in proceedings between Centros Ltd, a private limited company registered in England and Wales, and the Danish Trade and Companies Board, because of this authority's refusal to register a branch of Centros in Denmark.

The refusal of the registration was based on the ground that Centros, which was not trading in any way in the United Kingdom, was in fact seeking to establish in Denmark, not a branch, but a principal establishment, by circumventing the national rules concerning, in particular, the paying-up of minimum capital fixed at DKK 200 000 by a Danish Law of 1991.

The ruling of the Court raised many questions and gave rise to a much heated debate, especially in German literature[2].

---

* Professor at the University of Padua. The author is very grateful to Miss Sinead FITZPATRICK, for the accurate linguistic correction of the text

[1] Case C-212/97 of 9 March 1999, in: *ECR* 1999, I-1459.

[2] See also for a general survey on the literature: FORSTHOFF U., 'Niederlassungsrecht für Gesellschaften nach dem Centros-Urteil das EuGH: Eine Bilanz', in: *Europarecht* 2000, pp. 167-196; KINDLER P., 'Niederlassungsfreiheit für Scheinauslandsgesellschaften', in: *Neue juristische Wochenschrift* 1999, pp. 1993-2000; ID., 'Internationales Gesellschaftsrecht am Scheideweg', in: *Recht der internationalen Wirtschaft* 2000, pp. 649-653. In the Italian literature see DELLA CHA A., 'Companies, Right of Establishment and the *Centros* judgement of the European Court of Justice', in: *Diritto del commercio internazionale* 2000, 925-939; GESTRI M., 'Mutuo riconoscimento delle società comunitarie, norme di conflitto nazionali e frode alla legge: il caso *Centros*', in: *Rivista di diritto internazionale* 2000, pp. 71-112. BENEDETTELLI M.V., 'Libertà comunitarie di circolazione e diritto internazionale privato delle società', in: *Riv. dir. int. priv. proc.* 2001, pp. 569-620.

Yearbook of Private International Law, Volume 4 (2002), pp. 203-216
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

The first question is an ordinary question of secondary establishment. It was clear that Centros had never traded since its formation and was incorporated in the United Kingdom only because this country does not impose any requirement on limited liability companies for the paying-up of a minimum share capital. Centros's share capital, which amounted to 100 pounds, was neither paid up nor made available to the company. It was divided into two shares held by Mr and Mrs Bryde, Danish nationals residing in Denmark. Mrs Bryde was the Director of Centros, whose registered office was at the home of a friend of Mr Bryde in the United Kingdom.

Under Danish law, Centros was regarded as a foreign limited liability company and was entitled, according to the law of 1991, to do business in Denmark through a branch.

In a previous case[3], the Court had ruled that Articles 52 and 58 of the Treaty prohibited the competent authorities of a Member State from excluding the director of a company from a national sickness insurance scheme solely on the ground that the company had its registered office in another Member State, even though it did not conduct any business there.

In the proceedings, Centros argued that the fact that it did not perform any economic activities in the State in which the company had its registered office did not affect its right to exercise the freedom of (secondary) establishment. From the facts of the case it was evident that the company intended to carry out its entire business in Denmark. By setting up a branch, Centros intended to create a fixed establishment in Denmark and not something of a temporary nature falling within the freedom to provide services.

Could the refusal to register in Denmark a branch of a company formed in accordance with the law of another Member State in which its has its registered office constitute an obstacle to freedom of establishment ? It must be borne in mind – observes the Court – that the freedom conferred by Article 52 of the Treaty on Community nationals, 'includes the right for them to take up and pursue activities as self-employed persons and to set up and manage undertakings under the same conditions as are laid down by the law of the Member State for establishment for its own nationals'. Finally, under Article 58 of the Treaty, companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community are to be treated in the same way as natural persons who are nationals of Member States.

The Court stated conclusively:

[3] Case 79/85, *Segers*, in: *ECR* 1986, 2375. On the general issues of the case see LOOIJESTIN-CLEARIE A., 'Centros Ltd. - A complete U-Turn in the Right of Establishment for Companies', in: 49 *I.C.L.Q.* 2000, pp. 621-642. On other previous cases of companies right of establishment see BALLARINO T., 'La società per azioni nella disciplina internazionalprivatistica', in: COLOMBO G.E./ PORTALE G.B. (eds.), *Trattato delle società per azioni*, Vol. IX, 1, Torino 1994, pp. 3-212, at p. 97.

> 'It is contrary to Articles 52 and 58 of the EC Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital. That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned.'

2. From the *Centros* judgment it can be concluded that in order to benefit from the right of secondary establishment, a company need only to be incorporated under the law of a Member State and have its registered office within the Community. An economic link with the State of incorporation is not required.

The Danish government had objected that Mr and Mrs Bryde invoked one of the fundamental freedoms guaranteed by the Treaty only in order to evade the application of domestic legislation, namely the Danish company law rules on the formation of private limited liability companies. It claimed that it was a so-called 'U turn' construction[4] (the term 'U-turn' construction is sometimes used to describe the situation in which a cross-border element is fitted into a situation only to invoke the provisions of Community law on free movement and to ultimately circumvent the application of certain provision of domestic law)[5].

[4] See LOOIJESTIN-CLEARIE A. (note 3), p. 638 *et seq*.

[5] A well known example is given by the *TV10* case, C-23/93, in: *ECR* 1994, I-4795, where a television broadcasting organization incorporated under Luxembourg law but broadcasting programs almost exclusively to the Netherlands had set up a company in Luxembourg with the manifest purpose of evading the legislation applicable to domestic broadcasting activities in the Netherlands. After the competent Dutch authority's refusal to grant the programs broadcast by TV10 access to the Dutch cable network, TV10 invoked the Treaty rules on the provision of services. See KARAYANNIS V., 'L'abus de droit découlant de l'ordre juridique communautaire', in: *Cahiers de droit européen* 1999, pp. 521-535.

It must be stressed that according to the case-law of the Court, a Member State is entitled to take measures designed to prevent its nationals from attempting to circumvent, through the Treaty's liberties, their national legislation, or to prevent individuals from taking advantage of Community law[6].

In *Centros*, however, the Court states:

> 'In the present case, the provisions of national law, application of which the parties concerned have sought to avoid, are rules governing the formation of companies and not rules concerning the carrying on of certain trades, professions or businesses. The provisions of the Treaty on freedom of establishment are intended specifically to enable companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community to pursue activities in other Member States through an agency, branch or subsidiary.'

That being so, the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty[7].

---

[6] See the judgments quoted at para. 24 of *Centros*, amongst them the well known *Van Binsbergen* case, 33/74, in: *ECR* 1974, 1299, para. 13, which was paramount in asserting direct applicability of EC Treaty rules: see BALLARINO T., *Manuale di diritto dell'Unione europea*, 6th ed., Padua (Cedam) 2001, at p. 445.

[7] LOOIJESTIN-CLEARIE A. (note 3) refers to two previous rulings of the Court. In *Factortame II* the Court stated that the right of establishment involves the actual pursuit of an economic activity: the registration of a fishing vessel in the host State did not constitute in itself – in the Court's opinion – an act of establishment. The purely formal requirements laid down in *Centros* of being formed under the law of a Member State and having the registered office within the Community – she concludes – are hardly to reconcile with *Factortame II*.

In my opinion the case is quite different from *Centros* because nobody could deny that Centros intended to carry out an economic activity. It belongs to the Court to ascertain what constitutes and what does non constitute establishment in EC law meaning. The objection is dismissed by the Court at para. 29 of the judgment. In addition, it is clear from paragraph 16 of *Segers* that the fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter Member State to deny that company the benefit of the provisions of Community law relating to the right of establishment.

3. The second issue involved in *Centros judgement* is a more complicated one. Although the judgement does not deal with the transfer by a company of its effective seat from one Member State to another, it was greeted as a significant step in bringing about a real mobility of corporate entities within the Community.

This freedom appears to be compromised in two ways in EC company's practice: *first* because some States prohibit the transfer of the seat abroad, even towards another EC member;[8] *second* because of the application by some EC members of the '*real seat rule*' in a way which requires winding up and consequent dissolution of the company if it transfers to another State its central administration.

The first problem refers to the much debated *Daily Mail* case[9] where a British company wished to transfer its central control and management to the Netherlands for tax purposes. Company law's of both States allowed the transfer, but the tax law of the United Kingdom required the consent of the British Treasury. In the words of the Court:

> 'The provision of United Kingdom law at issue in the main proceedings imposes no restriction on transactions such as those described above. Nor does it stand in the way of a partial or total transfer of the activities of a company incorporated in the United Kingdom to a company newly incorporated in another Member State, if necessary after winding-up and, consequently, the settlement of the tax position of the United Kingdom company. It requires Treasury consent only where such a company seeks to transfer its central management and control out of the United Kingdom while maintaining its legal personality and its status as a United Kingdom company.'

The EC Court denied any right to transfer the seat stating that a company does not derive from the Treaty provisions on the freedom of establishment an unconditional right to transfer its effective seat and control to another Member State while retaining its status of a company under the law of the place of incorporation.

Under those circumstances, Articles 52 and 58 of the Treaty cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central

---

In the other case (C-55/94, *Gebhard*, in: *ECR* 1995, I-4165) a lawyer was not considered established in Milan because he had only the requirements for providing legal services. His right to establish himself in Milan was not questioned, even if he did not comply with local provisions, and the real problem was whether his premises in Milan fitted to a mere services-giving seat or to a real establishment: see BALLARINO T. (note 6), p. 442.

[8] This prohibition can be either explicit or implicit. Failure to make provision in legislation for such a transfer can be viewed as an implicit prohibition.

[9] Case 81/87, *The Queen v. Treasury... ex parte Daily Mail*, in: *ECR* 1988, 5483.

administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State.

The *Daily Mail* decision has been considered a setback for the entire process of European integration since it hinders the development of the single market. As the Commission observed during the proceedings, the rights guaranteed by the Treaty would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving the country in order to establish themselves in another member State. Moreover, with regards to natural persons, the right to leave their territory for that purpose is expressly provided in Directive 73/148 of 21 May 1973.

The Court took a different stand stating that:

> 'In that regard it should be borne in mind that, unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning.'

As for the Directive 73/148 the Court says:

> 'It needs merely be pointed out in that regard that the title and provisions of that directive refer solely to the movement and residence of natural persons and that the provisions of the directive cannot, by their nature, be applied by analogy to legal persons.'

The second problem, which will be dealt with in a next paragraph is whether when a company incorporated under the law of one Member State moves its actual centre of administration to another Member State, the latter State is entitled to refuse to recognise its legal personality.

It is a question of company mobility, and, like in *Daily Mail*, relates to the question of 'freedom of primary establishment'. The *Centros* decision suggests a second way in which a company may be able to exercise this right of primary establishment[10]: if it does not conduct any business in the State where it was incorporated and carries out economic activities for the first time in another member State through a subsidiary.

4. Primary establishment of companies is something that does not create any problem insofar as it raises a question which requires an affirmative answer or a negative one. To be considered as established within the Community a company

[10] See LOOIJESTIN-CLEARIE A. (note 3), p. 625.

(or firm) must comply with two requirements (art. 48, formerly 58, EC Treaty): *first* it must have been formed in accordance with a law of a Member State (i.e. the company is governed by the law of a Member State); *second* it is a company having its 'registered office, central administration or principal place of business within the Community'.

If these requirements are satisfied the company must be treated from the point of view of its right of establishment in the same way as natural persons who are nationals of Member States. The difference is, however, that natural persons can exercise their primary right of establishment without affecting their link to a national Member State. In order to enable natural persons to move freely within the Community maintaining their original nationality, the Treaty has dictated a general obligation of non-discrimination.

Companies, as we know[11], are different from natural persons: being 'creatures of the law' it is up to the law of the States governing them to provide whether they can transfer their central administration. Since the Community has not succeeded in enforcing a treaty concerning 'the mutual recognition of companies within the meaning of the second paragraph of Article 58 (now 48)' and 'the retention of legal personality in the event of transfer of their seat from one country to another'[12] (art. 293, formerly 220) the primary right of establishment remains essentially ruled by national provisions.

[11] See *Daily Mail* (note 8), para. 18.

[12] A Convention on the mutual recognition of companies was in effect adopted on 1968 (29 February) pursuant to art. 220 (now 293), but never came into force because of the opposition of the Netherlands. The convention aimed to harmonize the theory of incorporation and the theory of the real seat setting a general obligation to recognize the companies created under the law of a Member State which gave them capacity. At the same time the convention enabled the Member States to enforce its rules on corporation to other Member States' companies which had their seat within its territory. Since all other Member States (five at that time) had made use of this faculty, the Netherlands denied its ratification, which was needed for coming into force of the Convention, objecting that the principle of incorporation became meaningless after all other Member States had made use of the faculty to reserve the application of their national rules: BALLARINO T. (note 3), p. 22 *et seq*.

During the prolonged debate on freedom of establishment of the companies the existence of art. 293 (formerly 220) was sometimes used to cast doubts on the attitude of art. 58 (now 48) to produce direct effect: if an appropriate convention was needed, so it was argued, then no direct effect could be envisaged. But it must be born in mind: *first* that the theory of direct effect having its source in the judiciary application of the Treaty could not be taken into consideration at the time of elaboration of EC Treaty; *second* that art. 220 was introduced into the Treaty at the last minute: see BALLARINO T. (note 6), p. 97. The legal ground for recognition of foreign (EC) corporations, in absence of an appropriate convention, has been found in the article (first 7, after 6, now 12) concerning prohibition of discrimination. German scholars are inclined to see in it a real, although hidden, conflicts rule: see DROBNIG U., 'Gemeinschaftsrecht und internationales Gesellschaftsrecht. 'Daily Mail' und die Folgen', in: *Europäisches Gemeinschaftsrecht und Internationales Privatrecht* (ed. by VON BAR Ch.), Köln 1991, pp. 185 *et seq*.

So the right to transfer central management and control of a company falls under the jurisdiction of the Member States, and in order to perform an effective transfer the conditions required both by the States of origin (*a quo*) and by that of arrival (*ad quem*) must be complied with. This does not entail a cumulative application of both laws since the law of the State *ad quem* may consider itself satisfied if the law of the State of incorporation authorizes the transfer. The problem with *Daily Mail* was that British authorities had denied the right of transfer the company's seat through the application of a mandatory rule of their own legal system[13]. EC right of establishment was not deemed sufficient to bypass the provision which subjected to restrictions the right of a company incorporated under its law to move its actual centre of administration to a foreign country.

As the German doctrine puts it, '(national) company law takes precedence over freedom of establishment' (*Gesellschaftsrecht geht vor Niederlassungsfreiheit*)[14].

It must therefore be held that the Treaty regards the differences in national legislation concerning the required connecting factor and the question whether – and if so how – the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions[15].

5. The above quoted statement (*Gesellschaftsrecht geht vor Niederlassungsfreiheit*)[16] is however related to a different hypothesis in which a company incorporated under the law of a Member State A (State *a quo*) is found under the law of another Member State B (State *ad quem*) to have moved its actual centre of administration to Member State B. Is the latter State entitled to refuse to recognize the legal personality which the company enjoys under the law of its State of incorporation ? This question was not dealt with in the *Daily Mail* case which only concerned the relations between a company and the Member State under whose laws it had been incorporated in a situation where the company wished to transfer its actual centre of administration to another State whilst retaining its legal personality in the State of incorporation.

[13] On mandatory rules in private international law see BONOMI A., *Le norme imperative nel diritto internazionale privato,* Zürich 1998.

[14] See KLINKE U., in: *Zeitschrift für Gesellschaftsrecht* 1993, at p. 3; KINDLER P. (note 2), p. 1997

[15] *Daily Mail* (note 8), at para. 23.

[16] In its full extension it says that 'real seat rule' stands against freedom of establishment: 'Das internationale Gesellschaftsrecht der Mitgliedstaaten und in der Folge die Sitztheorie sind niederlassungsfreiheitsresistent': KLINKE (note 13), *loc. cit.*

From taking into account foreign mandatory rules, the focus shifts to the real seat rule: both cases have in common the problem whether Community law on establishment should prevail over national law rules, especially when the latter are either modified or substituted through a conflict of laws provision which, in itself, is part of the municipal law and may differ from correspondent rules of another Member State. The answer of the Court has been negative.

6. Let us now turn to the attitude of a Member State like Germany which follows the company real seat principle[17].

Dr. Kindler argues that *Centros* judgment is irrelevant for such a State since the requirements for being legally formed under the law of a Member State are laid down by the municipal law of each State concerned and not by Community law[18]. When the subsidiary branch of a foreign company seeks the registration, it must prove to the Registergericht the existence of the factual circumstances which are paramount to enjoy full juridical capacity (*Rechtsfähigkeit*). Conversely, when the evidence is not given, there is no reference to a foreign company law[19] and the registration of the subsidiary is denied.

If, however, the real seat of the company is located in Germany, municipal law is applied and that company is considered a 'pseudo-foreign corporation'[20] *('Scheinauslandsgesellschaft'*): the case is that of acting under inappropriate law ('Handeln unter falschem Recht').

The difference with *Centros* lies in the fact that Centros was considered legally existent under British law since Denmark follows the law of incorporation principle. Therefore a second defensive line was sought in order to avoid the result to let Centros operate exclusively in Denmark through a subsidiary: the fraudulent use of freedom of establishment (*fraude à la loi*).

It has been objected that such a difference – Centros is recognized in Denmark and can act through its subsidiary whereas in Germany it is subjected to municipal law rules – is inconsistent with the principle of uniform applications of

[17] This principle (*Sitztheorie*) has not been expressly ruled in German private international law, which has been recently codified (1986, 1999). It is anyway the settled case-law of the *Bundesgerichtshof* and is approved by the overwhelming majority of commentators (ref. in KINDLER P. [note 2], note 12): the antagonist principle is the *Gründungstheorie*, or incorporation principle: see *infra*, para. 6.

[18] KINDLER P. (note 2), p. 1996.

[19] *Bayerisches Oberlandesgericht*, in: *Entscheidungen des Bayerischen Oberlandesgerichts* (BayObLGZ) 1998, p. 195 (quoted by KINDLER P. [note 2], p. 1993)

[20] See LATTY E.R., 'Pseudo-Foreign Corporations', in: 65 *Yale Law Journal* 1955-56, p. 137 *et seq*.

EC law[21]. The argument is impressive. It has been dealt with in a recent judgement of the European Court[22].

7. The question has been referred to European Court for a preliminary ruling by the German Supreme Court (BGH). In a case immediately preceding, the same German high court, departing from its previous jurisprudence according to which a company validly incorporated in a Member State which subsequently transfers its actual centre of administration to Germany cannot enjoy the right or be party to legal proceedings, ruled that a Limited Company created under the law of Channel Islands enjoyed legal capacity in Germany[23].

In case C-208/00, Überseering, a company incorporated under Netherlands law, had sued before German Courts the German company NCC seeking compensation for damage. NCC had to refurbish a garage and a motel on a piece of land acquired by Überseering in Germany: according to Überseering the work had been carried out in a defective way.

The German first instance Court (*Landgericht*) dismissed the action, and on appeal the *Oberlandesgericht* Düsseldorf upheld the decision dismissing the action.

Short after the contract all the shares in Überseering were acquired by two German nationals residing in Düsseldorf and the *Oberlandesgericht* from this fact argued that Überseering had transferred its actual centre of administration to Düsseldorf once its shares had been acquired by the two German nationals. As a company incorporated under Netherlands law, Überseering, according to the *Oberlandesgericht*, had not legal capacity in Germany; consequently, it could not bring legal proceedings there, and its action was inadmissible. Against the judgment Überseering appealed to the German supreme Court (*Bundesgerichtshof*).

In view of the Court's decision in *Centros*, the *Bundesgerichtshof* wonders whether the Treaty provisions on freedom of establishment preclude, in a situation such as that in the German proceedings, application of the rules on conflict of laws in the Member State (Germany) in which the actual centre of administration of a company validly incorporated in another Member State is situated. The consequence of those rules was plainly the refusal to recognise the company's legal capacity and, therefore, its capacity to bring legal proceedings in the first Member State to enforce rights under a contract.

---

[21] FORSTHOFF U. (note 2), p. 177-8.

[22] 5 November 2002, Case C-208/00, *Überseering BV v. NCC*, nyr.

[23] *Bundesgerichtshof*, 1 July 2002, and the commentary by P. KINDLER to be published in *IPRax* 2003. I am very grateful to my colleague Kindler for submitting me his text, which will be quoted hereinafter as KINDLER P., 'Anerkennung'. The previous case law of BGH is reported by KINDLER P. (note 2), at note 1.

Under those circumstances, the Bundesgerichtshof decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

> '1. Are Articles 43 EC and 48 EC to be interpreted as meaning that the freedom of establishment of companies precludes the legal capacity, and capacity to be a party to legal proceedings, of a company validly incorporated under the law of one Member State from being determined according to the law of another State to which the company has moved its actual centre of administration, where, under the law of that second State, the company may no longer bring legal proceedings there in respect of claims under a contract?
>
> 2. If the Court's answer to that question is affirmative:
> Does the freedom of establishment of companies (Articles 43 EC and 48 EC) require that a company's legal capacity and capacity to be a party to legal proceedings is to be determined according to the law of the State where the company is incorporated?'

The European Court correctly puts the question in terms of conflict of law rules.

As we have seen, in Germany a company's legal capacity is determined by reference to the law applicable in the place where its actual centre of administration is established ('*Sitztheorie*' or company seat principle), as opposed to the '*Gründungstheorie*' or incorporation principle, by virtue of which legal capacity is determined in accordance with the law of the State in which the company was incorporated.

This rule is also applied where a company has been validly incorporated in another State and has subsequently transferred its actual centre of administration to Germany. In this case a company, having its legal capacity determined by reference to German law, cannot enjoy rights or be the subject of obligations or be a party to legal proceedings unless it has been reincorporated in Germany in such a way as to acquire legal capacity under German law.

The problem submitted by the *Bundesgerichtshof* however was whether, on the basis that the company's actual centre of administration has been transferred to another country, the freedom of establishment guaranteed by Articles 43 EC and 48 EC does not preclude connecting the company's legal position with the law of the Member State in which its actual centre of administration is located.

The answer to that question, according to the *Bundesgerichtshof*, could not be clearly deduced from the case-law of the Court of Justice. In fact, in the case *Daily Mail* the Court, having stated that companies could exercise their right of establishment by setting up agencies, branches and subsidiaries, or by transferring all their shares to a new company in another Member State, eventually denied the freedom to transfer the seat in view of the paramount role attributed to British laws. The legal ground for this solution was that, unlike natural persons, companies exist only by virtue of the national legal system which governs their incorporation.

In the *Centros* case, on the other hand, the Court took exception to a Danish authority's refusal to register a branch of a company validly incorporated in the United Kingdom, which however had not transferred its seat, since, from its incorporation, the company's registered office had been in the United Kingdom and only its actual centre of administration had been in Denmark.

It must be stressed – as the Court points out in *Überseering* (para. 62) – that, unlike *Daily Mail*, which concerned relations between a company and the Member State under whose laws it had been incorporated in a situation where the company wished to transfer its actual centre of administration to another Member State whilst retaining its legal personality in the State of incorporation, the present case concerns the recognition by one Member State of a company incorporated under the law of another Member State, such a company being denied all legal capacity in the host Member State where it takes the view that the company has moved its actual centre of administration to its territory, irrespective of whether in that regard the company actually intended to transfer its seat.

By contrast, the Court did not rule on the question whether where, as here, a company incorporated under the law of a Member State (A) is found, under the law of another Member State (B), to have moved its actual centre of administration to Member State B, that State is entitled to refuse to recognise the legal personality which the company enjoys under the law of its State of incorporation (A).

Thus, despite the general terms in which paragraph 23 of Daily Mail and General Trust is cast, the Court did not intend to recognise a Member State as having the power, vis-à-vis companies validly incorporated in other Member States and found by it to have transferred their seat to its territory, to subject those companies' effective exercise in its territory of the freedom of establishment to compliance with its domestic company law.

There are, therefore, no grounds for concluding from Daily Mail and General Trust that, where a company formed in accordance with the law of one Member State and with legal personality in that State exercises its freedom of establishment in another Member State, the question of recognition of its legal capacity and its capacity to be a party to legal proceedings in the Member State of establishment falls outside the scope of the Treaty provisions on freedom of establishment, even when the company is found, under the law of the Member State of establishment, to have moved its actual centre of administration to that State.

For the foregoing considerations the Court holds that Überseering is entitled to rely on the principle of freedom of establishment in order to contest the refusal of German law to regard it as a legal person with the capacity to be a party to legal proceedings. The attitude of German courts constitutes, in the Court's opinion, a restriction on freedom of establishment.[24]

[24] The ruling of the Court reads as follows:

'Where a company formed in accordance with the law of a Member State (A) in which it has its registered office is deemed, under the law of another Member State (B), to have moved its actual centre of administration to

Under those circumstances, the refusal by a host Member State (B) to recognise the legal capacity of a company formed in accordance with the law of another Member State (A) in which it has its registered office on the ground, in particular, that the company moved its actual centre of administration to Member State B following the acquisition of all its shares by nationals of that State residing there, with the result that the company cannot, in Member State B, bring legal proceedings to defend rights under a contract unless it is reincorporated under the law of Member State B, constitutes a restriction on freedom of establishment which is, in principle, incompatible with Articles 43 EC and 48 EC.

The lesson of *Überseering* which does not contradict the Court's previous case law can be summarized as follows:

- national rules on conflict of laws remain unaltered[25] because EC has no competence at all in this field (except for promoting the conclusion of international treaties like the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 and entered into force on 1 April 1991)[26];
- an impact of the right of establishment on the conflict of laws rules is possible[27] when these rules are working in defining the field of application of municipal substantive rules ('inward looking')[28];

Member State B, Articles 43 EC and 48 EC preclude Member State B from denying the company legal capacity and, consequently, the capacity to bring legal proceedings before its national courts for the purpose of enforcing rights under a contract with a company established in Member State B.
Where a company formed in accordance with the law of a Member State (A) in which it has its registered office exercises its freedom of establishment in another Member State (B), Articles 43 EC and 48 EC require Member State B to recognise the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its State of incorporation (A).'

[25] KINDLER P., 'Anerkennung' (note 23), para. II, 2 and 3. This statement is not challenged by the theory of 'pseudo foreign corporations' (*Scheinauslandsgesellschaften*) which enhances the municipal character of these companies that look foreign only outwards.

[26] The transformation of this Convention into an EC Regulation is nevertheless projected. For a general review on this problem, see BONOMI A., 'Il regolamento comunitario sulla competenza e sul riconoscimento in materia matrimoniale e di potestà dei genitori', in: *Rivista di diritto internazionale* 2001, pp. 298-346, at p. 300 *et seq*.

[27] This conclusion is refused by KINDLER P., 'Anerkennung' (note 23), para. IV, 1, because of an alleged aprioristic lack of competence of EC in the field of the law governing companies.

[28] See DE NOVA R., 'Historical and comparative introduction to conflict of laws', in *Recueil des Cours*, Vol. 118, 1966-II, at p. 571.

- certain traditional tools of private international law, like mandatory rules, are to be taken into consideration and could discourage a thorough application of EC rules.

TRUSTS IN SWITZERLAND

Alfred VON OVERBECK*

Swiss scholars and some court decisions have generally held that foreign trusts, with which practitioners must deal on a regular basis, should be recognised. The most frequently quoted decision is the *Harrison Trust* case of 29 January 1970.[1] Having decided that Swiss law was applicable to that trust, the Court then proceeded to give effect to a number of Swiss institutions, such as mandate, fiduciary transfer of ownership, donation and stipulation for a third party (*stipulation pour autrui*), thus acting to a large extent in accordance with the settlor's intent.

The Swiss Statute on Private International Law of 18 December 1987, which entered into force on 1 January 1989, still contains no specific conflicts rule for trusts. However, the contractual approach taken by the Federal Court in the *Harrison* case should no longer prevail. Scholars agree that Articles 150-165 on companies apply to most trusts that fall under the definition in Article 150(1):[2]

> 'As used in this Statute, the term companies means organised bodies of persons and organised units of assets.'[3]

The sole judge in expedited proceedings before the District Court of Zurich (*Bezirksgericht Zürich)* applied Articles 150 and 151 of the Swiss Statute to a Guernsey trust in a decision of l February 1994, involving bankruptcy proceedings against the infamous raider and swindler WKR.[4] After discussing Guernsey and

---

* Professor emeritus in the University of Fribourg (Switzerland); former Director of the Swiss Institute of Comparative Law; Member of the Institute of International Law.

[1] *Harrison v. Schweiz. Kreditanstalt*, in : *Arrêts du Tribunal fédéral suisse, Recueil officiel* (*ATF*) 96 II 79 ; in : *Annuaire suisse de droit international*, vol. XXVII, 1971, p. 223, note VISCHER F., p. 237.

[2] VISCHER F. , *IPRG Kommentar*, Zurich 1993, No. 13 ad Art. 150, p. 1324; VON PLANTA A., *Internationales Privatrecht, Kommentar*, Basle 1996, No. 12-15, p. 1124; DUTOIT B. , *Droit international privé, Commentaire de la loi fédérale du 18 décembre 1987*, 3rd éd., Basle-Geneva-Munich 2001, No. 5-5bis, p. 484.

[3] Translation by KARRER P.A. and ARNOLD K.W., *Switzerland's Private International Law Statute 1987*, Deventer 1989.

[4] 98 *Blätter für zürcherische Rechtsprechung* 1999, No. 52, pp. 225 and 228. See FORBES-JAEGER D. G. and STORMANN E. 'The Trust in Switzerland - Revisited', in: 8 *Journal of International Trust and Corporate Planning* 2000, p. 141, (summary and translation of substantial excerpts), DUTOIT B. (note 2), p. 485, WACH TH. A. 'Appraisal of Guernsey Trust under Swiss law by the District Court of Zurich', in: *Trust and Trustees* 2000, p. 28.

Yearbook of Private International Law, Volume 4 (2002), pp. 217-218
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

Jersey law in detail and analysing the general principles of trusts, the judge found that the trust was formally constituted according to Guernsey law, but that it was void because the settlor had no intention of creating a real trust and because he retained complete control over the trust assets.

In a decision of 3 September 1999, the Swiss Federal Court abandoned the contractual approach taken in *Harrison Trust* and applied Jersey law to an express trust created in that jurisdiction.[5] The Court held that the trust assets were sufficiently organised to fall under the provision of Article 150(1) of the Swiss Statute. It found that Jersey had amended its statute in order to facilitate the introduction of the Hague Convention on trusts and that the conditions of the Convention set out in Article 2 were fulfilled. Pursuant to Article 154(1) of the Swiss Statute, the Court applied Jersey law under which the trust was constituted.

In a decision of 19 November 2001, the Swiss Federal Court confirmed the judgments of the Geneva Courts and went a step further by declaring a constructive trust.[6] This case concerned the aftermath of 'Irangate'. To cover his fees, a Geneva lawyer had sequestered about a million Swiss francs placed in several accounts in the name of H. (Colonel N's aid in charge of the 'enterprise') at Swiss banks and financial societies. The U.S. claimed these funds. Finding H. to be a U.S. agent, the Court held that, according to former Swiss case law and pursuant to the provisions of the Swiss statute of 1987, the agency relation was governed by U.S. law. (The Court did not designate a state of the U.S.; at some point it referred to the Restatement.) After a thorough review of Swiss legal scholarship, the Court ruled that H. was a 'constructive trustee' and that the U.S. could exercise a right *in rem* to the sequestered funds. The Court held that the distinction between legal ownership and equitable ownership is not incompatible with the Swiss principle of a *numerus clausus* of real rights and that the fact that, as equitable owners, the U.S. owners have the right to greater protection than a Swiss *fiduciant* in a similar case is not contrary to Swiss *ordre public*.

These cases show that Swiss courts are willing to recognise trusts and apply foreign trust law if necessary. Therefore Switzerland should be ready to ratify the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and their Recognition. At a meeting organised by the *Europa Institut* of the University of Zurich and the *Bundesamt für Justiz* and held 29 May 2002, a large majority of professors and practitioners agreed that ratification is desirable.

---

[5] *Tribunal federal, Ie Cour civile, G. C. C. Trust Co (Jersey) Ltd.*, in: *Semaine judiciaire* 2000, I, p. 269; see FORBES-JAEGER D.-G. and STORMANN E. (note 4), p 156, DUTOIT B. (note 2) p. 486.

[6] *Tribunal fédéral, IIe Cour civile*, N° 5C.169/2001, *X. v. Etats-Unis d'Amérique* (to be published).

NEWS FROM THE HAGUE

THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

WORK IN PROGRESS (2001-2002)*

J. H. A. VAN LOON**

I. Expansion of the Conference

During the period under review, the Hague Conference on Private International Law has experienced an unprecedented growth of its membership. In early 2001 the Conference numbered 47 States. Since January 2001, the Conference has welcomed 14 new Member States from all continents: New Zealand, Sri Lanka, Jordan, the Russian Federation, Lithuania, Belarus, Georgia, Bosnia and Herzegovina, Yugoslavia, Albania, South Africa, Brazil, Peru and Panama. While this growth in membership reinforces the global mission of the Conference, it also poses several challenges for both the Organisation and the new Member States. Many of them will need time to familiarise themselves with the Conference, its

* For earlier reviews, see this *Yearbook*, Vol. I, 1999, pp. 205-214, Vol. II, 2000, pp. 169-178 and Vol. III, 2001, pp. 237-244.

** Secretary General of the Hague Conference on private international law.

Yearbook of Private International Law, Volume 4 (2002), pp. 219-226
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

structure and working methods. Long-standing Members will need time to become familiar with the new Members. The Permanent Bureau will need to reach out even more and increasingly provide information, assistance and support.

A different challenge confronts the Conference in light of the intention of the European Community to become a Member of the Organisation, as communicated to the Conference by the Swedish Presidency during Part I of the Nineteenth Session in June 2001. At present – early September 2002 – it seems that such a request is likely to reach the Permanent Bureau in the near future. Since the Statute of the Conference only refers to States as Members, the request for Membership, if accepted by the Member States, will require an amendment of the Statute.

In addition to the expanding membership, the number of non-Member States acceding to one or more Hague Conventions has continued to increase: there are now more than 50 non-Member States that are parties to one or more of the Hague Conventions.

All these developments have made it necessary for the Conference to reflect on where it stands and where it wants to go. A Strategic Plan addressing the various challenges facing the Conference has been drawn up and adopted.[1]

II. Nineteenth Session: Meeting of Commission I on General Affairs and Policy of the Conference

Commission I (General Affairs and Policy of the Conference) convened at the Peace Palace at The Hague, 22-24 April 2002, to review the Conference's Strategic Plan and take decisions regarding the ongoing work. The meeting was chaired by Madame Monique Jametti-Greiner of Switzerland, as was the first meeting in June 2001. The decisions are summarised in the Minutes as follows:

> '*1. Jurisdiction and recognition and enforcement of foreign judgments in civil and commercial matters*
>
> The Commission unanimously reconfirms the great importance it attaches to harmonising the rules on jurisdiction and recognition and enforcement of judgments in civil and commercial matters on a worldwide basis. The Commission feels that the efforts to find common solutions for these issues in the area of private international law should be pursued by the Conference because the global need for such common solutions will only increase.
>
> Assisted by an informal working group the Permanent Bureau will facilitate and conduct an informal working process with a

[1] See *infra* II.

view to preparing a text to be submitted to a Special Commission during the first half of 2003 followed by a Diplomatic Conference to be held, if possible, at the end of 2003. The starting point for this informal process will be the core area and possible additions identified by Commission I.

2. *The law applicable to certain rights in respect of securities held with an intermediary*

   The Commission, noting the advanced stage of the work on this project, decides –

   a that the preparation of the Convention on the law applicable to certain rights in respect of securities held with an intermediary will be finalised on the basis of the working methods utilised to date;

   b to devote the Second Part of the Nineteenth Diplomatic Session to the adoption of such a draft convention;

   c that the Second Part will be held, if possible, before the end of 2002.

3. *The Hague Convention of 1980 on International Child Abduction*

   Commission I recommends that the Secretary General convene a Special Commission to be held in September/October 2002 to follow-up on matters arising from the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, which was held in March 2001. The principal item on the Agenda will be consideration, with a view to approval, of the first two sections (Central Authorities practices and implementing measures) of the Guide to Good Practice. There will also be initial discussion of the Permanent Bureau's final report on Transfrontier Access/Contact, as well as a Permanent Bureau report on direct international judicial communications in the context of the 1980 Convention. Every effort will be made to make preliminary documents available in Spanish and to provide interpretation in Spanish at the Special Commission.

4. *Strategic Plan*

   Commission I supports the main directions indicated in the Strategic Plan prepared by the Permanent Bureau. Commission I welcomes the linking of the programming of the Conference, decided by the organs of the Conference responsible for General Affairs and Policy, and the budget decided by the Council of

Diplomatic Representatives. Commission I supports the proposal that the implementation of the Strategic Plan be reviewed on a regular basis by the organs responsible for General Affairs and Policy and that the Strategic Plan itself be reviewed as a whole on a four year basis, depending on the outcome of the regular reviews of its implementation.

5. *Maintenance*

Commission I re-affirms the conclusions of the Special Commission on General Affairs and policy of May 2000 that there should be included, with priority, on the Conference's agenda 'the drawing-up of a new comprehensive convention on maintenance obligations, which would improve the existing Hague Conventions on this matter and include rules on judicial and administrative co-operation. Non-member States of the Hague Conference, in particular signatory States of the New York Convention of 1956, should be invited to participate in the future work'. Every effort should be made to ensure that the processes involved are inclusive, including by the provision if possible of Spanish translation of key documents and facilities for Spanish interpretation at plenary meetings.

6. *Conventions on judicial and administrative co-operation*

Commission I reaffirms the conclusions of the Special Commission on general affairs and policy of May 2000 and –

a invites the Secretary General to convene a Special Commission to study the practical operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, in the light inter alia of the impact of electronic means on these Conventions;

b invites the Permanent Bureau to study the practical operation of the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, in the light inter alia of the impact of electronic means, and, in particular, with a view to assessing the need and possibility of developing the legal framework for an electronic apostille and an electronic register.'

III. Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters

Pursuant to the aforementioned decision of Commission I,[2] the Permanent Bureau has commenced preparation for a series of meetings of a working group, consisting of 15-20 participants, with the aim of ensuring global coverage among the Hague Conference's Member States and the various legal systems. The working group will begin by examining the core area identified by Commission I (grounds of jurisdiction based on choice of court agreements, defendant's forum, counter claims, trusts, and possibly submission, branches, and physical torts). To assist the informal group, First Secretary, Andrea Schulz, drew up a *Reflection paper to assist in the preparation of a Convention on jurisdiction and recognition and enforcement of foreign judgments in civil and commercial matters.*[3]

IV. The Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary

In view of the extensive description of the project in the previous volume of this *Yearbook* by the Permanent Bureau staff member responsible for this project, First Secretary, Christophe Bernasconi,[4] it suffices here to mention that a Special Commission met 9-17 January 2002 and adopted the Preliminary Draft Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, which will be submitted to Part II of the Nineteenth Session in December 2002.[5] Experts from 35 Member States, 3 non-Member States, 11 inter-governmental Organisations and 10 non-governmental Organisations participated in this Special Commission, which was chaired by Professor Stefania Bariatti of Italy. This draft was discussed in depth at nine Regional Discussion Workshops

[2] See *supra* II.

[3] Preliminary Document No 19 of August 2002 for the attention of the meeting of the Informal Working Group of October 2002; also accessible on the Hague Conference website at: <http://www.hcch.net/e/workprog/jdgm.html>.

[4] See this *Yearbook*, Vol. III, 2001, pp. 63-100.

[5] See Preliminary Document No 15 of June 2002 for the attention of the Special Commission on indirectly held securities, also accessible on the Hague Conference website at: <http://www.hcch.net/e/workprog/sec_pd.html#pd>.

held in June/July 2002 in Sydney, Tokyo, London, Copenhagen, Frankfurt, Rome, Paris, Toronto and New York.[6]

V. Towards a Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

As Deputy Secretary General, William Duncan, pointed out in his contribution to Volume II of this *Yearbook*,[7] the work of the Hague Conference in respect of conventions on administrative and judicial co-operation, such as the Child Abduction Convention, can be divided into two parts: (1) promoting, monitoring and reviewing the operation of existing conventions and providing necessary support in terms of training and advice, and (2) the developmental work, which involves identifying new problem areas, researching and working towards possible solutions, including if necessary, the drafting of new instruments. The effort to draw up a Guide to Good Practice under the 1980 Hague Convention is a good example of the first type of work. Part I of this Guide defines the key operating principles, describes the respective roles of the requesting and the requested Central Authority in regard to abduction applications as well as access applications. Part II on Implementing Measures discusses questions such as the organisation of the courts, procedure, legal aid and assistance, and others. After being reviewed by a Special Commission in the autumn of 2002, these two parts of the Guide will be published. Meanwhile, work continues on other aspects, such as preventive measures, direct judicial and, possibly, visitation and access.

VI. Transfrontier Access / Contact and the Hague Convention of 1980

The work on this topic is an example of the developmental type of activity of the Conference. The Fourth Special Commission on the operation of the 1980 Hague

[6] See in more detail Preliminary Documents Nos 8-14; also available online at <http://www.hcch.net/e/workprog/sec_pd.html#pd>.

[7] DUNCAN W., 'The Hague Conference on Private International Law and its Current Programme of Work Concerning the International Protection of Children and other Aspects of Family Law', in this *Yearbook*, Vol. II, 2000, pp. 41-54.

Convention on child abduction, which took place 22-28 March 2001,[8] held an initial discussion on issues involving transfrontier access / contact. In one of its conclusions, the Special Commission recognised the deficiencies in achieving the objective of securing protection for rights of access in transfrontier situations and noted that this was 'a serious problem requiring urgent attention in the interests of the children and parents concerned'. In July 2002, William Duncan drew up a *Final Report* on this topic.

Difficulties arise because the 1980 Convention does not deal in a satisfactory and detailed manner with the effective exercise of access / contact between children and their custodian parents in the context of international child abductions and parent relocations; nor is it treated as an alternative to return requests. The system provided by Article 21 of the Convention is only rudimentary. At the Special Commission in May 2000, Australia, Spain, the United Kingdom and the United States of America had requested the Permanent Bureau 'to prepare … a report on the desirability and potential usefulness of a protocol to the 1980 Convention'. On the basis of various consultations, the Report concludes that the idea of a protocol should not be ruled out, but intermediate steps should be taken as a matter of urgency, before the complex and difficult process of negotiating a protocol is considered further. Such steps would include work on formulating general principles of international access and drafting a guide to promote consistent and best practices. Moreover, the Permanent Bureau should review the development of mediation schemes.

VII. Maintenance Obligations

Carrying out the decision of Commission I, the Permanent Bureau published an *Information note and questionnaire concerning a new global instrument on the international recovery of child support and other forms of family maintenance*.[9]

The Permanent Bureau is currently conducting research and consultations to prepare the ground for negotiations within the Hague Conference on the new global instrument on maintenance obligations. In this respect, the Questionnaire preliminarily tests opinions on the principal elements to be included in the new instrument. A report will be prepared by the Permanent Bureau to provide Member and other States with background information on developments at the national and international level and to identify some of the issues that are likely to be debated when negotiations commence. The report should be available to States before the

[8] See this *Yearbook*, Vol. III, 2001, p. 243.

[9] See *supra* II. Preliminary Document No 1 of June 2002 for the attention of the Special Commission on Maintenance Obligations; also accessible on the Hague Conference website at: http://www.hcch.net/e/workprog/maint.html.

end of 2002; after the first Special Commission is convened, negotiations are expected to begin in the first part of 2003.

NEWS FROM ROME

UNIDROIT – WORK IN PROGRESS

Herbert KRONKE*

I. Introduction

The International Institute for the Unification of Private Law (UNIDROIT), founded in 1926, was widely expected to hold a Congress celebrating the 75th anniversary of the founding of the Institute in 2001. The birthday party, however, was postponed, partly because of uncertainties surrounding the funding (a common feature in the private-law formulating Organisations' life) and partly because the workload was such as to make postponement inevitable.

* Secretary General of UNIDROIT, International Institute for the Unification of Private Law, Rome; Professor of Law, University of Heidelberg (on leave).

Yearbook of Private International Law, Volume 4 (2002), pp. 227-235
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

II. International Interests in Mobile Equipment

A. The Cape Town Convention

On 16 November 2001, a diplomatic Conference, sponsored by UNIDROIT and the International Civil Aviation Organization (ICAO), and held, at the invitation of the Government of South Africa, from 29 October to 16 November in Cape Town, adopted the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on Matters Specific to Aircraft Equipment. Twenty-two States have already become signatories of both instruments[1] and we are very optimistic as to the chances of them entering into force shortly.

B. Origins: The Nature of the Problem

The nature of the problem may be illustrated by the only famous case on the conflict of laws in property ever decided by a German court of first instance back in 1957[2]. The owner of an aircraft flew the aircraft from Germany to England where it was overhauled and where a new interior and new engines were installed. A lien had arisen in England in favour of the English contractor. After the aircraft had been brought back to Germany, it was attached there by the owner's creditors. Could the English company invoke its right? Now, German law does not know the lien. Therefore, the Court took the lien's closest equivalent under German law, which requires possession, i.e. physical control, and, as the English company had given up possession, the Court found that it had lost its right under the new *lex situs*.

Thus the private international law rule that rights *in rem* and, in particular, security interests are governed by the *lex situs*, i.e. the law of the place where the object is physically located creates a problem. Certain objects – like aircraft, railway rolling stock and indeed spacecraft – tend to be mobile and are not tied to territories.

Later on, in the 1960s and 1970s, some courts were more imaginative and translated the foreign security interest in its nearest relative under domestic law

[1] Burundi, Chile, China, Republic of the Congo, Cuba, Ethiopia, France, Ghana, Italy, Jamaica, Jordan, Kenya, Lesotho, Nigeria, Senegal, South Africa, Sudan, Switzerland, Tanzania, Tonga, Turkey and United Kingdom. For constitutional reasons, the United States, Canada and Germany were not in a position to sign. They are, however, expected to sign and ratify shortly.

[2] *Landgericht* (District Court) München I, 24 July 1957, in: *Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts (IPRspr.) in den Jahren 1956-57*, Tübingen 1962, No. 97.

whose requirements were *met* in order to let it survive. But, in most legal systems there still is no guarantee to that effect.

The attitude towards non-possessory security interests in moveables varies considerably from one legal system to another. A first group, mainly the common law jurisdictions, recognise generously security interests created in any kind of property and in particular chattels. A second group of legal systems is still very much under the influence of Roman law and therefore hostile vis-à-vis non-possessory security interests. Other countries still *seem* to be faithful to Roman law traditions but have allowed the free-style creation of all kinds of security devices by the commercial and professional circles concerned, and in contrast to the 'law on the books'.

Therefore, in many cases there is no hope that a security interest created in one jurisdiction will be valid against third parties in another State. And even if it is recognised/validated *in principle*, its technical *effects* are governed by the new *lex situs*. Accordingly, a financier and its counsel may theoretically need legal opinions with regard to as many jurisdictions as the asset may ever end up in – a paradise for lawyers but hell for financiers! The problems become exacerbated in cases of bankruptcy: whether the interest will be effective against the debtor's trustee in bankruptcy depends on the private international law rules regarding insolvencies in the various jurisdictions potentially involved. The most advanced solutions would recognise the proceedings opened in the State where the debtor has the centre of its business, but would honour third parties' *in rem* rights under the law of *another* State, if the assets were *situated* in that State. [3]

C. Scope, Objectives and Structure

1. Scope

This situation is manifestly unsatisfactory for equipment of high value, which by its very nature is liable to cross national borders day-in day-out or which is located outside any national territory. International conventions governing security rights in aircraft and ships, based on national registration, are felt to be inadequate for future needs of the aircraft industry, the spacecraft industries and others and specific aircraft or spacecraft financing techniques. A single aircraft can cost in excess of US$ 100 million (those Super-Airbuses to be delivered in a few years time reportedly US$ 250 million a piece), spacecraft much more. And there are other categories of high-value mobile equipment, such as railway rolling stock, ships, oil rigs, exploration rigs etc.

The starting point, however, was not only legal but also economic. Economic, in the sense that the opportunities for asset-based financing of such

[3] Articles 4, 5, 7, Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, *OJ* L 160, 30.6.2000, p. 1.

high-value mobile equipment have to date been extremely limited because of the difficulties lenders face in securing and collecting on such loans. Credit costs are unnecessarily high because the law does not provide reliable devices. To take the example of aircraft, those lenders contemplating lending on the security of an aircraft are clearly going to want, first, to find out whether other lenders may already also have claims outstanding against the same asset. This means that a reliable international registration system is needed.

The 1988 UNIDROIT Convention on International Financial Leasing includes a rule recognising the enforceability of the lessor's real rights, that is in most cases his ownership rights, against the trustee-in-bankruptcy and the unsecured creditors of his lessee. The Canadian Government, feeling that one might extend that principle to the enforceability of security rights in equipment likely by its *nature* to be moving regularly across or beyond national frontiers, proposed that UNIDROIT consider the desirability and feasibility of a convention in this field.

The reason for limiting the project to a relatively small number of high-value assets is that the willingness of States to contemplate the sort of radical solutions being proposed was calculated to be greater if the application of a convention was restricted to assets regularly operating across or outside national frontiers. In fact, in some recent domestic reforms of private international law rules pertaining to property rights, these items were given a special status.

2. Objectives

Apart from giving international protection to (security) interests in uniquely identifiable mobile equipment, i.e., the creation of a *genuinely* international interest not in need of being recognised by and, possibly, translated into domestic devices of laws other than the law of the country where the interest was created, the draft Convention has the following objectives:

- to provide holders of (security) interests with *default remedies* which can be readily exercised;
- to provide a *registration system*, disclosure being the basic principle for perfection, priority and recognition in many legal systems;
- to lay down rules for recognition and *priority* of the (security) interests not only in the normal course of business, but also in the debtor's bankruptcy.

These *legal* features are to result in *economic* benefits to:

- operators of equipment (e.g. providers of space-based services, airlines), through reduced financing costs and reduced transaction costs;

- manufacturers, through increased sales and safer income;
- banks and lessors, through an improved legal position vis-à-vis borrowers (and under the Basle rules on capital adequacy vis-à-vis the Bank for International Settlements);
- governments, through reduced debt levels where sovereign guarantees are used to finance acquisition of mobile equipment;
- investors in mobile equipment industries through better ratings/higher valuation of their investments;
- end-users (such as passengers in air and rail transportation; companies and individuals communicating via telecommunications satellites or agriculture – and again transportation systems – in the case of meteorological satellites) through pass-through price reduction and better service levels.

3. Structure

During the UNIDROIT Study Group's work it became clear that, while there is a core of rules which may be universally applied across the whole spectrum of equipment, there will be a number of rules corresponding (only) to the characteristics of specific categories. Therefore, at the suggestion of a specially set up 'Aviation Working Group' (AWG) and IATA, it was decided that the future convention would – in the terminology of civil lawyers – be a 'General Part', to be complemented for each category of equipment by a protocol drafted especially to cater for special needs of that category. The two-tiered structure of the instrument architecture (the Convention setting out *basic principles* on the one hand, equipment specific Protocols making them *operational* on the other) was looked at with some scepticism by some but was eventually endorsed by the diplomatic Conference.

4. Sphere of Application

The Convention will apply to three categories of agreement creating what the instruments call an 'interest': conditional sale agreements, leasing agreements and security agreements. Extension to after-acquired property and proceeds is not contemplated. The Convention focuses on *consensual* interests. There are provisions allowing Contracting States to declare types of non-consensual interests registrable. The relevant protocol may extend the Convention to outright sales and prospective outright sales and the aircraft equipment protocol so provides.

5. Key Features

With respect to the agreement, i.e., the contractual relationship underlying the creation of the right *in rem*, the Convention reflects the fact that parties to this kind of high-value, cross-border transaction are knowledgeable, experienced and expertly represented. Consequently, *party autonomy* as well as the parties' *freedom to select* the *forum* for any dispute that may arise feature as core elements of the Cape Town instruments.[4] Others are rather drastic, predictable and therefore efficient *remedies* in the case of default and simple system of *priorities* not only in the normal case of business and execution but also in case of insolvency proceedings. Priority, not creation of the interest, depends on its being filed in a newly created international registry which will be a *notice-file-registry* and fully electronic.

D. Work in Progress and Future Work

Currently, the work of the Institute and industry-specific working groups (Rail Working Group and Space Working Group) is focused on the completion of two more equipment-specific protocols. Two sessions of Committees of Governmental Experts, jointly held with the Intergovernmental Organisation for International Carriage by Rail (OTIF), have made considerable progress in the preparation of the draft Protocol on Matters Specific to Railway Rolling Stock. A third session will be held in May 2003 in Berne and it is anticipated that this instrument, designed to enhance the opportunities for asset-based finance of the development of rail transportation in many parts of the world, may then be mature to be transmitted to a diplomatic Conference.

Careful examination, in particular of aspects of public international space law, was the subject of an ad-hoc mechanism set up by the United Nations Committee on Peaceful Uses of Outer Space, regarding the draft Protocol on Matters Specific to Space Assets.[5] Following completion of this preliminary scrutiny, the draft, finalised by a UNIDROIT steering and revisions committee, has now been transmitted to a UNIDROIT Committee of Governmental Experts, which is to be convened in early 2003. As in the case of aircraft and railway rolling stock, there is a range of very specific issues which need to be solved: the unique identifiability of

[4] For a first brief overview, cf. KRONKE H., 'Parteiautonomie und Prorogationsfreiheit im internationalen Mobiliarsicherungsrecht: Zwei Grundprinzipien der Konvention von Kapstadt', in *Liber amicorum Gerhard Kegel*, Munich 2002, pp. 33-43.

[5] Cf. PANAHY D., 'Prospective UNIDROIT Convention on International Interests in Mobile Equipment as applied to space assets', in: *International Business Lawyer* 2001, pp. 505-511; DE FONTMICHEL A., 'Commentaires sur 'l'avant-projet de Protocole sur les questions spécifiques aux matériels d'équipement spatial au projet de Convention d'UNIDROIT relative aux garanties internationales portant sur des matériels d'équipement mobiles'', in: *Zeitschrift für Luft- und Weltraumrecht* 2001, pp. 526-552.

an asset and making available to the creditor certain 'debtor rights' relating to the operation of a satellite, to name but two of them.[6] Again, it is anticipated that beneficiaries will be developing countries in urgent need of telecommunications satellites, meteorological and disaster forecast satellites and with hardly any other means to provide the manufacturers and other lenders with security but the charged asset itself.

III. Principles of International Commercial Contracts, Part II

Following the considerable success in both contract and arbitration practice,[7] which greeted in 1994 the publication of Part I of the Principles, a working group was convened with a view to preparing Part II covering the following subjects: agency, limitation of actions, assignment, contracts for the benefit of a third party, set-off and waiver. The work is expected to be concluded in 2003.

IV. Franchising

In 1998, the Governing Council decided that a Study Group commence work on the preparation of a model law on disclosure in franchising. Insufficient disclosure of material facts may lead to uninformed decisions of a potential franchisee and the question of whether there was sufficient disclosure gives rise to a bulk of legal disputes in many countries. Two sessions of a Committee of Governmental Experts, held in 2001 and 2002, finalised the draft, which will now be adopted either by the Governing Council or by the General Assembly. At the time of

[6] For a concise overview, cf. also STANFORD M., 'The Creation of a New International Regimen Governing the Taking of Security in Space Assets: A Window of Opportunity for the Financing of Commercial Space Activities', paper submitted to the 10th International Space Insurance Conference, London, 8 July 2002.

[7] Regular coverage of abstracts of case law, bibliography and doctrinal analysis in *Uniform Law Review / Revue de droit uniforme*. Arbitral awards are also published in BONELL M.J. (ed.), *UNILEX – International Case Law and Bibliography on the UNIDROIT Principles on International Commercial Contracts*, Ardsley, NY, 2000, and to be retrieved on: <http://www.unilex.info/>. Conference papers and discussions at an ICC/UNIDROIT Seminar held in Paris on 27 April 2001 have been published in: ICC INTERNATIONAL COURT OF ARBITRATION, 'UNIDROIT Principles of International Commercial Contracts – Reflections on their Use in International Arbitration, Special Supplement' in*: ICC International Court of Arbitration Bulletin*, 2002.

writing, this was still unclear as it is the first time that UNDROIT adopts this type of instrument.

V. Principles and Rules of Transnational Civil Procedure

For the first time in its history, UNIDROIT is currently working, in co-operation with the American Law Institute, in the field of civil procedure. The working group is to formulate rules of procedure applicable to transnational disputes, once the question of jurisdiction has been settled and before the question of recognition and enforcement of the (foreign) judgment arises. The work is based on the hypothesis that existing bodies of procedural rules, be they codified or judge-made, tend to create efficiency gaps as well as fairness gaps since they assume that both parties are residents of and used to the procedure of the forum State. The project has met with considerable interest in all four corners of the world[8] and is expected to be completed at the study group level by 2004.

VI. Transactions on Transnational and Connected Capital Markets

The Governing Council decided to include a project under the above-mentioned title in the work programme. Governments had indicated their priorities following internal consultations with financial institutions, market regulators, the legal profession and other interested parties. Five topics had attracted the widest degree of support. (1) The creation of clear and consistent substantive rules for the taking of securities, especially securities held through intermediaries and evidenced by book entries in the investor's account, as collateral. This item has to be seen in connection with the draft Hague Convention on the disposition of securities in indirect holding systems and a number of the persons involved in The Hague will be serving on the UNIDROIT Study Group. (2) The creation of standardised 'global shares' permitting trade of such shares on more than one (national) stock exchange so as to make foreign capital markets accessible to a wider range of companies with limited means to create genuinely global shares on a case-by-case basis. (3) The development of rules capable of enhancing trading on emerging markets.

[8] Cf. current text versions and 21 contributions on various aspects in a special issue of the *Uniform Law Review / Revue de droit uniforme* 2001, pp. 739-1144.

(4) The development of harmonised or unified substantive rules applicable to so-called 'delocalised' transactions. Such delocalisation may be the consequence of mergers between markets located in different jurisdictions or it may be technologically induced where 'electronic communication networks' (ECNs) are used for trading and even initial offerings of securities. (5) The examination of the desirability and feasibility of rules for worldwide takeover bids.

What all five items have in common is that the determination of the law applicable through the conflict-of-laws rule of the forum, to a varying extent, does not lead to satisfactory results[9] - a well-known starting point for many important projects to modernise substantive commercial law in an internationally harmonised fashion.

The Secretariat is authorised to set up one or more Study Group(s) depending on the availability of resources. The Study Group on item 1, the taking of security in securities, will hold its first session on 9-13 September 2002.

VII. Interrelationship Between Worldwide Harmonisation of Private Law and Regional Economic Integration

The anniversary congress mentioned in the introduction is now to be held on 27 and 28 September 2002 in Rome.[10] It is designed to be the starting point for an in-depth reflection to be undertaken by international Organisations, Governments and scholars on how varying degrees of regional economic integration and the policy agendas behind them impact the objectives, the mechanics and the results of worldwide harmonisation in Organisations such as UNIDROIT, the Hague Conference and UNCITRAL.

[9] Cf KRONKE H., 'Capital Markets and Conflict of Laws', in: *Recueil des Cours*, vol. 286, 2001, pp. 246-385.

[10] The papers submitted to the congress as well as the discussions will be published.

NEWS FROM WASHINGTON

THE VI[TH] INTER-AMERICAN SPECIALIZED CONFERENCE ON PRIVATE INTERNATIONAL LAW (CIDIP VI): A NEW STEP TOWARDS INTER-AMERICAN LEGAL INTEGRATION

Diego P. FERNÁNDEZ ARROYO[*] and Jan KLEINHEISTERKAMP[**]

I. Background to CIDIP VI

A. The Conference

The Inter-American Specialized Conference on Private International Law (CIDIP) has served the Organization of American States (OAS) as the body responsible for

[*] Universidad Complutense de Madrid, special invited guest to CIDIP VI.

[**] Max-Planck-Institut für ausländisches und internationales Privatrecht Hamburg, observer for the Federal Republic of Germany to CIDIP VI.

Yearbook of Private International Law, Volume 4 (2002), pp. 237-255
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

codifying Private International Law (in the broadest sense) since 1975.[1] Unlike the previous sessions, the sixth session was dominated by uncertainty. Originally scheduled for 1999 in Guatemala but postponed several times at short notice, the Conference finally took place 4-8 February 2002 in Washington, D.C. at the OAS Headquarters under the presidency of the Uruguayan Minister of Foreign Affairs, Didier OPERTTI BADÁN, one of the main protagonists of the CIDIP since its beginning. Due to the extremely tight schedule, the sessions concentrated primarily on topics that had dominated the preparatory works – transport by road and secured transactions. As a result, the controversial topic of civil liability for cross-border environmental damages was put on hold, and only little time was left to discuss the future of the CIDIP. Thanks to the dedicated efforts of the informal drafting groups, a model law on secured transactions and uniform bills of lading for transport by road were adopted in the final plenary session.[2]

B. 'Commercialization' of Subject-Matters and 'Privatization' of Preparatory Works

Although CIDIP VI had been officially convened in 1996, the topics of discussion remained largely unclear until the first meeting of experts in December 1998, when the Conference agenda took a clearer form but the goals were changed fundamentally. As a result of the poor response in most Member States to the preparatory

[1] For details on the development of the CIDIP, see especially SAMTLEBEN J., 'Die Interamerikanischen Spezialkonferenzen für Internationales Privatrecht', in: *RabelsZ* 1980, p. 57 *et seq*., as well as 'Neue interamerikanische Konventionen zum Internationalen Privatrecht', *ibid.* 1992, p. 1 *et seq*.; ID., 'Los resultados de la labor codificadora de la CIDIP desde la perspectiva europea', in: *España y la codificación internacional del Derecho internacional privado*, Madrid 1993, p. 259 *et seq*.; OPERTTI BADÁN D., 'L'œuvre de la CIDIP dans le contexte du droit international privé actuel', in: BORRÁS A. *et al.* (ed.), *E Pluribus Unum – Liber Amicorum Georges A.L. Droz*, The Hague 1996, S. 269 ff.; ID., 'Compatibilidad e interacción de la codificación regional interamericana con los ámbitos de producción jurídica universal y subregional – Balance de los veinte primeros años de la CIDIP', in: *El Derecho internacional privado interamericano en el umbral del siglo XXI*, Madrid 1997, p. 217 *et seq*.; PARRA-ARANGUREN G., *Codificación del Derecho internacional privado en América*, Caracas 1982 (vol. 1) and 1998 (vol. 2); PEREZNIETO CASTRO L., 'Some Aspects Concerning the Movement for Development of Private International Law in the Americas Through Multilateral Conventions', in: *Netherlands International Law Review* 1992, p. 243 *et seq*.; MAEKELT T.B., 'General Rules of Private International Law in the Americas – New Approach', in: *Recueil des Cours*, Vol. 177, 1982, p. 193 *et seq*.; FERNÁNDEZ ARROYO D.P., *La codificación del Derecho internacional privado en América Latina*, Madrid 1994, p. 173 *et seq*.; ID., *Derecho internacional privado interamericano – Evolución y perspectivas*, Buenos Aires 2000, p. 45 *et seq*. and 81 *et seq*.

[2] Doc. OEA/Ser.K/XXI.6, CIDIP-VI/RES. 5/02 and RES. 8/02 of 5 March 2002.

works,[3] the two subjects proposed by the U.S. and Mexico – secured transactions and uniform documentation for the carriage of goods by land – became the focus of attention, while the Uruguayan proposal on conflicts aspects regarding liability for cross-border environmental damages did not get any attention. A fourth proposal to finally harmonize the different linguistic versions of the Convention of Mexico on the law applicable to international contracts (1994)[4] disappeared entirely with little glory.[5]

Commercial topics had already been present since the first CIDIP, held 1975 in Panama where the Convention on International Commercial Arbitration was concluded.[6] This was followed by the Conventions on Juridical Persons (La Paz 1984) and the Carriage of Goods by Road (Montevideo 1989).[7] However, CIDIP VI was the first session to be devoted entirely to transnational commercial relations. Reflecting U.S. ambitions to establish a free trade zone 'from Alaska to *Tierra del Fuego*' (FTAA), the 'commercialization' of the CIDIP was again confirmed by the subject matters proposed by the final plenum for CIDIP VII: development of an Inter-American electronic registry system, multi-modal transportation, values of investments, cross-border insolvency, electronic commerce, international rules for the transfer of tangible and intangible goods in international commerce.[8]

---

[3] Only eight of 34 Member States replied to a survey conducted by the Commission for legal and political affairs of the OAS.

[4] See HERNÁNDEZ-BRETÓN E., in: *IPRax* 18 (1998), p. 378 *et seq*.; SAMTLEBEN J., *ibid*. at 385 *et seq*.; JUENGER F.K., in: *Am. J. Comp. L.* 42 (1994), p. 381 *et seq*.; PARRA-ARANGUREN G., in: BORRÁS A. (note 1), p. 299 *et seq*.

[5] Thus probably burying the last hopes for possible ratification of this Convention by the U.S. or Canada. In its 'Chart of Private International Law Priorities – A Functional Approach' (2001), the Canadian Ministry of Justice reduced ratification to 'low priority', after it had maintained a 'medium priority' for quite some time; in 2000 the same Ministry had commented that, 'due to the general compatibility of the Convention with Canadian law', accession by Canada would be worth being taken into consideration, 'if the linguistic problems could be solved satisfactorily' (Activities and Priorities of the Department of Justice in Private International Law – Report to the Uniform Law Conference of Canada, 2000, pp. 18-19). Similar objections were raised by the U.S. Department of State in a letter written in reply to F.K. Juenger's insistence on ratification by the U.S.

[6] This topic had also been put on the 1975 Agenda after insistence by the U.S. in light of their economic interests, see SAMTLEBEN J., 'Die Interamerikanischen Spezialkonferenzen...' (*supra* note 1) at 267; see also KLEINHEISTERKAMP J., 'Conflict of Treaties on International Arbitration in the Southern Cone', in: KLEINHEISTERKAMP J./ LORENZO IDIARTE G. (eds.), *Avances del Derecho Internacional Privado en América Latina – Liber Amicorum Jürgen Samtleben*, Montevideo 2002, pp. 672-673.

[7] See SAMTLEBEN J, 'Neue interamerikanisch Konventionen...' (*supra* note 1) at 7 *et seq*. and 52 *et seq*.

[8] OEA/Ser.K/XXI.6, CIDIP-VI/Res.1/02 corr. 1. The other proposed topics are cross-border movement of persons and migration flows, and international protection of

As in the case of the harmonization of legislation within the framework of NAFTA, the preparatory works for CIDIP VI were drafted mainly by the National Law Center for International Free Trade (NLCIFT) in Tucson/Arizona. Headed by Professor Boris KOZOLCHYK and maintained by private funding, this research center had already played a vital role in preparing the above-mentioned Convention of Mexico of 1994.[9] This time the NLCIFT immediately assumed the responsibility of elaborating the basic drafts for the main topics – a role traditionally allocated to the Inter-American Juridical Committee of the OAS[10] – and organized the preparatory expert meetings in Washington and Miami with funding from the private sector.[11] In view of the limited resources of the OAS, such intensive preparation would certainly not have been possible without private funding. On the other hand, their work was limited to the two topics proposed by the U.S., leaving the task of preparing the topic of cross-border pollution entirely to Uruguay. As a result, no expert meetings were held and there was no coordination among the States on this topic.[12] At the Conference itself, members of the NLCIFT frequently spoke on behalf of the U.S. Delegation.

C. Inter-American Codification via 'Soft Law'?

CIDIP VI also took a new direction in drafting methodology. The fact that the number of ratifications of conventions adopted at recent conferences has decreased sharply[13] clearly shows that the traditional technique of international conventions has lost much its drive within the framework of the Inter-American codification of Private International Law. Thus it is not surprising that new instruments of legal

---

adults lacking legal capacity. The President of the Conference, Didier Opertti Badán, explicitly expressed his concerns about the 'commercialization' of the CIDIP.

[9] See PARRA-ARANGUREN G. (*supra* note 4) at 299 (301-302).

[10] The Inter-American Juridical Committee merely submitted a report to CIDIP VI on the role and future of the CIDIP; see OEA/Ser.K/XXI.6, CIDIP-VI/RES.2/02 corr.1 (where the plenary thanks the Committee for its work). See PARRA-ARANGUREN G. (*supra* note 4) at 300 on the active role of the IJC in the preparation of CIDIP V in Mexico. For further indication of the reduced role of the IJC, see *infra* note 58.

[11] The invitation to the third expert meeting in November 2000 mentioned the sponsors, most of which were major U.S. multinationals.

[12] See *infra* part IV on the preparation of this topic and its consequences.

[13] See PEREZNIETO CASTRO L., 'La codificación interamericana en Derecho internacional privado, ¿es todavía una opción?, in: *Revista Mexicana de Derecho Internacional Privado* 1 (1996), p. 82. Notwithstanding, see the last changes of the status of ratification at <http://www.oas.org/juridico/english/treaties.html>. Conventions are often regarded as being too rigid; see, *e.g.*, the resistance in Uruguay against ratification of the Convention of Mexico on the law applicable to international contracts, OPERTTI BADÁN D./ FRESNEDO DE AGUIRRE C., *Contratos comerciales internacionales*, Montevideo 1997, p. 55 *et seq*.

harmonization were presented at CIDIP VI – although their choice was the result of purely pragmatic considerations.

Generally rejected as too fragmentary, the Inter-American Convention on Contracts for the International Carriage of Goods by Road has not yet been ratified by a single country.[14] Nonetheless, the complete failure of the Convention was not the main reason for placing the topic back on the agenda. Instead of revising and amending the Convention by addressing questions of liability, which had remained unresolved due to lack of time at CIDIP IV, the U.S., Mexico and Canada favored the elaboration of a multilingual uniform transport documentation urgently needed within NAFTA to reduce formalities and cut costs of cross-border transportation.[15] At the same time, the idea was to compensate for the absence of an international legal framework by adopting uniform general terms for transportation contracts that would fill in the *lacunae* of the Convention. Since this 'private law' is not subject to national ratification procedures,[16] the U.S. delegation predicted that the new commercial usages developed as a result of this standard form transportation contract would lead the way to a comprehensive legal unification. According to this view, the CIDIP would take on the new role of codifying regional *lex mercatoria*, thus giving life to the theoretic recognition of this opalescent 'institution' at the 1994 CIDIP in Mexico.[17]

[14] Convención Interamericana sobre Contrato de Transporte Internacional de Mercadería por Carretera, signed 1989 in Montevideo. For criticism see BASEDOW J., in: SCHMIDT K. (ed.), *Münchner Kommentar zum Handelsgesetzbuch*, vol. 7, 1997, p. 882; LARSEN P., 'International Carriage of Goods by Road in the Americas: Time to Revise the Inter-American Convention?', in: *Uniform Law Review* 1999-1, pp. 33 *et seq.* (especially regarding the rejecting position by the U.S.); FRESNEDO DE AGUIRRE C./ AGUIRRE RAMÍREZ F., 'International Carriage of Goods by Road in the Americas: Looking at Policy Aspects of a Revised Inter-American Convention', in: *Uniform Law Review* 1999-1, pp. 50 *et seq.*; ID., 'Transporte Internacional de mercaderías por carretera en el MERCOSUR y América: la Convención de Montevideo de 1989 ¿requiere ser revisada o actualizada?', in: *Jurisprudencia Argentina* 6154 (1999), pp. 1 *et seq.*

[15] See LARSEN P. (note 14) at 37-38 (on the lack of statutory rules in NAFTA; supposedly the gaps are to be filled by the CIDIP) and 41 (the corresponding laments and claims by the U.S. transportation industry, as well as the argument that unification would strengthen the economy in Central and South America).

[16] For the origins of this 'private law' approach, see the Report to the NAFTA Land Transportation Standards Subcommittee by the North American Committee on Surface Transportation Law and Practice, presented by its Chairman Kenneth HOFFMAN in Vancouver on 27 June 1995; download at the NLCIFT web site:
<http://www.natlaw.com/pubs/present1.htm>.

[17] See FERNÁNDEZ ARROYO D.P. on the *lex mercatoria* in the Inter-American context in: *Derecho internacional privado interamericano* (*supra* note 1), at 60 *et seq.*

The topic of secured transactions also has its origin in efforts to achieve legal harmonization within the framework of NAFTA.[18] Elaborated with the assistance of the NLCIFT, the basic texts of the OAS Model Law were drafts reforming the law on secured transactions in Mexico, with the intention of cautiously incorporating the U.S. and Canadian legislative solution into Mexican law.[19] The U.S. delegation is convinced that adopting such a model law could reproduce the U.S. success story of Article 9 of the Uniform Commercial Code in Latin America, i.e., stimulate economic growth by providing more flexible and cheaper credits, which in turn would create international markets for negotiable titles.[20] Including Mexico in this initiative was intended to serve as a catalyst for the delicate task of incorporating these common law concepts into the Latin-American legal orders.[21] Such a task could certainly not be achieved in the form of an international convention.[22] Doubts raised during the Conference as to the compatibility of individual provisions with national law were regularly appeased by the clarification that each legislator could choose the method it deemed best to incorporate the concepts of the model law into its national law. It is worth noting that Inter-American conventions have frequently served in the past as models for modernizing national

[18] See comments on the efforts since 1993, *e.g.*, NELSON T.C./CUMING R.C.C., *Harmonization of Secured Financing Laws of the NAFTA Partners: Focus on Mexico*, Arizona 1995.

[19] See WILSON J., 'Secured Financing in Latin America: Current Law and the Model Inter-American Law on Secured Transactions', in: *Uniform Commercial Code Journal* 33 (2000), p. 46 (63-65).

[20] Article 9 UCC has been adopted by all U.S. states and Canada and has an impact on virtually all international efforts of codification; see CUMING T.C., 'The Internationalization of Secured Financing Law: The Spreading Influence of the Concepts UCC, Art. 9 and its Progeny', in: CRANTON R. (ed.), *Making Common Law – Essays in Honor of Roy Goode*, Oxford 1997, p. 499 *et seq*. and 517 *et seq*. (on the influence of the European Bank for Development and Reconstruction on the Model law); see the critical discussion in VENEZIANO A., *Le garanzie mobiliari non possessorie – Profili di diritto comparato del commercio internazionale*, Milan 2000, pp. 6, 169 *et seq*.

[21] *Cf*. WILSON J. (note 19) at 65 n.133. However, the urging for an Inter-American model law is also connected with the equally pressing task of the NLCIFT to lobby the Mexican legislator; see, *e.g.*, DE LA MADRID M., 'La prenda sin transmisión de posesión – Estudio comparativo con la Ley modelo interamericana de garantías mobiliarias', in: *Revista Mexicana de Derecho Internacional Privado* 9 (2001), p. 11 *et seq.*; deficiencies of the steps of the reform taken thus far are described by PEREZNIETO CASTRO L, 'Comentarios al 'Proyecto México-Estadounidense para una Ley Modelo en Materias de Garantías Mobiliarias', in: *Revista Mexicana de Derecho Internacional Privado* 10 (2001) p. 66.

[22] For an analysis of general problems in achieving international codification of this matter, see DROBNIG U., 'Security Rights in Movables', in: HARTKAMP A.S. *et al*. (ed.), *Towards a European Civil Code*, 2nd edition, Den Haag 1998, p. 511; KREUZER K., 'La propriété mobilière en droit international privé', in : *Recueil des Cours*, Vol. 259, 1996, p. 271.

legislation in Latin America.[23] Accordingly, the technique of using model laws is somewhat promising – at least in the long run.

II. Uniform Transport Documentation for Transport by Road

A. Previous Drafts

The U.S. delegation proposed the subject of carriage of goods by road at the second expert meeting in February 2000 and was elected to head the working group. Thereafter the NLCIFT drafted the first proposal entitled 'Uniform Inter-American Bill of Lading for International Carriage of Goods by Road – Terms and Conditions',[24] which was presented by the U.S. delegation as the basic text at the third expert meeting in November 2000 in Miami. The 'final' version of this document was circulated in November 2001. By the end of January 2002, only a few days before the beginning of the Conference, Uruguay presented an alternative project based on the U.S. draft, laid down in three documents: one including comments on each article proposed by the U.S., another presenting its own draft, and a third explaining the reasons underlying the Uruguayan proposal.[25] Apparently surprised, the U.S. delegation had to confront the strong antagonistic position of the experienced team of the Uruguayan delegation. With the exception of conciliating attempts by the Mexican delegation, the substantial negotiations in Commission I of the Conference were thus dominated by the tug-of-war between the two delegations, essentially reflecting the rivaling interests of the shipping industry and the insurance business.[26]

---

[23] See especially SAMTLEBEN J., 'Los resultados de la labor codificadora de la CIDIP...' (*supra* note 1), p. 302; PEREZNIETO-CASTRO L., 'Las influencias recíprocas entre la codificación interamericana y los sistemas de derecho internacional privado', in: *El Derecho internacional privado en el umbral del siglo XXI*, Madrid 1997, p. 253-254; PARRA-ARANGUREN G., 'La aplicación del derecho internacional privado en el derecho interno a través de los tratados internacionales, en particular en los foros de La Haya y de la Organización de los Estados Americanos', in: COMITÉ JURÍDICO INTERAMERICANO (ed.), *Curso de Derecho Internacional Privado*, XXIV, 1997, p. 24-27; similarly also HERBERT R., *Del Congreso de Lima a la CIDIP III – El Derecho internacional privado en América Latina (1878-1984)*, Saarbrücken 1984, p. 18.

[24] Doc. OEA/Ser.K/XXI.6, CIDIP-VI/doc.5/02.

[25] Doc. OEA/Ser.K/XXI.6, CIDIP-VI/doc.12-14/02.

[26] The U.S. delegation was headed by the former president of the Transportation Lawyers Association (Kenneth Hoffman), the Uruguayan delegation by the crown jurist of insurance companies in transport matters in Montevideo (Fernando Aguirre Ramírez).

B. Two 'Uniform' Bills of Lading

The points of tension between the two positions had already been clearly exposed in Uruguay's preliminary documents. Nevertheless, since the negotiations commenced with the unproblematic points, the work of the Committee advanced well in respect of the terms and conditions of the underlying transportation contract. The initial strategy of both sides was to have the few disputed points resolved as determined by the applicable law – the last point to be discussed. The inherent tension of this approach inevitably culminated when the different positions clashed over the modalities of the carrier's liability – the main lacuna and coffin nail of the 1989 Inter-American Convention.[27] Especially here, it became inevitable that the strategy of agreeing on the solution provided by the applicable law doomed not only the negotiations on that point but also the entire project to shipwreck since most of the disputed points depended on the applicable law.

The clash over the question of the applicable law perfectly manifested the above-mentioned conflict of interests between the shipping industry and the insurance business. The initial U.S. draft had proposed the application of the conflicts rules embodied in the Inter-American Convention on Contract Law of 1994[28] – despite the fact that this Convention had thus far been ratified only by Mexico and Venezuela. Accordingly, the U.S. delegation was firmly counting on free party autonomy and the law of the country where the goods are first loaded, which would regularly lead to the application of U.S. law. Not surprisingly, this was by no means acceptable to Uruguay. Its longstanding phobia of being submitted to the dictate of powerful foreign multinationals had resulted in its policy of prohibiting contracting parties to choose any law other than the one determined by Uruguayan conflicts rules.[29] As expected, the application of its fundamental *lex loci solutionis* rule regularly amounts *de facto* to the application of Uruguay's protective

[27] With this key question unsolved, not a single American State has ratified the Convention; see *supra* notes 14-15.

[28] See the U.S. draft OEA/Ser.K/XXI.6, CIDIP-VI/Com.I/doc.5/02 Article 17. After both the U.S. and Uruguay had agreed to drop this reference, Mexico insisted – and the Commission agreed – that an official proposal be made to the Plenary to recommend ratification of the Convention by the OAS Member States; the proposal was never made. For details on this Convention, see *supra* note 4.

[29] E.g., by FRESNEDO DE AGUIRRE C. (who led the Uruguayan delegation's voice together with her husband, Fernando AGUIRRE RAMÍREZ, *supra* note 26), *La autonomía de la voluntad en la contratación internacional*, Montevideo 1991; see also ALFONSÍN Q., *Régimen internacionales de los contratos*, Montevideo 1950, pp. 13-27; SANTOS BELANDRO R., *El derecho aplicable a los contratos internacionales*, Montevideo 1996, pp. 51-54; OPERTTI BADÁN D., 'La CIDIP V: una visión en perspectiva', in: *Revista Uruguaya de Derecho Internacional Privado* 1 (1996), pp. 28-35.

substantive law.[30] In this sense, the Uruguayan delegation insisted that the transportation contract would typically require granting protection to the weak party. However convincing this argumentation may be, the point was that the model terms and conditions of the uniform transportation contract could not overcome the failure of the 1989 Convention, which omitted a binding conflicts rule.[31] Without a corresponding international norm, the contractual choice of law would be void under a municipal law hostile to party autonomy. Although increasingly aware of this inherent limitation, the two delegations were unable to reach an agreement on this point.

A loophole out of this impasse appeared only after the delegations finally managed to delineate the document's precise scope of application. Pursuant to the initial mandate to elaborate a complementary document to the shipwrecked Convention of 1989, it was decided that the uniform document would cover carriage of goods by road and – most important for the North American transportation sector – the inter-modal transport (piggy-back haulage of entire trucks together with their load by train or ferry), but not the multi-modal transport (transshipment of sealed containers).[32] After it had become clear that, for geographical reasons, there would be no conflict between the U.S. and the Uruguayan spheres of interest, the delegations transcribed this factual reality into a double-tracked solution based on a Uruguayan proposal. Since only non-negotiable bills of lading are used in practice in the North American sphere (NAFTA), whereas only negotiable bills of lading are used in South America, the key was to make two uniform documents: a non-negotiable and a negotiable one, each honoring the respective geographical needs and interests, but maintaining a formal parallelism.

As a result, the 'northern' non-negotiable bill of lading allows for full party autonomy and in the absence thereof provides for the application of the law of the country of first physical possession of the goods by the carrier, whereas the 'southern' negotiable bill designates the law of the country of final destination as applicable. Each version explicitly states that the provision might be unenforceable in some countries (Article 17). This also enabled the delegations to return to their preferred solutions in the disputed question of carrier liability. While both bills limit the carrier's liability for damages or losses to the actual value of the goods,[33] the parties may increase or decrease the limitation of liability by agreement in

[30] See Article 2399 of the Uruguayan Civil Code, based on Articles 32 and 33 (c) of the Treaty on International Civil Law of Montevideo of 1889 and Article 37 (c) of the 1940 version.

[31] A conflicts rule was excluded from the 1989 Convention; see PARRA-ARANGUREN G., *Codificación del derecho internacional privado en América*, vol. II, Caracas 1998, pp. 224-225.

[32] Reference to clarify the scope of application.

[33] At the time and place determined by the applicable law, plus freight and other costs if paid (Article 6.1).

writing under the 'northern' bill of lading, but only increase it under the negotiable 'southern' bill (Article 6.2).[34] Other limitations may apply in both versions 'whenever the applicable law so authorizes' (Article 6.3). Following the liberal North American liability rules, the non-negotiable bill provides that the carrier is not entitled to any limitation of liability if it is proven that the loss or damage has been caused by the carrier's or its agent's 'conversion of the goods to its own use', i.e. intentionally and for one's own enrichment. In contrast, the 'southern' bill provides that the carrier may lose its right of limitation even in the event of gross negligence (Article 7). A potential source of uncertainty could arise from the different language used to prescribe the preclusive effect of notice of loss or damage apparent at the time of delivery. Under the 'northern' bill, the delivery of the goods itself constitutes *prima facie* evidence that the goods have been delivered as described in the bill of lading, provided no contrary notice in writing is submitted to the carrier by the next working day. On the other hand, the negotiable bill provides rather cryptically that it is the 'receipt' (Spanish: 'recibo de entrega') that constitutes such limited presumption of the state of the delivered goods (Article 9.2). Neither defined nor mentioned elsewhere, this probably means that the carrier is required to request a 'receipt' explicitly confirming that the goods have been received in an orderly state.

The above shows that the two 'uniform' documents certainly achieve some formal uniformity of the transport documentation as such – but by no means Inter-American uniformity of the contractual substance. Instead, the respective interest groups have managed to secure their position in their relevant territories. Just as it is questionable whether the Uruguayan delegation's position reflects the general South American perspective on negotiable bills, it is not yet quite clear whether the 'uniform' terms and conditions of the non-negotiable bill based on the U.S. draft and endorsed by the OAS will be acceptable for NAFTA, as originally hoped.[35]

III. Inter-American Model Law on Secured Transactions

A. Previous Drafts by the U.S., Mexico, and Canada

The original working title of the preparatory works for CIDIP VI was 'International private contracts on credits with special reference to the uniformity and

[34] Uruguay had already forced the U.S. to accept the proviso 'to the extent authorized by applicable law', arguing that a decrease in contractual liability is not possible under Uruguayan mandatory law.

[35] See *supra apud* note 15.

harmonization of the norms on securities for international commercial and financial transactions'. However, it quickly became clear at the first expert meeting that the preparatory works would be limited exclusively to secured transactions and the elaboration of a model law.[36] At the second expert meeting, the U.S. and Mexican Delegations presented the draft elaborated by NLCIFT. In essence a replica of Article 9 UCC, the draft was based on the following seven fundamental principles for a modern law on secured transactions:[37]

- Creation of a unitary and uniform security interest independent of the actual possession of the collateral;
- Automatic expansion of the original security interest to new assets acquired later;
- The possibility of automatic expansion of the interest to the proceeds of the collateral;
- Exception to the automatic expansion if new assets are financed with credits from third parties, i.e. an exception to the principle of chronological priority;
- Exemption of consumers;
- Quick and efficient enforcement proceedings, including the possibility to take the collateral into possession or judicial adjudication, as well as to directly dispose of the collateral;
- Publicity through filing in an electronic central registry with effects *erga omnes*.

These seven principles took the form of 137 Articles, which the NLCIFT furnished with comments based on the discussion at the second expert meeting in February 2000 at Washington, D.C. Since the experts had agreed at this meeting that uniform rules for electronic documents and signatures would be very helpful in light of the planned electronic registration system, the NLCIFT also elaborated such rules, which together with the comments served as the starting point for the third expert meeting in November 2000 at Miami.[38]

A few weeks before the originally planned conference date – and thus only a few days before its was actually postponed – Mexico presented a revised version of the Model Law in September 2001. The Mexican delegates had accomplished the feat of reducing the original draft, commonly regarded as much too long, by 50 percent, thus contributing considerably to the Model Law's potential acceptability to national legislators, without compromising the necessary definition

[36] For more details see FERNÁNDEZ-ARROYO D.P., *Derecho internacional privado interamericano* (note 1), pp. 81-86, 89.

[37] See WILSON J. on these principles (note 19) at 65-68.

[38] See *infra* note 46.

of the fundamental principles. The acceptability was further enhanced by the clarification that the Model Law would not eliminate specific guarantees under special national laws, often ones incorporating national peculiarities.[39] Moreover, the Mexicans included 'soothing' norms such as setting the rank of creditors secured under the Model Law on equal footing with creditors secured by mortgages in case of insolvency and requiring judicial authorization for taking possession of assets given as security if they are not handed over voluntarily. The extensive list of definitions was also deemed a very positive contribution in light of the low degree of elaboration of the topic in Latin American legal orders and the considerable conceptual divergences among them. The U.S. adhered to this new draft, thus allowing the two delegations to present it – after some minor adjustments – as their common official Conference proposal in February 2002.

Invoking their long experience of harmonizing common law and civil law, the Canadian delegation stunned the others by presenting what appeared to be a completely new draft only three days before the actual Conference.[40] As a result, most delegates did not receive notice of the new proposal until the opening day of the Conference, which exasperated U.S. delegates who feared that the new material could jeopardize the extremely tight working schedule. However, the Canadian proposal in fact maintained the essence of the previous drafts, improving them considerably due to its superior drafting and concision. The synopsis provided immediately by the Conference Secretariat enabled the Canadian proposal to finally serve as the basic text for the work of Commission II.

B. The Final Product

Despite the intensive preparation, it was the first time that an official proposal underwent so many and in part major changes.[41] Significant parts of the draft Model Law on Secured Transactions were completely reformulated in the last night by a small pertinacious drafting group. This bizarrely – but also significantly – contrasted the fact that the Canadian delegation – manned with top experts – had previously alleged not to have had sufficient time to review the draft in its entirety after the presentation of the Mexican proposal almost half a year earlier.[42] Finally, a

[39] See WILSON J. (note 19) at 58-59 on special laws on securities such as agricultural pledges or pledges on ships and aircraft.

[40] OEA/Ser.K/XXI.6, CIDIP-VI/doc.15/02 (with the reference that 'only' the provisions on the enforcement of security interests and the applicable law were left untouched 'because of lack of time'; see also the final report by the Rapporteur, OEA/Ser.K/XXI.6, CIDIP-VI/doc.8/02.

[41] At previous CIDIP sessions significant changes had been made only regarding special questions, e.g., elimination of the reference to the 'characteristic performance' in the Convention of Mexico in last minute; see PARRA-ARANGUREN G. (note 9), pp. 408-409.

[42] See *supra* note 40.

practically new document was produced as the official Model Law at the Conference itself. Such finale was possible because of the strong interests and persistence of the U.S. delegation, which viewed the Conference as a unique opportunity to finally propose a modern solution for the topic of secured transactions with Inter-American and especially Latin American endorsement. This would promote its acceptability in the Latin American legal orders and, last but not least, support the reform process in Mexico, which was feared to collapse without it.[43] The obstacles in Latin American laws preventing access to flexible and cheap credits had long been identified as grave competitive disadvantages in a global economy, especially in a setting of liberal free trade, thus giving rise to massive calls for corresponding reforms.[44] The actual realization of the Model Law's 'blitz' metamorphose, however, was made possible by the even more sedulous Rapporteur of Committee II, Uruguayan Professor Ronald HERBERT, who managed to coordinate the final editing without prejudicing the numerous and varied observations and claims raised earlier in the Committee's sessions.

The document finally adopted by the Plenary Session contains 72 Articles which regulate in eight chapters the Law's scope of application, creation of the security interest, publicity, registry, priority rules enforcement of the security interest, arbitration and the conflict of laws. Even though the U.S. – Mexican model did not succeed in its original version, its basic features have nevertheless been kept in the final version. This means that the Inter-American Model Law still promotes profound reforms in the existing Latin American legal orders, reflecting the abovementioned principles. Examples of this are the Model Law's very broad scope with its purpose 'to regulate security interest in movable property securing the performance of any obligation whatsoever, present or future, determined or undetermined of any nature' (Article 1.1). These securities can be extended in favor of the creditor to interests (including default interests), commissions, expenses incurred for maintenance and custody of the secured property, damages caused by breach of contract, and liquidated damages (Article 4). The categories of movables eligible as collateral are virtually unlimited[45] and do not depend on the type of underlying

[43] See *supra* note 21.

[44] Recommended is the study by GARRO A.M., 'Security Interests in Personal Property in Latin America: A Comparison with Art. 9 and a Model for Reform', in: *Houston Journal of International Law* 9 (1987) 157 *et seq.* and the corresponding reform proposal 'The Reform and Harmonization of Personal Property Security Law in Latin America', in: *Revista Jurídica de la Universidad de Puerto Rico* 59 (1990) 1 *et seq.* See also WILSON J. (*supra* note 19) at 55-60.

[45] Article 2.1 encompasses 'one or several specific movable property or on generic categories of movable property or on all of the secured debtor's movable property, whether present or future, corporeal or incorporeal, susceptible to pecuniary valuation at the time of creation or thereafter'. Explicitly treated are receivables (Articles 13-20), non-monetary claims (Articles 21-22), letters of credit (Articles 23-26), negotiable instruments and titles

transaction or on whether the property is held by the secured creditor or debtor (Article 2.1). The secured debtor may retain possession of the collateral; in such case the security interest is created by written agreement between the parties, otherwise by simple delivery of possession or control to the secured creditor (Articles 5-8). The State is obliged to establish a unitary and uniform registration system which is public and fully automated, relying on a central database to which registered users have access and can request registration online with a confidential key (Articles 1, 43-46).[46] With such registration the security interest is effective against third persons (Articles 10, 35, 47) – with the exception of consumers (Article 49) – and grants the creditor preferential right to payment from the proceeds (Articles 2.2 and 48).[47] Secured creditors can change the priority of a security interest by agreement among them, but only with effect *inter partes* (Article 50).[48] Contrary to the original proposals, enforcement requires *exequatur* by the judiciary or a notary public in all cases (Article 55). Nonetheless, according to Latin American standards, the enforcement rules are still quite favorable to the creditor. The secured debtor can escape enforcement only if he can prove within three days that full payment of the amount and its accessories had been made (Article 56). All other exceptions or defenses can be raised only by taking independent judicial action, which has no suspension effect (Articles 57 and 61). If the creditor is in possession or after taking repossession of the collateral, he can seek satisfaction by directly selling the collateral at market price, if necessary by public auction (Article 59).[49] Interesting – if not critical for potential third party interests – is the clarification that disputes regarding security interests may be submitted to arbitration (Art. 68). However, some 'digestive help' is offered by the clarification introduced by the Mexican draft to the effect that the Model Law would not neces-

(Articles 27-29), property in possession of a third party (Articles 30), inventory (Articles 31) and intellectual property rights (Article 32).

[46] The electronic register is regarded as the backbone of this approach based on publicity; this is explained by Resolution OEA/Ser.K/XXI.6, CIDIP-VI/Res. 6/02, which recommends that the Member States adopt legislation consistent with the UNCITRAL model laws on electronic commerce (1996) and electronic signatures (2001). It also invites States 'to examine the principles embodied in the Draft Uniform Inter-American Rules for Electronic Documents and Signatures' elaborated by the NLCIFT but not discussed at the Conference because of lack of time 'and to consider the advisability of incorporating them into their national law'.

[47] Despite repeated interventions by various delegates, the relationship between 'privileged creditors' and secured creditors remained unclear. According to numerous national laws and even some constitutions, privileged creditors have priority over secured creditors.

[48] Furthermore, there are special conflicts rules for different types of security interests (Articles 51 and 52).

[49] However, the secured debtor is always entitled to claim damages for abusive enforcement by the creditor (Article 63).

sarily – as originally planned by the U.S. – constitute the exclusive regulation of all security interests (Article 1.2).

With regard to international constellations, all drafts prior to the Conference provided merely that, if the security interest is international or becomes international because the collateral has later been relocated, the creditor would have to create the security interest in that country as well. Some definitions on internationality and the time of conclusion were also included.[50] Title VII on the 'Conflict of Laws and the Territorial Scope of Application' of the adopted Model Law makes a distinction according to the type of security interest and the collateral. Validity, publicity and priority of security interest in tangible and intangible property remaining in the debtor's possession (the former held as equipment for use in the debtor's business or as inventory for lease) are governed by the law of the state in which the secured debtor is located when the security interest is created (Article 70.1). The same aspects of other kinds of security interest are governed by the law of the state where the collateral is located at the time the security interest is created (Article 69.1).[51] If the debtor's location changes in the former case or the collateral's location in the second case, the law of the respective new country of location takes over the issues of publicity and priority (Articles 69.2_1 and 70.2_1 respectively); however, in both cases the creditor may preserve its original priority if the security interest is also registered in the state of the new location within 90 days after relocation (Articles 69.2_2 and 70.2_2 respectively).[52]

It is difficult to say whether these (North American) innovations propagated by the Inter-American Model Law will effectively be accepted by national legislators in Latin America. Difficulties in the process of trimming Mexican legislation to full compatibility with its NAFTA partners reflect the fundamental and longstanding suspicion that transplanting 'modern' law, sold under the label of establishing an ideal environment for business and economic growth and thus a push for development, will only benefit foreign multinationals doing profitable

[50] The small number was apparently the result of the belief that widespread adoption of the Model Law would make conflicts rules unnecessary, see NELSON T.C., 'Receivables Financing to Mexican Borrowers: Perfection of Art. 9 in Cross-Border Accounts', in: *Inter-American Law Review* 29 (1998), p. 528 *et seq.*; see criticism in FERNÁNDEZ ARROYO D.P., 'Las garantías mobiliarias en el comercio internacional de nuestros días', in: *Revista Mexicana de Derecho Internacional Privado* 10 (2001), p. 55.

[51] The only exception to this rule exists for non-possessory security interest in negotiable intangible property, whose priority is governed by the law of the state where the collateral is located when the possessory interest is acquired (Article 71).

[52] For early comments on this solution, see DROBNIG U., 'Mobiliarsicherheiten im internationalen Geschäftsverkehr', in: *RabelsZ* 38 (1974), p. 480 *et seq.*; BOUZA VIDAL N., *Garantías mobiliarias en el comercio internacional*, Madrid 1991, pp. 163, 209, and 248. See also Article 9-103.1 (d) UCC and Article 102.2 Swiss Act on Private International Law. But see KREUZER K., 'La propriété mobilière en droit international privé', in: *Recueil des Cours*, Vol. 259, 1996, pp. 253 *et seq.* and 304.

business in Latin America. Fears about the role of the creditor are extremely difficult to dispel, especially because they are often based on unfortunate experiences in the past.[53] It will be difficult to convince them of the sincere intentions to build a legal *acquis inter-americain* when there is clearly a lack of trust and mutual understanding, as well as serious socio-economic disparity.

IV. Conflict of Laws Related to Cross-Border Pollution

As mentioned above, Uruguay was left to its own resources at the first expert meeting to prepare the topic it had proposed: 'Conflict of laws in matters of extra-contractual responsibility, with emphasis on the topic of jurisdiction and applicable law regarding international civil liability for cross-border pollution'**.** As a result, Uruguay presented a preliminary draft for a convention to be held on the specific question of cross-border pollution in October 2001.[54] As regards the forum for instituting civil proceedings, the draft proposed that the party having suffered damages as a result of cross-border pollution caused by another State Party would be able to choose between the courts of the country where the event causing the pollution took place, where the damage occurred, or where the defendant or the plaintiff has its legal domicile, residence or business address (Article 4). In regard to the applicable law, the draft proposed that the plaintiff could choose the law of the country where the contaminating event had its origin or where the damage occurred (Article 5). A provision made it clear that a governmental authorization would not be valid defense for release from liability for cross-border pollution (Article 2.3).[55]

However, Uruguay changed its strategy shortly before the conference, probably because it had become obvious that the project would be pushed aside. Namely, the draft Conference schedule assigned only two short sessions to the topic. Uruguay proposed instead that a general convention be held on the conflict

[53] See, *e.g.*, the comments on the Argentine Law 12962 (on commercial pledges and registers) of 26 March 1947 (ratifying the Decree-Law 15348 of 28 May 1946, which had been dictated by a *de facto* government), by ZAVALA RODRÍGUEZ C.J., in: *Código de Comercio y leyes complementarias*, vol. III, Buenos Aires 1967, p. 246: 'The law has functioned, as we could say, in a unilateral way as if pursuing not the social aim of stimulating economy and credit but rather to grant the creditor – and only the creditor, seller or borrower – irritating guarantees and privileges.'

[54] Doc. OEA/Ser.K/XXI.6, CIDIP-VI/doc.8/02.

[55] For an in-depth study on the topic in general, see FACH GOMEZ K., *La contaminación transfronteriza en Derecho Internacional Privado – Estudio de Derecho aplicable*, Barcelona 2002.

of laws and jurisdiction in extra-contractual liability (no longer mentioning the environmental aspect)[56] – a strategy that finally doomed its efforts. Already at the first plenary meeting, the U.S. delegation, seconded by Canada, left no doubt that an agreement on such a convention could not possibly be reached due to the poorly elaborated draft and the lack of time to draw up an acceptable one.[57] Uruguay withdrew the draft after informal negotiations and pushed instead for a resolution that would give the Inter-American Juridical Committee a clear mandate to elaborate a convention on international extra-contractual liability. This attempt was also in vain despite the support of the Mexican delegation. By persistent diplomatic maneuvers, the delegations from the U.S., Canada, and Brazil (Uruguay's immediate neighbor) succeeded in diluting this mandate to homeopathic relevance.[58] A Mexican motion in the final plenary session to mention pollution as one of the topics to be discussed fell on deaf ears.

V. The Future of the CIDIP

A. Change of Scenery and its Consequences

The last two CIDIP conferences (especially CIDIP VI) established a clear change of course moving the codification of Inter-American PIL towards privatization, commercialization and the use of soft law techniques. Moreover, the traditional Latin American model of the CIDIP has clearly developed into a truly Inter-American codification forum as a result of the active participation of the United States and Canada.[59] In particular, the U.S. has taken a leading role, selecting topics for discussion, preparing these topics and achieving the desired results at the end of the conference, with the help of its two NAFTA partners. The old scheme of the CIDIP appears to have ended, i.e., where the most prominent PIL specialists in

[56] Doc. OEA/Ser.K/XXI.6, CIDIP-VI/doc.16/02 (with comments in doc.17).

[57] See the report of the Rapporteur of Commission III: OEA/Ser.K/XXI.6, CIDIP-VI/doc.2/02.

[58] See Doc. OEA/Ser.K/XXI.6, CIDIP-VI/Res.7/02: the ICJ may only report to a meeting of experts – a filter that '*may consider the preparation* of an international instrument on the matter'. Furthermore, there is only a vague commitment that 'the Conference is in favour of conducting a preliminary study to identify specific areas indicating the progressive development of regulation in this field through conflict of laws solutions, as well as a comparative analysis of national norms currently in effect'.

[59] A similar attitude by English-speaking Caribbean countries is still pending.

Latin American met[60] and proceeded on a rigorous scientific level, sometimes departing from the national interests of the States represented. Nowadays we are witnessing a pragmatic CIDIP, concerned with topics imposed by the free trade agenda in the region.[61]

Looking towards the future, establishment of the Free Trade Area of the Americas (FTAA) requires considerable legal development on the part of all OAS members, a task that could be achieved within the framework of the CIDIP. Implementing free market rules on a regional scale requires clear rules and systems of dispute resolution that are both impartial and efficient, preventing and punishing market excess and protecting states, groups and individuals who have difficulty defending themselves under such a scheme. If the creation of the FTAA is inevitable, as generally said, it may not serve as an instrument to consolidate injustice (a common occurrence in all countries in the region) and, much less, as a means of broadening the social and economical gap. All governments of the Member States apparently accept the idea that free trade will bring benefits to their countries and generate prosperity for their people (as preached by its apostles). Therefore, it is becoming all the more important to establish clear rules and respect social rights in light of the future FTAA; such a process must abide by these rules. This is the only way for this almost religious belief of the governments to have a minimum opportunity to pass through the fine mesh of reason. Both PIL and International Trade Law are in need of new regulations in this sense and the CIDIP could provide the adequate forum. The European experience proves that countries with radically different systems are capable of agreeing on basic tools to develop free trade, including indirect norms to protect weaker contracting parties and material norms that sanction the violation of competition rules. Although it still has numerous imperfections and is far from constituting a model for social development, such efforts yield positive and reasonable results.

B. The Challenges of CIDIP VII for Latin American Countries

In view of past accomplishments and future challenges, it seems clear that the CIDIP plays an important role and should continue in its endeavors. Nevertheless, it is also evident that its methods should be profoundly changed and its objectives

[60] D. OPERTTI BADÁN, J.L. SIQUEIROS, R. HERBERT, G. PARRA-ARANGUREN, W. GOLDSCHMIDT, H. VALLADAO, T.B. DE MAEKELT, L. PEREZNIETO CASTRO, F. VÁZQUEZ PANDO, among others.

[61] See the two documents discussed during the session of CIDIP VI dedicated to 'the future CIDIP'. One was made by the Inter-American Judicial Committee and presented by its President Joao Grandino Rodas and the American member of the Committee Carlos Vázquez (Doc. OEA/Ser.K/XXI.6, CIDIP-VI/doc.10/02). The other was presented by D.P. Fernández Arroyo, a special guest of the OAS to CIDIP VI (Doc. OEA/Ser.K/XXI.6, CIDIP-VI/doc.18/02).

redefined. Both questions are open to discussion. At CIDIP VI, where 'the future of the CIDIP' was discussed, there was a sense of consensus that codification efforts should continue in this forum. It should, however, be emphasized that legislation proposed by the CIDIP must benefit all States (all States of 'all the Americas') and that all thirty-five Member States of the Organization should actively participate in the drafting of such texts. In order to encourage States to assume an active role in the CIDIP, the OAS should identify contact persons in each State who will be responsible for promoting active participation. Those contacts could vary according to the subject discussed at each meeting.[62]

The fact that the OAS has very limited resources for PIL is not necessarily connected with the last issue. It is important to achieve a balance in the financial support provided by private and public institutions interested in discussing certain topics within the framework of the CIDIP.[63] Above all, it is necessary to avoid 'privatization' of the process, thus guaranteeing that neutrality and independence will prevail at all conferences. On the other hand, if the authorities of the Member States are convinced of the importance of these issues, they should take steps to increase the budget. It is important for Latin American States to react as dictated by the circumstances. The apathy demonstrated by most OAS Member States before and during CIDIP VI[64] cannot be repeated if the American States really want an Inter-American codification that reflects a balanced agenda and respects the interests of all States represented in the Organization.

[62] See FERNÁNDEZ ARROYO D.P., '¿Qué CIDIP para cuál América?', in: KLEINHEISTERKAMP J./ LORENZO IDIARTE G. (eds.) (*supra* nota 6), pp. 31 *et seq.*

[63] We are reminded of the list of sponsors of the third expert meeting. It is not absurd to think that a party strongly interested in the adoption of some rules will collaborate in order to achieve adoption, obviously in such a way that does not imply a compromise of some sort.

[64] The isolated exceptions are well known because they represent acts of the majority.

FORUM[*]

PRIVATE INTERNATIONAL ENFORCEMENT OF COMPETITION LAW[**]

The Application of Foreign Competition Law

Michael HELLNER[***]

[*] This section contains summaries of books recently published by young authors in languages other than English.

[**] This article summarizes some of the ideas expressed in Michael HELLNER´s book *Internationell konkurrensrätt. Om främmande konkurrensrätts tillämplighet i svensk domstol*, Skrifter från Juridiska fakulteten i Uppsala 82, Iustus Förlag, Uppsala 2000, 379 pp.

[***] LL.D. (Uppsala), Associate Professor in EU Law, Riga Graduate School of Law

Yearbook of Private International Law, Volume 4 (2002), pp. 257-301
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

I. Private Enforcement of Competition Law in a Globalized World

A. The Role of Private Enforcement

Competition (antitrust) law enforcement has two sides – a public and a private. In Europe the private side of enforcement has attracted little attention until recently. National competition authorities and, in the case of EC competition law, the Commission, are generally seen as those responsible for the enforcement of competition law. Those suffering as a result of anticompetitive action are generally content to file a complaint with the competent authorities and let it stay at that. The enforcement authorities also take their own initiatives when investigating competition in various branches of business. Furthermore, undertakings may notify competition authorities of agreements in order to receive prior clearance from competition law fines and other sanctions.

Private enforcement of competition law in Europe can take mainly two shapes. A company that illegally restricts competition may be sued for damages, contractual or non-contractual.[1] Furthermore, in an action in contract the illegality of the contract may be used offensively or defensively. Plaintiff may pre-emptively ask for a declaratory judgment that the contract (or certain clauses) is (are) void or defendant may use the illegality of the contract as a defence. But for various reasons private enforcement has come to play a minor role in European competition law.

The proportion of public versus private enforcement can be illustrated by the situation in Sweden. Of all the cases before Swedish courts between 1 July 1993 and 31 December 1996, there were only seven (!) cases of private litigation

[1] It is not possible to claim contractual damages in private competition litigation in all European states, e.g. under English law. However, the European Court of Justice has ruled in case C–453/99 *Crehan v. Courage* [2001], in: *ECR* I-6297 that such a remedy must be made available when there is a violation of EC competition law.

involving either a plea of illegality of contract or of damages for the violation of competition law.[2] It may be noted that in the same time period the number of notifications of agreements to the Swedish Competition Authority (*Konkurrensverket*) averaged 2-300 annually and in 2001 alone it received more than 500 written complaints.[3]

The problem with this concentration on public enforcement is that enforcement authorities are constantly overburdened to the detriment not only of competition itself but also of those companies awaiting an answer to the question of the legality of their notified agreements.[4]

The situation on the other side of the Atlantic is quite different. There too public enforcement of competition (antitrust) law has a role to play under the auspices of the Department of Justice Antitrust Division and the Federal Trade Commission (FTC).[5] However, the proportion of private versus public enforcement is quite the opposite of that in Europe. In the United States there are ten private antitrust cases for every case initiated by the authorities.[6] It is generally held that the encouragement of private litigation has greatly contributed to the efficiency of antitrust law.[7]

There are several reasons why private enforcement has come to play a greater role in the United States than in Europe. Of greatest importance is probably the possibility to sue for 'treble damages' under the Clayton Act.[8] Another important factor is probably that U.S. lawyers work for contingency fees, i.e., a percentage of the profit if the client wins the case, rather than being paid by the hour regardless of the outcome of the lawsuit. Furthermore, U.S. rules on discovery are widely unprecedented in continental European law making it more difficult to gather the evidence necessary for a private action. In addition, it is probably a matter of 'legal culture' as well.

---

[2] *Statens Offentliga Utredningar (SOU) 1997:20*, p. 192.

[3] See *Konkurrensverkets årsredovisning 1997*, p. 11 and *Konkurrensverkets årsredovisning 2001*, p. 9.

[4] See COM (2000) 582 final 'Regulation implementing Articles 81 and 82 of the Treaty', p. 2.

[5] Those authorities are responsible for the enforcement of federal antitrust law. There is also state antitrust law.

[6] SLOT P.J./ MCDONNELL A. (eds.), *Procedure and Enforcement in EC and U.S. Competition Law: Proceedings of the Leiden Europa Instituut Seminar on User-friendly Competition Law*, London 1993, p. 27; SULLIVAN L.A./ GRIMES W.S., *The Law of Antitrust: An Integrated Handbook*, St. Paul 2000, p. 913.

[7] EMMERICH V., '§ 35' in: IMMENGA U./ MESTMÄCKER E.-J. (eds.), *GWB Kommentar zum Kartellgesetz*, 2nd ed., München 1992, pp. 1522–1549, at p. 1527 (para. 12); JONES C.A., *Private Enforcement of Antitrust Law in the EU, UK and U.S.A*, Oxford 1999, p. 20.

[8] 15 U.S.C. § 15.

There is every reason to believe that private enforcement of competition law will gain in importance in Europe in the future. Certainly this is the intention of the Commission and its proposal for a revision of EC competition law will lead in this direction.[9]

B. The Private International Law Problem

As stated earlier, private litigation of competition law focuses mainly on the illegality of a certain contract and on damages**,** contractual or non-contractual, suffered as a result of a violation of competition law. In a purely domestic setting this raises a number of questions: partial illegality, calculation of damages, causation, joint liability, *locus standi* etc.[10] Difficult as these problems may be, the fact that more and more disputes involve parties from more than one country creates additional legal problems. In international competition law disputes, as in all international disputes, questions arise concerning judicial jurisdiction, the applicable law, and finally the recognition and enforcement of foreign judgments. This article attempts to answer questions relating to the applicable (competition) law.[11]

As illustrated by the following three moot cases, it is not difficult to imagine situations where the application of foreign competition law could constitute the issue at stake.

Case 1

> An Austrian chain of sports stores has recently entered the U.S. market and signs an exclusive distribution agreement for the U.S. market with a Swedish manufacturer of exclusive sportswear. To preserve the air of exclusivity and high tech connected to the Swedish sportswear, the Austrian distributor reluctantly agrees not to sell the product in question below a certain price – resale price maintenance or vertical price fixing.
>
> In the course of events the companies disagree about the usefulness of the exclusivity strategy. After failed attempts to renegotiate the contract, the Austrian distributor switches to another manufacturer of sportswear. When the breach of contract is clear to the Swedish company, it brings an action for contractual damages in an

[9] COM (2000) 582 final (note 4), p. 6.

[10] For an ambitious attempt to sort out the legal problems pertaining to damages in Swedish law, see WAHL N., *Konkurrensskada: skadeståndsansvar vid överträdelse av EG:s konkurrensregler och den svenska konkurrenslagen*, Stockholm 2000, 444 pp.

[11] In an earlier article the author attempted to shed some light on the Brussels Convention (now the Brussels Regulation) and competition law. See DROEGE M., 'Brysselkonventionen och konkurrensrätten', in: *Europarättslig Tidskrift* 1998, pp. 102–121.

Austrian court.[12] The Austrian company raises the defence that the contract is illegal under U.S. antitrust law, which is applicable to this restriction of competition. Furthermore it brings a counter-claim requesting contractual damages based on U.S. antitrust law for loss in profit as a result of a decrease in revenue caused by the Swedish demand for resale price maintenance.[13]

Can the Austrian court apply U.S. antitrust law?

Case 2

A U.S. software company, which holds the copyright to some very advanced CAD (Computer Aided Design) software, licenses the rights for the Latvian market in respect of distribution, customer support and training to an Estonian company that already successfully distributes the product in Estonia. To acquire the Latvian rights to this very attractive software, the Estonian company must also agree to purchase annually a large number of licenses for some of the U.S. company's less attractive products – a tying clause. In the licensing agreement, which is unilaterally drawn up by the U.S. company, Californian law is chosen as the law governing the contract.

The venture into the Latvian market is not as successful as the Estonian company had hoped. To cut costs and hopefully return some profit, the Estonians refuse to buy more licenses for the less attractive software. However, it is not possible to reach an agreement with the U.S. company on this matter.

Since the main assets of the Estonian company are in Estonia, and the Americans are advised by their lawyers about the extreme difficulty of enforcing foreign judgments in Estonia, the U.S. company brings an action for contractual damages in an Estonian court. In their defence the Estonians raise the issue of the invalidity of the tying clause. Such a tying clause would be illegal under the new Latvian competition law, which is applicable to the agreement.

Can the Estonian court apply Latvian competition law?

[12] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* L 12, 16.1.2001, p. 1.

[13] This presupposes that the Austrian company is not deemed to be *in pario delicti* (of equal fault).

Case 3

A large U.S. pharmaceutical company holds a worldwide patent for a base substance necessary for the production of a particular asthma medicine. Thus far the U.S. firm has not produced the medicine but has been content to sell the base substance to other companies throughout the world. After deciding to produce the asthma medicine itself, the U.S. company refuses to sell the substance to European competitors, claiming that it cannot produce enough to supply them as well.

A German competitor, who has suffered substantial losses on several markets due to the refusal to sell, brings an action in a German court against a fully owned German subsidiary of the U.S. company. The German competitor sues for treble damages for violation of U.S. antitrust law, for damages for violation of EC competition law and also for damages for violation of German competition law.

Can the German court award damages based on U.S. competition law?

The three moot cases show that the application of foreign competition law is not merely a theoretical problem but could also play a practical role. Admittedly, the last case is more on the moot side. It would probably be better for plaintiff to go through the trouble of litigating in a U.S. court since most likely it would be difficult to convince a European court of the merits of U.S. levels of damages.[14] A qualified guess is that a contract case in which defendant raises foreign competition law as a defence is the type of case most likely to occur in practice (cf. cases 1 and 2).

Although it is not difficult to create hypothetical examples involving the application of foreign competition law, there are extremely few court cases in which this has been an issue.[15] Admittedly, the courts are only one part of the legal

[14] Cf. Art. 137(2) of the Swiss *Bundesgesetz über das internationale Privatrecht* (IPRG), which provides that a Swiss court cannot award higher damages than would be awarded to the injured party in a similar violation of Swiss competition law.

[15] See SCHWARTZ I./ BASEDOW J., 'Chapter 35: Restrictions on Competition', in: LIPSTEIN K. (ed.), *International Encyclopedia of Comparative Law. Volume III. Private International Law*, Tübingen 1995, at p. 110, and BAADE H.W., 'The Operation of Foreign Public Law', in: 30 *Texas International Law Journal* 1995, pp. 429–498, at p. 474 who refers to *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), ICC Preliminary Award No. 4132, 22.9.1983, 10 *Yearbook of Commercial Arbitration* 1985, p. 49, and to *Bundesgericht* 28.4.1992, in: *BGE* 118 II 193 as cases where foreign competition law has either been applied or been an issue. See also the German cases *Landesgericht* Freiburg 6.12.1966, *Die deutsche Rechtsprechung auf dem Gebiete des*

arena and there is hearsay evidence that the problem has occurred in arbitration.[16] Moreover, the threat of the application of foreign competition law could quite possibly have influenced the outcome of negotiations.

Nevertheless, a plea of foreign competition law is very rare indeed and there are some good reasons for this. Firstly, since it is quite rare to find claims based on domestic competition law in litigation between private parties, it is only natural that claims based on *foreign* competition law are even rarer. Secondly, with the exception of Swiss private international law,[17] there are no clear choice-of-law rules for competition law. Thirdly, competition law lies in a grey zone between public and private law[18] and there is a general reluctance in the private international law of many jurisdictions to apply foreign public law.[19]

The application of foreign competition law would have two major advantages. First of all, it would promote the uniformity of decisions between courts in different jurisdictions – one of the main purposes of private international law.[20] Competition rules clearly belong to the category of rules characterized as (internationally) mandatory.[21] Hence the courts of the state that enacted the rules in question will apply them regardless of which law could otherwise be applicable to the situation at hand.[22] The second advantage is simply that it would further a good

---

internationalen Privatrechts (IPRspr.). 1966–67, No. 34a and Landesgericht Hamburg 29.9.1971, in: *Außenwirtschaftsdienst des Betriebs-Beraters* 1972, p. 132.

[16] Due to the non-public character of arbitration proceedings such hearsay is of course impossible to confirm.

[17] Article 137 of the IPRG designates the applicable law for competition law damages.

[18] BERNITZ U., *Marknadsrätt. En komparativ studie av marknadslagstiftningens utveckling och huvudlinjer*, Stockholm 1969, p. 77.

[19] Again Swiss law is the exception. Article 13 of the IPRG states that the application of a foreign provision is not excluded for the sole reason that it is characterized as public law.

[20] For the importance of this purpose, see VON SAVIGNY F.C., *System des heutigen Römischen Rechts. Achter Band*, Berlin 1849, p. 27; RABEL E., *The Conflict of Laws. A Comparative Study. Volume One. Introduction: Family Law*, 2nd ed., Ann Arbor 1958, p. 94.

[21] See GIULIANO M./ LAGARDE P., 'Report on the Convention on the law applicable to contractual obligations', in: *OJ* C 282, 31.10.1980, pp. 1–50, at p. 28.

[22] For mandatory rules see SCHWANDER I., *Lois d'application immediate, Sonderanknüpfung, IPR-Sachnormen und andere Ausnahmen von der gewöhnlichen Anknüpfung im internationalen Privatrecht*, Zürich 1975, and BONOMI A., 'Mandatory Rules in Private International Law: The Quest for Uniformity of Decisions in a Global Environment', in this *Yearbook* 1999, pp. 215–247, who particularly stresses the importance of the application of foreign mandatory rules in order to achieve international uniformity of decisions at p. 239 *et seq*. In the book that serves as the basis for this article (see note **) there is background information on mandatory rules from Savigny to the 1980 Rome Convention at pp. 43–80, which is omitted here.

cause – that of fighting restrictions on competition. It is submitted that this can now be said to constitute an internationally shared value although this was not always the case and 'blocking statutes' were the news of the day.[23]

However, even if one agrees that applying foreign competition law would be useful, one cannot disregard the importance of the public/private law dichotomy in private international law. We would therefore have to characterize the relevant competition rules and, if they are deemed to be public in nature, assess whether the maxim of the non-application of foreign public law should be upheld. Furthermore, regardless of the public or private nature of the relevant competition rules, an adequate choice-of-law rule must be found.[24]

II. The Doctrine of Non-Application of Foreign Public Law

A. General Remarks

Legal scholarship and case law throughout the world appear to be in general agreement that foreign public law should not be applied. However, as our study will show, there is no consensus as to the definition of the concept of public law. We will therefore see that it is difficult to assess whether or not competition rules on damages and contractual nullity should be regarded as public law rules.

Furthermore, a comparative study of German, Swiss, U.S. and Swedish law will show that the doctrine of non-application of foreign public law is not absolute. What is more, the object of non-application varies. Whereas German, Swiss and Swedish private international law all resist the application of foreign 'public law', in the United States this applies to foreign 'penal and revenue laws'. Finally, an attempt will be made to analyse whether the competition rules applicable in private litigation fall under the doctrines of non-application – that of foreign 'public law' or 'penal and revenue laws'.

[23] This was not always so, SCHWARTZ I., *Deutsches internationales Kartellrecht*, Köln [etc.] 1962, p. 224 *et seq*. then felt that the time was not ripe. To this day, exemptions for export cartels such as that in the U.S. Webb-Pomerene Act 1918 still constitute a problem.

[24] Unless of course we find that the rules in question are public law in nature and that the non-application of foreign public law is a good idea.

B. The Concept of Public Law

1. Theoretical Discourse on the Concept of Public Law

As several leading legal scholars have pointed out,[25] it is not possible to draw a sharp line between public and private law once and for all. This has not discouraged many an attempt to make a clear delimitation between the two.[26] Of all the attempts to characterize public law, three different theories prevail: the theory of public interest, the subject theory and the subordination theory.[27]

According to the *theory of public interest*, rules that put the interests of the state higher than those of the individual are considered to be public. Private law rules place private interests on the same level as public interests and leave the safeguarding of these interests to the individuals themselves.

The main critique of this theory focuses on the wrongful assumption that private and public interests are necessarily in opposition to each other. Firstly, in the end all public interests are based on interests of individuals. Only individuals exist in the real world and are capable of having interests. Secondly, typically private interests, such as the right to property, can also be public interests. Alf ROSS illustrates the absurdity of the theory by citing an example of a company with a large share holding capital and thousands of employees that falls into economic difficulties. The rules concerning its liquidation or reconstruction are generally considered to be private law rules, albeit public interests are highly at stake. If, on the other hand, the state imposes a duty or a levy of ever so small an amount, it is considered to be a matter of public law.[28]

According to the *subject theory*, the characterization of a rule as belonging to public or private law depends on whether one of the parties is exercising public authority.[29] This is the characterization used by the European Court of Justice for

---

[25] See, e.g., ROSS A., 'Sondringen mellem privat og offentlig ret', in: *Tidskrift for Rettsvitenskap* 1936, pp. 109–125.

[26] In the beginning of the 20th century the Swiss scholar HOLLIGER made an inventory of all known theories of delimitation, which totalled 16. From STUCKI H.-U., *Der Grundsatz der Nichtanwendung fremden öffentlichen Rechts im schweizerischen Internationalen Privatrecht*, Zürich 1971, p. 11 who himself at p. 12 counted eight theories as the most important, viz.: *Interessentheorie*, *Funktionstheorie*, *Rechtstiteltheorie*, *Rechtswegtheorie*, *Fiskustheorie*, *Subjektstheorie*, *Verfügungstheorie* and *Subjektionstheorie*.

[27] In German: *Interessentheorie*, *Subjektstheorie* and *Subjektionstheorie*. See ACHTERBERG A., *Allgemeines Verwaltungsrecht*, Heidelberg 1982, p. 8 *et seq*. and MARCUSSON L., *Offentlig förvaltning utanför myndighetsområdet*, Uppsala 1989, p. 49 *et seq*.

[28] ROSS A. (note 25), p. 110 *et seq.*

[29] ACHTERBERG A. (note 27), p. 9. The term *Mehrwerttheorie* is also used for this theory since it is based on the assumption that '[g]ewissen Subjekten, insbesondere der

the purpose of delimiting the scope of application of the Brussels Convention, which applies only to 'civil and commercial matters'.[30]

Both the theory of public interest and the subject theory suffer from the fact that they use circular definitions. In order to separate a public from a private interest we need to know what is public – that is what should be defined. In regard to the subject theory, we need to define public authority by making a distinction between public and private authority – the purpose of the definition in the first place.

The *subordination theory* regards legal relationships as public in which one party is subordinate to the other. This theory too has its shortcomings. Firstly, there are within the core domains of private law a multitude of subordinate relations such as parenthood, guardianship etc. Secondly, not all clearly public law relationships are characterized by subordination, for instance, public law agreements.[31]

2. The Public Law Character of Competition Law

Just as there is no clear answer to what actually constitutes public law, there is no clear answer as to whether competition rules belong to this category. Those who have attempted to answer the question have not in anyway come to a consensus. H. KRONSTEIN has expressed hesitation towards the application of foreign competition rules (in U.S. courts) because of what he perceived as their public law character.[32] Ulf BERNITZ concedes that competition law contains elements of both public and private law but does not attempt to single out individual rules.[33] In the leading German commentary on competition law, Messrs IMMENGA and MESTMÄCKER come to the same result – also without attempting a closer analysis of individual rules.[34] Pierre LALIVE classifies competition law as belonging to '*une large 'zone grise' intermédiaire entre le droit dit privé et le droit public*'.[35]

Person des Staates, wird ein höherer rechtlicher Wert zugesprochen als den anderen Rechtssubjekten', see KELSEN H., *Allgemeine Staatslehre*, Berlin 1925, p. 82 f.

[30] See cases 29/76 *LTU v. Eurocontrol* [1976], in: *ECR* 1541; 814/79 *Netherlands v. Rüffer* [1980], in: *ECR* 3807; C-172/91 *Sonntag v. Waidmann* [1993], in: *ECR* I-1963.

[31] ACHTERBERG A. (note 27), p. 9.

[32] KRONSTEIN H., 'Conflicts Resulting from the Extraterritorial Effects of the Antitrust Legislation of Different Countries' in: NADELMANN K.-H./ VON MEHREN A.T./ HAZARD J.N. (eds.), *XXth Century Comparative and Conflicts Law: Legal Essays in Honor of Hessel E. Yntema*, Leyden 1961, pp. 432–450 at p. 449 *et seq.*

[33] BERNITZ U. (note 18), p. 77.

[34] IMMENGA U./ MESTMÄCKER E.-J., 'Einleitung', in: IMMENGA U./ MESTMÄCKER E.-J. (note 7), pp. 41–61, at p. 48 *et seq.* (para. 21).

[35] LALIVE P., 'Tendances et méthodes en droit international privé', in: 155 *Recueil des Cours* 1977-II, pp. 1–424, at p. 313.

Ole LANDO is generally inclined to regard competition rules as rules of public law but admits that they are on the borderline between public and private law.[36] Finally, Ivo SCHWARTZ and Jürgen BASEDOW go back to the historical background of competition rules providing the right to damages and various forms of nullity or unenforceability of contracts. Such rules existed in many states long before modern competition law saw the light of day. They ensure individual economic freedom and at the same time further public interest in an economy built on free competition on the market. They have not lost their private law character just because modern legislation, in addition to the existing private law remedies, has also created new public law sanctions.[37]

If we restrict the analysis to competition rules on the nullity of contracts or damages, we find that, according to at least two of the theories discussed above, they should be characterized as rules of private law. If we apply the subject theory, we find that both parties to a litigation involving the application of these rules will be private parties, neither of which exercises public authority. If we apply the subordination theory we will come to the same result. None of the parties to a dispute involving the private enforcement of competition law is subordinate to the other. We are stating the obvious because, after all, it is called *private* enforcement.

On the other hand, difficulty arises when we try to apply the theory of public interest to the competition rules in question. When applied in private litigation, these rules serve a dual purpose – they protect the interests of individuals, as well as the public interest of effective competition on the market. The fact that such rules are often found in the same legislative act as rules that are clearly public law in nature has most probably contributed to the view that they too are public law rules. In many European countries competition law also has public law roots.

In conclusion it can be said that whether competition law is regarded as public or private law depends very much on how public law is defined. Both the subject and subordination theories lead to the conclusion that the relevant rules on damages and contractual nullity are private law rules. The advantage of these theories lies in their relative simplicity.

Although much speaks in favour of considering the competition rules in question to be private law rules, there is of course some merit in the opposite view. The rules clearly serve a dual interest. The following section on the scope of the doctrine of the non-application of foreign public law will show that there is room to give effect to foreign competition rules on damages and nullity of contracts even if they would be deemed to be rules of public law.

---

[36] LANDO O., 'The EEC Convention on the Law Applicable to Contractual Obligations', in: 24 *Common Market Law Review* 1987, pp. 159–214, at pp. 209 and 211.

[37] SCHWARTZ I./ BASEDOW J. (note 15), p. 110.

C. Scope of the Doctrine of Non-Application of Foreign Public Law

1. German Law

The doctrine of non-application of public law was established by the *Bundesgerichtshof* as late as 1959.[38] Prior to this, the position of German private international law was that foreign public law formed part of the *lex causae*.[39] This was an expression of the so-called *Schuldstatuttheorie*, according to which one single law governs all the aspects of a dispute – including public law aspects. However, there is really only one case where this so-called principal rule was applied fully[40] and so many exceptions that its validity could be questioned. Deviations from the principal rule were made either openly through the use of *ordre public*[41] or by various 'tricks' leading to the designation of German law as the applicable law – e.g. by referring to an explicit, tacit or presumed will of the parties.[42]

Against this background, the principal rule had in reality turned into an exception; thus it comes as little surprise that the *Schuldstatuttheorie* was abandoned. In a 1959 judgment, the *Bundesgerichtshof* established that the scope of the applicable law determined by private international law rules did not include the rules of public law of that particular country. However, the *Bundesgerichtshof* also allowed a few exceptions to this doctrine of non-application, viz. (1) when a public law rule mainly protects or serves the interests of individuals or (2) the purpose of the rule is to achieve a fair balancing of interests between individuals.[43] In such cases, the foreign public law rule could also be given some influence on the

[38] Judgment of the Bundesgerichtshof of 17.12.1959, in: *Entscheidungen des Bundesgerichtshofes in Zivilsachen* (*BGHZ*) 1959, Vol. 31, p. 367. Judgments of the BGH are hereinafter quoted in the German way. This case is *BGHZ* 31, 367.

[39] KREUZER K., *Ausländisches Wirtschaftsrecht vor deutschen Gerichten. Zum Einfluß fremdstaatlicher Eingriffsnormen auf private Rechtsgeschäfte*, Heidelberg 1986, pp. 19 and 35; LEHMANN R., *Zwingendes Recht dritter Staaten im internationalen Vertragsrecht. Zur Bedeutung und Anwendung des Art. 7 Abs. 1 EUIPRÜ*, Frankfurt a.M. [etc.] 1986, p. 26 f.; BECKER C., *Theorie und Praxis der Sonderanknüpfung im internationalen Privatrecht*, Tübingen 1991, p. 90; EHLERS-MUNZ K., *Die Beachtung ausländischen Devisenrechts: Bretton Woods und autonomes nationales Recht*, Hamburg 1991, p. 149.

[40] Judgment of the Reichsgericht of 1.7.1930, in: *IPRspr.* 1939, No. 15.

[41] See, e.g., the judgment of the Reichsgericht of 21.10.1921, in: *Niemeyers Zeitschrift für internationales Recht* 1924, p. 452.

[42] See, e.g., Reichsgericht 7.12.1921, *Entscheidungen des Reichsgerichtes in Zivilsachen* (*RGZ*) 103, 259; Reichsgericht 3.10.1923, in: *RGZ* 108, 241, *Juristische Wochenschrift* 1924, p. 667, *Clunet* 1934, p. 154; Kammergericht 1.4.1926, in: *IPRspr.* 1926/27, No. 14; Reichsgericht 27.6.1928, in: *RGZ* 121, 337, *IPRspr.* 1928, No. 180; Reichsgericht 12.3.1928, *Juristische Wochenschrift* 1928, p. 1196.

[43] It could be argued that such a rule is a private law rule.

relationship between the individuals.[44] It remains to be seen how applying a foreign rule differs from giving effect to the same; we will come back to this important distinction later (see *infra* at III.C.3.b**)**.

2. Swiss Law

Prior to the IPRG, which entered into force in 1989, Swiss private international law adhered to the doctrine of non-application of foreign public law. Unlike their German neighbours, the Swiss never subscribed to the *Schuldstatuttheorie*.[45] In 1954 the *Bundesgericht* added some nuance to its doctrine of non-application by stating that public law that mainly protected private interests should not be deprived of all effect solely because of its characterization as public law.[46] This is more or less the same view adopted by the German *Bundesgerichtshof* five years later.[47]

As indicated above, the basic rule changed 180 degrees with the coming into force of the new statute on private international law (IPRG) in 1989. Article 13, second sentence of the IPRG clearly states that '[a] foreign provision is not inapplicable for the sole reason that it is characterized as public law'.[48] However, the purpose of Article 13 is to regulate the effect of foreign public law on private law relationships. Claims made by foreign states *de jure imperii* do not fall under the provision.[49] Furthermore, if a foreign rule *only* serves the interests of a foreign country – e.g. currency legislation voiding all contracts contrary to it – it will not be applied.[50] It is therefore submitted that, even if the main rule has changed, the difference vis-à-vis the former law might not be so great.

---

[44] See note 38. The position has been upheld by the Bundesgericht on 18.12.1965, in: *BGHZ* 43, 162, and 16.4.1975, in: *BGHZ* 64, 183.

[45] See the judgment of the *Bundesgericht* of 11 July 1913 in: *Entscheidungen des Schweizerischen Bundesgerichts* (*BGE*) Vol. 39 II, p. 640. Swiss judgments are hereinafter quoted in the Swiss manner, hence this case is: BG 11.7.1913, in: *BGE* 39 II 640 (the court and date are often omitted). See also BG 17.4.1916, in: *BGE* 42 II 179; BG 19.4.1918, in: *BGE* 44 II 163; BG 1.4.1924, in: *BGE* 50 II 51; BG 18.9.1934, in: *BGE* 60 II 294; BG 1.2.1938, in: *BGE* 64 II 88, and BG 28.10.1948, in: *BGE* 74 II 224.

[46] BG 2.2.1954, in: *BGE* 80 II 53 at p. 62.

[47] See note 38.

[48] Unofficial translation by KARRER P.A./ ARNOLD K.W., *Switzerland's Private International Law Statute 1987. The Swiss Code on Conflict of Laws and Related Legislation. Introduced, Translated and Annotated*, Deventer 1989, p. 41.

[49] HEINI A., 'Artikel 13' in: HEINI A./ KELLER M./ SIEHR K./ VISCHER F./ VOLKEN P., *IPRG-Kommentar. Kommentar zum Bundesgesetz über das Internationale Privatrecht (IPRG) vom 1. Januar 1989*, Zürich 1993, pp. 102–111 at p. 107 (para. 12 *et seq.*).

[50] BG 23.6.1992, in: *BGE* 118 II 353.

3. Swedish Law

The Swedish attitude towards foreign public law is very similar to that in Germany and Switzerland, at least Swiss law prior to the IPRG. The argument that the Swedish state has no interest in enforcing public law claims of another state has been used to justify the non-application of foreign public law rules.[51] *Högsta Domstolen* made it clear in the *Takvorian* case that an action serving mainly to protect a foreign public law interest shall be dismissed.[52] To determine the scope of the judgment in the *Takvorian* case, it has to be analysed in the light of earlier case law. *Högsta Domstolen* had already made it clear that foreign tax claims would be dismissed[53] but accepted public law claims in the form of public fees for services rendered.[54]

Of particular importance is the judgment in the *Gold Clause* case,[55] which, like so many other judgments in other countries dealt with the effects of the U.S. Joint Resolution of 1933.[56] According to this statute, all gold clauses were prohibited and all payments would be considered legally satisfied if paid in depreciated paper dollars. In the case *Högsta Domstolen* applied the law of the state of New York, including the Joint Resolution. The majority of the court never discussed the public law character of the legislation but the issue had been thoroughly discussed by the parties;[57] the minority of the court explicitly discussed the public law nature of the U.S. legislation but did not find that it prevented its application in the case. Later in the *Salomon* case,[58] *Högsta Domstolen* in an *obiter dictum* indicated that the public law character of German currency legislation did in itself not constitute grounds for its non-application.[59]

---

[51] GIHL T., *Studier i internationell rätt*, Stockholm 1955, p. 367 f.; JÄNTERÄ-JAREBORG M., *Svensk domstol och utländsk rätt. En internationellt privat- och processrättslig studie*, Uppsala 1997, p. 121; BOGDAN M., *Svensk internationell privat- och processrätt*, 5:e uppl., Stockholm 1999, p. 80.

[52] *Nytt Juridiskt Arkiv (NJA)* 1961, p. 145. Judgments of the *Högsta Domstolen* are hereinafter cited in the Swedish way, hence this case is: NJA 1961 s. 145.

[53] NJA 1914 s. 409 (*Fittinghof and Procopé*) and NJA 1924 s. 635 (*Bruhn*).

[54] NJA 1909 s. 638 (*Hilda Lundberg*) and NJA 1933 s. 486 (*Pineus I*).

[55] NJA 1937 s. 1. The complete files of the case in *Svea Hovrätt* (Svea Court of Appeals) and *Högsta Domstolen* were published by *Riksgäldskontoret* (The Swedish National Debt Office) in *Guldklausulmålet [Volumes] I-III*, Stockholm 1935-37.

[56] 31 U.S.C. § 463.

[57] See *Guldklausulmålet I*, p. 248 f. and *passim*.

[58] NJA 1942 s. 389.

[59] See NIAL H., *Internationell förmögenhetsrätt.* 2:a uppl., Stockholm 1953, p. 147 for further analysis of the case.

The difference between the *Takvorian*[60] and *Gold Clause*[61] cases lies in the nature of the foreign legislation. In the *Takvorian* case it was Bulgarian currency legislation that served the sole purpose of guaranteeing acquisition of foreign currency to the Bulgarian state. In the *Gold Clause* case, the U.S. Joint Resolution did indeed serve the state interest by making a devaluation of the dollar possible, thereby avoiding bankruptcies and unemployment. However, it also served the private interest of protecting individual debtors from an unreasonable increase in the value of their debts.[62] These two cases and the *obiter dicta* in the *Salomon* case,[63] where the application of foreign public law was not excluded, show that the Swedish position towards foreign public law is similar to that in German law and Swiss law prior to the IPRG. The main rule is that foreign public law is not applied; however, under certain conditions public law rules serving a private interest may be given effect.

4. U.S. Law

It is not really possible to write a section on private international law in the United States since private international law is mainly state law. Hence there are 51 systems of private international law – 50 state systems and the federal system. However, there is considerable convergence between the laws of the states on general issues such as the application of foreign public law, thus warranting the attempt to provide a synthesis.

The dichotomy between public and private law does not play the same vital role in common law as in civil law.[64] Instead of a general doctrine of non-application of foreign public law, the United States has a doctrine of non-application of

[60] See note 52.

[61] See note 55.

[62] It may be noted that Sweden had its own gold clause legislation: *lag (1932:212) om betalning på grund av vissa obligationer*. According to the *travaux préparatoires*, the Swedish law served both public and private interests. See NJA II 1932 (NJA II is a collection of *travaux préparatoires*, whereas NJA I, the 'I' is usually omitted, is a collection of cases of the *Högsta Domstolen*), at pp. 756 and 759.

[63] See note 58.

[64] WEIR T., 'The Common Law System. Chapter 2. Structure and the Divisions of the Law' in: DAVID R. (ed.), *International Encyclopedia of Comparative Law. Volume II. The Legal Systems of the World, Their Comparison and Unification*, Tübingen 1974, pp. 77–114 at p. 94 *et seq.*; BERMANN G.A., 'Public Law in the Conflict of Laws', in: 34 *Am. J. Comp. L.* 1986 (supplement), pp. 157–192 at p. 157.

foreign 'penal and revenue laws',[65] which is narrower in scope than that of public law in general.

The relationship of 'penal law' to competition law in private litigation is important because it can be argued that damages are a sanction with a penal character. Both the first and second Restatements on the Conflict of Laws contain rules dealing with 'action for a penalty'.[66] The First Restatement states in § 611 (Action for a Penalty) that '[n]o action can be maintained to recover a penalty, the right to which is given by the law of another state'; the Second Restatement in § 89 (Action for a Penalty) that '[n]o action will be entertained on a foreign penal cause or action'.

The First Restatement gives the concept of 'penal law' a relatively wide meaning including not only fines but also 'penal or exemplary damages awarded in addition to full compensation'.[67] Such a definition would exclude the application of foreign treble damages rules such as the one in the Clayton Act.[68]

For the purpose of delimiting § 89, the Second Restatement falls back on the definition given by the Supreme Court in *Huntington v. Atrill*,[69] in which the Court defined 'penal law' as a law whose 'purpose is to punish an offense against the public justice of the State' as opposed to a law whose purpose is 'to afford a private remedy to a person injured by the wrongful act'.[70] The Restatement states that § 89 is to be given a narrow interpretation and that exemplary damages and damages which vary according to the degree of *culpa* of the tortfeasor should not

---

[65] The origin of the doctrine can be traced to the *Antelope* case, in which Chief Justice Marshall established that '[t]he courts of no country execute the penal laws of another'. See 23 U.S. (10 Wheaton) 66 (1825) at p. 123.

[66] AMERICAN LAW INSTITUTE, *Restatement of the Law of Conflict of Laws*, St. Paul 1934, § 611 and ID., *Restatement of the Law (Second), Conflict of Laws*, St. Paul 1971, § 89. More than half of the states adhere to the choice of law methodology of the First and Second Restatements, see SYMEONIDES S.C., 'Choice of Law in the American Courts in 1997', in: 46 *Am. J. Comp. L.* 1998, pp. 233–285 at p. 266.

[67] AMERICAN LAW INSTITUTE (note 66) comments b and c.

[68] See note 8. Of interest is also First Restatement (note 66) § 610 (Action on a Foreign Public Right), which excludes an action based on rights created in a state for the purpose of furthering the interests of that state. Comment d to the section in question illustrates this *inter alia* through maintenance rules created for the purpose of alleviating states of the burden of taking care of the poor.

[69] 146 U.S. 657 (1892).

[70] *Ibid*. at p. 673 *et seq.*

be considered as 'penal'.[71] It is also important to note that in this matter the Second Restatement does not differentiate between interstate and international cases.[72]

A clear reference to foreign competition law is given in the Third Restatement of the Foreign Relations Law of the United States, in which the reporter pronounces that '[c]ourts in the United States do not distinguish, for purposes of enforcement, between judgments awarding compensatory judgments only and judgments awarding multiple or punitive (exemplary) damages, such as treble damages for violation of antitrust laws'.[73] Admittedly both *Huntington v. Atrill*[74] and the Third Restatement[75] deal with the recognition and enforcement of judgments and not with the application of foreign law. However, no difference in the definition of 'penal law' appears to be made.

5. The Doctrine Applied to Competition Law

It is submitted that the private or public law character of the competition rules relating to private litigation is a matter of little importance; therefore the question of the public or private nature of rules of competition law concerning damages or contractual nullity will not be pursued further. The doctrine of non-application of foreign public law (or penal and revenue laws) in all the examined jurisdictions would allow for sufficient flexibility to permit the application of foreign competition law. It would not add more certainty to the analysis if we were to devote time and effort to an investigation of the public or private law nature of the competition rules in question. The concepts are not sufficiently clearly defined to provide a clearer answer than already given by the analysis of the doctrine of non-application.

Most obvious is Swiss law, which formally no longer adheres to the doctrine of non-application of foreign public law.[76] Article 137 IPRG also contains an explicit choice-of-law rule for claims for damages arising as a result of a restriction

---

[71] AMERICAN LAW INSTITUTE (note 66), § 89 reporter's note c. In *James-Dickinson Farm Mortgage Co. v. Harry* 273 U.S. 119 (1927) a Texan law providing for 'exemplary damages' up to double the amount of the value of the damage suffered was not deemed a 'penal law'.

[72] AMERICAN LAW INSTITUTE (note 66), § 10 (Interstate and International Conflict of Laws), note 66.

[73] AMERICAN LAW INSTITUTE, *Restatement of the Law (Third), The Foreign Relations Law of the United States*, St. Paul 1987, § 483 reporter's note 4.

[74] See note 69.

[75] See note 73.

[76] Article 13 IPRG.

of competition. Rules of foreign competition law governing contractual nullity or unenforceability can obviously be given effect as well.[77]

US law also appears to be open to the application of foreign competition law. Since the question would be a matter of state law, there are of course 50 different answers. However, the influential Restatements issued by the American Law Institute together with case law indicate that there would be a readiness to apply rules of foreign competition law. The level of damages available in U.S. competition law makes it highly unlikely that a tort action involving the application of *foreign* competition law would ever be brought before a U.S. court, but cases involving the nullity or unenforceability of contracts are foreseeable. Nevertheless, the fact that there is no case law on the matter obviously reduces the value of any assertion.

More difficult to assess are German and Swedish law. Both adhere to the doctrine of non-application of foreign public law but recognize some limitations. German law appears to be the more restrictive of the two, requiring that the particular rule of foreign public law either serve mainly the interests of individuals or purport to balance interests between individuals. Swedish law would appear to be more open, excluding only foreign public laws that serve mainly to protect a public interest. Yet, the difference should not be exaggerated.

Here it becomes evident that the nature of a rule of foreign competition law depends on the eyes of the beholder. Competition rules giving rise to damages and nullity of contracts serve dual purposes. They serve the interest of the state in maintaining free competition on the market, as well as the interest of private individuals in reparation of damages suffered or withdrawal from an illegal contract. It is submitted that these rules (if not regarded as private law rules in the first place) should be given effect and that this would be admissible under the law as it stands in Germany and particularly in Sweden.

It is undisputed that the rules of competition law in question serve a private interest as well. Moreover, they are normally the only rules that the private party concerned can invoke to protect its interests – there is no alternative.[78] Denying a party the right to apply foreign competition law does not serve to keep the egotistical interest of another state at bay – it only harms a private party for whom there might be no other forum. Furthermore, as stated above (*supra* at I.B), it promotes international uniformity of decisions. In 1962 Ivo Schwartz did not think that the time was ripe for the application of foreign competition law. He felt that there was no *communis opinion* at the time.[79] However, since 1962 much water has flowed

[77] VISCHER F., 'Artikel 137', in: HEINI A./ KELLER M./ SIEHR K./ VISCHER F./ VOLKEN P. (note 49), p. 1192 *et seq.* (paras. 1 and 6).

[78] However, in some jurisdictions it will also be possible in some cases to invoke an older rule of the common law or the civil code. Examples would be a tort action for conspiracy of trade or possibly § 826 BGB of intentional damage contrary to *bonos mores* or 38 § avtalslagen (the Swedish Contracts Act) on non-competition clauses.

[79] SCHWARTZ I. (note 23), p. 224 *et seq.*

under the bridges and almost all developed countries now have similar competition laws and share a common interest in having them applied by courts of other countries as well. This is what it all boils down to.[80]

III. A Choice-of-Law Rule for Competition Law

A. The Alternative Solutions

One question that needs to be answered when looking for an appropriate choice-of-law rule for foreign competition law is the relevance of the *lex causae* – the law applicable to the contract or tort. Three possible solutions for determining the applicable foreign competition law rules can be envisaged:

1. they are included in the *lex causae* and cannot be taken from the law of another country – in German terminology *Schuldstatuttheorie* or *Einheitsanknüpfung;*
2. competition law matters are subject to a particular choice-of-law – *dépeçage* or *Sonderanknüpfung;* or
3. competition law rules are included in the *lex causae* but may also be subject to a particular choice-of-law – a cumulative solution.

From a methodological standpoint, the question arises whether European private international law should abandon its traditional approach of seeking a law applicable to the legal relationship as a whole. For example, in contracts, the law designated by choice-of-law rules (the *lex contractus*) governs questions of the existence and material validity of the contract, interpretation, performance and the consequences of breach.[81] In other words, once the applicable law has been selected by the parties or the court, (almost) all issues arising from the contract will be governed by the chosen law. There are of course some exceptions to this principle, but cases where *dépeçage* is permitted are quite limited.[82] This approach differs considerably from the one prevailing in the United States, where courts determine the applicable law for each particular issue. As a result, different issues in one single legal relationship, a contract, for instance, can be governed by the laws of

[80] There will of course be true conflicts when the competition laws of two states clash and the policy of two states is to 'defend what it is the policy of [the] other state to attack'. See *In re Westinghouse Uranium Contract Litigation* [1978] A.C. 547 at p. 617.

[81] See Articles 8 and 10 of the Rome Convention.

[82] Most importantly with respect to capacity and formal validity, see Articles 9 and 11 of the Rome Convention.

different states. It has also been submitted that mandatory rules require an issue-by-issue approach similar to the American method since they do not purport to regulate an entire legal relationship.[83]

An example of the *first alternative* would be the position of the English court in the *British Nylon Spinners* case, in which an exclusive patent assignment contract between two British companies was enforced, even though the defendant had been ordered by a U.S. court, according to U.S. antitrust law, to grant non-exclusive licenses. U.S. antitrust law was not given any effect more than being a datum that the court took into consideration when weighing the equities between the parties under English law.[84]

There has been a great deal of discussion in legal scholarship about whether mandatory rules in general should be included in the *lex causae*. The opinions of authors vary depending on whether the mandatory rules are private or public in nature.[85] In the context of the 1980 Rome Convention,[86] Ole Lando maintains that public law rules that affect the validity of the contract in question should be included in the scope of the applicable law. This, he submits, follows from Article 8 of the Rome Convention, according to which the validity of a contract is to be judged by the law that would be applicable to the contract (if there is any).[87]

Examples of the *second alternative* would be Articles 7(1) of the 1980 Rome Convention[88] and Articles 19 and 137 of the Swiss IPRG. Article 19 IPRG reads:

> '(1) A provision of a law other than the one designated by this Statute that is meant to be applied mandatorily may be taken into account if interests of a party that are according to Swiss views legitimate and clearly overriding so require and the case is closely connected to that law.
>
> (2) Whether such a provision should be taken into account depends on its policy and its consequences for a judgment that is fair according to Swiss views.'[89]

---

[83] See BAADE H.W. (note 15), p. 468 *et seq*., and BONOMI A. (note 22), p. 226 *et seq*.

[84] *British Nylon Spinners v. Imperial Chemical Industries*, [1955] 1 Ch. 37, at pp. 52–54.

[85] E.g. PÅLSSON L., *Romkonventionen: tillämplig lag för avtalsförpliktelser*, Stockholm 1998, p. 225, finds it 'self-evident' that private law mandatory rules should be included in the scope of the applicable law.

[86] 80/934/EEC Convention on the law applicable to contractual obligations, *OJ* L 266, 9.10.1980, p. 1.

[87] LANDO (note 36), p. 213.

[88] The provision has been quite controversial; therefore Article 22(1)(a) of the Convention makes it possible to enter a reservation against Article 7(1).

[89] Unofficial translation by KARRER P.A./ ARNOLD K.W., (note 48), p. 49.

Like Article 7(1) of the Rome Convention, the Article uses a 'functional approach' according to which the point of departure is the territorial applicability of the foreign rule in question. This method is very similar to the governmental interests analysis presented by Brainerd CURRIE in a series of articles in the 1960's.[90] The main difference is that CURRIE's method pertains to all legal rules, whereas Article 19 IPRG and Article 7 of the Rome Convention apply only to mandatory rules.[91]

Article 137 IPRG, which deals with the law applicable to competition law torts, reads:

> '(1) Claims of restraint of competition are governed by the law of the country in whose market the restraint directly affects the damaged party.
>
> (2) If claims of restraint of competition are governed by foreign law, no damages can be awarded in Switzerland beyond those that would be awarded under Swiss law in case of an unlawful restraint of competition.'[92]

The choice-of-law rule in Article 137 IPRG uses a *bilateral* method. According to the connecting factor – the country in whose market the restraint directly affects the damaged party – the applicable law may be either Swiss or foreign.[93] Later we will asses the pros and cons of the bilateral method vis-à-vis the 'functional approach' (se *infra* at III.C.2).

---

[90] Collected in *Selected Essays on the Conflict of Laws*, Durham 1963 and re-reprinted in facsimile by William S. Hein & Co. in Buffalo 1990.

[91] CURRIE's 'dubious assumption that private laws are imbued with a *volonté d'application*' has also been criticized *inter alia* by JUENGER F., 'General Course on Private International Law', in: 193 *Recueil des Cours* 1985-IV, pp. 119–388, at p. 239. See also BRILMEYER L., 'Interest Analysis and the Myth of Legislative Intent', in: 78 *Michigan Law Review* 1980, pp. 392–431, at p. 393; ID., *Conflict of Laws*, 2nd ed., Boston [etc.] 1995, p. 54 *et seq.*

[92] Unofficial translation by KARRER P.A./ ARNOLD K.W., (note 48), p. 128.

[93] SCHWARTZ I./ BASEDOW J. (note 15), p. 118, consider the rule to be 'a bilateralization of the effects doctrine'; RENOLD M.-A., *Les conflits de lois en droit antitrust: contribution à l'étude de l'application internationale du droit économique*, Zürich 1991, p. 195 *et seq.* contends that '[l]'article 137 LDIP est en effet le seul exemple d'une règle de rattachement bilatérale en matière d'antitrust'; SCHNYDER A.K., *Wirtschaftskollisionsrecht: Sonderanknüpfung und extraterritoriale Anwendung wirtschaftsrechtlicher Normen unter besonderer Berücksichtigung von Marktrecht*, Zürich 1990, p. 235 regards the rule as an 'allseitige Beachtung (Bilateralisierung) des Auswirkungsprinzips', and finally ESSEIVA D., 'Die Anwendung des EG-Kartellrechts durch den schweizerischen Richter aufgrund des Artikels 137 IPRG', in: *Zeitschrift für vergleichende Rechtswissenschaft* 1995, p. 80 speaks of a choice-of-law rule that is 'allseitig ausgestaltet'.

If we restrict ourselves to the discussion on the 1980 Rome Convention, Alan PHILIP, whose opinion in this matter has been frequently quoted, argues that mandatory rules of private law should be included in the scope of the applicable law, but rules of public law excluded.[94] According to Mr. PHILIP, the legislative history of the Convention shows that Article 7 is envisaged as the Article leading to the application of public law rules.[95] Therefore, regardless of whether they originate from the same country as the applicable law, such rules may only be applied under Article 7(1). In other words, his solution admits *dépeçage* for foreign mandatory rules of public law.

Jürgen BASEDOW argues that 'mandatory rules of economic law' that are primarily public in nature should not be included in the scope of the applicable law. Since Article 10, which is devoted to the scope of the applicable law, does not mention mandatory rules, the Convention does not specify under what conditions mandatory rules form part of the applicable law – another *dépeçage* solution.[96]

The *third alternative* would come into play if the relevant competition rules were not only included in the *lex causae* but could also be given effect via a rule of special connection ('*Sonderanknüpfung*'), as in Article 7 of the Rome Convention or Article 19 IPRG. This would then amount to a cumulative solution. As seen above, this solution has been advocated for mandatory rules of private law. Since there is much to be said in favour of regarding rules of competition law in respect of damages and contractual nullity as belonging to private law, this is a solution that merits some discussion.

B. The *Lex Causae* Solution

1. Choice-of-Law in Contract

In the context of cross-border private litigation of competition law, the problem arises that most often the *lex causae* is not the law of the same country whose competition rules are territorially applicable to the case. Rules of competition law normally become applicable when a restriction of competition has effect on the market of the enacting state.[97] However, particularly in contract but also in tort, the

[94] See also PÅLSSON L. (note 85), p. 225.

[95] Mr. PHILIP was a member of the Danish delegation in the negotiations leading to the Rome Convention. See GIULIANO M./ LAGARDE P. (note 21), p. 48.

[96] BASEDOW J., 'Conflicts of Economic Regulation', in: 42 *Am. J. Int. L.* 1994, pp. 423–447, at p. 442.

[97] We will not go into the possible differences between the effects doctrine and the doctrine of implementation here. See SCHWARTZ I./ BASEDOW J. (note 15), pp. 10–91 for a comparative overview of the territorial fields of application of competition laws in the world.

applicable law will be that of another state. A few examples should suffice to make the point.

An *exclusive distribution agreement* is an agreement that gives a particular retailer exclusive rights to a product or products within a certain geographic area. In some cases such contracts may be in violation of competition law. One example from EC competition law is when the retailer is prohibited from selling to consumers outside the exclusive area who have contacted the retailer on their own initiative.[98] Such an agreement will have its main effect in the country where the retailer has exclusive distribution rights. However, in contract, under Article 4 of the Rome Convention, the law governing the agreement would most likely be that of the manufacturer or licensor.[99]

An *exclusive purchasing agreement* is an agreement in which one party agrees to buy a particular product only from a particular supplier. Common commodities often subject to purchasing restrictions are petrol and beer. Such agreements may be considered to restrict competition, for instance, if the agreement is for an indefinite period of time.[100] The anti-competitive effect of such an agreement would typically be in the state where the purchaser is located and thus the competition law of that state would apply. However, if the contract is deemed a normal contract for the sale of goods, pursuant to Article 4 of the Rome Convention, it would be governed by the law of the seller.

In a case of *resale price maintenance* or *vertical price-fixing*, the retailer is prevented from selling the product to the consumer below a certain price. Typically, the applicable law would be the competition law in the country of the retailer or in the countries whose markets are affected by the agreement prohibiting the retailer to sell below a certain price. However, under Article 4 of the Rome Convention, the contract would be governed by the law of the manufacturer.

We find that in cases of vertical agreements, i.e., agreements between parties at different levels in the production or distribution chain, our examples all lead to incongruence between the applicable competition law and the law applicable to the contract. If we want to give effect to foreign competition law, it would have to be via a particular choice-of-law. However, if we look at horizontal agreements, agreements between actors on the same level in the way of a product to the consumer, no such easy answer can be given.

---

[98] See, e.g., Commission decision 98/273/EC, *OJ* L 124, 25.4.1998, p. 60 (Case IV/35.733 – *VW*)

[99] For license agreements see PÅLSSON L. (note 85) and franchise agreements VISCHER F., 'The Concept of the Characteristic Performance Reviewed', in: BORRÁS A. (ed.), *E pluribus unum: Liber amicorum Georges A.L. Droz. On the Progressive Unification of Private International Law/ Sur l'unification progressive du droit international privé*, The Hague 1996, pp. 499–519, at p. 513.

[100] Article 5(a) of Commission Regulation (EC) No. 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, *OJ* L 336, 29.12.1999, p. 21.

A *cartel agreement*, for example, a market sharing agreement, will have its effect on the market or markets that are affected by the cartel and thus the competition law of that or those countries will be applicable. However, it is more difficult to determine the law governing such an agreement. The presumption in Article 4(2) of the Rome Convention, i.e., the contract is most closely connected to the country of habitual residence of the party who is to effect the performance characteristic of the contract, cannot be used since none of the parties is effecting a performance that can be deemed more characteristic than that of the other party. In that sense, a cartel agreement is like other barter agreements.

The country to which the contract is most closely connected will then have to be selected by weighing different connecting factors much akin to the 'centre of gravity' approach[101] or the method of finding 'the proper law of the contract' under English private international law.[102] Such a weighing of connecting factors *could* of course lead to the application of the law of a country on whose market the cartel has had effect but that would only be a coincidence. A possibility would be to consider the agreement to be most closely connected to the country whose market is affected by it. Although unorthodox, this would certainly have its merits. One problem with such an approach is that the cartel agreement might have effect on several markets, whereas normally only the law of one country should govern the contract.

The same difficulty arises in the case of *joint venture agreements*. If a joint venture results in the co-ordination of competitive behaviour between independent undertakings, it may be in violation of competition law.[103] The applicable competition law will be the law of the country (or regional organisation) on whose market the joint venture will function. However, it is more difficult to determine the law governing the joint venture agreement.[104] Here again the presumption in Article 4(2) of the Rome Convention does not lead anywhere. Nevertheless, congruence with the applicable competition law is quite imaginable if the joint venture agreement is considered to have its closest connection to the country in which the joint venture will take up activity or the joint venture company is registered.

---

[101] See *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954) and *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394 (1969).

[102] See *R. v. International Trustee for the Protection of Bondholders* [1937] A.C. 500; *Mount Albert Borough Council v. Australasian Temperance & General Mutual Life Association Society Ltd.* [1938] A.C. 224.

[103] Article 3(2) of Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, *OJ* L 395, 30.12.1989, p. 1 as amended by Council Regulation (EC) No. 1310/97 of 30 June 1997 amending Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings, *OJ* L 180, 9.7.1997, p. 1.

[104] Here we are looking for the law applicable to the agreement between the 'parent' undertakings, not the law applicable to the internal matters of the joint venture (if this is a separate legal entity).

The examples above are only a small selection of possibly anti-competitive agreements, but they serve the purpose of illustrating the lack of congruence between the applicable competition law and the law applicable to the contract. The two coincide only by chance. Moreover, in the case of vertical agreements, the choice-of-law rules in the Rome Convention generally increase the incongruence.

There is, of course, also ample opportunity for the parties to circumvent competition rules by selecting the law of a country whose market will be unaffected by the anti-competitive agreement. Apart from the provision of Article 7(1), against which several Member States have entered a reservation, the Rome Convention does not prevent this other than in purely domestic situations, in which Article 3(3) makes it impossible for the parties to escape the mandatory rules of that country via a choice of law.

2. Choice-of-Law in Tort

The situation is different in the case of tort. Unlike contract law, currently there are no common provisions in the European Union on the choice of law in tort.[105] However, all the Member States of the European Union in one way or other adhere to the principle of *lex loci delicti*, i.e., they apply the law of the place where the damage occurred.[106] Nevertheless, in many states there may be exceptions to the rule when there is a strong connection to another state, for instance, when both parties are habitually resident in the same country. When both the event causing the damage and the place where the damage occurs are located in the same country – 'single-country' torts – the *lex loci delicti* rule does not give rise to great difficulties of interpretation. The law of that country is applicable to the tort. Furthermore, if any country's competition law is applicable, it will be the competition law of the same country.

Difficulties with the *lex loci delicti* rule occur when the event giving rise to the damage and the place where the damage occurs are *not* located in the same country – 'multi-country' torts. In such cases, in the Member States of the European Union it is possible:

1. to apply the law of the country where the act giving rise to the damage took place;

[105] There is now a Commission Preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations (Rome II). It is available at <http://europa.eu.int>. If reactions to this proposal are positive, the Commission will issue a proper proposal in the autumn of 2002 or spring of 2003.

[106] Ireland appears to still adhere to the doctrine of 'double actionability' (which was also the rule in the UK before 1996), according to which plaintiff must prove that defendant would be liable under both the *lex fori* and the *lex loci delicti*.

2. to apply the law of the country where the damage occurred;[107] or
3. to allow the injured party the choice of law most favourable to him.[108]

Other possibilities do not provide an acceptable solution for multi-country torts, viz.

4. to apply the law of the country where the harmful event occurred;[109] or
5. to apply the law of the country with which the case is most closely connected.

A convergence with the applicable competition law is likely only if alternative 2 (the law of the country where the damage occurred) is chosen – unless alternatives 4 and 5 are given rather fanciful interpretations.

Another factor that works contrary to the convergence of the law applicable to the tort and the applicable competition law is the fact that not all states determine applicability according to the effects doctrine. For example, EC and U.K. competition law both adhere to the implementation doctrine.[110] The differences should not be exaggerated but are imaginable, as illustrated by the following two moot cases:

Case 1

A, B and C are Swiss watchmakers. They export their watches mainly to wholesale dealers and individual retailers in the EU, which adheres to the implementation doctrine, and to the U.S., which adheres to the effects doctrine. They hold 20% of the market for wristwatches both in the EU and the U.S. They have entered into a price-fixing agreement, i.e., a cartel, and apply a common price policy vis-à-vis their customers.

[107] In Austrian and Dutch private international law this solution is coupled with the requirement that the tortfeasor should have been able to foresee that the damage could occur in that country. This is the solution chosen in the draft proposal for a Rome II Regulation. The wording used in the English version is 'country in which the loss is sustained' and in French 'pays où le dommage survient'. The English version speaks of 'loss', whereas all the other language versions, with the exception of the Greek (ζημια) and Finnish (vahinko) versions, use expressions similar to 'damage'. It remains to be seen if the difference is significant.

[108] This is the case in German and Italian private international law.

[109] This was the solution chosen in Article 10 of the 1972 proposal for a Rome Convention including choice-of-law rules for tort. It can be found in 21 *Am. J. Comp. L.* 1973, p. 587.

[110] See cases 89, 104, 114, 116, 117 and 125–29/85 *Åhlström and others v. Commission (Woodpulp)* [1988], in: *ECR* 5193 and UK Competition Act 1998 Section 2(3).

The implementation doctrine: The watchmakers sell directly to the EU. The agreement is consequently implemented in the EU and EC competition law is applicable.[111]

The effects doctrine: Since the cartel pertains to goods sold directly to the U.S. market and they have a market share of 20%, the effect is both direct and substantial. U.S. competition law is also applicable.[112]

Case 2

The facts are the same as in case 1 with one important difference. The three Swiss watchmakers sell their products to an independent export company in the Swiss canton Uri. This export company subsequently sells the watches to the U.S. and the EU. To enable them to adapt their production to demand, the export company keeps the watchmakers well informed about its sales. In this case the price cartel is directed vis-à-vis the export company.

The implementation doctrine: What is decisive is whether the watchmakers sell directly to the Common Market. Since this is not the case, they cannot be said to have implemented the agreement in the EU. Thus EC competition law is not applicable.

The effects doctrine: The effect on the U.S. market was foreseeable to the watchmakers since they were regularly informed about the sales of the export company. Therefore, it can be said that the price cartel was intended to produce an effect on the U.S. market. U.S. competition law is still applicable.

Finally, another factor that must coincide in order to achieve convergence between the law applicable to the tort and the applicable competition law is the localization of damage. In the case of abstract torts such as defamation, copyright infringement and restriction of competition, the damage is not concrete but a legal fiction. In cases of personal injury or damage to movable or immovable property, the damage

[111] For the sake of simplification, the example ignores the competition laws of the Member States.

[112] Here it is presumed that the effect of the restriction must be both direct and substantial for competition law to be applicable. In *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993) the US Supreme Court stated that 'the Sherman Act applies to foreign conduct that was meant to produce, and did in fact produce, some substantial effect in the United States'.

is factual. It can be felt with the physical senses.[113] There is therefore a discussion about where the damage should be deemed to occur for different kinds of torts. Particularly in German legal scholarship, the damage is often said to occur at the place where the object protected by the law is damaged.[114] As we have already seen in the discussion on whether competition law belongs to private or public law (*supra* at II.B.2), in the case of competition law torts, the object of protection is both the market and the individual. However, for the purpose of determining the law applicable to a competition law tort, it is submitted that the damage should be located on the market whose competition is restricted.[115]

As we have seen, the likelihood of convergence between the applicable competition law and the *lex causae* is higher in the field of torts than in contract. In single-country torts the two will foreseeably coincide. There is also a very high likelihood of convergence in multi-country torts *if* the law of the country where the damage occurred is applied and, of lesser importance, *if* the applicability of the competition law is determined according to the effects doctrine. An obstacle to convergence that remains is the use of connecting factors such as the common habitual residence of the parties when determining the law applicable to the tort, whereas this is not important when determining the applicability of the competition law of a certain country.[116]

3. The Lex Causae and 'Self-Limiting' Rules of Competition Law

As shown above, one of the main problems arising when rules of competition law are included in the *lex causae* is that there is little correspondence between the applicable law (particularly in the field of contracts) and the applicable competition law. In some cases this will inevitably lead to a situation where the law of country A is applicable to the contractual dispute or tort but the restriction of competition has effect on the market of country B and its competition law is applicable. Since the restriction of competition does not produce any anti-competitive effects on the market of country A, its competition law is not applicable – it does not have any '*volonté d'application*'.

The question to be answered is how to deal with the competition law of country A. Is it possible to take its lack of territorial applicability into

[113] STRÖMHOLM S., *Torts in the Conflict of Laws. A Comparative Study*, Stockholm 1961, p. 134 *et seq.*

[114] KEGEL G., *Internationales Privatrecht*, 7th ed., München 1995, p. 540.

[115] Of the same opinion: SCHWARTZ I. (note 23), p. 231 and BÄR R., *Kartellrecht und Internationales Privatrecht. Die kollisionsrechtliche Behandlung wirtschaftsrechtlicher Eingriffe, dargestellt am Beispiel der Gesetze gegen Wettbewerbsbeschränkungen*, Bern 1965, p. 33.

[116] Cf. Article 3(2) of the Commission Draft Proposal for a Council Regulation on the law applicable to non-contractual obligations (Rome II).

consideration? The prohibition against *renvoi* laid down in Article 15 of the Rome Convention (and in Article 19 of the Preliminary Draft Rome II Regulation) means that a choice of law refers to the substantive law of a country excluding its rules of private international law.

The rules on the territorial applicability of competition laws, such as § 130(2) of the German *Gesetz gegen Wettbewerbsbeschränkungen* (GWB), are often described as unilateral choice-of-law rules, i.e., choice-of-law rules that can only lead to the application of the *lex fori*.[117] From this point of view, it would run contrary to the ban on *renvoi* to take into account whether the competition rules of a certain country are applicable or not when applying the law of that country. Nevertheless, we recognize that there is something different about a rule of competition law and a rule of contract law or tort law that makes it important to take its territorial applicability into account.

One fundamental difference between a rule of competition law and an 'ordinary' rule of private law is that the former will have a territorial field of application, whereas the latter will not.[118] Certain substantive rules, such as those of competition law, have a specific territorial field of application – a defined spatial reach.[119] This trait is common to all mandatory rules. Most, if not all[120] substantive rules with a defined territorial field of application are mandatory rules.[121]

---

[117] Both BGH 29.5.1979, in: *BGHZ* 74, 322, at p. 324, and IMMENGA U., 'Nach Art. 37: Recht der Wettbewerbsbeschränkungen', in: SONNENBERGER, H.J. (Red.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 10, Einführungsgesetz zum Bürgerlichen Gesetzbuch, Internationales Privatrecht*, 3rd ed., München 1998, pp. 1968–1992, at p. 1974 (para. 17), speak of an '*einseitige Kollisionsnorm*'.

[118] The advocates of Brainerd CURRIE's governmental interest analysis would probably disagree with this. See note 91.

[119] See SCHWARTZ I./ BASEDOW J. (note 15) for an overview of the territorial applicability of competition law rules.

[120] This would certainly be an interesting topic for further research and has been the object of some discourse: see *inter alia* KELLY D.S.L., 'Localising Rules and Differing Approaches to the Choice of Law Process', in: 18 *I.C.L.Q.* 1969, pp. 249–274, at p. 253; LIPSTEIN K., 'Inherent Limitations in Statutes and the Conflict of Laws', in: 26 *I.C.L.Q.* 1977, pp. 884–902, at p. 894; MANN F.A., 'Unfair Contract Terms Act 1977 and the Conflict of Laws', in: 27 *I.C.L.Q.* 1978, pp. 661–664; GUEDJ T.G., 'The Theory of Lois de Police, A Functional Trend in Continental Private International Law – A Comparative Analysis with Modern American Theories', in: 39 *Am. J. Comp. L.* 1991, pp. 661–697, at 667 *et seq.*; BONOMI A., (note 22), p. 231.

[121] This would explain why French legal scholarship speaks only of '*lois d'application immédiate*' when trying to identify and separate these rules from choice-of-law rules. See GRAULICH P., 'Règles de conflit et règles d'application immédiate', in: *Mélanges en l'honneur de Jean Dabin, T. II, Droit positif*, Bruxelles, 1963, pp. 629–644; TOUBIANA A., *Le domaine de la loi du contrat en droit international privé (contrats internationaux et dirigisme étatique)*, Paris 1972, p. 228.

The distinction between 'self-limiting rules[122] and unilateral choice-of-law rules is upheld particularly in English private international law. However, in Dicey and Morris, the authors concede that:

> '[a]lthough the distinction between them is plain enough in principle, it is not always easy to distinguish between unilateral conflict rules and self-limiting provisions; nor has any writer succeeded in formulating a satisfactory test for distinguishing between them.'[123]

This does not mean that a distinction has not been attempted.[124] The most convincing analysis points out that a unilateral choice-of-law rule leads to the application of the *lex fori* in its entirety – all the rules of that country applying to the legal relationship. The self-limiting rule only indicates when certain provisions are territorially applicable.[125]

If we uphold this useful distinction between 'self-limiting' provisions and unilateral choice-of-law rules and acknowledge that competition rules belong to the former category, it becomes possible to take the territorial applicability of competition law into account when applying the *lex causae*. It is thus possible to avoid the application of foreign competition law that does not 'want' to be applied. It remains to be seen whether it is also possible to give effect to foreign competition law that does not belong to the *lex causae* but 'wants' to be applied and still retain the *lex causae* solution – or *Einheitsanknüpfung*, to use the German terminology.

---

[122] The terminology is by no means uniform. NUSSBAUM A., *Principles of Private International Law*, New York 1943, speaks of 'spatially conditioned internal rules'. MORRIS J.H.C., 'The Choice of Law Clause in Statutes', in: 62 *Law Quarterly Review* 1946, pp. 170–185, at p. 176 of 'particular choice of law rules'; CAVERS D.F., 'The Choice-of-law Process', Ann Arbor 1965, p. 225 *et seq*., of 'localizing rules' and DE NOVA R., 'Conflict of Laws and Functionally Restricted Substantive Rules', in: 54 *California Law Review* 1966, pp. 1569–1574 of 'functionally restricted rules'.

[123] DICEY A.V./ MORRIS J.H.C., *The Conflict of Laws*, 13th ed. (ed. by COLLINS L. and others), London 2000, p. 20.

[124] See *inter alia* DE NOVA R., 'Conflit des lois et normes fixant leur propre domaine d'application', in: *Mélanges offerts à Jacques Maury*, Paris 1960, pp. 377–401, at p. 395 *et seq.*; GRAULICH P. (note 121), p. 635; UNGER J., 'Use and Abuse of Statutes in the Conflict of Laws', in: 83 *Law Quarterly Review* 1967, pp. 427–448, at p. 429; TOUBIANA A. (note 121), p. 228 and KAHN-FREUND O., 'General Problems of Private International Law', in: 143 *Recueil des Cours* 1974-III, pp. 139–474, at p. 240 *et seq.*

[125] JÄNTERÄ-JAREBORG M., 'Internationell tvingande civilrättsregler, fastighetsförmedling och konsumenter – några reflexioner', in: *Svensk Juristtidning* 1995, pp. 374–384, at p. 380 *et seq.*

4. Foreign Competition Law as Datum

a) Illegality and Immorality

In both common law and continental law the notion exists that the violation of a foreign law may result in the unenforceability or nullity of a contract.[126] Here again we will make a comparison between U.S., German, Swiss and Swedish law. The U.S. First Restatement on Contracts stipulates in § 592 (Bargain to Violate Foreign Law) that '[a] bargain, the performance of which involves a violation of the law of a friendly nation, is illegal'.[127] In *Rutkin v. Reinfeld* the Federal Court of the 2nd Circuit explicitly referred to § 592 of the Restatement and considered it 'well settled' that contracts the purpose of which is to violate the law of another country are illegal.[128] However, court practice is sparse and there is no corresponding rule in the Second Restatement on Contracts. One explanation for this is that the applicability of foreign mandatory rules is taken into account by the Second Restatement (using, of course, governmental interest analysis) when determining the law applicable to a contract.[129] Another is that the question of illegality of a contract is subject to *dépeçage* and that the law of the country in which the contract is to be performed is applicable to that issue.[130] Thus there is not such a need for this kind of 'escape clause' in the substantive law.[131]

In German law, pursuant to § 134 BGB, legal acts (*Rechtsgeschäfte*) contrary to a statutory prohibition are void. However, this provision has been held to apply only to acts in violation of German law.[132] Instead, § 138(1) BGB, which provides that 'a legal act that violates good morals is void', has been used against contracts in violation of foreign law. There is a long list of cases from the *Reichsgericht* and subsequently the *Bundesgerichtshof* confirming that contracts in violation of a foreign law can be considered to be *contra bonos mores*.[133]

---

[126] To be precise, German law speaks in § 138 BGB of nullity of the act – not the contract.

[127] AMERICAN LAW INSTITUTE, *Restatement of the Law of Contracts*, St. Paul 1932.

[128] *Rutkin v. Reinfeld*, 229 F.2d 248 at p. 255 (1956).

[129] AMERICAN LAW INSTITUTE, (note 66), § 6(2)(c).

[130] *Ibid.* § 202.

[131] Nevertheless, the court in *Sedco Int'l v. Cory*, 522 F. Supp. 254, at pp. 317–21 (1981) came to the conclusion that it could be a violation of U.S. public policy to violate foreign legislation against bribery.

[132] BGH 22.6.1972, in: *BGHZ* 59, 82; BGH 29.9.1977, in: *BGHZ* 69, 295.

[133] See *inter alia* KRATZ B., *Ausländische Eingriffsnorm und inländischer Privatrechtsvertrag*, Frankfurt a.M. [etc.] 1986; LEHMANN R. (note 39) and ANDEREGG K., *Ausländische Eingriffsnormen im internationalen Vertragsrecht*, Tübingen 1989, for summaries of the case law.

The two leading cases are concerned with the violation of trade embargoes and smuggling. In the *Borax* case, the Court applied § 138(1) BGB to invalidate a contract with the purpose of circumventing a U.S. export embargo and ship 100 tons of borax to the GDR.[134] In the *Nigerian Masks* case the *Bundesgerichtshof* declared that an agreement to insure a shipment of certain African masks and other cultural objects to be shipped from Nigeria to Germany was contrary to § 138(1) BGB.[135] The agreement was not illegal under German law but contrary to a UNESCO convention prohibiting the illicit export of cultural property, which Nigeria but not Germany had ratified.[136] In both cases the contract was governed by German law and the *Bundesgerichtshof* concluded that contracts in violation of a foreign law that either coincides with German interests or with those shared by the people of the world are void.

Article 20 of the Swiss Law of Obligations (OR) contains a provision similar to §§ 134 and 138 BGB. According to the provision, 'a contract that has either an impossible or illegal content or that violates good morals is void'. The Swiss *Bundesgericht* has ruled that a contract in violation of foreign law *may* be *contra bonos mores*.[137] In the case in question, the court stated that the violation of foreign currency or trade policy legislation normally did not constitute a violation of good morals but that a violation of foreign narcotics or anti-slavery legislation would.[138]

The requirements are stricter than in German law. Not only must the contract violate Swiss good morals, but it must also threaten the public order (*die öffentliche Ordnung*) in Switzerland. The latter would require the contract to have a close connection to Switzerland, for example, the habitual residence of one of the parties or the place of performance of the contract. The mere fact that Swiss law is applicable is not sufficient.[139]

Swedish contract law, unlike German or Swiss law, does not contain any explicit rule stipulating that a transaction or contract in violation of the law or of good morals is void. The drafters of the Contract Act 1915 felt that such a provision would be too inflexible and left it to the courts to determine the consequences of illegality on a case-by-case basis.[140] There is to date no Swedish case law in

[134] Bundesgerichtshof 21.12.1960, in: *BGHZ* 34, 169.

[135] Bundesgerichtshof 22.6.1972 (note 132).

[136] Convention of 17 November 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 823 UNTS 231 (1972), 10 ILM 289 (1972).

[137] Bundesgericht 28.2.1950, in: *BGE* 76 II 33.

[138] *Ibid.* at p. 41 *et seq*.

[139] BÄR R. (note 115), p. 158.

[140] NJA II 1915, p. 235. See NIAL H., 'Om förvärv i strid mot legala förbud', in: *Tidskrift for Rettsvitenskap* 1936, pp. 1–77, at p. 5, for suggestions for consequences other than nullity.

which the violation of foreign law has been considered either illegal or a violation of good morals but legal scholarship considers it theoretically possible.[141]

It appears to be theoretically possible to escape a contract in violation of foreign competition law in all the examined countries but would be unnecessary to try to do so via contract law in the U.S., Switzerland and Sweden. U.S. private international law will take foreign mandatory rules into account when determining the applicable law or will make a particular choice of law for the question of illegality.[142] Swiss and Swedish private international law, under Articles 19 IPRG and 7(1) of the Rome Convention, would also be ready to make a particular choice of law, *dépeçage*, for mandatory rules outside the *lex causae* (given the strict criteria for immorality in Swiss contract law, such a plea would probably not have succeeded).

However, since Germany has made a reservation against Article 7(1) of the Rome Convention, a plea of immorality would be the only way to take applicable competition law outside the *lex causae* into consideration.[143] It is extremely difficult to predict the outcome of such a plea; however, it is submitted that a minimum requirement would be that the restriction of competition be treated by German competition law in the same manner as by the foreign law.

b) Impossibility

Imaginably all contract laws, national or international, contain some provision which excuses the non-performance or delay of a party to a contract due to a supervening event causing impossibility.[144] Foreign embargo legislation, nationalizations and the like have generally been deemed to constitute excusable impossibilities. In German law the courts apply § 275 BGB and in Switzerland Article 20 OR. Swedish law does not contain a specific provision dealing with the

---

[141] LEMKIN R., *Valutareglering och clearing*, Stockholm 1941, p. 146; NIAL H., *Internationell förmögenhetsrätt*, 2:a uppl., Stockholm 1953, p. 124, and HJERNER L., *Främmande valutalag och internationell privaträtt: studier i de främmande offentligrättsliga lagarnas tillämplighet*, Stockholm 1956, p. 613. The latter advocates a restrictive approach in line with Swiss law.

[142] See notes 129 and 129. This is the case especially if the court adheres to Brainerd CURRIE's theory of governmental interest analysis.

[143] Note that MARTINY D., 'Der deutsche Vorbehalt gegen Art. 7 Abs. 1 des EG-Schuldvertragsübereinkommen vom 19.6.1980 – seine Folgen für die Anwendung ausländischen zwingenden Rechts', in: *IPRax* 1987, pp. 277–280, at p. 278 *et seq*., and KROPHOLLER J., *Internationales Privatrecht*, 3rd ed., Tübingen 1997, p. 449, advocate a *Sonderanknüpfung* of foreign mandatory rules outside the *lex causae* in spite of the reservation.

[144] See, e.g., the UN Convention on Contracts for the International Sale of Goods (CISG), Art. 79(1).

impossibility of performance but the *travaux préparatoires* to the Sale of Goods Act 1990 provide that foreign embargo legislation could constitute such an impossibility that would relieve a party of his duty to perform.[145] U.S. law also recognizes foreign law as constituting such impossibility. The Second Restatement on Contracts acknowledges this in § 264,[146] and § 2-615(a) of the Uniform Commercial Code (U.C.C.) makes it clear that foreign law may be an excuse for non-performance. Furthermore, § 441 of the Third Restatement on Foreign Relations recognizes that, according to the 'doctrine of foreign government compulsion', a party can generally not be required to act contrary to the laws of a state.[147]

If the foreign legislation constitutes an initial impossibility, the question arises as to whether any of the parties knew or should have known about the impossibility.[148] If competition legislation applies to a contract, it is reasonable to assume that a party having his habitual residence in the state enacting the competition law is subject to that law. The motto *error iuris semper nocet* should at least apply to a party's own law.

If a foreign competition law prohibits a certain agreement or clauses thereof, none of the examined jurisdictions require that a party put himself in peril of being punished by a foreign state. However, it is required that the foreign compulsion is real[149] and that the foreign state has the actual power to enforce its laws. The foreign law is to be treated as a fact, not a law. If the enacting state does not have the power to enforce its legislation, the only way to escape the contract is to plea immorality.[150]

C. The *Dépeçage* Solution

1. General Pros and Cons of Dépeçage

More than a century ago Franz KAHN observed that 'private international law, just as little as substantive law, cannot be distilled into half a dozen theses'; more than

[145] Proposition 1988/89:76, *Ny köplag*, p. 99. Legal scholarship also unanimously acknowledges this. See NIAL H. (note 141), p. 151; GIHL T. (note 51); HJERNER L. (note 141) investigates the question extensively at pp. 558–604; EEK H., *Lagkonflikter i tvistemål: Metod och material i svensk internationell privaträtt*, Stockholm 1972, p. 200 *et seq*. and BOGDAN M. (note 51), p. 86 *et seq*.

[146] AMERICAN LAW INSTITUTE (note 66).

[147] AMERICAN LAW INSTITUTE, *Restatement of the Law (Third) of the Foreign Relations Law of the United States*, St. Paul 1987.

[148] See, e.g., AMERICAN LAW INSTITUTE (note 146), § 266(1).

[149] See ATWOOD J.R., 'Blocking Statutes and Sovereign Compulsion in American Antitrust Litigation', in: *Revue Suisse de droit international de la concurrence* 1986, No. 27, pp. 5–20.

[150] BÄR R. (note 115), p. 50.

half a century later Rolando QUADRI likened the lack of detail in the rules of private international law to 'a forest of dry branches'.[151] With these observations in mind, a development in private international law making it a more refined and detailed system for choice of law would be welcome. *Dépeçage* becomes the solution in the absence of refined choice-of-law rules.[152] This has been taken to its greatest extreme in the Second Restatement on the Conflict of Laws in § 188:

> 'The rights and duties of the parties *with respect to an issue* in contract are determined by the local law of the State which, *with respect of that issue*, has the most significant relationship to the transaction and the parties [italics added].'[153]

Dépeçage has some disadvantages. One drawback is that the simplicity of the system is lost. In addition, the rules of *one* legal system taken as a whole balance each other and take the interests of all parties into account (at least in theory). If laws from different countries are applied to different issues, the delicate balance is disturbed. For example: In the U.S. a product liability plaintiff will typically make a plea both in tort and in warranty (contract). The two pleas together seek to compensate the same injury and both are necessary for full compensation. However, the First Restatement on Conflict of Laws[154] will apply the law of the place of the injury to the plea in tort and the law of the place where the product was produced to the plea in warranty.[155] Full protection is lost because the unity of the legal system is lost.

Another disadvantage in the context of competition law is that it creates problems of delimitation between the law governing the contract or tort and the law applicable to the restriction of competition. It has to be determined which issues are subject to a particular choice of law for competition law. Since the application of foreign competition law is partially done in the interests of a foreign state, it would be appropriate to apply the foreign competition law to issues establishing the existence of contractual nullity or the right to contractual or non-contractual damages in the first place. This would, *inter alia*, include consequences of failure

---

[151] KAHN F., 'Abhandlungen aus dem internationalen Privatrecht. Zweite Abhandlung. Ueber Inhalt, Natur und Methode des internationalen Privatrechts', in: *Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts* 1899, pp. 1–87, at p. 48; QUADRI R., *Lezioni di diritto internazionale privato*, 3rd ed., Napoli 1961, p. 7.

[152] REESE W.L.M., 'Dépeçage: A Common Phenomenon in Choice of Law', in: 73 *Columbia Law Review* 1973, pp. 58–75, at p. 58, defines *dépeçage* as 'all situations where the rules of different states are applied to govern different issues in the same case'.

[153] AMERICAN LAW INSTITUTE (note 66).

[154] AMERICAN LAW INSTITUTE (note 66).

[155] Example from RICHMAN W.M./ REYNOLDS W.L., *Understanding Conflict of Laws*, 2nd ed., New York [etc.] 1993 (1995 printing), p. 189.

to cooperate with competition authorities and to comply with time limits.[156] The issues of *how* the nullity should affect the contract or *how* the damages should be calculated are questions for the *lex causae* since these issues mainly concern the interests of the parties.[157]

2. A Bilateral Choice-of-Law Rule for Foreign Competition Law

Since self-limiting provisions such as rules of competition law have frequently been regarded as unilateral choice-of-law rules, i.e., choice-of-law rules that lead only to the application of the *lex fori*, there have been many proposals for bilateralization. A bilateral choice-of-law rule is a rule that, on the basis of a specific connecting factor – place of performance, place of contracting, habitual residence, etc. – can lead to the application of the law of any country.

Most of the proposals for a bilateral choice-of-law rule for competition law were made by German scholars in the 1960's and later. The explanation for this is most likely that German private international law had its roots in the bilateralization of unilateral choice-of-law rules *and* has been one of the few European countries with a developed competition law.[158] Against this background it was quite understandable that most proposals were for a bilateralization of § 98(2) GWB (now § 130(2) GWB),[159] which reads:

---

[156] For some detail see BÄR R. (note 115), p. 233.

[157] Article 10(e) of the Rome Convention stipulates that the consequences of nullity are subject to the applicable law. However, in some legal systems the consequences of nullity are considered to be non-contractual in nature; thus Article 22(1)(b) provides for a possibility to enter reservations against this provision. See GIULIANO M./ LAGARDE P. (note 21), p. 33. It could also be argued that treble damages are available to further the interest of the state of deterrence rather than the private interest of reparation.

[158] See BEHN M., *Die Entstehungsgeschichte der einseitigen Kollisionsnormen des EGBGB unter besonderer Berücksichtigung der Haltung des badischen Redaktors Albert Gebhard und ihre Behandlung durch die Rechtssprechung in rechtsvergleichender Sicht*, Frankfurt a.M. 1980, pp. 195–293 for a history of the bilateralization of unilateral German choice-of-law rules.

[159] Positive, but did not think the time was ripe: SCHWARTZ I. (note 23), p. 224 *et seq.* Positive: ZWEIGERT K., 'Internationales Privatrecht und öffentliches Recht', off-print of article in: *Fünfzig Jahre Institut für internationales Recht and der Universität Kiel*, Hamburg 1965, p. 134 *et seq.*; HABSCHIED W.J., 'Territoriale Grenzen der staatlichen Rechtsetzung: Referat 2', in: HABSCHEID W.J./ RUDOLF W., *Territoriale Grenzen der staatlichen Rechtsetzung. Referate und Diskussion der 12. Tagung der Deutschen Gesellschaft für Völkerrecht in Bad Godesberg vom 14. bis 16. Juni 1971*, Karlsruhe 1973, pp. 47–77 at p. 62; MARTINEK M., *Das internationale Kartellprivatrecht*, Heidelberg 1987, p. 94. In Swiss doctrine BÄR R. (note 115), at p. 226, proposed a bilateral choice-of-law rule for nullity of contracts in competition law.

> 'This law is applicable to all restrictions of competition that have effect in [the Federal Republic of Germany], also when they are caused from outside the [Federal Republic of Germany …].'[160]

Many critical voices have been raised. While there has been no significant opposition to the application of foreign competition law as such, the breaking up of the unity of the *lex causae* has been criticized[161] and the method of bilateralization has been considered inappropriate.[162] This has not stopped the Swiss legislator from adopting a bilateral approach for competition law torts in Article 137 IPRG (see II.A).

From a theoretical point of view, the bilateralization of mandatory rules is disadvantageous in that it hides the structural and qualitative differences between the competition law of the forum state and that of foreign law. The territorial field of application of domestic competition law is determined on the basis of the economic policy of the forum state. It is questionable whether such considerations are relevant when determining whether *foreign* competition law should be applied.[163] Furthermore, a bilateral choice-of-law rule might give the impression that domestic and foreign competition law are of equal importance when in reality domestic rules take precedence.[164]

From a practical point of view, the effects principle in domestic law does not lend itself to transformation into a bilateral choice-of-law rule. The concept of effect on the market is a complicated one and differs for different restrictive practices and between different countries as well.[165] In addition, not all countries adhere to the effects principle. Thus uniformity of decisions, which is one of the main reasons for applying foreign competition law in the first place, will not be achieved.

---

[160] In this matter § 130(2) GWB reads the same as § 98(2) GWB.

[161] MANN F.A., 'Sonderanknüpfung und zwingendes Recht im internationalen Privatrecht', in: SANDROCK O. (Hrsg.), *Festschrift für Gunther Beitzke zum 70. Geburtstag am 26. April 1979*, Berlin [etc.] 1979, pp. 607–624, at p. 614 *et seq.*

[162] REHBINDER E. '§ 98 Abs. 2', in: IMMENGA U./ MESTMÄCKER E.-J. (Hrsg.), *GWB Kommentar zum Kartellgesetz*, 2nd ed., München 1992, pp. 2217–2297, at p. 2274 *et seq.* (para. 246 f.); IMMENGA U. (note 117), p. 1974 (para 18 *et seq.*).

[163] BASEDOW J. (note 96), p. 440; SCHWARTZ I./ BASEDOW J. (note 15), p. 118.

[164] SCHWARTZ I./ BASEDOW J. (note 15), p. 118.

[165] REHBINDER E., (note 162), p. 2275 (para. 247).

3. A 'Functional Approach' vis-à-vis Foreign Competition Law

a) Some Comments on Terminology

Before considering the actual significance of this approach for the application of foreign competition law, a brief discussion of terminology would be useful. The term 'functional approach' signifies a different approach to choice-of-law issues, since the point of departure is not the application of a domestic choice-of-law rule to a particular relationship, but rather an inquiry into whether the object and the purpose of a foreign rule warrants its application in the particular case.[166]

However, the approach is not entirely new to European private international law. There have always been critics of SAVIGNY's bilateral approach that advocated what became known as a 'unilateral' approach. This approach, which can be divided into two main schools of thought – an older[167] and a younger one[168] – took as its point of departure the territorial field of application (or spatial reach) of the foreign law. Bearing a strong semblance to the theory of governmental interest analysis introduced by Brainerd CURRIE, the theories would function in more or less the same way.[169] The difference is very much one of presentation; whereas the European unilateralists focus on logical problems and technical aspects of private international law, CURRIE talks about policies and the contents of laws.[170]

Using the term 'unilateral' to signify an approach that uses the applicability of the foreign law as its point of departure causes a problem in English because it

---

[166] The terminology is taken from GUEDJ T.G. (note 120). In American legal scholarship the term 'content-selecting systems' has also been used to signify 'functional' systems that focus on the policy behind a substantive law when making a choice-of-law decision. The traditional bilateral choice-of-law rules go under the name of 'jurisdiction-selection' systems since the foreign law is chosen without regard to its content or motivating policy, see RICHMAN W.M./ REYNOLDS W.L. (note 155), p. 148.

[167] Represented *inter alia* by SCHNELL J., 'Über die Zuständigkeit zum Erlaß von gesetzlichen Vorschriften über die räumliche Herrschaft der Rechtsnormen', in: *Zeitschrift für internationales Privat- und Strafrecht* 1895, pp. 337–343, and NIEDNER A., *Das Einführungsgesetz vom 18. August 1896*, 2nd ed., Berlin 1901.

[168] See, *inter alia*, NIBOYET J.-P., *Cours de droit international privé français*, 2e éd., Paris 1949; VIVIER G., 'Le caractère bilatéral des règles de conflit de lois', in: *Rev. crit. dr. int. pr.* 1953, pp. 655–676 and 1954, pp. 73–90; PILENKO A., 'Droit spatial et droit international privé', in: *Jus Gentium – Diritto Internazionale* 1953, pp. 319–355 and QUADRI R., *Lezioni di diritto internazionale privato*, 5th ed., Napoli 1969.

[169] An attempt to play down the similarities between CURRIE and the unilateralists was later made by KAY H.H., 'A Defense of Currie's Governmental Interest Analysis' in: 215 *Recueil des Cours* 1989-III, pp. 9–204, at p. 96. CURRIE himself unfortunately died already in 1964, thus leaving the defence and development of his theories to others.

[170] See WIETHÖLTER R., *Einseitige Kollisionsnormen als Grundlage des Internationalen Privatrechts*, Berlin 1956, pp. 43–87 for an evaluation of the practicability of the unilateral systems.

risks being confused with a unilateral choice-of-law rule, which, as we have pointed out, is something different, i.e., a choice-of-law rule that does not look at the content of the substantive law and can lead only to the application of the *lex fori*. To avoid confusion, it is therefore best to speak of a 'functional approach'.

b) Contract – Article 7(1) of the Rome Convention

In Europe, several examples of a functional approach to foreign mandatory rules can be found in recent codifications. The first legislative example embodying this approach was in Article 13 of a draft Benelux Convention on uniform rules of private international law,[171] then in Article 16 of the 1978 Hague Convention on the Law Applicable to Agency, followed by Article 7(1) of the Rome Convention on the law applicable to contractual obligations, Article 19 of the Swiss IPRG and most recently the English Private International Law (Miscellaneous Provisions) Act 1995 (section 14(4) of part III on choice of law in tort and delict). Whereas the scope of the other provisions is limited either to agency, contract or torts and delicts, the Swiss provision is applicable to all areas.

Our focus will be on the most widely applied rule, which is Article 7(1) of the Rome Convention.[172] It reads:

> '(1) When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.'

We find that in order to 'give effect' to a foreign mandatory rule, four prerequisites must be fulfilled:

1. the foreign rules must be mandatory;
2. there must be a close connection between the situation and the foreign country;
3. giving effect to the foreign mandatory rules must be justified in light of their nature and purpose; and

[171] Published in 18 *Am. J. Comp. L.* 1970, p. 420.

[172] The 1978 Hague Convention on the law applicable to agency is in force only in four countries: Argentina, France, the Netherlands and Portugal.

4. the consequences of their application or non-application must be reasonable.

What is more, the rule is facultative: The court may refrain from applying the foreign mandatory rule even if all the prerequisites are fulfilled. The relative novelty of the functional approach in European private international law and fear of the uncertainty embedded in its extremely facultative nature led to the inclusion of a possibility to enter a reservation against the provision in Article 22(1)(a) of the Convention.[173]

Assessing whether a foreign rule is *mandatory* or not can sometimes be difficult.[174] The rule must be regarded as mandatory by the state that enacted it. For this assessment it is irrelevant whether corresponding rules of the forum are mandatory – determining whether a foreign rule is mandatory is not the same as characterization. Characterization is normally done according to the *lex fori*, but in the case of mandatory rules, the very fact that the *enacting* state considers them mandatory is the reason for derogating from the bilateral method. This is justified by the quest for uniformity of decisions. In the case of competition law, the task of assessing the mandatory nature of a foreign rule is simplified by the fact that there is widespread consensus on the mandatory nature of such rules.[175]

It would be impossible to establish general criteria for determining what constitutes a *close connection* between the situation and the state enacting a mandatory rule. Mandatory rules are far too heterogeneous for that.[176] It has been submitted that there would be a sufficiently close connection if the spatial reach of the mandatory rule kept within the confines of public international law.[177] However, if and to what extent public international law imposes any restrictions on a state's jurisdiction to legislate is much debated.[178]

---

[173] The possibility has been used by Germany, Ireland, Luxembourg, Portugal and the United Kingdom.

[174] See BONOMI A. (note 22), p. 230 *et seq.*

[175] See, *inter alia*, GIULIANO M./ LAGARDE P. (note 21), p. 28; BAADE H.W. (note 15), p. 472 and REHBINDER E. (note 162), p. 2218 (para. 7). See also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth* (note 15) at p. 637 note 19 for U.S. law and case C-126/97 *Eco Swiss* [1999], in: *ECR* I-3055 for EC law.

[176] VON HOFFMAN B., 'Artikel 34. Zwingende Vorschriften', in: *Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Kolhammer-Kommentar. Begründet von Dr. Hs. Th. Soergel und neu herausgegeben von Dr. W. Siebert*, Vol. 10, *Einführungsgesetz*, 12nd ed., Stuttgart 1996, pp. 1701–1761, at 1738 (para 95); VISCHER F., 'Artikel 19' in: HEINI A./ KELLER M./ SIEHR K./ VISCHER F./ VOLKEN P. (note 49), p. 212 (para. 13).

[177] KREUZER K. (note 39), p. 91 *et seq.*

[178] See HABSCHEID W.J./ RUDOLF W. (note 159); MENG W., *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht*, Berlin [etc.] 1994. For competition law in particular, see NEREP E., *Extraterritorial Control of Competition under International Law*, Stockholm 1983.

It has also been submitted that, if the spatial reach of the foreign mandatory rule is the same or less than that of corresponding rules in the forum state, the connection should be considered close enough.[179] One reason for the application of foreign mandatory rules that has not yet been touched on but speaks in favour of such an approach, could be international comity.[180] We would tend to agree with this, but in the case of competition law it should not be ruled out that a state adhering to the implementation doctrine would be ready to give effect to a foreign competition law rule that bases its spatial reach on the effects doctrine in one of the few cases where there is a difference (*supra* at III.B.2). The difference is very small and the effects doctrine is becoming more and more internationally recognized.[181]

In order to be given effect, the situation must also be within the spatial reach of the rule(s) of the foreign competition law in question. It must be their *purpose* to be applied to the situation. The task of assessing whether the competition rules on contractual nullity or damages are territorially applicable to a certain situation is admittedly easier than it is for many other types of mandatory rules. In competition law there are relatively well-known criteria embodied in the doctrines of effect implementation or territoriality.[182] This does not mean that the task is an easy one. Although simple in theory, the effects doctrine, for example, can be quite complicated when it comes to individual restrictions of competition. For instance, in regard to vertical restrictions such as retail price maintenance, exclusive distribution agreements and licensing agreements, it is important to determine whether the restriction is considered to have effect where the retailer, distributor or licensee is located or on the market(s) where the product finally meets the end consumer.[183]

Furthermore, a court applying Article 7(1) should consider the content of the foreign competition law. In order to give effect to the foreign rule, it must be the expression of a policy shared at least to some extent by the forum state. Fighting restrictions of competition is a policy common to most economically advanced states in the world and certainly to all the Member States of the European Union. It is submitted that it should not be necessary for the foreign competition law to make the same assessment of the restriction as the competition law of the forum, had it

---

[179] VON HOFFMAN B. (note 176), p. 1738 (para 95); BONOMI A. (note 22), p. 245.

[180] Comity thinking has been connected with the application of foreign mandatory rules since the beginning. See WENGLER W., 'Die Anknüpfung des zwingenden Schuldrechts im internationalen Privatrecht. Eine rechtsvergleichende Studie', in: *Zeitschrift für vergleichende Rechtswissenschaft* 1941, pp. 168–212 at p. 181 *et seq.*

[181] See the *travaux préparatoires* to the Swiss Cartel Act 1986, in: BBl. (*Bundesblatt*) 1981 II, p. 1337.

[182] See SCHWARTZ I./ BASEDOW J. (note 15), pp. 10–91 for a comparative overview of the spatial reach of competition laws in the world.

[183] BÄR R. (note 115), p. 390 *et seq.*; SCHNYDER A.K. (note 93), p. 339 *et seq.*

been applicable. It should suffice for the foreign rule to have the purpose of upholding free competition on the market of the enacting state.

It is quite possible for a restriction of competition to have an effect on the markets of several states, thus making the competition laws of several countries applicable to the given situation. The explanatory report to the Convention cites the problem of multiple applicability of contradicting mandatory rules as a reason for requiring that regard be had to the *consequences of the application or non-application* of a rule. A choice must then be made between them.[184] This should not really pose a great problem in the case of competition law since (given that there is a close connection to all the enacting countries) they can be applied cumulatively. A contract must fulfil the requirements of all the applicable competition laws to escape nullity.[185]

The only problem that could arise is a case of 'true conflicts', i.e., when the law of a country demands a behaviour that is illegal in another, such as a forced cartel. It is possible that such conflicts of interest should be taken into account already at the level of private international law and not later within the framework of the law governing the contract.

The legal consequence of the application of Article 7(1) is that the court may *give effect* to the foreign mandatory rule. This is a different expression than that used in Article 4 – the contract is 'governed' by the foreign law. In the explanatory report, Messrs. Giuliano and Lagarde indicate that the expression 'give effect' is used, thus making it possible to perform the difficult task of combining the mandatory rules with the law governing the contract.[186]

In the light of the very nature of the functional approach, i.e., giving effect to certain mandatory rules of a foreign country according to their spatial reach (a result of the policy of that country), a qualitative difference between this approach and the 'normal' application of foreign law becomes evident. In the case of competition law, the *dépeçage* or *Sonderanknüpfung* pertains only to the fact that a contract clause is void or that there is a right to contractual damages. The consequences in contract law of the nullity of contract clauses or the existence of a right to damages will be decided by the law governing the contract.[187] This is why contract law is applied and foreign competition law is 'given effect'.

---

[184] GIULIANO M./ LAGARDE P. (note 21), p. 27.

[185] This would be similar to the *Zweischrankentheorie* introduced in 1959 by KOCH N., 'Das Verhältnis zwischen der Kartellvorschriften des EWG-Vertrages zum Gesetz gegen Wettbewerbsbeschränkungen', in: *Betriebs-Berater* 1959, pp. 241–248. There are some additional problems concerning the relation between state and federal systems such as in the U.S.A., where there is both federal and state antitrust law and in particular by international systems such as the EU with both Member State and EC competition law that cannot be dealt with here. See HELLNER M. (note **), pp. 111–129.

[186] GIULIANO M./ LAGARDE P. (note 21), p. 27 *et seq.*

[187] See case C-453/99 (note 1) for the delimitation vis-à-vis the law governing the contract in EC law.

Article 7(1) has been the focus of much criticism. Many an unsympathetic voice has been raised not only against the functional approach and the vagueness of the Article but also against the methodological pluralism embodied therein. The combination of the bilateral choice-of-law rules ('jurisdiction-selecting rules') and the functional approach could cause confusion as to where one method begins and the other ends.[188] Furthermore, it has been suggested that applying the functional approach to mandatory rules could constitute a hidden ticking bomb in private international law.[189] The functional approach could become the main method, leaving the small corrections in the margin for the traditional bilateral choice-of-law rules.[190]

As has already been pointed out, the alleged vagueness of Article 7(1) and the uncertainty it creates has led to the inclusion of a possibility to enter a reservation against the provision in Article 22(1)(a) of the Convention.[191] It has been said that the rule serves only to make courts aware of the existence of foreign mandatory rules – without solving the problem.[192] Nonetheless, the legal uncertainty is no greater than that generated by taking foreign mandatory rules into account as data within the scope of the law governing the contract (*supra* III.B.4.a)**.**

The vagueness has also been criticized for causing extra work for the courts; theoretically they must look at all the countries in the world to see if any mandatory rules are applicable.[193] This, however, is only a problem seen from an abstract perspective. In real cases, particularly in cases involving the application of foreign competition law, the types of potentially applicable competition laws will be known and their spatial reach will also be known.

---

[188] SCHURIG K., *Kollisionsnorm und Sachrecht. Zu Struktur, Standort und Methode des internationalen Privatrechts*, Berlin 1981, p. 327.

[189] DE BOER TH.M., 'Een dreigend faillissement: het tekort van het international privaatrecht', in: *Weekblad voor Privaatrecht, Notariaat en Registratie* 1976, pp. 285–291 at p. 291.

[190] JESSURUN D'OLIVEIRA H.U., in: *Medelingen van de NVIR* 1975, p. 114. From DE BOER TH.M (note 189), p. 291.

[191] See note 173.

[192] FRISCH W., *Das internationale Schuldrecht der nordischen Länder im Vergleich zu dem europäischen Übereinkommen über das auf Schuldverträge anwendbare Recht*, Frankfurt a.M. 1985, p. 183.

[193] See, *inter alia*, FIRSCHING K., 'Übereinkommen über das auf vertragliche Schuldverhältnisse anzuwendende Recht (IPR-VertragsÜ) vom 11.6.1980', in: *IPRax* 1981, pp. 37–43 at p. 40.

c) Tort

It is not certain to what extent the functional approach is used in tort in the EU, since there are currently no common provisions.[194] The need for a functional approach is less in tort than in contracts because the bilateral choice-of-law rules will frequently lead to the application of the tort law of the country that has also enacted the applicable competition law. This will be even more likely if there is a particular bilateral choice-of-law rule for competition law based on the effects doctrine – a *dépeçage* solution.[195] The remaining problems connected with these solutions have already been aired and need not be repeated. However, using a jurisdiction-selecting bilateral method for mandatory rules clouds the true nature of the foreign rule. Those rules are not interchangeable like other rules of private law. The important reasons for applying them according to their own *volonté d'application* are hidden, i.e., the quest for uniformity of decisions and promoting a common policy (or one that is at least tolerated by the forum state).

D. The Cumulative Solution

We have already come to the conclusion that foreign mandatory rules should be included in the *lex causae* if they are to be regarded as belong to private law. They may, at least in the area of contract law, also be given effect under Article 7(1) of the Rome Convention. This is what amounts to a cumulative solution. Since there is a good case to be made for characterizing competition rules relating to nullity of contracts and damages as private law rules (*supra* III.B.2), this is most likely the *lex lata* in the EU, at least in the field of contracts.

The best thing that can be said for the cumulative solution is that it will do no harm. It will lead to the application of rules of foreign competition law either by means of the *lex causae* or *dépeçage*. If the functional approach is chosen for the *dépeçage,* it will also invariably lead to the application of a foreign competition law without an exorbitant spatial reach. If the *lex causae* contains competition rules that are not territorially applicable, this will be taken into account and they will not be applied. The argument against this is that nothing is gained. As said earlier, the

[194] The Preliminary Draft Rome II Regulation does not contain a rule similar to Article 7(1) of the Rome Convention. Note again the English Private International Law (Miscellaneous Provisions) Act 1995, which in part III on choice of law in tort and delict contains section 14(4), which provides for a functional approach to foreign mandatory rules. This is all the more strange since the UK entered a reservation against Article 7(1) of the Rome Convention.

[195] Like Article 137 IPRG or possibly Article 6 of the Draft proposal for a Council Regulation on the law applicable to non-contractual obligations (Rome II). However, the latter speaks of 'unfair competition'/'concurrence déloyale'/'unlauterer Wettbewerb', which is not the same as competition law in the sense of 'antitrust law'.

bilateral method was never intended to be applied to mandatory rules. Savigny himself was of the opinion that, due to their nature and purpose, mandatory rules ('*Gesetze von streng positiver, zwingender Natur*') should not be the object of bilateral choice-of-law rules.[196] He was right.

[196] VON SAVIGNY F.C. (note 20) pp. 32 *et seq.* and 276 *et seq.* This is a simplification. What Savigny said was that, due to their nature, those rules cannot be subject to his principle of equal treatment of foreign and domestic rules. This principle leads in turn to bilateral choice-of-law rules

MULTINATIONAL GROUPS OF COMPANIES AND INDIVIDUAL EMPLOYMENT CONTRACTS IN SPANISH AND EUROPEAN PRIVATE INTERNATIONAL LAW

Guillermo PALAO MORENO*

* Lecturer in Private International Law at the University of Valencia (Spain). The author would like to thank Professor Andrea Bonomi, of the University of Lausanne for his suggestions and comments.

Yearbook of Private International Law, Volume 4 (2002), pp. 303-334
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

I. The Social Dimension of Multinational Groups of Companies

A. Multinational Groups of Companies from the Perspective of Labour Law

Globalisation is manifested in a continuous process of international expansion, which forces capital to be flexible, adopting new forms to achieve its objectives and facilitate the process of business concentration.[1] Created specifically for this purpose, the so-called 'group of Companies' is an organisational structure enabling the international growth of a company and the concentration of capital by virtue of its formal diversity.[2] As a result, multinational groups of companies have become star performers in the economic and social systems at international level.

The success of this organisational model has resulted not only in economic but also in serious social repercussions. The globalisation of the economy has given rise to a labour market with an international dimension,[3] in which multinational groups of companies play an instrumental role. Having become the major employers in the international labour market, they are the main factor affecting the division of labour internationally.[4] Thus it is clear that decisions taken by multinational groups of companies lead to social repercussions. In short, their personnel and labour policies (designed to function internationally rather than exclusively at national level) can produce significant changes in the market, which are generally beyond the control of the States directly affected as well as regional and international organisations.

---

[1] GALGANO F., *Las instituciones de la economía capitalista. Sociedad anónima, Estado y clases sociales*, Barcelona 1990, p. 89 *et seq.;* REICH N., *Mercado y Derecho (Teoría y praxis del derecho económico en la República Federal Alemania*), Barcelona 1985, p. 285. MONEREO PÉREZ J.L., *Teoría jurídica de los grupos de empresas y Derecho del Trabajo*, Granada 1997, p. 3.

[2] ENGRÁCIA ANTUNES J.A., *Os grupos de sociedades. Estrutura e organizaçao juridica da empresa plurissocietária*, Coimbra 1993, pp. 36-39; VICENT CHULIA F., *Concentración y Unión de empresas ante el Derecho español*, Madrid 1971, p. 93; ALESSI R., *La disciplina dei gruppi multinazionali nel sistema societario italiano*, Milano 1988, pp. 6, 8 and 13.

[3] SPYROPOULOS G., 'Encadrement social de la mondalisation de l'economie: bilan et prespectives d'avenir de l'action normative au niveau international dans le domaine du travail', in: *Droit social* (*Dr.soc.*) 1996, pp. 551-552; LEE E., 'Mundialización y empleo: Se justifican los temores?', in: *Revista Internacional del Trabajo* (*R.I.T.*) 1996, pp. 534-537.

[4] ESER G., *Arbeitsrecht im Multinationalen Unternehmen*, Frankfurt a.M. 1994, pp. 21-23; JUNKER A., 'Arbeitsrecht im Grenzüberschreitenden Konzern – die kollisionsrechtliche Problematik', in: *Zeitschrits für Internationales Arbeit- und Sozialrecht* (*Z.I.A.S.*) 1995, p. 573.

This panorama is not without complications: Despite globalisation of the international labour market, in reality it is legally fragmented into State and/or regional units, which remain economically interdependent. This also occurs in regions in an advanced phase of economic integration (e.g. the European Community).

Such circumstances have a notable impact on the performance of entities in the international labour market, in particular multinational groups of companies, which benefit from the competitive advantages provided by special territorial regulations, thus increasing the existing division in the international labour market.[5] Accordingly, decisions taken by multinational groups of companies as to the destination of their direct investments and employee relations are bound to influence the configuration of the international labour market. This applies in particular to decisions on dividing the production process between companies within the multinational group (depending on the conditions offered by the receiving States), as well as decisions affecting the process of delocalisation by moving production units and labour from one State to another (decisions affecting the mobility of capital and labour).

Such measures are taken in an attempt to secure more favourable conditions for the companies of the group.[6] Since it is almost impossible to control them from outside, they can lead to '*social dumping'*, which has negative consequences for both the international and national labour market.[7]

B. Inadequate Response of Labour Law to the Legal Regime of Multinational Groups of Companies

Transnational activities of multinational groups of companies are still governed by legal rules providing solutions that are almost exclusively 'State inspired'.[8] Since

[5] DURÁN LÓPEZ F., 'Globalización y relaciones de trabajo', in: *Revista Española de Derecho del Trabajo* (*R.E.D.T.*) 1999, p. 870; MONTOYA MELGAR A., 'Empresas multinacionales y relaciones de trabajo', in: *R.E.D.T.* 1983, pp. 486-487; PALAO MORENO G., 'La Ley 45/1999, de 29 de noviembre, sobre desplazamiento de trabajadores en el marco de una prestación de servicios transnacional. Un nuevo paso hacia la consolidación de un mercado de trabajo integrado en Europa', in: *Gaceta Jurídica de la Unión Europea y de la Competencia* 2000.208, pp. 43-44; SPYROPOULOS G. (note 3), p. 552; REICH N. (note 1), *pp.* 323-327.

[6] LYON-CAEN A., 'Sur le transfert des emplois dans les groupes multinationaux', in: *Dr.soc.* 1995, p. 489; MONEREO PÉREZ J.L. (note 1), p. 32. Against, LEE E. (note 3), p. 539.

[7] BIRK R., 'Diritto del lavoro e imprese multinazionali', in: *Rivista italiana di diritto del lavoro* (*Riv.it.dir.lav.*) 1982, p. 138. Against, LEE E., 'Mundialización y normas del trabajo. Puntos de debate', in: *R.I.T.* 1997, pp.197-200.

[8] GROSSFELD B., 'Legal Controls of Transnational Enterprises', in: ŠARČEVIĆ P./ VAN HOUTTE H., *Legal Issues in International Trade*, London 1990, pp. 177-178;

such rules are usually intended to be applied to purely internal situations, they are inapt when applied to a phenomenon with a multinational dimension.[9]

Even the EU legislation governing such relations is inadequate. This can be seen in various texts, for example, Directive No. 94/45/EC on the Establishment of a European Works Council or a Procedure in Community-Scale Undertakings and Community-Scale Groups of Undertakings for the Purposes of Informing and Consulting Employees, and Directive No. 96/71/EC concerning the Posting of Workers in the framework of the Provision of Services. Moreover, the European authorities have been preoccupied with some aspects of the transnational behaviour of groups of companies. This can be seen in various Resolutions issued with respect to the de-localisation of international companies in Europe.[10]

Consequently, the fact that practically no international control is exercised over multinational groups of companies (particularly in regard to industrial relations) is the result of the inadequate response of the international community to this phenomenon.[11] As a result, an international division of the labour market still exists in the EU. Not surprisingly, multinational groups of companies take advantage of this in their global planning strategies.

This is not to say that important aspects of this subject matter are not regulated by international instruments but rather that the results have been unsatisfactory up to now. In particular, three instruments, all of which can be regarded as *soft law*, deal with this subject matter and even contain provisions regulating social matters:[12] Project of a Code of Conduct for Transnational Societies, elaborated by the Economic and Social Council of the UN,[13] Guidelines for multinational Companies proposed by the Organisation for Economic Cooperation and

---

KOPELMANAS L., 'L'application du droit national aux sociétés multinationales', in: *Recueil des Cours* 1976-II, p. 333.

[9] RODRÍGUEZ PIÑERO M., 'Empresas Multinacionales y Derecho del Trabajo', in: CREMADES SANZ PASTOR B.M., *Empresas Multinacionales y Derecho español*, Madrid 1977, pp. 787-789 and 799-800; MONTOYA MELGAR A. (note 5), pp. 490-491; REICH N. (note 1), p. 253. A framework usually ignored. DAVIES P.L., 'Labour Law and Multinational Groups of Companies', in: HOPT K.J., *Groups of Companies in European Laws. Legal and Economic Analyses of Multinational Enterprises*, Vol. II, Berlin 1982, pp. 209-224. Against, LEE E. (note 3), pp. 537-539.

[10] 'Opinion on the relocation of international businesses' (96/C 100/11), in: *OJ* 1996, C 100; 'Resolution on industrial restructuring and relocation in the European Union', in: *OJ* 1996, C 362.

[11] RIGAUX F., 'Les situations juridiques individuelles dans un système de relativité générale. Cours général de droit international privé', in: *Recueil des Cours* 1989-I, p. 341. RODRÍGUEZ PINERO M. (note 9), pp. 789-793; MONTOYA MELGAR A. (note 5), pp. 492-494; DAVIES P.L. (note 9), p. 227; SPYROPOULOS G. (note 3), p. 557.

[12] SALERNO F., *La regolamentazione internazionale dei rapporti di lavoro con imprese multinazionali*, Milano 1986; RIGAUX F. (note 11), pp. 355 *et seq*.

[13] *I.L.M.* 1984, pp. 626 *et seq*.

Development (OECD),[14] and the Tripartite Declaration of Principles regarding multinational Companies and Social Policy of the International Labour Organisation (ILO).[15]

Finally, two Resolutions of the International Law Institute (I.L.I.) should also be mentioned: the Oslo Resolution of 1977[16] on multinational Companies, and the Lisbon Resolution of 1995 on Obligations of a company belonging to an international group and their effect on other companies of that group.[17]

C. Aim of the Present Study

Of all the legal problems relating to the activities of multinational groups of companies, from the viewpoint of what is sometimes called international labour law,[18] the most interesting is examining the legal regime of international individual employment contracts. Problems arise mainly in situations where the employee has formalised his labour relationship with one of the companies integrated in a multinational group. This matter is all the more problematic because of the lack of a uniform legal framework at the international level. Moreover, due to the absence of national norms, case law often plays a decisive and creative role.

This study deals with private international law aspects of the regulation of individual employment contracts within a multinational group, hence in a group with a foreign element. Attention is focused mainly on determining the law governing an individual employment contract concluded with a company belonging to a multinational group and how this is affected by the employee's cross-border mobility within the group.

[14] *I.L.M.* 1976, pp. 967 *et seq*. See TREBILCOCK M.J./ HOWSE R., *The Regulation of International Trade*, London 1995, pp. 297-300.

[15] The text was approved by the I.L.O., 30 November 1977.

[16] Institut de Droit International (I.D.I.), *Tableau des Resolutions adoptées (1957-1991)*, Paris 1992, p. 325.

[17] In: *Ann. I.D.I.* 1995, Vol. 66-II, p. 465.

[18] BIRK R., 'Das internationale Arbeitsrecht der Bundesrepublik Deutschland', in: *RabelsZ.* 1982, p. 417; ESER G. (note 4), pp. 13-14; JUNKER A., *Internationales Arbeitsrecht im Konzern*, Tübingen 1992, p. 19.

II. Individual Employment Contracts with Companies Belonging to a Multinational Group

A. Fundamental Issues

In practice, this type of employment contract is most frequently encountered in situations where the employee formally concludes his contract with one of the companies of the group, being bound by and providing his services exclusively to that particular company.

At first glance, one rarely finds a foreign element in such relationship. As a rule, the contract is governed by the law of the State where the employing company is established, which is usually the country of its nationality. Nevertheless, the fact that the company belongs to a multinational group is decisive in determining the legal regime of an employment contract. The companies of the group may be affected by the 'mobility of capital' and some elements of the contract may be subject to the national law of the State where the parent company is located.

Let us start with the hypothesis that the work is performed in a subsidiary; if this is the case, the employee's integration in the group affects the contents of the contract. Such legal relation can also be characterised as international on certain occasions because of what LYON-CAEN calls the 'international mobility of capital'[19] or because personnel policies in the multinational group are dictated by the parent company,[20] directly affecting its subsidiaries and the regime of staff employees (due to 'extraterritorial' interests of the multinational group of companies).[21] Under those circumstances, the possibility exists that the labour standards of the State where the parent company is based could be applied extraterritorially in the country where the subsidiary is located. Moreover, directives issued by the parent company could also apply.

Secondly, if the work is to be performed outside the country where the company of the multinational group hired the employee, the existence of the foreign element is more apparent. In such a scenario, 'the international mobility of the employee',[22] as LYON-CAEN calls it, comes into play in different ways. To

[19] LYON-CAEN A., 'Les rapports internationaux de travail', in: *Dr.Soc.* 1978, p. 201.

[20] NICOLAS J., 'Sur l'execution des relations de travail dans les groupes de sociétés: le regard de l'avocat', in: TEYSSIE B., *Les groupes de sociétés et le droit du travail*, Paris 1999, pp. 69-70.

[21] MORGENSTERN F./ KNAPP B., 'Multinational Enterprises and the Extraterritorial Application of Labour Law', in: *I.C.L.Q.* 1978, p. 771; VERKINDT P.-Y., 'L'execution des relations de travail dans les groupes de sociétés', in: TEYSSIÉ B. (note 20), p. 44; KIRALFY A., 'Social and industrial repercussions of operation of multinational firms in the EEC', in: GRISOLI A., *Le imprese multinazionali e l'Europa*, Padova 1978, p. 451.

[22] LYON-CAEN A. (note 19), p. 197; LYON-CAEN G., *Les relations de travail internationales*, Paris 1991, p. 34.

begin with, the itinerant nature of certain jobs obliges the employee to perform his work in two or more countries outside the country where he was contracted. A variation of this would be situations where the employee performs his work in only one other country outside the country where he was initially contracted.

Several important questions of private international law may arise; however, in such situations, one must always take into account that the contractual relation exists only between the employee and one of the companies of the multinational group, i.e., the one with which he concluded the employment contract and to which he offered his services. As a result, it would be difficult to consider the multinational group of companies as the socially responsible business entity or to admit that the contract links the employee with the multinational group as a whole.

Therefore, in the cases examined, the employing company directly bound by the individual employment contract would usually be exclusively responsible.

B. Jurisdiction over Individual Employment Contracts with a Company Integrated in a Multinational Group

In these situations, the first problem is to determine which national courts have international jurisdiction over claims brought by employees against the employing company. Pursuant to Articles 2, 5(1) and 17(5) of the Brussels Convention of 1968 and Articles 18 to 21 of the Council Regulation (EC) No. 44/2001,[23] jurisdiction can be based on different concurring criteria. The same is true under Article 25.1 of the Spanish Ley Organica de Poder Judicial (Organic Law on Judicial Powers, OLPJ) of 1985.

Furthermore, the employee has the option of taking action against the employing company or directly against the parent company of the multinational group.

[23] Consolidated version in: *OJ* C 27, 26.01.1998. The references made to the Brussels Convention 1968 are understood to be the same, unless specified otherwise as the 'parallel' Lugano Convention 1988. This Convention is related to judicial competence and to the execution of judicial resolutions in civil and commercial matters, and was signed on 16 September 1998.

The Regulation (CE) No. 44/2001 (*OJ* L 12, 16.01.2001) has replaced (from 1 March 2002) the Brussels Convention 1998 in the relations between the Member States (with the exception of Denmark whose relations with the other Member States are still governed by the Brussels Convention). However the Regulation does not incorporate anything new in respect to the jurisdiction concerning individual employment contracts, although it includes a new positioning of the provisions pointed out, by incorporating a new Section 5 (Articles 18 to 21) regarding specifically to these contracts.

1. Taking Action Against the Employing Company in the State Where the Work is Performed

Under Article 5.1 of the Brussels Convention 1968, Article 19.2(a) of the Council Regulation (EC) No. 44/2001 and Article 25.1 of the Spanish OLPJ 1985, it is rather easy to determine the competent court in situations where the employee habitually carries out his work for one company of the group and in only one State.[24] As a matter of fact, all these rules stipulate the jurisdiction of the courts of the place where the employee habitually carries out his work.

Even if the employee has performed his work abroad, there appears to be no obstacle to filing the claim before the courts of the defendant's domicile on the basis of the general forum provided in Article 2 of the Brussels Convention and Article 19.1 of Regulation No. 44/2001 (the same applies under Article 25.1 of the Spanish OLPJ).

In addition, in such cases, the company and employee may have included a jurisdiction clause in the employment contract designating the judicial authorities that are competent to hear any claims arising from the contract. Both parties can benefit from such an agreement and thus jurisdiction clauses are frequently used in practice.[25] Also envisaged in Article 17.5 *in fine* of the Brussels Convention of 1968 (after its modification by the San Sebastian Convention on the adhesion of Spain and Portugal[26]) and currently in Article 21 of Regulation No. 44/2001, this

[24] *Cour de travail Bruxelles* 20 January 1981. See DROZ G.A.L., 'Delendum est forum contractus', in: *Dalloz, Chroniques*, 1997, p. 353. On the problems of interpretation that this criteria has raised, MANKOWSKI P., 'Der gewöhnliche Arbeitsort im internationalen Privat- und Prozessrecht', in: *IPRax* 1999, pp. 332 *et seq.*

[25] Also, MORGENSTERN F., *International Conflicts of Labour Law*, I.L.O., Geneva, 1984, pp. 50-51. In U.S. case law, *Gaskin v. Stumm Handel GMBH* (390 F.Supp. 361, S.D.N.Y. 1975). In French case law, *Cass.* 1 July 1964, in: *Rev. crit. dr. int. pr.* 1966, pp. 47-48, Note by SIMON-DEPITRE M., pp. 48-49.

[26] *Report* ALMEIDA/ DESANTES/ JENARD, in: *OJ* 1990, C 189, pp. 47-48. The possible application of Article 17 to these contracts was already admitted by the case law in the Judgement of the ECJ of 13 November 1979, in case 25/79, *Société Sanicentral GmbH c. René Collin*, in: *ECR* 1979, pp. 3423 *et seq*. One must take into account that the text of the Lugano Convention 1988 is different and more restrictive for the employee than the Brussels Convention 1968, given that it only accepts the agreements if they are subsequent to litigation. See SCHACK H., *Internationales Zivilverfahrensrecht*, Munich 1996, p. 113; JIMÉNEZ BLANCO P., 'Los foros de competencia en materia de contrato de trabajo en los Convenios de Bruselas y de Lugano', in: BORRÁS RODRÍGUEZ A. (ed.), *La revisión de los Convenios de Bruselas de 1968 y Lugano de 1988 sobre competencia judicial y ejecución de resoluciones judiciales: una reflexión preliminar española. Seminario celebrado en Tarragona, 30-31 de Mayo de 1997*, Madrid 1998, pp. 222-224.

possibility aims to protect the employee as the 'weaker party' to the contract.[27] This option, however, is not provided in Article 25 of the Spanish OLPJ of 1985.[28]

In the absence of such an agreement, the courts of a Member State still resort to various alternative methods of exercising jurisdiction in certain circumstances. Some of these are included in the Brussels Convention and the Regulation, as well as in the Spanish OLPJ, though with some slight differences.

On the one hand, all of the above instruments provide that the courts of the State where the company has its domicile are always internationally competent. This general forum is stipulated in Article 2 of the Brussels Convention 1968, Article 19 of Regulation No. 44/2001, and in Article 25 of the Spanish OLPJ of 1985. This possibility is also accepted in the case law.[29]

On the other hand, focusing on the differences between the instruments in question, one can see that Article 5.1 *in fine* of the Brussels Convention and Article 19.2(b) of Regulation No. 44/2001 allow employees who do not habitually carry out their work in one country to take action at the courts of the State where the business entity that contracted him is situated.[30] While Article 25 of the Spanish OLPJ is silent about this possibility, it provides other alternatives not mentioned in

---

[27] DROZ G.A.L., 'La Convention de San Sebastian alignant la Convention de Bruxelles sur la Convention de Lugano', in: *Rev. crit. dr. int. pr.* 1990, p. 11; RODRÍGUEZ BENOT A., *Los acuerdos atributivos de competencia judicial internacional en Derecho comunitario europeo*, Madrid 1994, pp. 555 *et seq.*; CALVO CARAVACA A.L., 'Artículo 17', in: CALVO CARAVACA A.L. (ed.), *Comentario al Convenio de Bruselas relativo a la competencia judicial y a la ejecución de resoluciones judiciales en materia civil y mercantil*, Madrid 1994, p. 364.

[28] See ÁLVAREZ GONZÁLEZ S., 'Competencia judicial internacional (Orden Social)', in: *Enciclopedia Jurídica Básica*, Madrid, 1995, Vol. I, p. 1198; CARRASCOSA GONZÁLEZ J., 'El contrato de trabajo internacional', in: CALVO CARAVACA A.-L. *et al*., *Derecho Internacional Privado*, Vol. II, Granada 1998, p. 453.

[29] In Spain, *T.S.* 16 May 1988, in: *Recopilación de Jusrisprudencia Aranzadi* (*R.J.A.*) 3627. In Germany, *Bundesarbeitsgericht* (*BAG*) 21 March 1985, in: *Rechtsprechung zum internationalen Privatrecht* (*IPRspr.*) 1985, pp. 128-130; *Landesarbeitsgericht* (*LAG*) *Bremen* 17 April 1996, in: *IPRspr.* 1996, pp. 109-113. Nonetheless, while in the Brussels Convention of 1968 and in Regulation No. 44/2001 it deals with concurrent criteria, in the Spanish OLJP 1985 it is a secondary forum: FERNÁNDEZ DOMÍNGUEZ J.J., 'Competencia judicial internacional y ley aplicable al contrato de trabajo en las relaciones internacionales (I)', in: *Actualidad Laboral* (*A.L.*) 1991, p. 532.

[30] Report ALMEIDA/ DESANTES/ JENARD (note 26), pp. 44-45. However, the solution in the Lugano Convention is more restrictive as it only takes account of the place where this '*is situated*'. See JIMÉNEZ BLANCO P. (note 26), pp. 224-229; ZABALO ESCUDERO Mª E., 'Competencia judicial internacional en materia laboral en el Convenio de Bruselas', in: BORRÁS RODRÍGUEZ A. (note 26), p. 236; GEIMER R./ SCHÜTZE R., *Europäisches Zivilverfahrensrecht*, München, 1997, p. 139; ADAM MUÑOZ Mª D., 'El foro de competencia judicial internacional en materia de contrato individual de trabajo en los Convenios de Bruselas y de Lugano. Art. 5.1', in: BORRÁS RODRÍGUEZ A. (note 26), pp. 210-211.

the Brussels Convention and the Regulation. For instance, the employee may initiate proceedings before Spanish courts 'when the contract has been signed in Spain'[31] or 'when the employee and the employer have Spanish nationality, regardless of where the services are rendered or where the contract was signed'.[32] However, in our opinion, these options would not very useful in practice because of the priority of EU legislation.[33]

Finally, the employee might be interested in suing the company that hired him in a third country different from that of its domicile.[34] Under the Brussels Convention 1968 and Regulation No. 44/2001, this possibility exists only if the parties included an agreement on choice of forum in their contract (ex Article 17.5 of the Convention and Article 21 of the Regulation) or if the *locus laboris* is in a foreign country (ex Article 5.1 *in fine* of the Convention and Article 19.2(a) of the Regulation[35]). As regards the second situation, designating the forum at the place of performance of the contract would not create a problem if there is only one *locus*

[31] *Tribunal Supremo* (*T.S.*) 4 June 1986, in: *R.J.A.* 3460; *T.S.* 9 of February 1987, in: *R.J.A.* 797; *T.S.* 14 April 1987, in: *R.J.A.* 2757; *T.S.* 7 November 1989, in: *R.J.A.* 8015; *T.S.* 6 March 1991, in: *R.J.A.* 1858; *T.S.* 17 of July 1998, in: *Actualidad Jurídica Aranzadi* 1998-355, p. 13. Spanish legal Literature has criticised this possibility (ZABALO ESCUDERO Mª E., 'La competencia judicial internacional de los tribunales españoles en materia de contrato de trabajo (el artículo 25.1 de la Ley Orgánica del Poder Judicial)', in: *R.E.D.I.* 1986, p. 620; ÁLVAREZ GONZÁLEZ S. (note 28), p. 1197; RIVAS VALLEJO Mª P., 'La competencia judicial internacional en materia de contratos de trabajo (II)', in: *R.E.D.T.* 1995, p. 553.

[32] This criterion was used prior to 1985. See: *T.S.* 5 April 1968, in: *R.J.A.* 1784; *T.S.* 6 March 1971, in: *R.J.A.* 2541; *T.S.* 29 April 1971, in: *R.J.A.* 2560; *T.S.* 22 December 1972, in: *R.J.A.* 195, *T.S.* 6 November 1979, in: *R.J.A.* 3936. This has been criticised by some Spanish authors: IGLESIAS BUHIGUES J.L./ DESANTES REAL M., 'Extensión y límites de la jurisdicción española. Influencia del Convenio de Bruselas de 1968 en la Ley Orgánica del Poder Judicial de 1985', in: DEL ARENAL C., *Las relaciones de vecindad*, Bilbao 1987, p. 462; RIVAS VALLEJO Mª P. (note 32), p. 554; MOLINER TAMBORERO G., 'La competencia judicial internacional de los órganos de la jurisdicción española en el orden social', in: SALINAS MOLINA F. (ed.), *Derecho internacional privado. Trabajadores extranjeros. Aspectos sindicales, laborales y de Seguridad Social*, Madrid 2001, p. 460.

[33] ZABALO ESCUDERO Mª E., *El contrato de trabajo en el Derecho internacional privado español*, Barcelona 1983, pp. 47-50.

[34] In English case law, *Sayers v. International Drilling Co. N.V.* [1971] 1 W.L.R. 1176; Note by CARTER P.B., in: *British Yearbook of International Law* (*B.Y.I.L.*) 1971, pp. 404-406. In a similar way in German case law, *Landesarbeitsgericht Frankfurt am M.* 3 November 1992, in: *IPRspr.* 1992, pp. 161 *et seq.*

[35] Whenever the employment contract is not totally performed outside the territory of the contracting States. In this way, the Judgment of the ECJ of 15 February 1989, in case 32/88, *Six Constructions Ltd. C. P. Humbert*, in: *ECR* 1989, pp. 341 *et seq.* See GUZMAN ZAPATER M., 'Competencia judicial internacional de contrato laboral a ejecutar en diversos países y el art. 5.1 del Convenio de Bruselas', in: *La Ley*, 30 January 1989, pp. 7 *et seq.*

executionis.[36] If, however, the employee had to perform his work in various Member States, this could lead to conflicting multiple jurisdictions, thus making it difficult to determine which *locus laboris* should prevail.[37] To avoid this problem, another alternative to the *locus laboris* has been granted to the employee,[38] permitting him to sue the company before 'the court of the country where the enterprise that hired him is, or was, located'.[39] This alternative is also provided by Article 19.2(b) of Regulation No. 44/2001.

[36] In French case law, *Cour d'appel d´Angers* 29 January 1980, in: *Rev. crit. dr. int. pr*. 1981, pp. 118 *et seq*., note by GAUDEMET-TALLON H., pp. 122 *et seq*.

[37] Note by ZABALO ESCUDERO Mª E., in: *R.E.D.I.* 1993, p. 472; note by HUET A., in: *Clunet* 1994, pp. 541 and 546. With respect to this, in our opinion, the determination of the *locus laboris* in those cases should not be left to national legislation, as it happened in German case law, *LAG Frankfurt a M.* 4 January 1984. See COESTER-WALTJEN D., 'Gerichtstand des Erfüllungsortes für Lohnansprüche (Art. 5 Nr. 1 EuGVÜ)', in: *IPRax* 1986, pp. 88 *et seq*. Therefore, uniform and autonomous interpretation of this connecting factor must be welcomed, as recently occurred in the ECJ Judgment of 27 February 2002, in case C-37/00, *Herbert Weber c. Universal Ogden Services Ltd*. See GONZÁLEZ VEGA J.A., 'Instalaciones Offshore y competencia judicial: el Convenio de Bruselas de 1968, el TJCE y la 'obsesión por el territorio'', in: *La Ley. Unión Europea*, 2002-5556, pp. 1 *et seq*.

[38] Report ALMEIDA/ DESANTES/ JENARD (note 26), p. 45; PÉREZ BEVÍA J.A, 'Competencia judicial y ley aplicable al contrato individual de trabajo en los convenios comunitarios europeos de Derecho internacional privado', in: *Relaciones Laborales* (*Rel.Lab.*) 1995, p. 1399; Note by TAGARAS H., in: *Cahier de droit européen* 1995, pp. 188 *et seq*., p. 190. Against, RIVAS VALLEJO Mª P. (note 32), p. 550.

[39] ECJ Judgment of 9 January 1997, in case 383/95, *P.W. Rutten c. Cross Medical Ltd*., in: *ECR* 1997, pp. 57 *et seq.* See, JUNKER A., 'Die internationale Zuständigkeit deutscher Gerichte in Arbeitssachen', in: *Zeitschrift für Zivilprozess International* 1998, pp. 194 and 201. However, curiously, it never mentions the second alternative. JAYME E./ KOHLER Ch., 'Europäisches Kollisionsrecht 1997 – Vergemeinschaftung durch ‚Säulenwechsel'?', in: *IPRax* 1997, p. 393; CHECA MARTÍNEZ M., 'El foro del lugar de cumplimiento de la obligación contractual en el Convenio de Bruselas: avances en el contrato de trabajo plurilocalizado. Comentario a la sentencia del T.J.C.E. of 9 January 1997', in: *La Ley*, 25 March 1997, p. 5; note by GAUDEMET-TALLON H., in: *Rev. crit. dr. int. pr*. 1997, pp. 345-346. Similarly, ECJ Judgment of 13 July 1993, in case 125/93, *Mulox IBC Limited c. Hendrick Geels*, in: *ECR* 1993, pp. 4105-4107. See ESPINOSA CALABUIG R., 'Interpretación del artículo 5.1 del Convenio de Bruselas de 27 de septiembre de 1968', in: *Noticias de la Unión Europea* (*N.U.E.*) 1995.123, *p.* 100; note by LAGARDE P., in: *Rev. crit. dr. int. pr.* 1994, p. 576; HOLL V.H., 'Der Gerichtsstand des Erfüllungsortes nach Art. 5 Nr. 1 EuGVÜ bei individuellen Arbeitsverträgen', in: *IPRax* 1997, pp. 88-89. This opinion is not envisaged in the Lugano Convention 1988 in the same terms (Report JENARD/ MÖLLER, *OJ* 1990, C 189, p. 73), keeping the formal equality between the parties (LAGARDE P. (note 39), p. 576).

2. Taking Action Against the Foreign Parent Company of the Multinational Group

In certain circumstances (e.g., insolvency of the actual employer), it might be advisable for the employee to take action directly against the parent company. In this case, however, the absence of a contractual agreement between the parties could make it difficult to determine the international competence of national courts. As a rule, the courts of the State where the employee performs his work would not be competent, due to the absence of a contractual link between the parties. This is true under the Brussels Convention and the Regulation, as well as in Spanish private international law.

For the same reason, jurisdiction could not be exercised in Spain based on other criteria of Article 25 of the Spanish OLPJ, i.e., even if the *locus celebrationis* (done either in a branch or delegation of the foreign parent company) or the *locus executionis* is situated in Spain.[40] It should be noted, however, that this provision accepts the jurisdiction of Spanish courts not only when 'the defendant is domiciled on Spanish territory' but also when it has 'an agency, branch, delegation or other type of representative in Spain'. With respect to this provision, RIVAS VALLEJO expressed the view that 'Spanish law does not specify that this branch or agency has to be one of the contracting parties'. It would thus be possible to file a suit against the foreign parent company by virtue of the simple fact that it possesses a secondary establishment in Spain.[41] In our opinion, however, this interpretation would create a forum of exorbitant character.[42]

A similar question arises under the Brussels Convention and the Regulation, which in Article 5(5) grant jurisdiction to the courts of the Member State where a branch, an agency or other establishment is situated, in respect of a dispute arising out of the operations of such branch, agency or establishment. Article 18 of the Regulation expressly refers to this provision in connection with disputes relating to employment contracts.

In this context it is interesting to note that the interpretation of Article 5(5) has undergone a positive evolution in the case law of the European Court. In *Somafer*, the ECJ ruled that this provision also applies to claims relating to the contracting of the personnel to work in the branch.[43]

---

[40] *T.S.* 14 December 1988, in: *R.J.A.* 9614; *Juzgado de lo Social Madrid* 18 March 1996, in: *A.L.* 1996 nº 977, pp. 1946 *et seq.* In Italian case law, *Trib. Milano* 11 May 1967, in: *Riv. dir. int. priv. proc.* 1968, pp. 132 *et seq.*; *Cass.* 17 May 1995, in: *Riv. dir. int. priv. proc.* 1996, pp. 325 *et seq.*

[41] In Italy, *Trib. Milano* 24 November 1966, in: *Riv. dir. int. priv. proc.* 1967, pp. 598 *et seq.*

[42] RIVAS VALLEJO Mª P. (note 32), pp. 553-554. See also ÁLVAREZ GONZÁLEZ S. (note 28), p. 1198.

[43] Just as was done by virtue of the ECJ Judgments of 6 October 1976, in case 14/76, *De Bloos c. Bouyer*, in: *ECR* 1976, pp. 1497 *et seq.*; of 22 November 1978, in case 33/78,

It could thus be invoked only in situations where the employee was contracted exclusively by the secondary entity and carried out his work in the country where this entity is located. In view of this, some authors maintain that this provision could not be invoked in the situations dealt with here,[44] i.e., when a foreign parent company is sued based on the simple fact that it possesses a secondary establishment in another Member State.[45]

At a later date, however, the Court took it upon itself to extend the scope of application of this article to situations where the employee was hired by the secondary establishment in the name of the headquarters, ev*en if the contract was not concluded in that country*.[46] As a result, the courts in the country of the branch's domicile are now competent to entertain an action brought by an employee against the foreign parent company.[47] In [our] opinion, this positive extension of the jurisdiction of national courts is totally justified because, on certain occasions, the branch office or secondary establishment operates as a mere recruitment centre, whereas the final responsibility lies with the parent company for which the employee provides his services. Thus, the possibilities existing under the current legal framework would give the employee a good chance of success, but only if the contract has been concluded in the name of the parent company, thus creating a contractual relation between the latter and the employee**.**

In this context it is worth mentioning the provision included in Paragraph 3 of the Principles of the ILI Resolution of 1995 on the obligations of a company belonging to an international group and their effect on other companies of that group. According to this provision, a suit could be initiated in any State, even against the foreign parent company of the multinational group, if the foreign parent

---

Somafer c. Saar-Ferngas, in: *ECR* 1978, 2141 *et seq.*; of 18 March 1981, in case 139/80, *Blanckaert & Willems PVBA c. Luise Trost*, in: *ECR* p. 819; and of 9 December 1987, in case 218/86, *SAR Schotte GmbH c. Parfums Rothschild SARL*, in: *ECR* 1987, p. 4905. See DESANTES REAL M., *La competencia judicial en la Comunidad Europea*, Barcelona 1986, pp. 319 *et seq.*; BLANCO-MORALES LIMONES P., 'Artículo 5.5', in: CALVO CARAVACA A.L. (note 26), pp. 141-142; BERAUDO J.-P., 'Convention de Bruxelles du 27 septembre 1968', in: *Juris-Classeur, Droit international*, No. 631-42, 1999, pp. 9-10; GEIMER R./ SCHÜTZE R. (note 30), p. 166; KROPHOLLER J., *Europäisches Zivilprozessrecht*, 5th ed. Heidelberg 1996, p. 83.

[44] ALVAREZ RODRÍGUEZ A., 'El lugar de situación de las sucursales, agencias o cualesquiera otros establecimientos como criterio determinante de la competencia judicial internacional', in: *La Ley. Comunidades Europeas*, No. 32, 1988, p. 3.

[45] DESANTES REAL M. (note 43), p. 319.

[46] ECJ Judgment of 6 April 1995, in case 439/93, *Lloyds Register of Shipping c. Société Campenon Bernard*, in: *ECR* 1995, pp. 961 *et seq*. See SANCHO VILLA D., in: *R.E.D.I.* 1995-43-Pr, pp. 394-395; note by DROZ G.A.L., in: *Rev. crit. dr. int. pr*. 1995, pp. 774-776; BERAUDO J.-P. (note 43), p. 12.

[47] KROPHOLLER J. (note 43), p. 136. Against, RIVAS VALLEJO Mª P. (note 32), p. 543; BERAUDO J.-P. (note 43), p. 13.

company controls the subsidiary of the multinational group, or if the court is confronted by one of the situations described in Paragraph 2 of the ILI Resolution of 1995 (cited below). However, in [our] opinion, it would be difficult to obtain foreign recognition of a judgment rendered on this basis. Paragraph 3 of the Resolution reads as follows:

> '[…] 3. When the claim for which jurisdiction is asserted arises out of or is closely related to the activities of, or on behalf of, the multinational enterprise in a State, it is open to the State, in addition to such other bases of judicial jurisdiction as it may provide over persons not established in its territory, including jurisdiction based on injury sustained or contracts made or breached in the State, provide
>
> (a) that a parent company or controlling entity of a multinational enterprise is subject to the jurisdiction of its courts on the basis
>
> i. of the permanent presence in the State of a branch or comparable establishment of the multinational enterprise;
>
> ii. of the permanent presence in the State of a subsidiary so closely linked to the multinational enterprise by common ownership, control, personnel, management, or activity as to be fairly regarded as a mere department or *alter ego* of the multinational enterprise; or
>
> iii. of the existence of circumstances that could justify imputation of liability of the parent company or controlling entity in accordance with Paragraph 2 (a) or (b) of these Principles.
>
> (b) that another member of the multinational enterprise is subject to the jurisdiction of its courts on the basis of the existence of circumstances that could justify imputation of liability to that member in accordance with Paragraph 2 of these Principles.'

Furthermore, if a claim is filed against a foreign parent company before the courts of the State where it is established, those courts would presumably not accept its competence – at least not under a contractual action.[48] This difficulty could be overcome if European or Spanish law contained solutions similar to those of the ILI Resolution of 1995 More specifically, I am referring to the solutions incorporated in Paragraph 2 of the Principles, which make it possible to file a suit directly in the *forum* of the parent company under certain conditions, even in the absence of a contractual relation between them. In this respect, Paragraph 2 of the Resolution provides:

[48] Although Spanish case law has admitted this possibility in an indirect way. *T.S.* 7 July 1997, in: *R.J.A.* 5565; *T.S.* 16 February 1994, in: *R.J.A.* 1052.

'2. (a) Liability for claims arising out of contractual relations between a company an third party may be imputed by a court or arbitral tribunal to the parent company or other controlling entity of a multinational enterprise when

i. the controlling entity has taken part in the negotiation, performance, or termination of the contract on which the claim is based in such manner as to lead the claimant reasonably to rely on its responsibility;

ii. the company in question or the controlling entity has engaged in fraud or deceptive practice in respect of the obligation on which the claim is based; or

iii. a member of a multinational enterprise ceases its activity, enters into liquidation, or is put into bankruptcy, in order to contribute to the compensation due to its employees in accordance with the law applicable at the place of activity.'

C. Applicable Law Issues

Article 6 of the Rome Convention of 1980 serves as a basic reference when determining the law governing an individual employment contract.[49] This provision is applicable *erga omnes* and virtually displaces the existing provisions of private international law in this field in EU Member States. Accordingly, in Spain, Article 10(6) of the Spanish Civil Code and Article 1, subsection 4 of the Spanish Workers' Statute are no longer applicable.[50]

1. Preliminary Remarks

Before analysing Article 6, it is necessary to make some preliminary remarks. In principle, questions of private international law do not arise in cases in which the relations between employees and the employing company are considered strictly domestic, which includes a large number of cases. Moreover, even in cases with an international element, the typical response is still to apply the law of a particular country. This is because the results achieved by international unification are very limited in this area.[51]

[49] Consolidated version in: *OJ* 1998, C 27.

[50] ESPLUGUES MOTA C., 'Régimen jurídico de la contratación en el Derecho del comercio internacional', in: ESPLUGUES MOTA C., *Contratación internacional*, Valencia 1999, pp. 119-121; VIRGÓS SORIANO M., 'Artículo 10.6', in: *Comentarios al Código Civil y Compilaciones Forales*, Vol. I/2 Madrid 1995, pp. 694-695.

[51] ESER G. (note 4), pp. 123 *et seq.*; REICH N. (note 1), p. 353; MORGENSTERN F./ KNAPP B. (note 21), pp. 782-786. KNAPP B., 'La protection des travailleurs des sociétés

Furthermore, the fact that a company is part of a multinational group has an impact on some aspects of the employment contract, connecting the subsidiary company with its staff. When a parent company sets up a subsidiary or acquires an already-made company in another State, it will undoubtedly strive to have its personnel policy followed by other companies of the group as well. This, however, does not always lead to the creation of a 'single social statute' governed by the law of the country where the parent company is domiciled and applicable to all employees of the various companies of the group.[52] Instead, positions of inequality are frequently maintained[53] as part of the policy of international expansion.[54]

On the other hand, the parent company will probably unify only certain aspects of individual contracts, while the remaining are subject to the conditions generally applied in the State where the subsidiary company is established.[55] In addition, the decision of the parent company to restructure the companies of the multinational group could also have a decisive impact on employment contracts formalised with subsidiaries established in different States,[56] as in the case of collective redundancies.[57]

Finally, it is also interesting to note in which situations Collective Agreements can be applied, as they can affect individual labour relations if they form part of the *lex causae*.[58] The answer to this question depends on the spatial scope of

membress du groupe', in: *Colloque international sur le droit international privé des groupes de sociétés*, Geneva 1973, pp. 160-161; BIRK R. (note 7), p. 143.

[52] COURSIER P., *Le conflit de lois en matière de contrat de travail*, Paris 1993, p. 77; MORGENSTERN F./ KNAPP B. (note 21), p. 771.

[53] MONTOYA MELGAR A., *Derecho del Trabajo*, Madrid 1996, p. 542.

[54] Thus it is an important element for delocalising the companies from one country to another (see the Report about delocalising international undertakings, (note 10) *pp.* 41-42), with the consequent risk of social *dumping* (CARRASCOSA GONZÁLEZ J./ RODRÍGUEZ-PIÑERO ROYO M.C., 'Contrato internacional de trabajo y Convenio de Roma sobre la ley aplicable a las obligaciones contractuales: impacto en el sistema jurídico español', in: *Rel.Lab.* 1996, pp. 1372). The opposite, as MONTOYA MELGAR pointed out, would go against the multinational group's own logic. MONTOYA MELGAR A. (note 53), p. 542. Also, RODRÍGUEZ PIÑERO M. (note 9), p. 789; KIRALFY A. (note 21), p. 456.

[55] BIRK R. (note 7), pp. 145-146. Except that these companies usually adapt to the labour practices of the host country. MONTOYA MELGAR A. (note 5), p. 490.

[56] RODRÍGUEZ PIÑERO M. (note 9), p. 788. To a large extent, this will be the same even in decentralised groups. DAVIES P.L. (note 9), p. 211.

[57] See ENGRÁCIA ANTUNES J.A. (note 2), p. 186; ESER G. (note 4), pp. 54 *et seq.*; REICH N. (note 1), p. 327; JUÁREZ PÉREZ P., *Las relaciones laborales en los grupos internacionales de sociedades*, Granada 2000, pp. 179 *et seq.*

[58] ÁLVAREZ GONZÁLEZ S., 'Convenio Colectivo (Derecho Internacional Privado)', in: *Enciclopedia Jurídica Básica*, Vol. I, pp. 1688-1689; LYON-CAEN G., 'La convention collective du travail en Droit international privé', in: *Clunet* 1964, pp. 247 *et seq.*; ZAMORA CABOT J., 'El esquema estatal de fuentes del Derecho Laboral Internacional', in: *Revista de*

application of the Collective Agreement concerned.[59] For instance, the Collective Agreement can be designed to exclude situations outside the territory where it is in force, as well as labour relations between a company of the multinational group and employees posted outside the country where they were originally employed, or those with foreign employees contracted by a foreign company.[60]

However, in some cases the nature of the work could give rise to conflicting situations. This occurs, for example, when work outside the home country is performed by an employee who often performs his activities in different countries. In such situations, the Collective Agreement could contain a special provision providing for its application, or the parties could have concluded a special agreement to this effect.[61] If this is not the case, one must distinguish between situations where an employee contracted by a company carries out his work abroad and those where the employee provides his services to a foreign subsidiary of the parent company. In the first situation, Spanish case law would probably exclude application of the Collective Agreement on the basis of its territorial interpretation. In our opinion, however, it would be more appropriate to adopt a more positive position, such as that adopted by German, French and Italian case law, according to which the Collective Agreement is applied as belonging to the law governing the contract, provided this law does not exclude work performed abroad.[62] In the second situation, it would seem logical to assume that the provisions of a Collective Agreement of the State of the parent company cannot be applied to relations between foreign subsidiaries of the parent company and their employees.[63]

---

la Facultad de Derecho de la Universidad Complutense de Madrid (*R.F.D.U.C.M.*) 1980, pp. 96-99; RODIÈRE P., 'Conflits de lois en droit de travail: étude comparative', in: *Dr.soc.*, pp. 129-131; MARTINY D., 'Arbeitsvertrag', in: REITHMAN C./ MARTINY D., *Internationales Vertragsrecht*, Köln 1995, pp.1127-1133.

[59] JUNKER A. (note 18), p. 428. In German case law, *BAG* 11 September 1991, in: *IPRspr.* 1991, pp. 121-122. In Italian case law, *Cass.* 18 February 1983, in: *Riv. dir. int. priv. proc.* 1984, pp. 331 *et seq.*

[60] In this way, in Italy, *Cass.* 6 September 1980, in: *Riv. dir. int. priv. proc.* 1981, pp. 923 *et seq.*; *Clunet* 1983, pp. 190-191, note by R.C., pp. 191-193; in: *Riv.it.dir.lav.* 1982, note by F. POCAR, 'Protezione del lavoratore e legge applicabile al rapporti di lavoro', pp. 43 *et seq.* With respect to German case law, *BAG* 4 of May 1977, in: *IPRspr.* 1977, pp. 109 *et seq.*; *Clunet* 1984, pp. 170-171. Against, JUNKER A. (note 18), pp. 413-414.

[61] As occurred in Italian case law, *Cass.* 15 July 1994, in: *Riv. dir. int. priv. proc.* 1995, pp. 719 *et seq.* See, JUNKER A. (note 18), *pp.* 418-423; ZAMORA CABOT J., 'El contrato de trabajo internacional', in: *Rivista di diritto internazionale e comparato del lavoro* 1977, p. 106.

[62] LYON-CAEN G. (note 22), p. 50; JUNKER A. (note 18), p. 415. In France, *Cass.* 5 November 1991, in: *Clunet* 1992, pp. 357-358., See MOREAU M-A., pp. 359 *et seq.*; in: *Rev. crit. dr. int. pr.* 1992, pp. 314-317; see MUIR WATT H., pp. 317 *et seq.*

[63] ÁLVAREZ GONZÁLEZ S. (note 58), p. 1688. In Spain, *T.S.* 16 February 1994, in: *R.J.A.* 1052; *T.S.* 7 July 1997, in: *R.J.A.* 5565.

2. Application of the Law of the Place Where the Work is Performed

In international situations, individual employment contracts are generally governed by the law of the country where the employee habitually performs his activities. This solution is stipulated by Article 6 of the Rome Convention of 1980.

The parties to an employment contract may make use of the principle of party autonomy to choose the law governing the contract (Article 6(1) of the Rome Convention). The choice of law may be express or implied.

A choice of law explicitly expressed in a clause of the individual employment contract causes no problems,[64] whereas detecting an implied choice can be problematic in practice.[65] For instance, the company could use an implied choice of law to impose a particular national law, without the employee being aware of it at the time of the conclusion of the contract.[66] In practice, party autonomy usually coincides with the application of the *lex fori* in the situations examined here, the objective being to favour a national employee who performs his work outside the Member State where he was contracted.[67] As a rule, this also leads to the choice of the law of the State where the employing company is located.[68] Moreover, this solution normally coincides with the place where the work is performed.

On the one hand, this solution can clearly be beneficial for both parties, since it guarantees equal treatment for the employees of a company and thus a protective framework familiar to the employee. On the other hand, the choice of the law of the country where the local staff habitually performs its work enables

---

[64] Nevertheless, difficulties could arise when the choice takes the form of a Collective Agreement: JUNKER A. (note 18), p. 199.

[65] In JUNKER's opinion, the most important indications of an implied choice include jurisdiction clauses, the subjection to a specific Collective Agreement, or the choice of a legal institution of a specific national legal system: JUNKER A. (note 18), p. 201.

[66] Similarly, MORSE C.G.J., 'Contracts of Employment and the EEC Contractual Obligations Convention', in: NORTH, P.M., *Contract conflicts. The EEC Convention on the Law Applicable to Contractual Obligations*, Amsterdam 1982, p. 151; MARTINY D. (note 58), p. 1082.

[67] RODIÈRE P. (note 58), p. 122; COURSIER P., 'Conflits de lois en droit du travail', in: *Juris-Classeur, Droit international*, No. 573-10, 1996, pp. 5-8. In French case law, *Cass.* 25 May 1977, in: *Rev. crit. dr. int. pr.* 1978, pp. 701-703, note by LYON-CAEN A., pp. 705 *et seq*; *Cass.* 10 July 1992, in: *Dr.Soc.* 1993, pp. 78-79. See CHAUVY Y., 'Conflit de lois et contrat de travail: détermination de la loi applicable au licenciement de salariées protégées et au licenciement économique', in: *Dr. Soc.* 1993, pp. 67 *et seq.*; see AUDIT B., *Rev. crit. dr. int. pr.* 1994, pp. 72 *et seq.*

[68] COURSIER mentions the possibility of collectively subjecting the individual employment contracts to a national law to create a 'group statute': COURSIER P. (note 68), p. 77. ZAMORA CABOT also echoes this possibility, with the objective being to subject a specific 'body' of employees of the group to the same law: ZAMORA CABOT J. (note 61), p. 97.

the employee to rely on this protective legal framework regardless of where the work is performed.[69]

One should not forget, however, that the choice of law can also lead to the application of the law of the country where the parent company of the multinational group is located, or the law of the State where the work is performed, if this is different from the country where the employee has been hired and where the subsidiary is established. Moreover, the choice will depend on the bargaining position of the employee.[70]

In practice, the parties rarely make an express choice of law; furthermore, the law chosen by the parties usually cannot be clearly inferred from the terms of the contract.[71]

In the absence of a choice of law by the parties, an individual labour contract will be governed by the *lex loci laboris*[72] pursuant to Article 6.2(a) of the Convention. This solution generally coincides with the *lex fori*[73] and the habitual place of residence or domicile of the employee.[74] This is the most appropriate connecting factor for international individual employment contracts[75] because it

[69] In Spain, *Juzgado de los Social Madrid* 18 March 1996, in: *A.L.* 997, pp. 1946 *et seq.* In Germany, *BAG* 30 April 1987, in: *IPRspr.* 1987, pp. 85 *et seq.*; *BAG* 21 March 1985 (JUNKER A., 'Die zwingenden Bestimmungen' im neuen internationalen Arbeitsrecht', in: *IPRax* 1989, pp. 69 *et seq.*). In Italy, *Cass.* 9 August 1996, in: *Riv. dir. int. priv. proc.* 1998, pp. 180-181.

[70] In BOGGIANO's opinion, there is an obligation to subject the contract to the law of the parent company if there is a close connection to the board of directors of the company; or to the place where the work is performed if the relationship is minor. BOGGIANO A. *Sociedades y Grupos Multinacionales,* Buenos Aires, 1985, *p.* 190.

[71] In this way, Report ZÖLLNER W., in: *Colloque international sur le droit international privé des groupes de sociétés* (note 51), pp. 212-213.

[72] In Spanish case law, *T.S.* 20 January 1983, in: *R.J.A.* 103. In French case law, *Cass.* 9 November 1959, in: *Rev.crit.dr.int.pr.* 1960, pp. 566-569, note by SIMON-DEPITRE M., pp. 569 *et seq.*; in: *Clunet* 1960, p. 1064, note by LYON-CAEN G.; *Cass.* 31 March 1978, in: *Rev. crit. dr. int. pr.* 1978, pp. 703-704, note by LYON-CAEN A., pp. 705 *et seq.* See COTTEREAU V., 'Le rapport de travail et le droit international privé', in: *Droit et pratique du commerce international* 1988, p. 25. In English case law, *South African Breweries v. King* [1899] 2 Ch. 173, affirmed [1900] 1 Ch. 273 (C.A.). In German case law, *BAG* 29 October 1992, in: *IPRspr.* 1992, pp. 142 *et seq.*; in: *IPRax* 1994, pp. 123 *et seq.* Note by MANKOWSKI P., pp. 88 *et seq.*

[73] VILLANI U., 'I contratti di lavoro', in: *Verso una disciplina comunitaria della legge applicabile ai contratti*, Padova 1983, p. 144; KAYE P., *The New Private International Law of Contract of the European Community*, Aldershot 1993, *p.* 232.

[74] VILLANI U. (note 73), p. 144; KAYE P. (note 73), p. 238.

[75] SAZSY I., 'Les conflits de lois en matière du travail', in: *Annales I.D.I.* 1971-I, pp. 341 *et seq.*; ID., 'The Proper Law of Labour Contracts', in: *I.C.L.Q.* 1968, p. 12. Also, VILLANI U. (note 73), p. 282; ZABALO ESCUDERO Mª E., 'La Convención CEE sobre la ley aplicable a las obligaciones contractuales y el contrato de trabajo', in: *Revista de*

guarantees equal treatment for all the company's employees and, as such, improves the organisation of the company.[76] Nevertheless, due to its strict territorial nature, this option can lead to problems in practice.[77]

For instance, problems may arise in determining the place of work and the meaning of the concept 'habitual place of work'. It could occur that the 'place of work' is not same as the place where the work is actually performed[78] or that the work is not carried out in any particular State at all.[79] As for determining the meaning of the term 'habitual', a valid solution would be to seek guidance from the case law of the ECJ, which has interpreted this concept within the framework of Article 5(1) *in fine* of the Brussels Convention 1968.[80]

These problems can be excluded either by invoking the exemption clause in Article 6(2) *in fine*, which displaces the *lex loci executionis* if it is apparent from the circumstances that the contract is most closely connected with another country, or by relying on the mandatory effect of the said rules (see *infra*).

As regards cases in which the employee does not habitually perform his work in any one country, Article 6.2(b) provides for application of the law of the contracting company's domicile.[81] This connecting factor reflects the German theory of 'irradiation' (*Ausstrahlung*)[82] and has to be accepted positively in these cases.[83] Nonetheless, this alternative can create certain problems when the role of

---

Instituciones Europeas (*R.I.E.*) 1983, p. 526; MOURA RAMOS R.M., 'El contrato individual de trabajo', in: CALVO CARAVACA A.L./ FERNÁNDEZ DE LA GÁNDARA L., *Contratos internacionales*, Madrid 1997, pp. 1891 and 1895.

[76] See VIRGÓS SORIANO M., 'El Convenio de Roma de 19 de Junio de 1980 sobre ley aplicable a las obligaciones contractuales', in: *Tratado de Derecho comunitario europeo*, Vol. III, Madrid 1986, p. 804; CARRASCOSA GONZÁLEZ J./ RODRÍGUEZ-PIÑERO ROYO M.C. (note 54), p. 1347; SIMON-DEPITRE M., 'Droit du travail et conflits de lois', in: *Rev. crit. dr. int. pr.* 1958, pp. 298-299.

[77] GAMILLSCHEG F., 'Les principes du droit du travail international', in: *Rev. crit. dr. int. pr.* 1961, pp. 284-285.

[78] ESER G. (note 4), p. 41.

[79] For instance, on the high seas; see MORGENSTERN F. (note 25), pp. 32-33.

[80] Also ESER G. (note 4), p. 61; KAYE P. (note 73), pp. 232-233; HARTLEY T.C., 'Mandatory Rules in International Contracts: the Common Law Approach', in: *Recueil des Cours* 1997-266, p. 377.

[81] See ESER G. (note 4), pp. 41-42; MORGENSTERN F. (note 25), p. 28; ZABALO ESCUDERO Mª E. (note 31), pp. 142-143; CARRASCOSA GONZÁLEZ J./ RODRÍGUEZ-PIÑERO ROYO M.C. (note 54), p. 1348.

[82] GAMISSCHLEG F. (note 77), pp. 285 *et seq.*; SAZSY I. (note 75), pp. 349 *et seq.*; ZABALO ESCUDERO Mª E. (note 31), p. 138.

[83] Also ESER G. (note 4), p. 42; VILLANI U. (note 73), p. 286; SZASZY I. (note 75), p. 12; SIMON-DEPITRE M. (note 76), p. 300. In French case law, *Cass.* 25 January 1984, in: *Rev. crit. dr. int. pr.* 1985, pp. 327-328. In Italian case law, *Trib. Roma* 26 February 1974, in: *Riv. dir. int. priv. proc.* 1974, p. 622; *Cass.* 22 February 1992, in: *Riv. dir. int. priv. proc.*

the employing company is not significant in the labour relationship.[84] Since the proposed solution would not be the most appropriate in such cases, it should be taken into account only if the company participated actively in the process of concluding the contract with the employee (i.e., when it is more than just a mail box or the mere place where the contract was signed) and if the multinational group owns a secondary establishment that has some permanence in that country.[85]

In some situations, however, it can occur that the *lex loci laboris* is not the national law most closely connected with the contract or that it is difficult to determine in the particular circumstances. In an attempt to give more flexibility to the above-mentioned solution, it is possible to apply the exemption clause contained in Article 6(2) *in fine* of the Rome Convention in situations where the result is otherwise not appropriate.[86]

This possibility has a corrective function inspired by the principle of proximity.[87] Nonetheless, it should be applied restrictively.[88] Firstly, because of the wide discretion it gives to judges. Moreover, its abuse can lead to a high level of legal uncertainty and to excessive reliance on the *lex fori*. On the other hand, it could be appropriate in situations where the work was carried out in a place outside a territory under State sovereignty, where the employing company was only slightly

1994, p. 150; Cass. 30 November 1994, *Riv. dir. int. priv. proc.* 1996, pp. 353-354. In German case law, *LAG Bremen* 17 April 1996. See MARTINY D., 'Europäisches Internationales Vertragsrecht – Ausbau und Konsolidierung', in: *Zeitschrift für europäisches Privatrecht* (*ZEuP*) 1999, pp. 261-262.

[84] MORSE C.G.J., 'Consumer contracts, employement contracts and the Rome convention', in: *I.C.L.Q.* 1992, p. 19; LAGARDE P., 'Le noveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 juin 1980', *Rev. crit. dr. int. pr.* 1991, p. 318; KAYE P. (note 73), p. 235.

[85] See KAYE P. (note 73), pp. 235-236; LAGARDE P. (note 84), pp. 318-319; PÉREZ BEVIÁ J.A. (note 38), p. 1403.

[86] When determining the law of the country most closely connected with the contract, one should take account of the place where the employing company is established, the residence or domicile of the employee, the form of the contract, the language in which it is written, and the currency of the money agreed upon. JUNKER A. (note 18), p. 195; MORSE C.G.J. (note 84), p. 29. To these one could add: previous labour relations (if any exist), a connection with a project of larger dimension, and a common residence or citizenship of the parties. KAYE P. (note 73), p. 237.

[87] BARATTA R., *Il collegamento più stretto nel diritto internazionale privato dei contratti*, Milano 1991, pp. 226-227 and 235-238; DÉPREZ J., 'Rattachaments rigides et pouvoir d´appréciation du juge dans la détermination de la loi applicable au contrat de travail international', in: *Dr.Soc.* 1995, p. 326; JUNKER A. (note 18), p. 190; SALVADORI M.M., 'La protezione del contaente debole (consumatori e lavoratori) nella Convenciones di Roma', in: *La Convenzione di Roma sul diritto applicabile ai contratti internazionali*, Milano 1994, pp. 145-146. However, VIRGÓS SORIANO M. (note 50), pp. 702-703.

[88] BARATTA R. (note 87), pp. 240 *et seq.*; JUNKER A. (note 18), p. 196.

connected with the contract (with the intention of applying the law of the country common to the two parties),[89] or where the work was not habitually performed in one country only.[90]

3. The Role of Mandatory Rules

In addition to the above, mandatory rules play a decisive role[91] in this field. As the GIULIANO/ LAGARDE Report on the Rome Convention points out, these rules relate not only to the employment contract, but also to some specific matters such as hygiene and the safety of employees.[92]

Mandatory rules constitute a limitation to the *pactum de lege utenda* in individual employment contracts. Their application follows primarily from Article 6(1) of the Rome Convention but also from subsections 1 and 2 of Article 7 of the same Convention. Their application can lead to problems, on the one hand, in situations where the law of a country must be applied because the employing company is located on its territory, and on the other, in situations where the national labour provisions have an extraterritorial effect if the parent company is in a foreign country.

The effect of mandatory rules on an international individual employment contract will depend on the particular situation.[93] If the work is to be carried out in a certain State, action will usually be taken at its courts, as a result of which local law will be applicable together with its mandatory rules.[94] It is irrelevant whether

---

[89] JUNKER A. (note 18), p. 194; MARTINY D. (note 58), p. 1094; VILLANI U. (note 73), p. 287. In Spain *Tribunal Superior de Justicia* (*T.S.J.*) *Madrid* 14 March 1997, in: *R.J.A.* 692. In German case law; *BAG* 29 October 1992, in: *IPRspr.* 1992, pp. 142 *et seq.*; *LAG Frankfurt* 3 November 1992, in: *IPRspr.* 1992, pp. 161 *et seq.*

[90] In Germany, *LAG Bremen* 17 April 1996, in: *IPRspr.* 1996, pp. 109-113. In French case law, *Cour d'appel Paris* 4 July 1996, in: *Recueil Dalloz* 1998.30, *Somm.comm.* p. 281.

[91] VIRGÓS SORIANO M. (note 50), p. 703; GUARDANS CAMBÓ I., *Contrato internacional y Derecho imperativo extranjero*, Pamplona 1993, pp. 402-403; ZABALO ESCUDERO Mª E. (note 31), pp. 71 y ss, 183; GAMILLSCHEG F., 'Labour Contracts', in: *International Encyclopaedia of Comparative Law*, Vol. III, Ch. 28, p. 6.

[92] *Report* GIULIANO M./ LAGARDE P., in: *OJ* 1992, C 327, *p.* 23. Against, KAYE P. (note 73), p. 227. Another doctrinal sector, in its turn, would include rules on strikes and the holiday schedule. VILLANI U. (note 89), p. 270 *et seq.*; SALVADORI M.M. (note 87), pp. 139-140.

[93] GUARDANS CAMBÓ I. (note 91), pp. 419-439, note 275; GAMILLSCHEG F. (note 77), pp. 687 *et seq.*

[94] BONOMI A., *Le norme imperative nel diritto internazionale privato*, Zürich, 1998, pp. 148 and 188; ZABALO ESCUDERO Mª E. (note 75), p. 537; GUARDANS CAMBÓ I. (note 91), p. 419; GAMILLSCHEG F. (note 77), p. 687. In Italian case law, *Cass.* 30 November 1994, in

this law is applicable because it was chosen by the parties or because it is the law of the country where the work is performed (*locus laboris*) or where the employing company was established. This is true because it is the *lex fori* (*ex* Article 7.2 of the Rome Convention) and coincides with the law governing the employment contract (Article 6.2 of the Rome Convention). If the work is performed in a foreign country, it is subject to the law of that country, and there will be no interest in applying the mandatory rules of the *lex fori*.[95] In theory, however, these mandatory rules could also be applied as part of the *lex fori* or as the law most closely connected with the contract.[96]

Mandatory rules are also of minor importance when they are part of the law of the country where the foreign parent company is established.[97] On the one hand, the courts of the State where the subsidiary employing company is located may have difficulty asserting their jurisdiction or the judges of this State may not be able to apply provisions that are extraterritorial in nature.

III. The Employee's Mobility Within a Multinational Group of Companies

A. General Approach

From the legal point of view, the most complex problems undoubtedly arise as a result of the mobility of the work force within a multinational group. Although relatively few employees of a multinational group perform their work in more than one country,[98] it was on the basis of such cases that Spanish case law recognised

Riv. dir. int. priv. proc. 1996, pp. 325 *et seq.* However, *Corte d'appello* Milano 20 May 1975, in: *Riv. dir. int. priv. proc.* 1976, pp. 367 *et seq.*

[95] MORSE C.G.J. (note 67), p. 154.

[96] ESER G. (note 4), pp. 61-62; JUNKER A. (note 70), p. 74; MORSE C.G.J. (note 84), pp. 16-17; VILLANI U. (note 89), pp. 287 and 292; GUARDANS CAMBÓ I. (note 91), pp. 431 and 455; BONOMI A. (note 94), p. 189. See, in Spanish case law, *T.S.* 27 November 1982, in: *R.J.A.* 6899. In Italian case law, *Cass.* 22 February 1992, in: *Riv. dir. int. priv. proc.* 1994, p. 150. In German case law, *BAG* 30 April 1987, in: *IPRspr.* 1987, pp. 85 *et seq.*

[97] GUARDANS CAMBÓ I. (note 91), p. 439; MORSE C.G.J. (note 67), pp. 154 and 163; GAMILLSCHEG F. (note 91), p. 22.

[98] In principle, only technicians and upper-management of companies would fall into this category. In many cases, mobility is connected to their international career within the group of companies. It could be stretched to the point that they enjoy a particular status within the staff. ESER G. (note 4), p. 63; PEREZ DE LOS COBOS ORIHUEL F., 'La movilidad de los trabajadores en los grupos de sociedades europeos: el caso español', in: *Documentación Laboral* (*D.L.*) 1991, pp. 37 *et seq.*, p. 39; JUNKER A. (note 4), pp. 573-575.

the existence of a multinational group of companies, finding them to be 'socially responsible'.[99]

Basically one must differentiate between two situations. The first situation involves a temporary posting where the employee is formally bound to only one of the companies of the group but temporarily offers his services to another company belonging to the same multinational group. He does not break his contractual relationship with the former employer, nor does he enter into a new one with the other company.[100] In the second situation, an example of 'expatriation' or 'mobility within an international group', the employee enters into successive contracts with various companies belonging to the multinational group. The labour relations with the first employer may be terminated (termination of the contract) but sometimes both contracts remain in force (with or without suspension of the first).[101]

B. The Posting of Employees within a Multinational Group of Companies

Temporary postings of employees within the multinational group of companies occur quite frequently, especially in the case of employees occupying management and technical positions in a number of companies of the multinational group. The contractual forms vary depending on the position of the employee concerned. This is a direct consequence of the fragmentation and decentralisation of the production process in an economy that is becoming more globalised on a daily basis. It can also lead to the phenomenon of '*social dumping*' if the law of the place of the employee's original posting is less protective than that of the country of destination.[102] In such situations, an *ad hoc* agreement (in the form of a 'mobility clause') usually allows the employer to transfer employees whenever changes in the work conditions make it necessary.[103]

This subject matter is dealt with in the Brussels Convention of 1968, Regulation No. 44/2001 and the Rome Convention of 1980. Matters relating to the

---

[99] In fact, cases involving international mobility occur most frequently within multinational groups: LYON CAEN A., 'La mise à disposition internationale de salariè', in: *Dr.Soc.* 1981, p. 747.

[100] LYON CAEN G./ LYON CAEN A. *Droit social international et européen*, Paris, 1993, p. 21; LYON CAEN G. (note 22), p. 35.

[101] LYON CAEN G./ LYON CAEN A. (note 100), p. 21; G. LYON CAEN (note 22), pp. 35-36; RODIERE P., 'Détachement et expatriation: les éléments de la distinction', in: *Droit et pratique du commerce international* 1988, p. 13.

[102] CARRASCOSA GONZÁLEZ J./ RODRÍGUEZ-PIÑERO ROYO M.C., 'Desplazamientos temporales en la Comunidad Europea y ley aplicable al contrato de trabajo', in: *Rel.Lab.* 1993-21, pp. 25-27.

[103] LYON CAEN G. (note 22), pp. 68-69. Also, BERAUD J.M., 'Le départ pour l'étranger du salarié détaché ou expatrié', in: *Dr.Soc.* 1991, pp. 827 *et seq.*; JUNKER A. (note 4), p. 578.

temporary posting of employees within the companies of a multinational group were not regulated by international legislation until the end of 1997. In addition, Directive No. 96/71/EC concerning the posting of employees in the framework of the provision of services deserves special attention. This Directive (incorporated into Spanish Law by virtue of Law 45/1999) aims to protect temporarily transferred employees and avoid '*social dumping*' in the European labour market.[104]

1. Application of the Brussels Convention of 1968, Regulation No. 44/2001 and the Rome Convention of 1980 in respect of the Temporary Posting of Workers

Prior to Directive No. 96/71/EC, the relevant rules led to the application of the law of the State of origin and the courts of that country were usually declared competent. Since jurisdiction and the applicable law are usually determined by the law of the place where the work is habitually carried out, this is not affected by a purely temporary posting.

As regards the question of jurisdiction, the competence of the courts of the State where the employee originally carried out his activity before being transferred seems to be the only possible solution.[105] The forum of the State of origin is closely connected with the employment contract, is clearly predictable for the parties involved and, in principle, is beneficial for them. The application of the Brussels Convention of 1968 and Regulation No. 44/2001 (and the Spanish OLPJ of 1985) lead to this conclusion. First of all, this is the place where the employee habitually carries out his work (despite the fact that all activities are not performed in one country); this would be the solution based on the general forum of the defendant; it is the country where the employing company is established; or, finally, the parties could have agreed on a jurisdiction clause in favour of these courts.[106] Although most factors convincingly lead to the above solution, it is possible that a temporarily transferred employee would nevertheless initiate a suit in the

[104] MOREAU BORLES M.-A., 'Le détachement des travailleurs effectuant une prestation des services dans l'Union européenne', in: *Clunet* 1996, p. 889; PALAO MORENO G. (note 5), pp. 47-49. In this way, ECJ Judgment of 23 November 1999, in the joined cases C-369/96 and C-376/96, *Arblade* and *Leloup.* See GARDEÑES SANTIAGO M., 'Aplicabilidad de las leyes de policia laboral y libre prestación de servicios en la Unión Europea', in: *La Ley. Unión Europea* 2001.5238, pp. 1 *et seq.*

[105] NEDJAR J.C./ SABOURIN A., 'Le règlement des litiges liés au contrat de travail des salariés détachés à l'étranger', in: *Droit et pratique du commerce international* 1988, pp. 79 *et seq.*; SYNVET H., 'La situation née du départ du salarié, aspects de droit international privé', in: *Dr.Soc.* 1991, p. 840.

[106] Also, CARRASCOSA GONZÁLEZ J./ RODRÍGUEZ-PIÑERO ROYO M.C. (note 102), pp. 36-37; MOREAU BORLES M.-A. (note 141), p. 903. In Spanish case law, *T.S.J. Cataluña* 8 April, 1998, in: A.S. 2056, Note by PALAO MORENO G., in: *R.E.D.I.* 1999, pp. 253-256.

country of his temporary posting. This alternative would be admissible only on the basis of an express[107] or implied[108] submission to these courts, or if the court hearing the claim considered that country to be the place where the work was carried out.[109]

Something similar could occur when determining the applicable law. In cases of temporary posting, Article 6 of the Rome Convention generally leads to the application of the law of the country of the original employer.[110] This could be the result of an express[111] or implied[112] choice of law or because it is the country where the work is habitually performed or because it is the country where the contracting company is established.[113] Thus it follows that, in matters relating to an individual employment contract,[114] the law of the country of origin is considerably more important than that of the country where the person is temporarily posted.[115]

---

[107] JUÁREZ PÉREZ P., 'El desplazamiento de trabajadores efectuado en el marco de una prestación de servicios: la incidencia de la Directiva 96/71/CE en los Convenios comunitarios de Derecho internacional privado', in: *Rel.Lab.* 1999-7, p. 74; PALAO MORENO G. (note 5), p. 59.

[108] ECJ Judgment of 24 June 1981, in case 150/80, *Elefanten Schuh GmbH c. Jacqmain*, in: *ECR* 1981, pp. 1671 *et seq.*; and of 7 March 1985, in case 48/84, *Spitzley c. Sommer*, in: *ECR* 1985, pp. 787 *et seq.* In Italian case law, *Cass.* 2 February 1991, in: *Riv. dir. int. priv. proc.* 1992, pp. 327 *et seq.*

[109] CARRASCOSA GONZÁLEZ J./ RODRÍGUEZ-PIÑERO ROYO M.C. (note 102), pp. 36-37. In Italian case law, *Trib. Milano* 26 September, 1968, in: *Riv. dir. int. priv. proc.* 1968, pp. 916 *et seq.*

[110] In Spanish case law, *T.S.* 15 June 1993, in: *R.J.A.* 4339. See PALAO MORENO G. (note 5), p. 54. In English case law, *Re Anglo Austrian Bank* [1920] 1 Ch. 69. See MORSE C.G.J. (note 67), p. 157-158.

[111] CARRASCOSA GONZÁLEZ J./ RODRÍGUEZ-PIÑERO ROYO M.C. (note 102), p. 34; KNAPP B. (note 51), pp. 168-169; ZABALO ESCUDERO Mª E. (note 31), p. 141; LYON-CAEN G. (note 22), p. 55; LYON-CAEN G./ LYON-CAEN A. (note 100), p. 28; JUNKER A. (note 18), p. 210. In Italian case law, *Cass.* 26 February 1986, in: *Riv. dir. int. priv. proc.* 1988, pp. 72 *et seq.* In German case law, *BAG* 4 May, 1977, in: *IPRspr.* 1977, pp. 109 *et seq.*

[112] RODIÈRE P. (note 58), p. 122. In French case law, *Cass.* 28 October 1997, in: *Recueil Dalloz* 1998.5, pp. 57-59. See FRANZEN M., 'Anknüpfung von Arbeitsverträgen im französischen internationalen Privatrecht', in: *IPRax* 1999, pp. 278 *et seq.*

[113] KNAPP B. (note 51), pp. 161 and 169; GAMILLSCHEG F. (note 77), p. 285; ZABALO ESCUDERO Mª E. (note 31), pp. 138 y 140-141; ZAMORA CABOT J. (note 61), p. 102; CARRASCOSA GONZÁLEZ J./ RODRÍGUEZ-PIÑERO ROYO M.C. (note 54), p. 1348; LYON CAEN G./ LYON CAEN A. (note 100), p. 28; LYON CAEN A. (note 99), p. 748; ESER G. (note 4), pp. 50 and 63-64; JUNKER A. (note 4), pp. 576, 585-586; MAGNO P., 'Multinazionali e disciplina dei rapporti di lavoro', in: *Il diritto del lavoro* 1974, pp. 387 and 398; MARTINY D. (note 58), pp. 1089-1090, 1095; MOURA RAMOS R.M. (note 75), p. 1895.

[114] GUARDANS CAMBÓ I. (note 91), pp. 426-427.

[115] Also, CARRASCOSA GONZÁLEZ J./ RODRÍGUEZ-PIÑERO ROYO M.C. (note 102), p. 38. See GUARDANS CAMBÓ I. (note 91), pp. 409 and 427.

Consequently, the system in force before enactment of the Directive could have resulted in situations where the employee lacked sufficient protection. This occurred when employees were temporarily transferred to another Member State whose social protection scheme was better than that of their country of origin. In such situations, they could not take action before the courts of the country of temporary posting, nor could they invoke the law of that State in other matters relating to their labour relationship.

2. New Legal Framework for the Temporary Posting of Workers in the EU: Directive No. 96/71/EC Concerning the Posting of Workers in the Framework of the Provision of Services

With the aim of protecting employees, Directive No. 96/71/EC contains special provisions that derogate from those included in the Brussels Convention of 1968, Regulation No. 44/2001 and the Rome Convention of 1980 in respect of temporary postings.

On the one hand, under Article 6 of the Directive No. 96/71/EC, a temporarily posted employee may choose between the fora already admitted in the Brussels Convention (and in Regulation No. 44/2001) and a forum in the country of his temporary posting.[116] This is of considerable benefit to transferred employees as it makes it possible for them to take action against the original employing company.[117] Furthermore, Article 3 of the Directive (its so-called '*hard core*') extends protection to transferred employees by guaranteeing the application of certain mandatory rules of the country of their temporary posting, without altering the choice-of-law rules of the Rome Convention of 1980.[118] In this respect, the objective of the Directive is to complement the solutions existing in the Rome Convention 1980 (as permitted under Article 20 of the Convention). This will

[116] MOLINA NAVARRETE C./ ESTEBAN DE LA ROSA G., 'Mercados nacionales de trabajo, libertad comunitaria de prestación de servicios y defensa de la competencia', *Rev.Trab.SS.* 2000.205, pp. 48-49 and 52; GAUDEMET-TALLON H. (note 39), p. 346; J.-P. BERAUDO (note 43), pp. 9-10.

[117] MOREAU BOURLÉS M.-A. (note 104), p. 903; ZABALO ESCUDERO Mª E. (note 30), pp. 236-237; JUÁREZ PÉREZ P. (nota 107), p. 84; PALAO MORENO G. (note 5), pp. 54-55.

[118] See MOREAU BOURLÉS M.-A. (note 104), pp. 896-897; PALAO MORENO G. (note 5), pp. 55-56; BONOMI A. (note 94), pp. 128 and 132; MOLINA NAVARRETE C./ ESTEBAN DE LA ROSA G., (note 116), pp. 33-34 and 46; QUIÑÓNEZ ESCAMEZ A., 'Libre prestación de servicios y normas de policía sobre salario mínimo: ¿Es oportuno el control de proporcionalidad', in: *La Ley* 2002.5576, pp. 1 *et seq.* An incomplete list, according to JUNKER A. (note 4), pp. 581-582. Mandatory rules also including those granted in Collective Agreements, as provided for in ECJ Judgment of 24 January 2002, in case C-164/99, *Portugaria Construçoes Lda*.

inevitably lead to a *depeçage* of the law governing individual employment contracts.[119]

There are two reasons for these important changes. In addition to protecting employees, the new rules also purport to prevent a distortion of competition inside the common market, i.e., to avoid 'social dumping'. In this context it should be pointed out that the effectiveness of the initial objective of the Directive could eventually be diminished due to the legal technique chosen by the European legislator.[120]

C. Circulation of Employees Within a Multinational Group of Companies

More complex cases involving the circulation of employees within the multinational group of companies[121] arise when successive employment contracts are concluded with different companies within the group.[122] In reality, this affects only a small number of employees of the companies – mainly high-level executives.

1. Questions of Jurisdiction

When analysing questions of international jurisdiction arising in labour disputes involving problems of mobility, one must take account of whether the employee concerned has filed the suit against his original employer or against his subsequent hiring employer. In situations where the action has been taken against the original employer, it often occurs that the parties have included a jurisdiction clause in the

[119] CARRASCOSA GONZÁLEZ J./ RODRÍGUEZ-PIÑERO ROYO M.C. (note 102), p. 47. On the other hand, this provision implies a certain revival of the traditional labour law principle of territoriality. PALAO MORENO G., 'Ley aplicable al contrato de trabajo internacional por los tribunales españoles y su problemática procesal', in: SALINAS MOLINA F. (ed.) (note 33), p. 556.

[120] Similarly, MOREAU BOURLÉS M.-A. (note 141), pp. 897-899; JAYME E./ KOHLER Ch., 'L'interaction des règles de conflit contenues dans le droit dérivé de la Communauté européenne et des conventions de Bruxelles et de Rome', in: *Rev. crit. dr. int. pr.* 1995, pp. 33-34; PALAO MORENO G. (note 5), p. 62.

[121] See MOREAU BOURLÉS M.-A., 'La mobilité des salariés dans les groupes de dimension communautaire: quelques réflexions à partir d'une analyse comparée', in: *Travail et emploi* 1992.2, pp. 56 *et seq.*; *id.*, 'La mobilité des salariés dans les groupes de dimension communautaire. Résultats d'une enquête sur les pratiques contractuelles', in: *Travail et emploi* 1994.60, pp. 44 *et seq.* Also, JUNKER A. (note 4), pp. 576 *et seq.*

[122] CAMPS RUIZ, L.M., *La problemática jurídico-laboral de los grupos de sociedades*, Madrid 1986, pp. 67 and 79-82. On the different forms it admits, PÉREZ DE LOS COBOS F. (note 98), pp. 44-47.

so-called 'mobility agreement', thus guaranteeing a forum that is known and predictable to all concerned. Such clauses usually stipulate the jurisdiction of the courts of the State where the employing company is established; they are common when the first employer's company is established in the country of origin of the employee[123] or even when the second employing company is foreign and the employee was transferred to a subsidiary.[124] The second alternative is an option admitted by existing legislation as well as relevant case law.[125]

2. Law Governing the Contract

It is advisable for the parties to exercise their party autonomy at the conclusion of the contract by designating the law governing the employee's labour relationship with the multinational group. In the framework of the 'mobility agreement' concluded by an employee with his original employer (or even the parent company),[126] the parties often include an express choice-of-law clause designating the law of the country where the employee performed his work before being transferred.[127] This possibility is also accepted by relevant case law,[128] although

[123] In Spain, *T.S.* 23 June 1983, in: *R.J.A.* 2961. In Italian case law, *Cass.* 30 August 1968, in: *Riv. dir. int. priv. proc.* 1969, pp. 777-780 (see, R. CLERICI, 'Lavoro bancario svolto en Argentina e volontá delle parti', in: *Riv. dir. int. priv. proc.* 1969, pp. 972-979); *Cass.* 9 November 1981, in: *Riv. dir. int. priv. proc.* 1982, pp. 619-625; *Cass.* 20 July 1990, in: *Riv. dir. int. priv. proc.* 1992, pp. 135-137.

[124] With respect to Spanish case law, *T.S.* 10 December 1990, in: *R.J.A.* 9762 (note by ÁLVAREZ GONZÁLEZ S., in: *R.E.D.I.* 1991, pp. 547-548). In Italian case law, *Corte d'appello Milano* 3 October 1966, in: *Riv. dir. int. priv. proc.* 1967, pp. 157-165; *Corte d'appello Milano* 29 May 1972, in: *Riv. dir. int. priv. proc.* 1973, pp. 137-144.

[125] In Spain, *T.S.* 31 January 1990, in: *R.J.A.* 801. In Germany, *Amtsgericht Wesel* 3 May 1995, in: *IPRspr.* 1995, pp. 108-110. In France, *Cour d'appel Paris* 27 November 1986, in: *Rev. crit. dr. int. pr.* 1988, pp. 314-322, note by LYON CAEN A., pp. 322-329. However, *Cass.* 29 May 1991, in: *Rev. crit. dr. int. pr.* 1992, pp. 468-471, note by MUIR WATT H., pp. 471-479.

[126] ENGRÁCIA ANTUNES J. A. (note 2), p. 188; KNAPP B. (note 51), p. 168; LYON CAEN G./ LYON CAEN A. (note 100), p. 21.

[127] LYON CAEN G. (note 22), p. 39; KNAPP B. (note 51), p. 169; LYON CAEN A., 'De la mobilité des salariés à l'intérieur de la Communauté européenne', in: *Dr. Soc.* 1989, p. 469; ZAMORA CABOT F. (note 61), pp. 120-121. Nevertheless, the parties could decide to have the subsequent contracts governed by a different law. In that case, the first one is usually governed by the law of the initial employing company, the subsequent one by the law of the place where the contract is executed: MARTINY D. (note 58), 1988, pp. 721-722.

[128] In Spain, *T.S.J. Cataluña* 30 October, 1997, in: *R.J.A.* 3755. Concerning French case law, *Cass.* 29 May, 1991, in: *Rev. crit. dr. int. pr.* 1992, pp. 314 *et seq.* In German case law, *BAG* 21 January, 1999. See FRANZEN M., 'Kündigungsschutz im transnational tätigen Konzern', in: *IPRax* 2000, pp. 506 *et seq.*; JUNKER A., 'Internationales Arbeitsrecht in der

problems have arisen when the courts attempted to determine the existence of an implied choice.[129] One should not forget that the choice of law will depend on the employee's position in the company.[130]

The important role of party autonomy in such situations has given rise to practices that are repeatedly used by multinational groups[131] when concluding 'agreements of mobility'. Some authors regard this as a true *lex laboris*[132] (parallel to the *lex mercatoria).*[133] Although the existence of general usages could be disputed, this practice can be regarded as de facto constituting a type of collective agreement for all 'mobile' employees of that multinational group.[134]

In the absence of a choice of law, the governing law will depend on the employee's relationship with the employing company of the group. In any case, the *lex loci laboris* will play an instrumental role in the above-mentioned situations.[135] This is also true in regard to mandatory rules.[136] Nonetheless, the exception clause contained in Article 6.2 of the Rome Convention can also lead to application of the

---

Praxis im Blickpunkt: Zwanzig Entscheidungen der Jahre 1994-2000', in: *IPRax* 2001, p. 95.

[129] *Cass.*10 February, 1998, in: *Clunet* 1999, pp. 144 *et seq.* A solution criticised by DYON-LOYE S., Note to Cass. 10 February 1998, in: *Clunet* 1999, p. 154. In German case law, *BAG* 26 July 1995, in: *IPRspr.* 1995, pp. 110-111. See JUNKER A. (note 129), p. 96; MANKOWSKI P., in: *Arbeitsrecht-Blattei* (*AR-Blattei*) ES, 1996, 340.15.

[130] RODIÈRE P. (note 58), p. 124.

[131] This could refer to rules of the company that initially contracted the employee, taken from a mobility agreement between two companies interested in 'mobile' employees, or they could be dictated by the multinational group of companies. Moreover, its content and level of 'imposition' directly depend on the employee's position in the company. LYON CAEN G. (note 22), pp. 84-87; SIBLINI-VALLAT A., 'Les normes matérielles internationales d´entreprise', in: *Rev. crit. dr. int. pr.* 1988, pp. 658-660.

[132] LYON CAEN G. (note 22), p. 85.

[133] SIBLINI-VALLAT A. (note 132), pp. 660-663 and 669-672. In the same token, these practices affect situations where employees are transferred among the companies of the multinational group.

[134] LYON CAEN G./ LYON CAEN A. (note 100), p. 67*;* LYON CAEN G. (note 22), p. 84.

[135] LYON CAEN A. (note 128), pp. 471-473; *id*., (note 99), pp. 750-751. In Spanish case law, *T.S.* 31 January 1990, in: *R.J.A.* 801. In German case law, *A.G. Wesel* 3 May 1995, in: *IPRspr*. 1995, pp. 108-110. In French case law, *Cass.* 12 January 1994, in: *Clunet* 1995, pp. 134-135.

[136] MOREAU BOURLÉS M.-A. (note 122), pp. 57 and 62; *id*., 'L'évolution récente de la jurisprudence dans le domaine de l'expatriation des salariés', in: *Dr.soc.* 1986, p. 24.

law of the country where the original employing company is located,[137] especially in the event of suspension of the initial employment contract.[138]

IV. Concluding Remarks

This study attempts to show how the European and Spanish systems of private international law deal with the complex problems arising from individual employment contracts concluded with companies belonging to a multinational group. The importance of this issue is constantly increasing as a result of the continued globalisation of the economy and the consolidation of a pan-European labour market. As shown above, the solutions provided by the existing legislation are relatively acceptable, thanks to the flexibility introduced by conventional legislation and Community acts. In particular, case law has had an active and creative role aimed at protecting the employee.

Nevertheless, the legal autonomy and independence enjoyed by the companies of a multinational group can still lead to situations in the regional and international labour market for which there are no appropriate solutions, thus leaving the 'multinational employee' defenceless, a victim of reduced labour rights and other forms of discrimination. The fact that the current framework does not extend full protection to employees within a multinational group has resulted in a troublesome imbalance allowing the group to act solely in its own interest when deciding where to invest. Unfortunately it is uncertain whether the case law will be able to fully resolve this problem.

In view of this, in our opinion, it is necessary to establish a uniform legislative framework, either European or international, which regulates the various situations analysed in this study, offering solutions that protect employees hired by companies belonging to a multinational group. This is especially necessary in the EU. The objective of such legislative approach should be to achieve compliance with the freedoms present in the Rome Treaty and to promote economic integration that prevents situations of 'social dumping' that distort competition and favour the delocalisation of companies.

Therefore, purely national solutions should be rejected; by definition they are incapable of resolving the multiple and complex problems arising in transnational relations. Instead, an international approach to this problem is preferable, similar to the attempts, though timid as they are, undertaken in the framework of the European Community. The example set by Directive No. 96/71/EC should be

[137] KNAPP B. (note 51), p. 176; CARRASCOSA GONZÁLEZ J. (note 28), p. 457. In Spain, *T.S.J. Cataluña* 30 October 1997, in: *R.J.A.* 3755.

[138] DÉPREZ J. (note 87), pp. 327-328; DYON LOYE S. (note 130), pp. 152 y 154; JUNKER A. (note 4), p. 586.

followed by adopting new legislative acts regulating other situations likely to occur in multinational groups of companies (perhaps by using a different harmonisation technique). The ultimate objective of this proposal is to gain support for the elaboration of a uniform international framework that is transnational, not merely national in nature.

TEXTS, MATERIALS AND RECENT DEVELOPMENTS

THE FAMILY CODE OF THE RUSSIAN FEDERATION*

No. 223-Fz of December 29, 1995
(with the Amendments and Additions of November 15, 1997, June 27, 1998, January 2, 2000)

APPROVED BY THE STATE DUMA ON DECEMBER 8, 1995

Article 14
The Circumstances, Preventing the Entering into a Marriage

Not to be admitted shall be entering into a marriage by:

- the persons, one of whom at least already consists in another registered marriage;
- close relations (relations by the direct ascending and descending lines – by the parents and the children, by the grandfather, the grandmother and the grandchildren), by full and by not full (having a common father or a mother) brothers and sisters);
- the adopters and the adoptees;
- the persons, one of whom at least is recognized by the court as legally incapable because of a mental derangement.

* We thank Prof. Lebedev for this English translation. This document is included in the system GARANT: Legislation of Russia in English, e-mail: gareng@garant.ru.

Yearbook of Private International Law, Volume 4 (2002), pp. 335-347
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

CHAPTER 19
ADOPTION OF CHILDREN

Article 124
Children, with Respect to Whom Adoption Shall Be Admitted

1. Adoption of a boy or a girl (hereinafter, adoption) shall be a priority form of the placement of children who have remained without parental care.

2. The adoption shall be admitted with respect to the underaged children and only in their interest with the observance of the requirements of paragraph three of Item 1 of Article 123 of this Code, and also with regard to the possibilities of the provision to children of adequate physical, psychic, spiritual and moral development.

3. The adoption of brothers and sisters by different persons shall not be admitted, with the exception of the cases, when the adoption is effected in the children's interest.

4. The adoption of children by foreign citizens or by stateless persons shall be admitted only in the cases, when it is impossible to give these children for upbringing into the families of the citizens of the Russian Federation, who permanently reside on the territory of the Russian Federation, or for adoption to the children's relatives, regardless of the citizenship and of the place of residence of these relatives.

   The children may be given for adoption to the citizens of the Russian Federation, who permanently reside outside of the territory of the Russian Federation, to foreign citizens or to stateless persons, who are not the children's relatives, after the expiry of three months from the date of the receipt of the information about such children by the state bank of the data about children who have remained without parental care in conformity with Item 3, Article 122 of the present Code.

Article 125
Procedure for Adopting a Child

1. The adoption shall be effected by the court upon an application of the persons (a person), wishing to adopt the child. The cases on instituting the adoption of the child shall be considered by the court by conducting special proceedings, according to the rules, stipulated by the civil procedural legislation.

   The cases on the establishment of the adoption of children shall be considered by the court with the obligatory participation of the adopters

themselves, the bodies of trusteeship and guardianship, and also the procurator.

2. For the establishment of the adoption of a child there shall be necessary a conclusion of the body of trusteeship and guardianship on the soundness of the adoption and on its conformity to the interests of the child being adopted, with the indication of the information about the fact of personal contracts of the adopters (or adopter) with the child being adopted.

   The procedure for the transfer of children for adoption, and also of the exercise of the control over the conditions of the life and upbringing of children in the families of the adopters on the territory of the Russian Federation shall be determined by the Government of the Russian Federation.

3. The rights and the duties of the adopter and of the adopted child (Article 137 of the present Code) shall arise as from the date of the court decision on instituting the child's adoption coming into legal force.
   The court shall be obliged, within three days from the court decision on instituting the child's adoption coming into legal force, to forward an excerpt from this court decision to the registry office by the place of passing the decision.

   The adoption of a child shall be subject to the state registration in conformity with the procedure, laid down for the state registration of the civil status acts.

Article 126
Registration of Children, Subject to Adoption, and of Persons, Wishing to Adopt a Child

1. Registration of the children, subject to adoption, shall be effected in the way, established by Item 3, Article 122 of the present Code.

2. The registration of the persons, wishing to adopt a child, shall be effected in the way, defined by the executive power bodies of the subjects of the Russian Federation.

   The registration of the foreign citizens and of the stateless persons, wishing to adopt children, who are the citizens of the Russian Federation, shall be effected by the executive power bodies of the subjects of the Russian Federation or by the federal executive power bodies (Item 3, Article 122 of the present Code).

Article 126.1
Impermissibility of Intermediary Activity in the Adoption of Children

1. Any intermediary activity in the adoption of children, that is any activity of third parties with the purpose of selecting and transferring children for adoption in the name and in the interest of persons wishing to adopt children shall be impermissible.

2. There shall not be deemed to be intermediary activity in the adoption of children the activity of the bodies of trusteeship and guardianship and of the bodies of the executive power in the performance of their incumbent duties in the revelation and placement of children who have remained without parental care, and also the activity of the specially authorized, by foreign states, bodies or organizations in the adoption of children which is being carried out on the territory of the Russian Federation by virtue of an international treaty of the Russian Federation or on the basis of the principle of reciprocity. The bodies and organizations indicated in this Item may not pursue commercial purposes in their activity.

   The procedure for the activity of the bodies and organizations of foreign states in the adoption of children on the territory of the Russian Federation and the procedure for the control over its conduct shall be established by the Government of the Russian Federation on presentation of the Ministry of Justice of the Russian Federation and the Ministry of Foreign Affairs of the Russian Federation.

3. The obligatory personal participation of the persons (or person) wishing to adopt a child in the process of adoption shall not deprive them of the right to have simultaneously their representative, whose rights and duties have been established by the civil and the civil-procedural legislation, and also to use the services of an interpreter where necessary.

4. The responsibility for the conduct of the intermediary activity in the adoption of children shall be established by the legislation of the Russian Federation.

Article 127
The Persons, Who Have the Right to Be Adopters

1. To be adopters may adult persons of both sexes, with the exception of:
   - the persons, recognized by the court as incapable or as partially capable;
   - the spouses, one of whom is recognized by the court as incapable or as partially capable;

- the persons, deprived of the parenthood by the court or restricted in the parental rights by the court;
- the persons, dismissed from the duties of a guardian (a trustee) for an improper fulfilment of the obligations, imposed upon him by the law;
- the former adopters, if the adoption has been cancelled by the court through their guilt;
- the persons, who cannot perform the parental duties because of the state of their health. The list of the diseases, which prevent the person from adopting a child, from acting as his guardian (his trustee) or from accepting him into a foster family, shall be compiled by the Government of the Russian Federation.
- persons who, as on the moment of the establishment of adoption, have no income ensuring to the child being adopted a minimum of subsistence established in the entity of the Russian Federation on whose territory the adopters (or adopter) reside;
- persons having no permanent residence, and also living accommodation meeting the established sanitary and technical requirements;
- persons having, as on the moment of the establishment of adoption, a record of conviction for an intentional crime against the life or health of citizens.

2. The unmarried persons shall not jointly adopt one and the same child.

3. In the presence of several persons wishing to adopt one and the same child the preferential right shall be granted to the relatives of the child, on the condition of the obligatory observance of the requirements of Items 1 and 2 of this Article and the interest of the child being adopted.

Article 128
An Age Gap Between the Adopter and the Adoptee

1. The age gap between an unmarried adopter and the adopted child shall not be less than 16 years. For the reasons, recognized by the court as valid, the age gap may be reduced.

2. The existence of the age gap, laid down by Item 1 of the present Article, shall not be required, if the child is adopted by his stepfather (his stepmother).

Article 129
The Parents' Consent to the Adoption of a Child

1. To adopt a child, it shall be necessary to obtain the consent of his parents. In the adoption of the child of the underaged parents, who have not reached the age of 16 years, it shall also be necessary to obtain the consent of their parents or guardians (trustees), and in the absence of the parents or the guardians (the trustees) – the consent of the guardianship and trusteeship body.

   The consent of the child's parents to his adoption shall be expressed in an application, certified notarially or by the head of the institution, in which the child, left without parental care, is maintained, or by the guardianship and trusteeship body by the place of the child's adoption, or by the place of his parents' residence, and may also be expressed directly in the court, while instituting the adoption.

2. The parents shall have the right to withdraw the consent they have given for the child's adoption before the court decision on the adoption is passed.

3. Parents may give their consent to the adoption of a child by a concrete person or without the indication of a concrete person. The consent of parents to the adoptions of a child may be given only after his or her birth.

Article 130
The Child's Adoption Without the Parents' Consent

The parents' consent to the child's adoption shall not be required, if they:

- are unknown or are recognized by the court as missing;
- are recognized by the court as legally incapable;
- are deprived by the court of the parenthood (with the observance of Item 6, Article 71 of the present Code);
- for the reasons, recognized by the court as invalid, do not live with the child and shirk the duties, involved in his upbringing and maintenance, for over six months.

Article 131
Consent to the Child's Adoption of His Guardians (Trustees), Foster Parents and Heads of the Institutions, Where the Children, Left Without Parental Care, Stay

1. To adopt the children, put under the guardianship (the trusteeship), a written consent of their guardians (trustees) shall be required.

To adopt the children, placed into the foster families, a written consent of the foster parents shall be required.

To adopt the children, left without parental care and maintained at the educational establishments, medical centres the institutions for the social protection of the population and at other similar institutions, a written consent of the heads of the given institutions shall be required.

2. The court shall have the right to adopt the decision on the child's adoption in the interest of the child without the consent of the persons, indicated in Item 1 of the present Article.

Article 132
The Adopted Child's Consent to Adoption

1. To adopt the child, who has reached the age of 10 years, his consent shall be required.

2. If, prior to filing an application for his adoption, the child lived in the adopter's family and believes him to be his parent, the adoption, by way of an exception, may be effected without receiving the consent of the adopted child.

Article 133
Consent of the Adopter's Spouse to the Adoption of a Child

1. In the adoption of the child by one of the spouses, the consent of the other spouse shall be required, if the child is not adopted by both spouses.

2. The consent of the other spouse to the child's adoption shall not be required, if the spouses have ceased their conjugal relations and do not live together for over a year, and the place of the other spouse's residence is unknown.

SECTION VII:
APPLICATION OF THE FAMILY LEGISLATION TO FAMILY RELATIONS WITH THE PARTICIPATION OF FOREIGN AND OF STATELESS PERSONS

Article 156
Entering into a Marriage on the Territory of the Russian Federation

1. The form and the procedure for entering into a marriage on the territory of the Russian Federation shall be defined by the legislation of the Russian Federation.

2. The terms for entering into a marriage on the territory of the Russian Federation shall be defined for each of the persons, entering into a marriage, by the legislation of the state, whose citizen the person is at the moment of entering into a marriage, while observing the requirements of Article 14 of the present Code with respect to the circumstances, interfering with the entering into a marriage.

3. If the person, alongside the citizenship of a foreign state, also enjoys the citizenship of the Russian Federation, to the terms for entering into a marriage shall be applied the legislation of the Russian Federation. In the case the person has the citizenship of several foreign states, the legislation of one of these states shall be applied, at the preference of the given person.

4. The terms for entering into a marriage with a stateless person on the territory of the Russian Federation shall be defined by the legislation of the state, in which this person has a permanent place of residence.

Article 157
Entering into a Marriage at the Diplomatic Representations and at the Consular Institutions

1. The marriages between the Russian Federation citizens, living outside of the territory of the Russian Federation, shall be entered into at the diplomatic representations or at the consular institutions of the Russian Federation.

2. The marriages between foreign citizens, entered into on the territory of the Russian Federation at the diplomatic representations and at the consular institutions of foreign states, shall be recognized as valid in the Russian Federation on the terms of reciprocity, if these persons at the moment of entering into a marriage were the citizens of a foreign state, which has accredited an Ambassador or a consul in the Russian Federation.

Article 158
Recognition of Marriages, Entered into Outside of the Territory of the Russian Federation

1. The marriages between the citizens of the Russian Federation and the citizens of foreign states or the stateless persons, entered into outside of the territory of the Russian Federation, while observing the legislation of the state, on whose territory they were entered into, shall be recognized as valid in the Russian Federation, if there are no circumstances, interfering with entering into the marriage, stipulated by Article 14 of the present Code.

2. The marriages between foreign citizens, entered into outside of the territory of the Russian Federation, while observing the legislation of the state, on whose territory they were concluded, shall be recognized as valid in the Russian Federation.

Article 159
Invalidity of the Marriage, Entered into on the Territory of the Russian Federation or Outside of the Territory of the Russian Federation

The invalidity of the marriage, entered into on the territory of the Russian Federation, or outside of the Russian Federation, shall be defined by the legislation, which, in conformity with Article 156 and Article 158 of the present Code, was applied when entering into the marriage.

Article 160
Dissolution of a Marriage

1. The dissolution of a marriage between the citizens of the Russian Federation and foreign citizens or stateless persons, and also of a marriage between foreign citizens on the territory of the Russian Federation shall be effected in conformity with the legislation of the Russian Federation.

2. A citizen of the Russian Federation, residing outside of the territory of the Russian Federation, shall have the right to dissolve his marriage with the spouse, residing outside of the territory of the Russian Federation, regardless of his citizenship, at the court of the Russian Federation. If, in conformity with the legislation of the Russian Federation, the dissolution of the marriage is admissible at the registry offices, the marriage may be dissolved at the diplomatic representations or at the consular institutions of the Russian Federation.

3. The dissolution of a marriage between the citizens of the Russian Federation and foreign citizens or stateless persons, effected outside of the territory of the Russian Federation, while observing the legislation of the concerned foreign state on the authority of the bodies, which have taken decisions on the dissolution of a marriage, as well as the legislation, subject to application in the dissolution of a marriage, shall be recognized as valid in the Russian Federation.

4. The dissolution of a marriage between foreign citizens, effected outside of the territory of the Russian Federation, while observing the legislation of the relevant foreign state on the authority of the bodies, which have taken decisions on the dissolution of a marriage, and the legislation, subject to application in the dissolution of a marriage, shall be recognized as valid in the Russian Federation.

Article 161
Personal Non-Property and Property Rights and Duties of the Spouses

1. The personal non-property and property rights and duties of the spouses shall be defined by the legislation of the state, on whose territory they have a joint place of residence, and in the absence of a joint place of residence – by the legislation of the state, on whose territory they have had the last joint place of residence. The personal non- property and property rights and duties of the spouses, who have not had a joint place of residence, shall be defined on the territory of the Russian Federation by the legislation of the Russian Federation.

2. When concluding a marriage contract or an agreement on the payment of an alimony to each other, the spouses, who do not have a common citizenship or a joint place of residence, may prefer the legislation, subject to application in defining their rights and duties by the marriage contract or by the agreement on the payment of an alimony. If the spouses have not preferred the legislation, subject to application, to the marriage contract or to their agreement on the payment of an alimony shall be applied the provisions of Item 1 of the present Article.

Article 162
Establishing and Disputing the Fatherhood (the Motherhood)

1. The establishment and the disputing of the fatherhood (the motherhood) shall be defined by the legislation of the state, whose citizen the child is by birth.

2. The procedure for the establishment and the disputing of the fatherhood (the motherhood) on the territory of the Russian Federation shall be defined by the legislation of the Russian Federation. In the cases, when the legislation of the Russian Federation admits the establishment of the fatherhood (the motherhood) at the registry offices, the child's parents, living outside of the territory of the Russian Federation, if even only one of them is the citizen of the Russian Federation, shall have the right to turn with applications on establishing the fatherhood (the motherhood) to the Russian Federation's diplomatic representations or consular institutions.

Article 163
The Rights and Duties of Parents and Children

The rights and duties of the parents and of the children, including the parents' duty to maintain the children, shall be defined by the legislation of the state, on whose territory they have a joint place of residence. In the absence of a joint place of residence of the parents and of the children, the rights and duties of the parents and of the children shall be defined by the legislation of the state, whose citizen the child is. On the plaintiff's claim, to the alimony obligations and to other relationships between the parents and the children may be applied the legislation of the state, on whose territory the child permanently resides.

Article 164
The Alimony Obligations of Adult Children and of Other Family Members

The alimony obligations of the adult children in favour of the parents, and also the alimony obligations of the other family members shall be defined by the legislation of the state, on whose territory they have a joint place of residence. In the absence of a joint place of residence, such obligations shall be defined by the legislation of the state, whose citizen the person, who claims an alimony, is.

Article 165
The Adoption

1. The adoption, including the cancellation of the adoption, on the territory of the Russian Federation by foreign citizens or by stateless persons of a child, who is the citizen of the Russian Federation, shall be effected in conformity with the legislation of the state, whose citizen the adopter is. In the case of the child's adoption by a stateless person, this shall be done in conformity with the legislation of the state, in which this person has a permanent place of residence at the moment of filing an application for the adoption, or for cancelling the adoption.

In the adoption on the territory of the Russian Federation by foreign citizens or by stateless persons of a child, who is the citizen of the Russian Federation, the requirements of Articles 124-126, Article 127 (with the exception of paragraph eight of Item 1), Articles 128 and 129, Article 130 (with the exception of paragraph five), Article 131-133 of the present Code with regard to the provisions of an international agreement of the Russian Federation on the interstate cooperation in the field of the adoption of children shall be observed.

The adoption on the territory of the Russian Federation by foreign citizens or stateless persons married to citizens of the Russian Federation, of children who are citizens of the Russian Federation shall be effected in the procedure established by this Code for citizens of the Russian Federation, unless otherwise provided for by an international agreement of the Russian Federation.

In the adoption on the territory of the Russian Federation by the citizens of the Russian Federation of a child, who is a foreign citizen, it shall be necessary to obtain the consent of the child's legal representative and of an authoritative body of the state, whose citizen the child is, and also, if this is required in conformity with the legislation of the said state, the child's consent to the adoption.

2. If as a result of the adoption the child's rights may be violated, which have been established by the legislation of the Russian Federation and by the international treaties of the Russian Federation, the adoption shall not be effected, regardless of the adopter's citizenship, while an already effected adoption shall be subject to cancellation in court.

3. The protection of the rights and legal interests of children who are citizens of the Russian Federation and have been adopted by foreign citizens or stateless persons, outside the limits of the territory of the Russian Federation shall, unless otherwise provided for by an international agreement of the Russian Federation, be carried out within the limits permissible by the norms of international law by the consular institutions of the Russian Federation in which such children have been registered, till their coming of age.

   The procedure for the registration by the consular institutions of the Russian Federation of children who are citizens of the Russian Federation and have been adopted by foreign citizens or stateless persons shall be determined by the Government of the Russian Federation.

4. The adoption of the child, who is the citizen of the Russian Federation and who resides outside of the territory of the Russian Federation, effected by an authoritative body of the foreign state, whose citizen the adopter is, shall be recognized as valid in the Russian Federation, under the condition that a

preliminary permission for the adoption is obtained from the executive power body of the Russian Federation, on whose territory the child or his parents (one of them) resided before moving outside of the territory of the Russian Federation.

Article 166
Establishing the Content of the Norms of Foreign Family Law

1. When applying the norms of foreign family law, the court or the registry offices, and the other bodies shall establish the content of these norms in conformity with their official interpretation, the practice of their application and the doctrine in the corresponding foreign state.

   To establish the content of the norms of foreign family law, the court, the registry offices and the other bodies may turn, in conformity with the established procedure, for assistance and explanations to the Ministry of Justice of the Russian Federation and to the other authoritative bodies of the Russian Federation, or to draw on the services of experts.

   The interested persons shall have the right to present the documents, confirming the content of the norms of foreign family law, to which they refer to substantiate their claims or objections, and to assist the court or the registry offices and the other bodies in establishing the content of the norms of foreign family law.

2. If the content of the norms of foreign family law, despite the measures, launched in conformity with Item 1 of the present Article, has not been established, the legislation of the Russian Federation shall be applied.

Article 167
Restricting the Application of the Norms of Foreign Family Law

The norms of foreign family law shall not be applied, if such application would contradict the fundamentals of the law and order (of the public order) of the Russian Federation. In this case, the legislation of the Russian Federation shall be applied.

The President of the Russian Federation: B. Yeltsin

THE CIVIL CODE OF THE RUSSIAN FEDERATION PART 3*

ADOPTED BY THE STATE DUMA ON NOVEMBER 1, 2001
APPROVED BY THE FEDERATION COUNCIL ON NOVEMBER 14, 2001

According to Federal Law No. 147-FZ of November 26 2001,
Part 3 of the present Code shall enter into force as of March 1, 2002.

SECTION VI: INTERNATIONAL PRIVATE LAW

CHAPTER 66
GENERAL PROVISIONS

Article 1186
Determining the Law Governing Civil Legal Relations Involving the Participation of Foreign Persons or Civil Legal Relations Complicated by Another Foreign Factor

1. The law applicable to civil legal relations involving the participation of foreign citizens or foreign legal entities or civil legal relations complicated by another foreign factor, in particular, in cases when an object of civil rights is located abroad shall be determined on the basis of international treaties of the Russian Federation, the present Code, other laws (Item 2 of Article 3) and usage recognised in the Russian Federation.

   The peculiarities of determining the law subject to application by the international commercial arbitration tribunal shall be established by a law on the international commercial arbitration tribunal.

2. If under Item 1 of the present article it is impossible to determine the law subject to application the law of the country with which a civil legal relation complicated by a foreign factor is most closely related shall apply.

3. If an international treaty of the Russian Federation contains substantive law norms governing a relevant relation, a definition on the basis of law of

* We thank Prof. S. Lebedev for this English translation. This document is included in the system GARANT: Legislation of Russia in English, e-mail: gareng@garant.ru.

Yearbook of Private International Law, Volume 4 (2002), pp. 349-364
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

conflict norms governing the matters fully regulated by such substantive law norms is prohibited.

Article 1187
Construction of Legal Terms in the Definition of Applicable Law

1. When applicable law is being defined legal terms shall be construed in compliance with the Russian law, except as otherwise required by law.

2. If, when applicable law is being defined, legal terms that require qualification are not known to Russian law or are known in another wording or with another content and if they cannot be defined by means of construction under Russian law a foreign law may be applied to the construction thereof.

Article 1188
The Application of the Law of a Country with Several Legal Systems

In cases when the law of a country where several systems of law are in effect the system of law defined in compliance with the law of that country shall apply. If under the law of that country it is impossible to define which of the systems of law is applicable the system of law to which the relation is the strongest shall apply.

Article 1189
Reciprocity

1. A foreign law shall be applicable in the Russian Federation, irrespective of the applicability of Russian law to relations of the kind in the relevant foreign state, except for cases when the application of a foreign law on reciprocal basis is required by law.

2. Where the application of a foreign law depends on reciprocity such a reciprocity shall be deemed to exist unless the contrary is proven.

Article 1190
Reverse Reference

1. Any reference to a foreign law in compliance with the rules of the present section shall be deemed a reference to substantive law rather than the law of conflict of the relevant country, except for the cases specified in Item 2 of the present article.

2. A reverse reference of a foreign law may be accepted in the cases of reference to the Russian law defining the legal status of a natural person (Articles 1195 - 1200).

Article 1191
Establishing the Content of Foreign Law Norms

1. Where a foreign law is applied a court shall establish the content of its norms in compliance with the official construction, application practices and doctrine thereof in the relevant foreign state.

2. For the purpose of establishing the content of norms of a foreign law a court may apply in the established manner to the Ministry of Justice of the Russian Federation and other competent bodies or organisations in the Russian Federation and abroad for assistance and clarification or may use the services of experts.

   Persons being party to a case may present documents confirming the content of foreign law norms to which they refer to substantiate their claims or objections and provide other assistance to a court in establishing the content of these norms.

   As concerns claims relating to the pursuance of entrepreneurial activity by parties, the burden of proving the content of foreign law norms may be vested by a court in the parties.

3. If, despite measures taken in compliance with the present articles, the content of foreign law norms fails to be established within a reasonable term, the Russian law shall apply.

Article 1192
Application of Imperative Norms

1. The regulations of the present section shall not affect the applicability of the imperative norms of the legislation of the Russian Federation which, due to indication in the imperative norms themselves or due to their special significance, in particular, for safeguarding the rights and law-protected interests of participants in civil law relations, regulate relevant relations, irrespective of the law that is subject to application.

2. According to the rules of the present section, when the law of any country is applied a court may take into account imperative norms of another country closely related to the relationship if under the law of that country such norms are to govern relevant relations, irrespective of the law that is subject

to application. In such cases the court shall take into account the purpose and nature of such norms and also the consequences of their application or non-application.

Article 1193
Public Order Clause

A norm of a foreign law subject to application in keeping with the rules of the present section shall not be applicable in exceptional cases when the consequences of its application would have obviously been in conflict with the fundamentals of law and order (public order) of the Russian Federation. In such a case a relevant norm of Russian law shall be applied if necessary.

A refusal to apply a norm of a foreign law shall not be based exclusively on a difference of the legal, political or economic systems of a relevant foreign state from the legal, political or economic system of the Russian Federation.

Article 1194
Retortions

The Government of the Russian Federation may establish reciprocal limitations (retortions) on the proprietary and personal non-proprietary rights of citizens and legal entities of the states where special limitations exist on the proprietary and personal non-proprietary rights of Russian citizens and legal entities.

CHAPTER 67
THE LAW GOVERNING DETERMINATION OF THE LEGAL STATUS OF PERSONS

Article 1195
The Personal Law of Natural Persons

1. The personal law of a natural person shall be the law of the country of which the person is a citizen.

2. If, apart from being a Russian citizen, a person also has foreign citizenship, his/her personal law shall be deemed Russian law.

3. If a foreign citizen has place of residence in Russian Federation his/her personal law shall be deemed Russian law.

4. If a person has several foreign citizenships his/her personal law shall be deemed the law of the country in which the person has place of residence.

5. The personal law of a person without citizenship shall be deemed the law of the country where he/she has place of residence.

6. The personal law of a refugee shall be deemed the law of the country where he/she has been granted asylum.

Article 1196
The Law Governing Determination of the Civil Legal Capacity of a Natural Person

The civil legal capacity of a natural person shall be determined by his/her personal law. In such a case foreign citizens and persons without citizenship shall possess civil legal capacity in the Russian Federation in equal measure with Russian citizens, except for the cases established by law.

Article 1197
The Law Governing Determination of the Civil Dispositive Capacity of a Natural Person

1. The civil dispositive capacity of a natural person shall be determined by his/her personal law.

2. A natural person who does not have civil dispositive capacity according to his/her personal law shall have no right to refer to his/her lacking dispositive capacity if he/she has dispositive capacity at the place where the deal was made, except for the cases in which the other party knew or was obviously supposed to know of the lack of dispositive capacity.

3. The recognition of a natural person in the Russian Federation as having no dispositive capacity or as having a limited dispositive capacity shall be governed by Russian law.

Article 1198
The Law Governing Determination of the Rights of a Natural Person to a Name

Natural person's rights to a name, the use and protection of a name shall be determined by his/her personal law, except as otherwise required by the present Code or other laws.

Article 1199
The Law Governing Tutorship and Guardianship

1. Tutorship and guardianship over minors, adults having no dispositive capacity or having a limited dispositive capacity shall be appointed and terminated according to the personal law of the person over which it is appointed or terminated.

2. The tutor's (guardian's) duty to accept tutorship (guardianship) shall be determined according to the personal law of the person who is appointed a tutor (guardian).

3. Relations between a tutor (guardian) and a person under his/her tutorship (guardianship) shall be determined according to the law of the country whose institution has appointed the tutor (guardian). However, when a person under tutorship (guardianship) has place of residence in the Russian Federation, Russian law shall apply if it is more favourable for such a person.

Article 1200
The Law Governing Cases of a Natural Person's Being Declared Missing or Dead

The declaration in the Russian Federation of a natural person as missing or dead shall be governed by Russian law.

Article 1201
The Law Governing Determination of the Possibility for a Natural Person to Pursue Entrepreneurial Activity

The natural person's right to pursue entrepreneurial activity as an individual entrepreneur, without the formation of a legal entity, shall be determined by the law of the country where the natural person is registered as an individual entrepreneur. If this rule cannot be applied due to lack of a compulsory registration the law of the country of the main place of business shall apply.

Article 1202
The Personal Law of a Legal Entity

1. The personal law of a legal entity shall be deemed the law of the country where the legal entity has been founded.

2. In particular the following shall be determined on the basis of the personal law of a legal entity:
   1) an organisation's status as a legal entity;
   2) the organisational legal form of a legal entity;
   3) the standards governing the name of a legal entity;
   4) issues concerning the formation, re-organisation and liquidation of a legal entity, in particular matters of succession;
   5) the content of the legal capacity of a legal entity;
   6) the procedure for acquisition of civil rights and assumption of civil duties by a legal entity;
   7) in-house relations, in particular, relations between a legal entity and its founders;
   8) a legal entity's capacity to be liable for its obligations.

3. A legal entity shall not refer to a limitation on the powers of its body or representative to enter into a deal which is not known in the law of the country where the body or the representative has entered into the deal, except for cases when it is proven that the other side in the deal knew or was obviously supposed to know of the said limitation.

Article 1203
The Personal Law of a Foreign Organisation Not Qualifying as a Legal Entity under Foreign Law

The personal law of a foreign organisation not qualifying as a legal entity under foreign law shall be deemed the law of the country where this organisation was founded.

If Russian law is applicable, the activity of such an organisation shall be accordingly subject to the rules of the present Code which govern the activities of legal entities, except as otherwise required by a law, other legal acts or the substance of the relation in question.

Article 1204
Participation of a State in Civil Legal Relations Complicated by a Foreign Factor

Civil legal relations complicated by a foreign factor as involving the participation of a state shall be subject to the rules of the present section on general terms, except as otherwise established by law.

CHAPTER 68
THE LAW GOVERNING PROPRIETARY AND PERSONAL NON-PROPRIETARY RELATIONS

Article 1205
General Provisions Concerning the Law Governing Rights in Rem

1. The content of a right of ownership and other rights in rem relating to immovable and movable property, the exercise and protection thereof shall be determined according to the law of the country where such property is located.

2. Property shall be classified as immovable or movable in compliance with the law of the country where such property is located.

Article 1206
The Law Governing the Emergence and Termination of Rights in Rem

1. The emergence and termination of a right of ownership and other rights in rem relating to property shall be determined by the law of the country where such property was located as of the time when the action was committed or another circumstance occurred which served as a ground for the emergence or termination of the right of ownership or other rights in rem, except as otherwise required under law.

2. The emergence and termination of a right of ownership or other rights in rem relating to a deal concluded in respect of property en route shall be determined by the law of the country from which the property has been dispatched, except as otherwise required under law.

3. The emergence of a right of ownership or other rights in rem in respect of property by virtue of acquisitive prescription shall be determined by the law of the country where the property was located as of the time of expiry of the acquisitive prescription term.

Article 1207
The Law Governing Rights in rem Relating to Aircraft, Vessels and Spacecraft

An ownership right and other rights in rem in respect of aircraft, sea vessels, inland navigation vessels, space craft subject to state registration, the exercise and protection of such rights shall be subject to the law of the country where such aircraft, vessels and space craft are registered.

Article 1208
The Law Governing Statute of Limitations

The statute of limitations shall be determined by the law of the country governing a relation in question.

Article 1209
The Law Governing the Form of Transaction

1. The form of transaction shall be governed by the law of place of conclusion. However, a transaction concluded abroad cannot be declared null and void because of a failure to comply with the form, if the provisions of Russian law have been observed.

   The rules set out in Paragraph 1 of the present item shall be applicable, in particular, to the form of powers of attorney.

2. The form of a foreign trade transaction in which at least one party is a Russian legal entity shall be governed by Russian law, irrespective of the place where the transaction was concluded. This rule shall be applicable, in particular, in cases when at least one of the parties to such a transaction is a natural person pursuing entrepreneurial activities whose personal law under Article 1195 of the present Code is Russian law.

3. The form of a transaction relating to immovable property shall be governed by the law of the country where the property is located and in respect of an immovable property recorded in a state register of the Russian Federation, by Russian law.

Article 1210
Selection of Law by the Parties to a Contract

1. When they enter into a contract or later on the parties thereto may select by agreement between them select the law that will govern their rights and duties under the contract. The law so selected by the parties shall govern the emergence and termination of a right of ownership and other rights in rem relating to movable property with no prejudice for the rights of third persons.

2. An agreement of parties as to the selection of law to be applicable shall be expressly stated or shall clearly ensue from the terms and conditions of the contract or the complex of circumstances of the case.

3. Selection of applicable law made by parties after the conclusion of a contract shall have retroactive effect and it shall be deemed valid, without prejudice for the rights of third persons, beginning from the time when the contract was concluded.

4. The parties to a contract may select applicable law both for the contract as a whole and for specific parts thereof.

5. If it ensues from the group of circumstances of a case that were in existence as of the time of selection of applicable law that the contract is actually connected with only one country the parties' selection of the law of another country shall not affect the imperative norms of the country with which the contract is actually connected.

Article 1211
The Law Governing a Contract in the Case of Lack of Parties' Agreement on Applicable Law

1. Where there is no agreement of parties on applicable law, the contract shall be subject to the law of the country with which the contract has the closest relation.

2. The law of the country with which a contract has the closest relation shall be deemed the law of the country where the party responsible for the performance under the contract of crucial significance for the content of the contract has its place of residence or main place of business, except as otherwise ensuing from the law, the terms or substance of the contract or the group of circumstances of the case in question.

3. A party responsible for the performance under a contract of crucial significance for the content of the contract shall be a party which, in particular, is the following, except as otherwise ensuing from law, the terms or substance of the contract or the group of circumstances of the case in question:
   1) a seller – in a sales contract;
   2) a donor – in a donation contract;
   3) a lessor/landlord – in a lease;
   4) a lender – in a contract of gratuitous use;
   5) a contractor – in a contract;
   6) a carrier – in a carriage contract;
   7) a forwarding agent – in a forwarding contract;
   8) a lender (a creditor) – in a loan (credit) contract;
   9) a financial agent – in a case in action assignment financing contract;

10) a bank – in a bank deposit contract and bank account contract;
11) a custodian – in a custody contract;
12) an insurer – in an insurance policy;
13) an agent – in a contract of agency;
14) a commission agent – in a contract of commission agency;
15) an agent – in a contract of agency service;
16) a franchisor – in a contract of franchise;
17) a mortgagor – in a mortgage contract;
18) a surety – in a suretyship contract;
19) a licensor – in a licence contract.

4. The law of the country with which the contract has the closest relation shall be as follows, except as otherwise ensuing from law, the terms or substance of the contract or the complex of circumstances of the case:

   1) for a contract of independent building contractor work and a contract of independent design and prospecting contractor work – the law of the country where on the whole the results stipulated by the contract are created;

   2) for a contract of general partnership – the law of the country where on the whole the activity of the partnership is pursued;

   3) for a contract concluded by auction, tender or commodity market – the law of the country where the auction, tender is held or the commodity market is situated.

5. A contract that has features of various types of contract shall be subject to the law of the country with which this contract as a whole has the closest relation, except as otherwise ensuing from law, the terms or substance of the contract or the group of circumstances of the case in question.

6. If internationally accepted trading terms are used in a contract it shall be deemed, unless there are directions to the contrary in the contract, that the parties have agreed on their application to their relations of business transaction usage designated by relevant trading terms.

Article 1212
The Law Governing a Contract with Participation of a Consumer

1. Selection of the law governing a contract whereto a party is a natural person using, acquiring or ordering or intending to use, acquire or order movable things (works, services) for personal, family, household or other purposes and not connected with the pursuance of entrepreneurial activity shall not cause deprivation of the natural person (consumer) of remedies relating to

his/her rights which are provided by imperative norms of the law of the country where the consumer has place of residence if any of the below circumstances have occurred:

1) in that country the conclusion of the contract had been preceded by an offer addressed to the consumer or an advertisement and the consumer has committed in the same country actions required for the purpose of entering into the contract;

2) a contract partner of the consumer or a representative of such a partner has received an order from the consumer in that country;

3) an order for acquisition of movable things, performance of works or provision of services has been made by the consumer in another country visited on the initiative of a contract partner of the consumer, if such an initiative was aimed at encouraging the consumer to enter into the contract.

2. If there is no agreement of the parties as to applicable law and if there are the circumstances specified in Item 1 of the present article the law of the country where the consumer has place of residence shall govern the contract with the participation of a consumer.

3. The rules established by Items 1 and 2 of the present article shall not be applicable to:

1) a carriage contract;

2) a work performance contract or a service provision contract if the work is to be performed or the service to be provided exclusively in a country other than the country where the consumer has place of residence.

The exemptions specified in the present item shall not extend to contracts for the provision of the services of carriage and accommodation for a single price (irrespective of the inclusion of other services in the single price), in particular, tourist service contracts.

Article 1213
The Law Governing Contracts Relating to Immovable Property

1. Where there is no agreement of parties on applicable law in respect of immovable property, the law of the country with which the contract has the closest relation shall apply. The right of the country with which the contract has the closest relation shall be deemed the law of the country where the immovable property is located, except as otherwise ensuing from law, the

terms or substance of the contract or the set of circumstances of the case in question.

2. Contracts relating to plots of land, tracts of sub-soil, isolated bodies of water and other immovable property located on the territory of the Russian Federation shall be subject to Russian law.

Article 1214
The Law Governing Contracts for the Formation of a Legal Entity with Foreign Interest

A contract for the formation of a legal entity with foreign interest shall be subject to the law of the country in which the legal entity is to be founded.

Article 1215
The Applicability of Law Governing a Contract

The following shall be in particular determined by the law governing a contract in keeping with the rules of Articles 1210 - 1214, 1216 of the present Code:

1) the construction of the contract;
2) the rights and duties of the parties to the contract;
3) performance under the contract;
4) the consequences of a default on performance or improper performance under the contract;
5) the termination of the contract;
6) the consequences of invalidity of the contract.

Article 1216
The Law Governing Assignment of a Claim

1. The law governing a claim assignment agreement between the initial and new creditors shall be determined in compliance with Items 1 and 2 of Article 1211 of the present Code.

2. The admissibility of a claim assignment, relations between the new creditor and the debtor, the conditions for the claim to be presented to the debtor by the new creditor and also the issue of the debtor's appropriate performance under his obligation shall be determined by the law applicable to the claim being the subject matter of the assignment.

Article 1217
The Law Governing Obligations Emerging from Unilateral Transactions

Except as otherwise required by law, the terms or substance of the transaction or the set of circumstances of the case in question, obligations emerging from unilateral transactions shall be governed by the law of the country where the party assuming obligations under a unilateral transaction has place of residence or main place of business.

The effective term of powers of attorney and the grounds for declaring it null and void shall be determined by the law of the country where the powers of attorney were issued.

Article 1218
The Law Governing the Relations of Payment of Interest

The grounds for collecting, the calculation procedure and the rate of interest on pecuniary obligations shall be governed by the law of the country governing a given obligation.

Article 1219
The Law Governing Obligations Emerging as a Result of Infliction of Harm

1. Obligations emerging as a result of infliction of harm shall be governed by the law of the country where the action or other circumstance that has served as ground for damages claim occurred. In cases when the action or other circumstances caused harm in another country, the law of that country may be applied if the person causing the harm foresaw or should have foreseen the onset of the harm in that country.

2. Obligations emerging as a result of infliction of harm abroad, if the parties are citizens or legal entities of one and the same country, shall be governed by the law of that country. If the parties to such an obligation are not citizens of one and the same country but have place of residence in one and the same country the law of that country shall apply.

3. After the committing of an action or onset of another circumstance that entailed infliction of harm the parties may come to an agreement that the obligation that has emerged as a result of infliction of the harm is to be governed by the law of the country of the court.

Article 1220
Applicability of the Law Governing Obligations Emerging as a Result of Infliction of Harm

The following, in particular, shall be determined on the basis of the law governing obligations emerging as a result of infliction of harm:

1) a person's capacity to be liable for harm inflicted;
2) the vesting of liability for harm in a person who is not the cause of harm;
3) grounds for liability;
4) grounds for limitation of liability and relief from liability;
5) the methods of compensation for harm;
6) the scope and amount of compensation for harm.

Article 1221
The Law Governing Liability for Harm Inflicted as a Result of Defects of Goods, Works or Services

1. At the discretion of the victim, the following shall be chosen to govern a claim for compensation of harm inflicted as a result of defects of goods, works or services:

   1) the law of the country where the seller or manufacturer of the goods or other causer of harm has place of residence or main place of business;

   2) the law of the country where the victim has place of residence or main place of business;

   3) the law of the country where the works or services have been completed or the law of the country where the goods were acquired.

   The selection of the law at the discretion of the victim from the options set out in Sub-items 2 or 3 of the present item may be recognized only in cases when the causer of harm fails to prove that the goods were brought into the given country without his consent.

2. If the victim did not exercise his right to choose applicable law as specified in the present article the applicable law shall be determined in compliance with Article 1219 of the present Code.
3. Accordingly, the rules of the present code shall be applicable to claims for compensation of harm inflicted as a result of unreliable or insufficient information on goods, works or services.

Article 1222
The Law Governing Obligations Emerging as a Result of Unfair Competition

Obligations emerging as a result of unfair competition shall be governed by the law of the country whose market has been affected by the competition, except as otherwise required by law or the substance of the obligation.

Article 1223
The Law Governing Obligations Emerging as a Result of Unjust Gains

1. Obligations emerging as a result of unjust gains shall be governed by the law of the country where the enrichment has taken place. The parties may come to an agreement that the law of the court is to govern such obligations.

2. If an unjust gain occurs in connection with a legal relation that exists or is assumed to exist due to which property was acquired, the obligations emerging as a result of the unjust enrichment shall be governed by the national law that governed or could have governed this legal relation.

Article 1224
The Law Governing Succession Relations

1. Succession relations shall be determined by the law of the country where a testator had his last place of residence, except as otherwise required by the present article.

   Immovable property succession shall be governed by the law of the country where property is located and succession of immovable property recorded in a state register of the Russian Federation shall be governed by Russian law.

2. The capacity of a person to create a will or revoke it, in particular, in relation to immovable property and also the form of such a will or will revocation act shall be governed by the law of the country where the testator had place of residence as of the time of creation of such a will or act. However, a will or revocation of a will shall not be declared void because the form has failed to be observed if the form meets the requirements of the law of the place of creation of the will or will revocation act or the provisions of Russian law.

President of the Russian Federation: V. Putin

MERCHANT SHIPPING CODE OF THE RUSSIAN FEDERATION*

ADOPTED BY THE STATE DUMA ON MARCH 31, 1999
APPROVED BY THE FEDERATION COUNCIL ON APRIL 22, 1999

CHAPTER XXVI
APPLICABLE LAW

Article 414
Establishing of Law to Be Applied to Relations Arising out of Merchant Shipping with the Participation of Foreign Citizens or Foreign Legal Entities or Complicated by a Foreign Element

1. The law to be applied to relations arising out of merchant shipping with the participation of foreign citizens or foreign legal entities or complicated by a foreign element, including where the object of civil rights is located outside the Russian Federation, shall be established in accordance with international treaties of the Russian Federation, this Code, other laws and customs of merchant shipping recognized in the Russian Federation.

2. The parties to a contract specified in this Code may, when concluding the contract or subsequently choose, by mutual agreement, which law is to apply to their rights and duties under that contract. In default of agreement of the parties as to the law to be applied, the relations of this Code shall apply; the existence of such agreement may not entail exoneration or reduction of liability which, in accordance with this Code, the carrier shall bear for loss of life or personal injury caused to a passenger or loss of or damage to goods or luggage or delay in their delivery.

Article 415
Right of Ownership and Other Property Rights

1. The right of ownership and other property rights, as well as arising, transfer and termination of such rights, shall be determined by the law of the state of the vessel's flag.

* The English translation of the MSC made by Mr. Alexander Kulikov is published in the journal 'Международное право – International Law' (Moscow), 2001, No. 2, pp. 453-560.

Yearbook of Private International Law, Volume 4 (2002), pp. 365-369
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

2. In respect of the property rights to the vessel, which is temporarily granted the right to fly the flag of another state, the law of the state where the vessel is registered actually before the change of the flag, shall apply.

3. Rights to a vessel under construction shall be determined by the law of the state where the vessel is accepted for construction or is being constructed, unless otherwise provided for by the contract of construction of vessel.

Article 416
Legal Status of Members of a Vessel's Crew

1. The legal status of members of a vessel's crew and the relationship between the members of the crew deriving from the operation of the vessel shall be determined by the law of the state of the vessel's flag.

2. Relationship between the shipowner and the members of the vessel's crew shall be governed by the law of the state of the vessel's flag, unless otherwise provided for by a contract regulating the relationship between the shipowner and members of the vessel's crew who are foreign citizens.

   The choice, by the parties to the labour contract, of the law to be applied to relationship between the shipowner and the members of the vessel's crew shall not entail a deterioration in the working conditions of the crew members in comparison with the norms of the state which shall govern the said relationship in default of agreement of the parties as to the law to be applied.

Article 417
Rights to Sunken Property

1. The rights to the property sunken in internal sea waters of territorial sea, as well as relations arising in connection with sunken property shall be governed by the law of the state where the said property sank.

2. In respect o vessels sunk in high seas, or the goods and other property thereon, the law of the state of the vessel's flag shall apply.

Article 418
Relations Arising out of Merchant Shipping Contracts

1. Relations arising out of the contract of carriage of goods by sea, contract of towage, contract of marine agency, contract of marine brokerage, contract of marine insurance, time charter or bareboat charter shall be regulated by

the law of the state specified by agreement of the parties, and out of the contract of carriage of a passenger by sea, by the law of the state specified in the passenger's ticket.

2. In default of agreement of the parties as to the law to be applied, relations between the parties arising out of contracts shall be governed by the law of the state of establishment or of the principal place of business or place of residence of the party who is:
   - the carrier, in the contract of carriage of goods by sea;
   - the shipowner, in the contract of marine agency, time charter or bareboat charter;
   - the shipowner of the towing vessel, in the contract of towage;
   - the principal, in the contract of marine brokerage;
   - the insurer, in the contract of marine insurance.

Article 419
General Average

1. In default of agreement of the parties as to the law to be applied, relations arising out of general average shall be governed by the law of the state in whose port the vessel terminated its voyage after the incident causing the general average.

   In cases where all the parties concerned belong to the same state, the law of such state shall apply.

2. The order of general average adjustment, if distributed in the Russian Federation, shall be determined by the regulations set out in Chapter XVI of this Code.

Article 420
Relations Arising out of Collision of Vessels

1. Relations arising out of collision of vessels in internal sea waters or territorial sea shall be governed by the law of the state on the territory of which the collision occurred.

2. Where the collision occurred in the high seas and the dispute is heard in the Russian Federation, the regulations set out in Chapter XVII of this Code shall apply.

3. In respect of relations arising out of a collision of vessels flying the flag of the same state, the law of such state shall apply, irrespective of the place of collision.

Article 421
Relations Arising out of Causing Damage by Oil Pollution from Vessels

Where damage by oil pollution from vessels is caused, the regulations set out in Chapter XVIII of this Code shall apply to:

- damage by oil pollution from vessels caused within the territory of the Russian Federation, including the territorial sea and the exclusive economic zone, of the Russian Federation;
- measures for preventing or minimizing such damage, wherever taken.

Article 422
Relations Arising out of Damage Caused in Connection with Carriage of Hazardous and Noxious Substances by Sea

Where damage in connection with carriage of hazardous and noxious substances by sea is caused, the regulations set out in Chapter XIX of this Code shall apply to:

- any damage caused within the territory of the Russian Federation including territorial sea;
- pollution damage to the environment caused in the exclusive economic zone of the Russian Federation;
- damage other than pollution damage to the environment caused outside the territory of the Russian Federation including territorial sea, if the said damage was caused by hazardous and noxious substances carried on board a vessel flying the State Flag of the Russian Federation;
- measures for preventing and minimizing damage, wherever taken.

Article 423
Relations Arising out of Salvage of Vessel or Other Property

1. In default of agreement of the parties as to the law to be applied to relations arising out of the salvage of vessel or other property in internal sea waters and territorial sea, the law of the state where the salvage took place shall apply, and, if the salvage is carried out in the high seas and the dispute is

heard in the Russian Federation, then the regulations set out in Chapter XX of this Code shall apply.

2. Where the salvaging and salvaged vessels are flying the flag of the same state, the law of the state of the vessel's flag shall apply, irrespective of the place of salvage.

3. In respect of the apportionment of the reward between the shipowner of the salvaging vessel, its master and other members of its crew, the law of the state of the vessel's flag shall apply and, if the salvage was carried out not from the vessel, the law shall apply under the effect of which the contract regulating relations between the salvor and his servants falls.

Article 424
Maritime Lien on a Vessel

In respect o maritime lien on a vessel and the ranking of claims secured by maritime lien on the vessel, law of the state in a court of which the dispute is heard shall apply.

Article 425
Mortgage on a Vessel or Vessel under Construction

Effecting of a mortgage on a vessel or vessel under construction and the ranking of claims arising out of the obligations secured by the registered mortgage on the vessel or vessel under construction shall be regulated by law of the state where the mortgage is registered.

Article 426
Limits of the Shipowner's Liability

The limits of the shipowner's liability shall be stipulated by law of the state of the vessel's flag.

Article 427
International Treaties of the Russian Federation

Where by an international treaty of the Russian Federation, regulations other than those specified in this Code are set out, the provisions of the international treaty shall apply.

SIXTH INTER-AMERICAN SPECIALIZED CONFERENCE ON PRIVATE INTERNATIONAL LAW (CIDIP-VI)

(convoked by the General Assembly of the Organization of American States at its twenty-sixth regular session, through resolution AG/RES. 1393-XXVI-O/96).

MODEL INTER-AMERICAN LAW ON SECURED TRANSACTIONS

APPROVED ON FEBRUARY 8, 2002 BY THE PLENARY SESSION OF THE CONFERENCE IN RESOLUTION CIDIP-VI/RES. 5/02

TITLE I: SCOPE AND GENERAL APPLICATION

Article 1

The objective of the Model Inter-American Law on Secured Transactions (hereinafter, the 'Law') is to regulate security interest in movable property securing the performance of any obligations whatsoever, of any nature, present or future, determined or determinable.

A State may declare that this Law does not apply to the types of collateral expressly specified in this text.

A State adopting this Law shall create a unitary and uniform registration system applicable to all existing movable property security devices in the local legal framework, in order to give effect to this Law.

Article 2

The security interests to which this Law refers are created contractually over one or several specific items of movable property, on generic categories of movable property, or on all of the secured debtor's movable property, whether present or future, corporeal or incorporeal, susceptible to pecuniary valuation at the time of creation or thereafter, with the objective of securing the fulfillment of one or more present or future obligations regardless of the form of the transaction and regardless of whether ownership of the property is held by the secured creditor or the secured debtor.

Yearbook of Private International Law, Volume 4 (2002), pp. 371-390
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

When a security interest is publicized in accordance with this Law, the secured creditor has the preferential right to payment from the proceeds of the sale of the collateral.

Article 3

For purposes of this law, the following terms mean:

I. *Registry*: is the Registry of Movable Property Security Interests.

II. *Secured Debtor*: the person, whether the principal debtor or a third party, who creates a security interest over movable property in accordance with this Law.

III. *Secured Creditor*: the person in whose favor a security interest is created, possessory or non-possessory, whether for its own benefit or for the benefit of other persons.

IV. *Buyer [or transferee] in the Ordinary Course of Business*: a third party who, with or without knowledge of the fact that the transaction covers collateral subject to a security interest, gives value to acquire such collateral from a person who deals in property of that nature.

V. *Movable Property Collateral*: any movable property, including receivables and other kinds of incorporeal property, such as intellectual property, or specific or general categories of movable property, including attributable movable property, that serves to secure the fulfillment of a secured obligation according to the terms of the security contract.

The security interest in the collateral extends to, regardless of any mention in the security contract or in the registration form, the right to be indemnified for any loss or damage affecting the collateral during the course of the security interest, as well as to receive the product of an insurance policy or certificate that covers the value of such property.

VI. *Attributable Movable Property*: the movable property that can be identified as derived from the originally encumbered property, such as fruits, or property resulting from its sale, substitution or transformation.

VII. *Registration Form*: the form provided by the Registry referred to in Article 3.I, to register a security interest, and which will include at least the data prescribed by the regulations necessary to identify the applicant, the secured creditor, the secured debtor, the collateral, the maximum amount secured by the security interest, and the termination date of registration.

VIII. *Inventory:* movable property held by a person for sale or lease in the ordinary course of that person's business operations. Inventory does not include movable property held by the secured debtor for its on-going use.

IX. *Acquisition Security Interest Movable property:* a security interest granted in favor of a creditor – including a supplier – who finances the acquisition by the debtor of the moveable corporeal property over which the security interest is granted. Such security interest may secure the acquisition of present or subsequently acquired movable property so financed.

X. *Receivable*: the secured debtor's right (contractual or extra-contractual) to claim or receive payment of any monetary sum, currently or thereafter due, from a third party, including accounts receivable.

Article 4

The secured obligation, in addition to the principal debt may consist in:

I. Ordinary and default interests generated by the principal sum of the secured obligation calculated according to what is stated in the security contract, with the understanding that, if no rate has been stated, said interest will be calculated at the legal rate applicable at the time of default;

II. The commissions which must be paid to the secured creditor as provided in the Security contract;

III. Reasonable expenses incurred by the secured creditor for the maintenance and custody of the secured property;

IV. Reasonable expenses incurred by the secured debtor, generated by the acts necessary to effectuate the enforcement of the security interest;

V. Damages caused by the breach of the security contract as determined by a court, arbitration award or private settlement;

VI. The liquidated damages, if any, when these have been established.

TITLE II: CREATION

Article 5

A security interest is created by contract between the secured debtor and secured creditor.

Article 6

If the security interest is non-possessory, the contract creating the security must be in writing and the security interest takes effect between the parties from the moment of the execution of the writing, unless the parties otherwise agree.

However, a security interest in future or after-acquired property encumbers the secured debtor's rights (personal or real) in such property only from the moment the secured debtor acquires such rights.

Article 7

The written security contract must contain, as a minimum:

I. Date of execution;

II. Information to identify the secured debtor and the secured creditor, as well as the written or electronic signature of the secured debtor;

III. The maximum amount secured by the security interest;

IV. A description of the collateral, in the understanding that such description may be generic or specific;

V. An express indication that the movable property described is to serve as collateral to a secured obligation; and,

VI. A generic or specific description of the secured obligations.

The writing may be manifested by any method that leaves a permanent record of the consent of the parties to the creation of the security interest, including telex, telefax, electronic data interchange, electronic mail, and any other optical or similar method, according to the applicable norms on this matter and taking into account the resolution of this Conference attached to this Model Law (CIDIP-VI/RES. 6/02).

Article 8

If the security interest is possessory, it takes effect from the moment the secured debtor delivers possession or control of the collateral to the secured creditor or a third person designated on its behalf, unless the parties otherwise agree.

Article 9

If the security interest is non-possessory, the secured debtor or any person that acquires the collateral subject to the security interest, unless otherwise agreed, has the following rights and obligations:

I. The right to use and dispose of the collateral and any proceeds derived from the original collateral in the ordinary course of the debtor's business;

II. The obligation to discontinue the exercise of such right when the secured creditor notifies the secured debtor of its intention to enforce the security interest in the collateral under the terms of this Law;

III. The obligation to prevent damage and loss of the collateral and do what ever is necessary for such purpose;

IV. The obligation to allow the secured creditor to inspect the collateral to verify its quantity, quality and state of conservation; and

V. The obligation to adequately insure the collateral against destruction, loss or damage.

TITLE III: PUBLICITY

CHAPTER I
General Rules

Article 10

The rights conferred by the security interest take effect against third parties only when the security interest is publicized. A security interest may be publicized by registration in accordance with this Title and Title IV or by delivery of possession or control of the collateral to the secured creditor or to a third person on its behalf in accordance with this Title.

A security interest in any type of collateral may be publicized by registration, except as provided in Article 23. A security interest may be publicized by delivery of possession or control only if the nature of the collateral so permits or delivery is effected in the manner contemplated by this Title.

A security interest publicized by one method may later be publicized by another method and, provided there is no intermediate lapse without publicity, it will be considered that the security interest was continuously publicized for the purposes of this Law.

Article 11

A security interest may cover attributable movable property if this consequence is mentioned in the registration form.

CHAPTER II
Acquisition Security Interest

Article 12

An acquisition security interest must be publicized by filing of a registration form that refers to the special character of this security interest and that describes the collateral thereby encumbered.

CHAPTER III
Receivables

Article 13

The provisions of this Law concerning security interests over receivables are applicable to every type of assignment of receivables. If the assignment is not for security it must comply only with the publicity provisions of this Law; if it fails to so comply, it will be subject to the priority rules of this Law.

Article 14

A security interest granted by the secured debtor in receivables owed to the secured debtor is publicized by registration.

Article 15

Except as otherwise provided in this Law, a security interest granted in receivables shall not modify the underlying legal standing nor increase the obligations of the account debtor without this party's consent.

Article 16

The account debtor of a receivable assigned in security has the rights and is subject to the obligations stated in this Chapter.

Article 17

The account debtor of the assigned receivable may discharge its obligation by paying the secured debtor or the assignor as the case may be. However, any outstanding amount owed to the secured debtor or assignor at the time or after the account debtor of the assigned receivable receives notice from the secured creditor

to make payment to the secured creditor, the outstandig amount must be paid to the secured creditor. The account debtor may request the secured creditor to provide reasonable proof of the existence of the security interest, and, if reasonable proof is not provided within a reasonable time, the account debtor may make payment to the secured debtor.

The notice to the account debtor may be given by any generally accepted means of communication. In order for such notice to be effective, it must identify the receivable in respect of which payment is requested, and include sufficient payment instructions to enable the account debtor to comply. Unless otherwise agreed, the secured creditor shall not deliver such notice before the occurrence of an event of default that entitles the secured creditor to enforce the security interest.

Article 18

If an account debtor receives notice of more than one security interest of the same receivable, the account debtor shall make payment of the obligation in conformity with the payment instructions contained in the first notification received. Any actions between secured creditors designed to give effect to the priority provisions of Title V of the Law are preserved.

Article 19

A security interest in a receivable other than a claim under a letter of credit, is effective notwithstanding any agreement between the account debtor and the secured debtor limiting the right of the secured debtor to grant security in or assign the receivable. Nothing in this Article affects any liability of the secured debtor to pay damages to the account debtor for breach of any such agreement.

Article 20

The account debtor may raise against the secured creditor all defenses and rights of set-off arising from the original contract, or any other contract that was part of the same transaction, that the account debtor could raise against the secured debtor.

The account debtor may raise against the secured creditor any other right of set-off, provided that it was available to the account debtor when notification of the security interest was received by the account debtor.

The account debtor may agree with the secured debtor or assignor in a writing not to raise against the secured creditor the defenses and rights of set-off that the account debtor could raise pursuant to the first two paragraphs of this Article. Such an agreement precludes the account debtor from raising those defenses and rights of set-off.

The account debtor may not waive the following defenses:

I. Those arising from fraudulent acts on the part of the secured creditor or assignee; or

II. Those based on the account debtor's incapacity.

CHAPTER IV
Non-Monetary Claims

Article 21

A security interest granted by the secured debtor in a claim that is a non-monetary obligation, owed to the secured debtor, is publicized by registration.

Article 22

When the collateral is a claim that is a non-monetary obligation, the secured creditor has the right to notify the person obligated on the claim to render performance of the obligation to or for the benefit of the secured creditor and to otherwise enforce the obligation to the extent that the nature of the obligation permits. The person obligated on the claim may refuse only based on reasonable cause.

CHAPTER V
Letters of Credit

Article 23

A security interest in a letter of credit the terms and conditions of which require that it be presented in order to obtain payment shall be publicized by the beneficiary's (secured debtor's) delivery of the letter of credit to the secured creditor, provided that such a letter of credit does not forbid its delivery to a party other than the paying bank. Unless the letter of credit has been amended to permit the secured creditor's draw, the delivery to the secured creditor does not entitle the latter to draw on the letter of credit and solely prevents the beneficiary's (secured debtor's) presentment of the letter of credit to the paying or negotiating bank.

Article 24

A beneficiary (secured debtor) may transfer or assign its right to draw on a letter of credit to a secured creditor by obtaining the issuance of a credit transferable to the name of the secured creditor as a transferee-beneficiary. The validity and effect upon third parties of such a transfer is governed by the applicable provisions of the prevailing version, at the moment in which it takes place, of the Uniform Customs and Practices for Documentary Credits of the International Chamber of Commerce.

Article 25

The existence of a security interest in the proceeds of a letter of credit is conditioned upon the beneficiary complying with the terms and conditions of the letter of credit thereby becoming entitled to payment thereon. To be publicized, such a security interest must be filed in the registry but not be enforceable against the issuing or confirming bank until the date and time on which this party accepts, under the terms and conditions governing the payment of the letter of credit.

Article 26

If the secured obligation consists of a future extension of credit or the giving of value in the future to the beneficiary (secured debtor), the secured creditor must extend such credit or value no later than 30 days from the date on which the issuing or confirming bank accepts the terms and conditions of the security interest in the proceeds of the letter of credit, unless otherwise agreed. If such credit is not extended or value is not given within this period, the security interest terminates, its registration, if any, may be cancelled, and the secured creditor must execute a signed release to the issuing or confirming bank allowing them to pay the beneficiary (secured debtor) according to its original terms and conditions.

CHAPTER VI
Instruments and Documents

Article 27

Where the collateral is an instrument or document, the title to which is negotiable by endorsement and delivery, or delivery alone, the security interest may be publicized by delivery of possession of the instrument or document with any necessary endorsement.

Article 28

When the transfer or a pledge of a document of title has taken place in an electronic format, or its transfer or pledge has been effectuated in an electronic registry, the special rules governing such electronic registry shall apply.

Article 29

If the secured creditor publicizes its security interest by possession and endorsement of the document but subsequently delivers it to the secured debtor for any purpose including withdrawing, warehousing, manufacturing, shipping or selling the movable property represented by the document, the secured creditor must register its security interest before the document is returned to the secured debtor in accordance with Article 10 of this Law.

When the movable property represented by a document is in the possession of a third party depository or a bailee, the security interest may be publicized by the delivery of a written notice to the third party.

CHAPTER VII
Property in Possession of a Third Party

Article 30

The secured creditor, with the consent of the secured debtor, may hold the property through a third person; detention by the third person effects publicity only from the time the third person receives evidence in writing of the security interest. The third person must at the request of any interested person disclose forthwith whether or not it has received notice of a security interest covering property in its possession.

CHAPTER VIII
Inventory

Article 31

A security interest over inventory, comprised of present and future property, and its attributable movable property, or any part thereof, may be publicized by a single registration.

CHAPTER IX
Intellectual Property Rights

Article 32

A security interest in intellectual property rights, such as patents, trademarks, trade-names, goodwill, royalties and other attributable movable property derived therefrom, is governed by this Law, including Article 37.

CHAPTER X
Obligations of a Creditor in Possession of Collateral

Article 33

A creditor in possession of the collateral:

I. Shall exercise reasonable care in the custody and preservation of the collateral. Unless otherwise agreed, reasonable care implies the obligation to take the necessary steps to preserve the value of the collateral and the rights derived therefrom.

II. Shall maintain the collateral in such a way that it remains identifiable, unless it is fungible.

III. May use the collateral only as provided in the security contract.

Article 34

A possessory security interest may be converted into a non-possessory security interest and retain its priority provided that the security interest is publicized by registration before the collateral is returned to the secured debtor, in accordance with Article 10.

TITLE IV: REGISTRY AND RELATED MATTERS

Article 35

The security interest publicized by registration takes effect against third parties from the moment of its registration.

Article 36

Any person may effect a registration authorized by the secured creditor and the secured debtor, and any person may register a continuation of an existing registration with the authorization of the secured creditor.

Article 37

Where another law or an applicable international convention requires title to movable property to be registered in a special registry, and contains provisions relating to security interests created over such property, such provisions shall have precedence over this Law, to the extent of any inconsistency between the two.

Article 38

The registration form shall be in the standard form and medium prescribed by regulation. Such form shall provide for entry of the following data:

I. The name and address of the secured debtor;

II. The name and address of the secured creditor;

III. The maximum amount secured by the security interest;

IV. The description of the collateral, which can be generic or specific.

When there is more than one secured debtor granting a security interest over the same movable property, all secured debtors must be separately identified in the registration form

Article 39

The registration in the Registry will be valid for a term of five years, renewable for three-year terms, preserving the original priority.

Article 40

In order for an acquisition security interest to be publicized and have priority over previously perfected security interests over property of the same type, the secured creditor must comply with the following requirements, before the debtor takes possession of such property:

I. Register in the registration form a notation that indicates the special character of the acquisition security interest; and,

II. Notify the holders of previously perfected security interests over property of the same kind that the secured creditor has or expects to acquire an acquisition security interest in the collateral described in the notice.

Article 41

The registration data may be amended at any time by the registration of an amendment form; the amendment shall take effect only from the time of its registration.

Article 42

The secured creditor may cancel the original registration by filing a cancellation form.

If a cancellation is made in error or in a fraudulent manner, the secured creditor may reregister the registration form in substitution of the cancelled form. Such secured creditor retains its priority in relation to other secured creditors that registered a security interest during the time of validity of the erroneously cancelled registration form, but not against secured creditors who registered their security after the date of cancellation and before the date of reregistration.

Article 43

The entity designated by the State will operate and administrate the Registry, which will be public and automated and in which there will be an electronic folio, which will be indexed by the name of the secured debtor.

Article 44

The Registry will have a central database constituted by the registration records of the security interests inscribed in the State.

Article 45

For the registration and searches of information, the Registry will authorize remote and electronic access to users who so request.

Article 46

The users will have a confidential key to access the Registry system in order to register security interests by sending the registration form via electronic means or via any other method authorized by the legislation of this State, as well as in order to conduct the searches that are requested.

TITLE V: PRIORITY RULES

Article 47

The right conferred by a security interest in respect of the collateral is effective against third persons only when the publicity requirements have been fulfilled.

Article 48

The priority of a secured interest is determined by the time of its publicity.
A security interest confers on the secured creditor the right to follow the collateral in order to exercise its rights under the security.

Article 49

Nevertheless, a buyer or transferee of collateral in the ordinary course of the transferor's business takes free of any security interest in the collateral.

The secured creditor cannot interfere with the rights of a lessee or a licensee under a lease or a license granted in the ordinary course of the lessor's or licensor's business after the publication of the security interest.

Article 50

The priority of a security interest can be modified by written agreement between the secured creditors involved, unless it affects the rights of third parties or is prohibited by law.

Article 51

An acquisition security interest will have priority over a previous security interest that encumbers future movable property of the secured debtor, as long as it is created according to the provisions of this law and even when it was publicized

after the previous security interest. The acquisition security interest will cover exclusively the specific movable property acquired with it and the cash proceeds attributable to their sale, provided the secured creditor has complied with the conditions set out in Article 40.

Article 52

I. A possessory security interest in a document of title has priority over a security interest in the property covered by such document of title if the latter is publicized after the document of title is issued.

II. The holder of money or a transferee of negotiable instruments who takes possession with any necessary endorsement in the ordinary course of the transferor's business takes free of any security interests.

III. The secured creditor who received notice of acceptance by the issuing or confirming bank, of its publicized security interest over the proceeds of a letter of credit, has priority over any security interest over such proceeds, regardless of the time of its publicity, obtained by another secured creditor who did not receive such acceptance or who received it at a later date. Where the security interest covers the proceeds of a letter of credit, the ordinary rule of priority set out in this Law applies.

IV. A publicized security interest in a movable that is affixed to an immovable, without losing its identity as a movable, has priority over security interests in the relevant immovable, provided the security interest over the movables has been registered in the immovable registry before affixation.

Article 53

The secured creditor may authorize the secured debtor to dispose of the collateral free of encumbrance, subject to any terms and conditions agreed to by the parties

TITLE VI: ENFORCEMENT

Article 54

A secured creditor who intends to commence enforcement, in case of default of the secured debtor, shall register an enforcement form in the Registry and deliver a copy to the secured debtor, to the principal debtor of the secured obligation, to the person in possession of the collateral and to any person who has publicized a security interest in the same collateral.

The enforcement form shall contain:

I. A brief description of the default by the secured debtor;

II. A description of the collateral;

III. A statement of the amount required to satisfy the secured obligation and to pay the secured creditor's enforcement expenses as reasonably estimated;

IV. A statement of the rights provided by this Title to the recipient of the enforcement form; and

V. A statement of the nature of the remedies provided by this Title that the secured creditor intends to exercise.

Article 55

In case of default on the secured obligation, the secured creditor shall require the payment from the secured debtor. Notice of this requirement shall be issued in a notarized or judicial form, at the creditor's option, to the debtor's address as indicated in the registration form. In the requirement or notification process, the debtor shall be given a copy of the enforcement form filed at the registry.

Article 56

The debtor shall have a period of three days from the day following receipt of the enforcement form to object by giving evidence to the Judge or the Notary involved that full payment of the amount and its accessories has been made. No exception or defense, other than full payment, will be admitted.

Article 57

In case of a non-possessory security interest over corporeal property, once the period indicated in the previous Article has elapsed, the secured creditor may ask the Judge to issue an order of repossession, which shall be enforced forthwith, without granting a hearing to the debtor. In accordance with a Judge's order the collateral shall be delivered to the secured creditor, or to a third party at the request of the secured creditor. Any exception or defense that the debtor wishes to make against such order, other than that indicated in the previous Article, shall be initiated through an independent judicial action, as provided for in local procedural law; such independent judicial action shall not prevent the secured creditor from exercising its enforcement rights against the collateral.

Article 58

At any time before the secured creditor disposes of the collateral, the secured debtor, as well as any other interested person, has the right to terminate the enforcement proceedings by:

I. Paying the full amount owed to the secured creditor, as well as the reasonable enforcement costs of the secured creditor; or

II. If the secured obligations are installment obligations, reinstating the security contract by paying the amounts actually in arrears together with the secured creditor's reasonable enforcement expenses and remedying any other act of default.

Article 59

With respect to a possessory security interest, or with respect to a non-possessory security interest in incorporeal property, or with respect to a non-possessory security interest in corporeal property after repossession:

I. If the collateral is movable property that is customarily priced in the market in the State where enforcement takes place, it may be sold directly by the secured creditor at a price in accord with such market.

II. If the collateral consists of receivables, the secured creditor has the right to collect or enforce the receivables against the third person obligated on the receivable in accordance with the provisions of Title III of this Law.

III. If the collateral consists of stocks, bonds or similar types of property, the secured creditor has the right to exercise the secured debtor's rights in relation to the collateral, including redemption rights, rights to draw, voting rights and rights to collect dividends or other revenues derived from the collateral.

IV. The collateral may be sold privately, or taken in payment against the debt, provided that it has been previously appraised by an single qualified appraiser designated by the secured creditor, for the price of the appraisal. The secured creditor may elect to sell the collateral in a public auction previously announced in two daily publications of major circulation, at least five days before the sale, without minimun bid, to the highest bidder.

Article 60

The proceeds of the sale or auction will be applied in the following manner:

I. The costs of enforcement, storage, repair, insurance, preservation, sale or auction, and any other reasonable cost incurred by the creditor;

II. The payment of any outstanding taxes owing by the secured debtor if they are secured by a lien on the collateral provided by operation of law;

III. The payment of the outstanding amount of the secured obligation;

IV. The payment of secured obligations stemming from security interests with a secondary priority; and

V. Any remainder will be returned to the debtor.

If the outstanding loan amount owed by the secured debtor exceeds the proceeds of the disposition of the collateral, the secured creditor shall have the right to demand payment for any deficiency from the debtor of the obligation.

Article 61

The possible appeals of any judicial decision mentioned in this Title will not have suspensive effect.

Article 62

At any time, before or during the enforcement proceeding, the debtor may reach an agreement with the creditor on terms other than those previously established, either for the delivery of the goods, the terms of the sale or auction, or any other matter, provided that said agreement does not affect other secured creditors or buyers in the ordinary course of business.

Article 63

In any event, the debtor will retain the right to claim damages for the abuse of his rights by the creditor.

Article 64

Any subsequent secured creditor may subrogate the rights of a preceding secured creditor by paying the secured obligation of the secured debtor.

Article 65

The secured debtor's right to sell or transfer collateral in the ordinary course of business operations is suspended from the moment the secured debtor receives notice of the commencement of enforcement proceedings against the secured debtor, pursuant to the enforcement rules of this Law. This suspension will

continue until the completion of the enforcement proceedings, unless the secured creditor otherwise agrees.

Article 66

Secured creditors are entitled to exercise their enforcement rights and to assume control of the collateral in the order of their priority rank.

Article 67

A person who purchases the collateral at a sale or auction, takes the property subject to the real rights with which it is encumbered, with the exception of the security interest of the creditor who sold the property and the security interests or claims which were subordinate to such security interest.

TITLE VII: ARBITRATION

Article 68

Any controversy arising out of the interpretation and fulfillment of a security interest may be submitted to arbitration by the parties, acting by mutual agreement and according to the legislation applicable in this State.

TITLE VIII: CONFLICT OF LAWS AND TERRITORIAL SCOPE OF APPLICATION

Article 69

In cases where a security interest has contacts to more than one State, the law of the State where the collateral is located at the time the security interest is created shall govern issues relating to the validity, publicity and priority of:

I. A security interest in corporeal movable property other than movable property of the kind referred to in the next Article; and

II. A possessory security interest in incorporeal movable property.

If the collateral is moved to a different State than that in which the security interest was previously publicized, the law of the State to which the collateral has been

moved governs issues relating to the publicity and priority of the security interest as against unsecured creditors and third persons who acquire rights in the collateral after the relocation. However, the priority of the security interest acquired under the law of the previous location of the collateral is preserved if the security interest is publicized in accordance with the law of the State of the new location within 90 days after the relocation of the property.

Article 70

In cases where a secured transaction has contacts to more than one State, the law of the State in which the secured debtor is located when the security interest is created governs issues relating to the validity, publicity and priority of:

I. A non-possessory security interest in incorporeal property; and

II. A security interest in movable corporeal property if the property is held by the secured debtor as equipment for use in the secured debtor's business, or as inventory for lease.

If the secured debtor changes its location to a different State than that in which the security interest was previously publicized, the law of the State of the secured debtor's new location governs issues relating to the publicity and priority of the security interest as against unsecured creditors and third persons who acquire rights in the collateral after the relocation. However, the priority of the security interest acquired under the law of the previous location of the secured debtor is preserved if the security interest is publicized in accordance with the law of the State of the secured debtor's new location within 90 days after the relocation of the debtor.

Article 71

The priority of a non-possessory security interest in negotiable incorporeal property as against third persons who acquire a possessory interest in the property is governed by the law of the State where the collateral is located when the possessory interest is acquired.

Article 72

For the purposes of applying Article 70, a secured debtor is considered located in the State where the secured debtor maintains the central administration of its business.

If the secured debtor does not operate a business or does not have a place of business, the secured debtor is considered located in the State of its habitual residence.

SIXTH INTER-AMERICAN SPECIALIZED CONFERENCE ON PRIVATE INTERNATIONAL LAW (CIDIP-VI)

(convoked by the General Assembly of the Organization of American States at its twenty-sixth regular session, through resolution AG/RES. 1393-XXVI-O/96).

NEGOTIABLE INTER-AMERICAN UNIFORM THROUGH BILL OF LADING FOR THE INTERNATIONAL CARRIAGE OF GOODS BY ROAD

TERMS AND CONDITIONS

Article 1
Scope of Application

1.1 Pursuant to the undertakings specified in Article 3 hereof, this Bill of Lading shall be deemed to be a negotiable through bill of lading governing transportation of the Goods by road (in whole or in part) by a single Performing Carrier or successively by separate Performing Carriers, from the point of their pickup in the first country in which the first Performing Carrier takes physical possession of all or any part of the Goods as shown in this Bill of Lading to the last point of delivery in another country.

1.2 This Bill of Lading shall not govern transportation of Goods, in whole or in part, through other modes.

1.3 A negotiable bill of lading shall be understood as that which serves as title to the Goods and may be made out to a named person or to the bearer. The original may or may not be endorsable. It shall be issued as an original plus numbered copies. Each of the copies should be marked "non-negotiable copy."

Article 2
Definitions

2.1 For purposes of this Bill of Lading, the following words and phrases shall have the following meanings:

Yearbook of Private International Law, Volume 4 (2002), pp. 391-400
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

2.1.1 *Contracting Carrier*: The term 'Contracting Carrier' means the person who contracts to transport, either directly, or indirectly by the use of Performing Carrier(s), the Goods, as evidenced by this Bill of Lading. The 'Contracting Carrier' may or may not also be a Performing Carrier.

2.1.2 *Performing Carrier*: The term 'Performing Carrier' means any person who performs any part of the transport of the Goods, including the 'Contracting Carrier' if applicable.

2.1.3 *Consignee*: The person named in this Bill of Lading to whom the Goods may be lawfully delivered. The 'Consignee' may or may not also be the Receiver.

2.1.4 *Shipper*: The person who enters into the contract of carriage with the Contracting Carrier as evidenced by this Bill of Lading. The "Shipper" may or may not also be the Consignor, the Consignee, or the Receiver.

2.1.5 *Goods*: Any commodity or article that is transported, including containers, pallets, or like dunnage supplied by the shipper.

2.1.6 *Person*: The term 'person' includes individuals, corporations, partnerships, or other business entities recognized by law in the country in which they are organized.

2.1.7 *Receiver*: The person(s), if other than the Consignee, named in this Bill of Lading to whom the Performing Carrier is instructed to make physical delivery of the Goods.

2.1.8 *Consignor*: The person(s) named in this Bill of Lading to provide or make available to the Contracting Carrier the Goods for transport.

2.1.9 *Writing*: Includes, but is not limited to, a written document, a telegram, telex, telephonic facsimile (fax), electronic data interchange, or a document created or transferred by electronic means.

Article 3
Undertakings

3.1 Contracting Carrier agrees to transport the Goods by road, with due care, in accordance with Articles 5, 6 and 7, from the designated point of pickup to the designated place(s) of delivery using other Performing Carriers and/or modes of transport as necessary for interline and/or interchange purposes.

3.2 Shipper agrees to pay Contracting Carrier in accordance with Article 4 of this Bill of Lading.

3.3 Any Contracting Carrier, Performing Carrier, Shipper, Consignor, Consignee, or Receiver shall be liable for the acts or omissions of their respective agents, representatives, or any other person of whose services

they make use for the performance of their obligations or the exercise of their rights under this Bill of Lading.

Article 4
Price or Freight Charge

4.1 Shipper or Consignee shall be liable for the payment of the freight and all other lawful charges, except that collect shipments may move without recourse to Shipper when Shipper so stipulates, by signature or endorsement in the space provided for that purpose on the face of this Bill of Lading. Nevertheless, Shipper shall remain liable for transportation charges where there has been an erroneous determination of the freight charges assessed, based upon incomplete or incorrect information provided by Shipper.

4.2 Nothing herein shall limit the right of Contracting Carrier either to extend credit or to require the prepayment or guarantee of the charges at the time of shipment or prior to delivery. If the description of Goods shipped or other information on this Bill of Lading is found to be incorrect or incomplete, the freight charges must be paid based upon the Goods actually shipped.

Article 5
Basis of Liability

Contracting Carrier shall be liable for the actual loss of or damage to the Goods and for delay in delivering or failure to deliver the Goods occurring while the Goods are in the Contracting Carrier's charge, as defined in Article 8 of this Bill of Lading, unless, subject to Article 5.2, the Contracting Carrier proves that the loss, damage, delay, or failure is due to any of the following causes:

5.1.1 Force majeure, act of God, or public enemy, as recognized and interpreted under applicable law;

5.1.2 Inherent vice or defect of the Goods, including natural shrinkage of the Goods;

5.1.3 Act or omission of the Shipper, the Consignor, the Consignee, or the Receiver;

5.1.4 Force of law or act of government; or

5.1.5 Contracting Carrier compliance with respect to instructions that have been expressly entered on this Bill of Lading by the Shipper, Consignor, Consignee, Receiver or on their behalf;

5.1.6 Faulty or impassable highway, or from lack of capacity of a highway, bridge, or ferry. Nor shall Contracting Carrier be liable for riots or strikes.

5.2 Contracting Carrier may avail himself of the causes of exoneration listed in Article 5.1 only if his negligence did not contribute to the loss of, or damage to, or delay in the delivery of, the Goods.

5.3 All rights and obligations of the Contracting Carrier under this through bill of lading shall also apply to the Performing Carrier against whom a claim is made. Similarly, whenever a provision of this through bill of lading obligates or entitles the Shipper, Consignor, Consignee, or Receiver to submit a written document, make a claim, or take any similar action against the Contracting Carrier, it may be validly taken against or addressed to the Performing Carrier and shall have identical effects against the Performing Carrier.

5.4 In the event of joint carriage, the Contracting Carrier and the delivering Performing Carrier shall be jointly and severally liable to all persons entitled to recover under this Bill of Lading regardless of the place in which the loss of or damage to the Goods or the delay in delivering or failure to deliver the Goods occurs or is caused. The Contracting Carrier and/or the delivering Performing Carrier is/are entitled to recover from any other Performing Carrier that was in physical possession of the Goods at the time of their loss, damage, delay, or non-delivery for the amount required to be paid for the loss, damage, delay, or non-delivery, as evidenced by a receipt, judgment, or decision, and the amount of its expenses reasonably incurred in defending the claim.

5.5 Delay in delivery occurs when the Goods have not been delivered within the time expressly agreed upon in writing. In the absence of such written agreement, Contracting Carrier is responsible to deliver the Goods with reasonable dispatch, according to circumstances in each case.

5.6 Subject to the provisions of Articles 8 and 15 hereof, if the Goods have not been delivered within thirty (30) calendar days following the date of delivery expressly agreed upon in writing, the Goods may be treated as lost. In the absence of such an expressly agreed upon delivery date, if the Goods have not been delivered within sixty (60) calendar days following the date on which the first Performing Carrier took physical possession of the Goods, the claimant may treat the Goods as lost.

Article 6
Limits on Contracting Carrier Liability

6.1 In no case shall the liability of the Contracting Carrier for any loss or damage to the Goods exceed the actual value of the Goods, at the time and

place determined by the applicable law, plus the freight and other costs if paid.

6.2 The Shipper and the Contracting Carrier may agree in writing to increase the limitation of liability of the Contracting Carrier. Nevertheless, if the Bill of Lading lists a declared value for the Goods, the carrier's liability may not exceed that amount, even if lower.

6.3 The Carrier may have other limitations on liability whenever the applicable law so authorizes.

Article 7
Loss of Limitation of Liability

7.1 The Contracting or Performing Carrier shall lose the right to limitation of liability if it has caused the damage, loss, or delay by committing fraud or through gross fault.

Article 8
Period of Responsibility

8.1 The responsibility of the Contracting Carrier for the loss, damage, delay in delivering or failure to deliver the Goods under this Bill of Lading covers the period from the time the Contracting Carrier takes charge of the Goods to the time of delivery.

8.2 For the purposes of this Article, the Contracting Carrier is deemed to be in charge of the Goods:

8.2.1 From the time the Contracting Carrier or Performing Carrier has taken physical possession of the Goods from:

8.2.1.1 The Consignor; or

8.2.1.2 An authority or third party from whom, pursuant to law or regulations applicable at the place of taking in charge, the Contracting Carrier, or a Performing Carrier if other than the Contracting Carrier, must take possession of the Goods for transport;

8.2.2 Until the time the Contracting Carrier, or a Performing Carrier if other than the Contracting Carrier, has delivered the Goods:

8.2.2.1 By handing over physical possession of the Goods to the Consignee or Receiver;

8.2.2.2 In cases where the Consignee or Receiver does not receive the Goods from the Contracting Carrier, or from a Performing Carrier if

other than the Contracting Carrier, by placing them at the disposal of the Consignee or Receiver in accordance with this Bill of Lading or with the law or with the usage of the particular trade applicable at the place of delivery; or

8.2.2.3 By handing over physical possession of the Goods to an authority or other third party to whom, pursuant to law or regulations applicable at the place of delivery, the Goods must be handed over.

Article 9
Notice of Loss or Damage to Goods

9.1 The parties shall be entitled to verify and make a record of the condition of the Goods at the time of delivery.

9.2 If loss of or damage to the Goods is apparent at the time of delivery, unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing to the Contracting Carrier not later than the next working day (as determined in the country of the delivery of the Goods) after the day when the Goods were delivered, such delivery is prima facie evidence of the delivery by the Contracting Carrier of the Goods as described in this Bill of Lading.

9.3 If loss or damage to the Goods is not apparent at the time of delivery, the corresponding provisions of section 9.2 of this Article apply, unless the written notice is given on or before the first working day (as determined in the country of the delivery of the Goods) following a period of fifteen (15) calendar days after the day when the Goods were delivered to the Consignee.

9.4 Unless the Contracting Carrier is given written notice of the delay in delivery of the Goods (as defined in section 5.5 of this Bill of Lading) not later than the next working day (as determined in the country of the delivery of the Goods) following the day on which delivery should have been made, it shall be rebuttably presumed that timely delivery was made.

Article 10
Time Limitations for Filing Claims and/or Suits for Loss, Damage, or Delay in Delivery or Failure to Deliver the Goods

10.1 Any action under this Bill of Lading shall be time-barred if the final statement of the claim, stating the nature and main particulars of the claim, has not been given to the Contracting Carrier in writing within nine (9)

months after the date when the Goods were delivered or within such shorter period as may be prescribed by applicable law. The limitation period commences on the day after the day on which the Performing Carrier has delivered the Goods or part thereof or, where the Goods have not been delivered, the date of delivery as expressly agreed upon and, in the absence of an expressly agreed upon delivery date, the date on which the first Performing Carrier took physical possession of the Goods.

10.2 Any action under this Bill of Lading must be instituted within a period of two (2) years from the date the Contracting Carrier gives the claimant written notice that the Contracting Carrier has disallowed all or any part of the claim specified in the notice, or within such longer period as may be prescribed by applicable law. If the parties pursue alternative dispute settlement under Article 11, they may also agree to toll this time period, but must expressly do so in writing.

Article 11
Jurisdiction and Settlement of Disputes

11.1 Actions based on this Bill of Lading may be instituted, at the option of the plaintiff, before the courts of the jurisdiction:

11.1.1 In which the defendant has its domicile or habitual place of residence or principal place of business, or in which the branch, agency, or affiliate through which this Bill of Lading was issued is located;

11.1.2 In which the Contracting Carrier took charge of the Goods, as defined in Article 8;

11.1.3 In which the place designated for delivery of the Goods is located; or

11.1.4 In which the loss, damage, delay in delivery, or failure to deliver occurred.

11.2 The parties may agree to submit to alternative dispute settlement any differences that may arise or have arisen between them. The alternative dispute settlement proceeding may be *ad hoc* or institutional.

Article 12
Undelivered Goods

12.1 If, through no fault of the Contracting Carrier, the Goods cannot be delivered, the Contracting Carrier shall use its best efforts to immediately notify the Shipper or Consignor and the Consignee or Receiver, as named on this Bill of Lading, that delivery cannot be made and request instructions. Notification may be made by telephone, but must be confirmed

in writing. Until the Contracting Carrier receives instructions from the Shipper, Consignor, Consignee, or Receiver, the Contracting Carrier may store the Goods in a commercially reasonable manner in a facility of the Contracting Carrier, subject to a reasonable charge for storage made known to the Shipper or Consignor or to a party otherwise responsible for the freight charges. If the Contracting Carrier has notified the Shipper or Consignor and the Consignee or Receiver of this intention, the Goods may be removed and stored in a commercially reasonable manner in an appropriate facility, subject to a reasonable charge, at the expense of the Shipper or Consignor or a party otherwise responsible for the freight charges.

12.2 If the Contracting Carrier has given notice pursuant to paragraph 12.1 of this Article and has received no instructions within fifteen (15) working days from the date of such notice or such other period required by law, the Contracting Carrier may:

12.2.1 Return to the Shipper or Consignor, at the latter's expense, all undelivered shipments for which such notice has been given; or

12.2.2 Sell the Goods as provided by applicable local law, apply the proceeds to the freight and storage charges and other related expenses, and remit any balance to the Shipper or Consignor.

Article 13
Salvage Retention

13.1 If the Consignee or Receiver refuses to accept delivery of the Goods, the Contracting Carrier may require that the Goods be stored in a commercially reasonable manner until the rights of the parties can be determined.

13.2 Unless otherwise agreed, the Consignee or the Receiver shall retain the damaged Goods and shipping containers until the final determination of the claim. The said retention shall not, however, constitute acceptance of the Goods or waiver of the right to make a claim for loss, damage, or delay.

13.3 Unless otherwise agreed by the parties, once a claim has been determined and paid, the Contracting Carrier shall have the right to take possession of the damaged Goods as salvage. The Contracting Carrier shall take possession of the salvage within thirty (30) days from the date Contracting Carrier was requested in writing to remove the salvage from the Consignee's or Receiver's premises.

Article 14
Diversion or Reconsignment

14.1 Neither the Contracting Carrier nor any Performing Carrier shall divert or reconsign the Goods except upon written amendment of this Bill of Lading by the Shipper or Consignor, with the consent of the Contracting Carrier, which shall not be unreasonably withheld. Any expenses incurred as a result of diversion or reconsignment shall be borne by the Shipper or Consignor.

14.2 The right of the Shipper or Consignor to dispose of the Goods in transit shall cease as soon as the right of the Consignee to the Goods begins, that is to say, from the moment when the Shipper or Consignor negotiates the Bill of Lading or transfers title to the rights arising out of it. Nevertheless, if the Consignee rejects the Bill of Lading or the Goods, or if the Consignee cannot be located, the Shipper or Consignor shall recover his right to dispose of the Goods. If the the Contracting Carrier or the Performing Carrier, as the case may be, obeys instructions from the Shipper to dispose of the Goods without demanding presentation of the original Bill of Lading, it shall be liable.

Article 15
Stoppage in Transit

15.1 If the Goods are stopped in transit at the request of the party entitled to so request, the Goods shall be held, in a commercially reasonable manner, at the risk of that party.

Article 16
Severability

16.1 In the event that any phrase, clause, sentence, or other provision contained in this Bill of Lading violates any applicable statute, ordinance, or rule of law, the same shall be ineffective to the extent of such violation, without invalidating any other provision of this Bill of Lading.

Article 17
Governing Law

17.1 All questions relating to the validity, execution, fulfillment, or interpretation of, or liability, arising from this Bill of Lading shall be governed (except for the conflict-of-law rules) by the law of the country of final destination of

the freight, where the Goods were, or should have been, delivered as agreed. This Article may be unenforceable in some countries.

Article 18
Signatures

18.1 The parties agree that any signature on or by this Bill of Lading may appear handwritten, printed on facsimile, perforated, stamped in symbols, or registered in any other mechanical or electronic means authorized by the applicable law. The parties agree to be bound by the same as if they had physically handwritten their signatures.

18.2 The Contracting Carrier's signature hereon constitutes issuance of this Bill of Lading.

Article 19
Governing Language

19.1 This Bill of Lading is written in the English, French, Portuguese, and Spanish languages, all of which versions shall be equally authentic. In case of doubt as to its translation, the competent court should consult the official original versions adopted on February 8, 2002, by the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI), held at the Headquarters of the Organization of American States in Washington, D.C.

SIXTH INTER-AMERICAN SPECIALIZED CONFERENCE ON PRIVATE INTERNATIONAL LAW (CIDIP-VI)

(convoked by the General Assembly of the Organization of American States at its twenty-sixth regular session, through resolution AG/RES. 1393-XXVI-O/96).

NON-NEGOTIABLE INTER-AMERICAN UNIFORM THROUGH BILL OF LADING FOR THE INTERNATIONAL CARRIAGE OF GOODS BY ROAD

TERMS AND CONDITIONS

Article 1
Scope of Application

1.1 Pursuant to the undertakings specified in Article 3 hereof, this Bill of Lading shall be deemed to be a negotiable through bill of lading governing transportation of the Goods by road (in whole or in part) by a single Performing Carrier or successively by separate Performing Carriers, from the point of their pickup in the first country in which the first Performing Carrier takes physical possession of all or any part of the Goods as shown in this Bill of Lading to the last point of delivery in another country.

1.2 This Bill of Lading shall not govern transportation of Goods, in whole or in part, through other modes.

1.3 A negotiable bill of lading shall be understood as that which serves as title to the Goods and may be made out to a named person or to the bearer. The original may or may not be endorsable. It shall be issued as an original plus numbered copies. Each of the copies should be marked "non-negotiable copy."

Article 2
Definitions

2.1 For purposes of this Bill of Lading, the following words and phrases shall have the following meanings:

Yearbook of Private International Law, Volume 4 (2002), pp. 401-410
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

2.1.1 *Contracting Carrier*: The term 'Contracting Carrier' means the person who contracts to transport, either directly, or indirectly by the use of Performing Carrier(s), the Goods, as evidenced by this Bill of Lading. The 'Contracting Carrier' may or may not also be a Performing Carrier.

2.1.2 *Performing Carrier*: The term 'Performing Carrier' means any person who performs any part of the transport of the Goods, including the 'Contracting Carrier' if applicable.

2.1.3 *Consignee*: The person named in this Bill of Lading to whom the Goods may be lawfully delivered. The 'Consignee' may or may not also be the Receiver.

2.1.4 *Shipper*: The person who enters into the contract of carriage with the Contracting Carrier as evidenced by this Bill of Lading. The "Shipper" may or may not also be the Consignor, the Consignee, or the Receiver.

2.1.5 *Goods*: Any commodity or article that is transported, including containers, pallets, or like dunnage supplied by the shipper.

2.1.6 *Person*: The term "person" includes individuals, corporations, partnerships, or other business entities recognized by law in the country in which they are organized.

2.1.7 *Receiver*: The person(s), if other than the Consignee, named in this Bill of Lading to whom the Performing Carrier is instructed to make physical delivery of the Goods.

2.1.8 *Consignor*: The person(s) named in this Bill of Lading to provide or make available to the Contracting Carrier the Goods for transport.

2.1.9 *Writing*: Includes, but is not limited to, a written document, a telegram, telex, telephonic facsimile (fax), electronic data interchange, or a document created or transferred by electronic means.

Article 3
Undertakings

3.1 Contracting Carrier agrees to transport the Goods by road, with due care, in accordance with Articles 5, 6 and 7, from the designated point of pickup to the designated place(s) of delivery using other Performing Carriers and/or modes of transport as necessary for interline and/or interchange purposes.

3.2 Shipper agrees to pay Contracting Carrier in accordance with Article 4 of this Bill of Lading.

3.3 Any Contracting Carrier, Performing Carrier, Shipper, Consignor, Consignee, or Receiver shall be liable for the acts or omissions of their respective agents, representatives, or any other person of whose services

they make use for the performance of their obligations or the exercise of their rights under this Bill of Lading.

Article 4
Price or Freight Charge

4.1 Shipper or Consignee shall be liable for the payment of the freight and all other lawful charges, except that collect shipments may move without recourse to Shipper when Shipper so stipulates, by signature or endorsement in the space provided for that purpose on the face of this Bill of Lading. Nevertheless, Shipper shall remain liable for transportation charges where there has been an erroneous determination of the freight charges assessed, based upon incomplete or incorrect information provided by Shipper.

4.2 Nothing herein shall limit the right of Contracting Carrier either to extend credit or to require the prepayment or guarantee of the charges at the time of shipment or prior to delivery. If the description of Goods shipped or other information on this Bill of Lading is found to be incorrect or incomplete, the freight charges must be paid based upon the Goods actually shipped.

Article 5
Basis of Liability

Contracting Carrier shall be liable for the actual loss of or damage to the Goods and for delay in delivering or failure to deliver the Goods occurring while the Goods are in the Contracting Carrier's charge, as defined in Article 8 of this Bill of Lading, unless, subject to Article 5.2, the Contracting Carrier proves that the loss, damage, delay, or failure is due to any of the following causes:

5.1.1 Force majeure, act of God, or public enemy, as recognized and interpreted under applicable law;

5.1.2 Inherent vice or defect of the Goods, including natural shrinkage of the Goods;

5.1.3 Act or omission of the Shipper, the Consignor, the Consignee, or the Receiver;

5.1.4 Force of law or act of government; or

5.1.5 Contracting Carrier compliance with respect to instructions that have been expressly entered on this Bill of Lading by the Shipper, Consignor, Consignee, Receiver or on their behalf;

5.1.6 Faulty or impassable highway, or from lack of capacity of a highway, bridge, or ferry. Nor shall Contracting Carrier be liable for riots or strikes.

5.2 Contracting Carrier may avail himself of the causes of exoneration listed in Article 5.1 only if his negligence did not contribute to the loss of, or damage to, or delay in the delivery of, the Goods.

5.3 All rights and obligations of the Contracting Carrier under this through bill of lading shall also apply to the Performing Carrier against whom a claim is made. Similarly, whenever a provision of this through bill of lading obligates or entitles the Shipper, Consignor, Consignee, or Receiver to submit a written document, make a claim, or take any similar action against the Contracting Carrier, it may be validly taken against or addressed to the Performing Carrier and shall have identical effects against the Performing Carrier.

5.4 In the event of joint carriage, the Contracting Carrier and the delivering Performing Carrier shall be jointly and severally liable to all persons entitled to recover under this Bill of Lading regardless of the place in which the loss of or damage to the Goods or the delay in delivering or failure to deliver the Goods occurs or is caused. The Contracting Carrier and/or the delivering Performing Carrier is/are entitled to recover from any other Performing Carrier that was in physical possession of the Goods at the time of their loss, damage, delay, or non-delivery for the amount required to be paid for the loss, damage, delay, or non-delivery, as evidenced by a receipt, judgment, or decision, and the amount of its expenses reasonably incurred in defending the claim.

5.5 Delay in delivery occurs when the Goods have not been delivered within the time expressly agreed upon in writing. In the absence of such written agreement, Contracting Carrier is responsible to deliver the Goods with reasonable dispatch, according to circumstances in each case.

5.6 Subject to the provisions of Articles 8 and 15 hereof, if the Goods have not been delivered within thirty (30) calendar days following the date of delivery expressly agreed upon in writing, the Goods may be treated as lost. In the absence of such an expressly agreed upon delivery date, if the Goods have not been delivered within sixty (60) calendar days following the date on which the first Performing Carrier took physical possession of the Goods, the claimant may treat the Goods as lost.

Article 6
Limits on Contracting Carrier Liability

6.1 In no case shall the liability of the Contracting Carrier for any loss or damage to the Goods exceed the actual value of the Goods, at the time and

place determined by the applicable law, plus the freight and other costs if paid.

6.2 The Shipper and the Contracting Carrier may agree in writing to increase the limitation of liability of the Contracting Carrier. Nevertheless, if the Bill of Lading lists a declared value for the Goods, the carrier's liability may not exceed that amount, even if lower.

6.3 The Carrier may have other limitations on liability whenever the applicable law so authorizes.

Article 7
Loss of Limitation of Liability

7.1 The Contracting or Performing Carrier shall lose the right to limitation of liability if it has caused the damage, loss, or delay by committing fraud or through gross fault.

Article 8
Period of Responsibility

8.1 The responsibility of the Contracting Carrier for the loss, damage, delay in delivering or failure to deliver the Goods under this Bill of Lading covers the period from the time the Contracting Carrier takes charge of the Goods to the time of delivery.

8.2 For the purposes of this Article, the Contracting Carrier is deemed to be in charge of the Goods:

8.2.1 From the time the Contracting Carrier or Performing Carrier has taken physical possession of the Goods from:

8.2.1.1 The Consignor; or

8.2.1.2 An authority or third party from whom, pursuant to law or regulations applicable at the place of taking in charge, the Contracting Carrier, or a Performing Carrier if other than the Contracting Carrier, must take possession of the Goods for transport;

8.2.2 Until the time the Contracting Carrier, or a Performing Carrier if other than the Contracting Carrier, has delivered the Goods:

8.2.2.1 By handing over physical possession of the Goods to the Consignee or Receiver;

8.2.2.2 In cases where the Consignee or Receiver does not receive the Goods from the Contracting Carrier, or from a Performing Carrier if

other than the Contracting Carrier, by placing them at the disposal of the Consignee or Receiver in accordance with this Bill of Lading or with the law or with the usage of the particular trade applicable at the place of delivery; or

8.2.2.3 By handing over physical possession of the Goods to an authority or other third party to whom, pursuant to law or regulations applicable at the place of delivery, the Goods must be handed over.

Article 9
Notice of Loss or Damage to Goods

9.1 The parties shall be entitled to verify and make a record of the condition of the Goods at the time of delivery.

9.2 If loss of or damage to the Goods is apparent at the time of delivery, unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing to the Contracting Carrier not later than the next working day (as determined in the country of the delivery of the Goods) after the day when the Goods were delivered, such delivery is prima facie evidence of the delivery by the Contracting Carrier of the Goods as described in this Bill of Lading.

9.3 If loss or damage to the Goods is not apparent at the time of delivery, the corresponding provisions of section 9.2 of this Article apply, unless the written notice is given on or before the first working day (as determined in the country of the delivery of the Goods) following a period of fifteen (15) calendar days after the day when the Goods were delivered to the Consignee.

9.4 Unless the Contracting Carrier is given written notice of the delay in delivery of the Goods (as defined in section 5.5 of this Bill of Lading) not later than the next working day (as determined in the country of the delivery of the Goods) following the day on which delivery should have been made, it shall be rebuttably presumed that timely delivery was made.

Article 10
Time Limitations for Filing Claims and/or Suits for Loss, Damage, or Delay in Delivery or Failure to Deliver the Goods

10.1 Any action under this Bill of Lading shall be time-barred if the final statement of the claim, stating the nature and main particulars of the claim, has not been given to the Contracting Carrier in writing within nine (9)

months after the date when the Goods were delivered or within such shorter period as may be prescribed by applicable law. The limitation period commences on the day after the day on which the Performing Carrier has delivered the Goods or part thereof or, where the Goods have not been delivered, the date of delivery as expressly agreed upon and, in the absence of an expressly agreed upon delivery date, the date on which the first Performing Carrier took physical possession of the Goods.

10.2 Any action under this Bill of Lading must be instituted within a period of two (2) years from the date the Contracting Carrier gives the claimant written notice that the Contracting Carrier has disallowed all or any part of the claim specified in the notice, or within such longer period as may be prescribed by applicable law. If the parties pursue alternative dispute settlement under Article 11, they may also agree to toll this time period, but must expressly do so in writing.

Article 11
Jurisdiction and Settlement of Disputes

11.1 Actions based on this Bill of Lading may be instituted, at the option of the plaintiff, before the courts of the jurisdiction:

11.1.1 In which the defendant has its domicile or habitual place of residence or principal place of business, or in which the branch, agency, or affiliate through which this Bill of Lading was issued is located;

11.1.2 In which the Contracting Carrier took charge of the Goods, as defined in Article 8;

11.1.3 In which the place designated for delivery of the Goods is located; or

11.1.4 In which the loss, damage, delay in delivery, or failure to deliver occurred.

11.2 The parties may agree to submit to alternative dispute settlement any differences that may arise or have arisen between them. The alternative dispute settlement proceeding may be *ad hoc* or institutional.

Article 12
Undelivered Goods

12.1 If, through no fault of the Contracting Carrier, the Goods cannot be delivered, the Contracting Carrier shall use its best efforts to immediately notify the Shipper or Consignor and the Consignee or Receiver, as named on this Bill of Lading, that delivery cannot be made and request instructions. Notification may be made by telephone, but must be confirmed

in writing. Until the Contracting Carrier receives instructions from the Shipper, Consignor, Consignee, or Receiver, the Contracting Carrier may store the Goods in a commercially reasonable manner in a facility of the Contracting Carrier, subject to a reasonable charge for storage made known to the Shipper or Consignor or to a party otherwise responsible for the freight charges. If the Contracting Carrier has notified the Shipper or Consignor and the Consignee or Receiver of this intention, the Goods may be removed and stored in a commercially reasonable manner in an appropriate facility, subject to a reasonable charge, at the expense of the Shipper or Consignor or a party otherwise responsible for the freight charges.

12.2 If the Contracting Carrier has given notice pursuant to paragraph 12.1 of this Article and has received no instructions within fifteen (15) working days from the date of such notice or such other period required by law, the Contracting Carrier may:

12.2.1 Return to the Shipper or Consignor, at the latter's expense, all undelivered shipments for which such notice has been given; or

12.2.2 Sell the Goods as provided by applicable local law, apply the proceeds to the freight and storage charges and other related expenses, and remit any balance to the Shipper or Consignor.

Article 13
Salvage Retention

13.1 If the Consignee or Receiver refuses to accept delivery of the Goods, the Contracting Carrier may require that the Goods be stored in a commercially reasonable manner until the rights of the parties can be determined.

13.2 Unless otherwise agreed, the Consignee or the Receiver shall retain the damaged Goods and shipping containers until the final determination of the claim. The said retention shall not, however, constitute acceptance of the Goods or waiver of the right to make a claim for loss, damage, or delay.

13.3 Unless otherwise agreed by the parties, once a claim has been determined and paid, the Contracting Carrier shall have the right to take possession of the damaged Goods as salvage. The Contracting Carrier shall take possession of the salvage within thirty (30) days from the date Contracting Carrier was requested in writing to remove the salvage from the Consignee's or Receiver's premises.

Article 14
Diversion or Reconsignment

14.1 Neither the Contracting Carrier nor any Performing Carrier shall divert or reconsign the Goods except upon written amendment of this Bill of Lading by the Shipper or Consignor, with the consent of the Contracting Carrier, which shall not be unreasonably withheld. Any expenses incurred as a result of diversion or reconsignment shall be borne by the Shipper or Consignor.

14.2 The right of the Shipper or Consignor to dispose of the Goods in transit shall cease as soon as the right of the Consignee to the Goods begins, that is to say, from the moment when the Shipper or Consignor negotiates the Bill of Lading or transfers title to the rights arising out of it. Nevertheless, if the Consignee rejects the Bill of Lading or the Goods, or if the Consignee cannot be located, the Shipper or Consignor shall recover his right to dispose of the Goods. If the the Contracting Carrier or the Performing Carrier, as the case may be, obeys instructions from the Shipper to dispose of the Goods without demanding presentation of the original Bill of Lading, it shall be liable.

Article 15
Stoppage in Transit

15.1 If the Goods are stopped in transit at the request of the party entitled to so request, the Goods shall be held, in a commercially reasonable manner, at the risk of that party.

Article 16
Severability

16.1 In the event that any phrase, clause, sentence, or other provision contained in this Bill of Lading violates any applicable statute, ordinance, or rule of law, the same shall be ineffective to the extent of such violation, without invalidating any other provision of this Bill of Lading.

Article 17
Governing Law

17.1 All questions relating to the validity, execution, fulfillment, or interpretation of, or liability, arising from this Bill of Lading shall be governed (except for the conflict-of-law rules) by the law of the country of final destination of

the freight, where the Goods were, or should have been, delivered as agreed. This Article may be unenforceable in some countries.

Article 18
Signatures

18.1 The parties agree that any signature on or by this Bill of Lading may appear handwritten, printed on facsimile, perforated, stamped in symbols, or registered in any other mechanical or electronic means authorized by the applicable law. The parties agree to be bound by the same as if they had physically handwritten their signatures.

18.2 The Contracting Carrier's signature hereon constitutes issuance of this Bill of Lading.

Article 19
Governing Language

19.1 This Bill of Lading is written in the English, French, Portuguese, and Spanish languages, all of which versions shall be equally authentic. In case of doubt as to its translation, the competent court should consult the official original versions adopted on February 8, 2002, by the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI), held at the Headquarters of the Organization of American States in Washington, D.C.

BOOK REVIEWS

Kurt SIEHR, *Internationales Privatrecht. Deutsches und europäisches Kollisionsrecht für Studium und Praxis*, C.F. Müller Verlag, Heidelberg 2001, LXX + 648 pp. ISBN 3-8114-5035-2.

The subtitle of this book accurately describes its function as a manual on 'German and European conflict of laws for study and practice'. In view of the fact that the German codification of private international law was not concluded until 1999 (the initial part was completed in 1986), Dr. Siehr's treatise proves remarkably timely.

As a student's tool, it is characterized by two main features: 1) relevant statutory provisions are included in the text, taking the reader step by step through the national (and some foreign) legislations and international conventions; and 2) the theory of private international law is explained after an exhaustive exposition of the 'special part'.

For instance, the first issue dealt with is capacity to marry (p. 3), which, pursuant to Article 13 of the German law on private international law (EGBGB), is governed by the national law of each of the contracting parties. Since the reference to the personal law as the law governing issues of capacity includes a reference to its own conflicts rules, the author immediately examines the relevant German provision on *renvoi* and the ensuing problems.

The same approach is also taken for *ordre public*, which in Dr. Siehr's opinion is different according to the place where the ceremony is celebrated, as are other matters as well.

The next issue of matrimonial property brings us in the same way to the traditional and much debated German rule according to which the special provision of the *lex rei sitae* always take precedence over whatever law is declared applicable to a person's patrimony when the assets are not situated within the territory of that State (Art. 13(3) EGBGB). Why is this principle not followed when the law most closely connected with the case is a *lex domicilii* that rules differently than the person's national law in matters of capacity or family law? The sole reason is the existence of Article 13(3). German PIL generally applies what in its view is the 'strongest' law – *renvoi*, right acquired and the most closely connected law expressly excepted (pp. 17, 465) – without taking account of the solutions of other legal systems.

This attitude – remarks the author – is quintessential to the nature of PIL. Since each State has not only its private law, but also its system of PIL (p. 7), the expectations of the parties concerned could be frustrated every time their case is adjudicated in a foreign legal system according to the conflicts rules of that State.

Yearbook of Private International Law, Volume 4 (2002), pp. 411-414
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

Although firmly rooted in the European tradition (p. 410), this statement amounts to giving up the search for a supernational or rational PIL.

The reader is obviously attracted by *Buch 2*, which is devoted to traditional problems, such as the sources and history of PIL, qualification, *renvoi*, adaptation, preliminary questions (*Vorfrage*) and ordre public, but also deals with less known matters such as change of jurisdiction (*Statutenwechsel* or *conflit mobile*, as E. Bartin calls it). The historical issues are revisited with the eyes of a modern lawyer, as we see through his praise of Savigny's two-law-approach in contract law in anticipation of consumer contracts.

Rules on *renvoi*, preliminary questions and ordre public are classified as ancillary rules (*Hilfsnormen*). As for *renvoi*, the German approach has always favored its acceptance and now *renvoi* is ruled out only when it runs against the meaning of the reference to a foreign law (Art. 4(1) EGBGB). The relevant cases are mostly those provided by a resolution of the Institut de Droit international (p. 466). The German trend to recognize the closest connection is decisive when resolving problems relating to preliminary questions, evasion of law, etc. Evasion of law (*Gesetzesumgehung*) is dealt with together with other topics rarely covered under the title 'Correction through forum'.

Although primarily aimed at students, Dr. Siehr's textbook is an outstanding inventory of our discipline for scholars as well. This remark is especially appropriate for '*Buch 3*' on international procedural law and the last chapter of '*Buch 1*' on international company law and international economic law. (As we have seen, *Buch 2* is devoted to the general theory of PIL).

The law governing companies is a traditional topic in German conflict of laws, even though the German codification has refused to come to terms with it. The discussion is enriched by numerous decisions of the European Court of Justice on topics covered in a very comprehensive manner.

The last part deals with problems such as negotiable instruments, foreign expropriation legislation, private enforcement of antitrust law etc.

Finally, the book contains a useful glossary of PIL terms of both German and Latin origin.

The insights conveyed by the author will no doubt make this book essential reading for all German practitioners and European scholars with an interest in the field. Its adherence to German law, which in its 1900 version was considered the most important codification of PIL and generated a paramount literature, does not prevent the author from using 'foreign' cases and materials (mostly Anglo-American and French, the latter taken from Ancel and Lequette's case-book *Grands arrêts*).

The accuracy of the indexes and tables is noteworthy as well.

Tito BALLARINO

Marie-Elodie ANCEL, *La prestation caractéristique du contrat*. Préface de L. Aynès, Economica (Paris) 2002, VII + 394 pp.

From the title it follows that the book deals with characteristic performance not only as a connecting factor in the conflict of laws but also as a central topic of jurisprudence. Unlike other contributions on the subject, the author does not limit herself to identifying the characteristic performance but also analyzes the general theory of contract, examining how individual and specific contracts are connected with the abstract concept of contract. The research is inspired by the consciousness that social and economic life has given rise to a wave of new contracts that must be adapted to a new and comprehensive contractual scheme capable of coordinating the various interests underlying the multitude of basic contracts (p. 371).

Following her path, the author expounds on an extensive range of problems surrounding two questions: Can characteristic performance be effectively used to achieve the unity of contract? Have contracts become such a multiform phenomenon that theoretical instruments provided by traditional doctrines – mostly by reducing the contract to an obligation - are inadequate for this purpose? In the second part of the book (p. 212 et seq.), the author analyzes the characteristic performance in both municipal and conflicts law.

While rejecting a mere constructive and theoretical approach, the author does not hesitate to start by examining the true essence of the obligation. Following some suggestions offered by recent Italian contributions on civil law, she seems to favor seizing the quintessence of obligation by focusing on the aim pursued by the creditor (p. 79) rather than on the debtor's constraint. This approach, as the author admits, is clearly adequate only for commercial obligations and requires abandoning the all-inclusive concept of obligation derived from Roman jurisprudence. However, when framing theoretical concepts, it is inevitable that what is gained in terms of homogeneity is often lost in terms of extension.

The rethinking of the contract goes along with this new approach to the characteristic of obligation. Departing from a formalistic construction in the service of private subjects, contract – the author points out – has developed into a carrier of economic functions, emerging as a complex and powerful entity (p. 143) emancipated from the obligation and focused on the characteristic performance.

The attention given to characteristic performance in the conflict of laws, both lawmaking and theory, is only a consequence of this more general development. In a relatively short (pp. 145-197) but dense survey, the author reviews the recent history of characteristic performance, assessing the legitimacy of this concept in the conflict of laws and the conflict of jurisdictions.

Conflicts scholars will turn their attention to the second part of the book (*Influences de la prestation caractéristique du contrat*) dealing with private international law, where the impact of characteristic performance on determining the applicable law, on the one side, and on resolving jurisdictional issues, on the other, are accurately scrutinized.

A number of themes arise from the well-known Article 4 of the Rome Convention. As we know, the dilemma posed by this article is whether a three, two or even one-stage process is intended (the sequence in which the provisions are set out points to a three-stage process). According to Ancel, the provision of Article 4(2) that 'it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration', sets out a true conflicts rule, which has the advantage of being predictable and promoting international commerce at the same time (pp. 333 et seq.).

Consequently, the '*clause échappatoire*' of para. 5 is applicable only when the country where the performing party is established is not the one where the contract is integrated (p. 350).

In regard to procedural matters, the author proposes a rule of interpretation that aims at recognizing the competence of the judge in a manner that avoids contradictory rulings.

The book offers a judicious balance of theoretical civil law and conflict of laws problems, thus ensuring that the reader is able to identify the basics of the debate on characteristic performance. Inevitably in a work as broad as Ancel's, some chapters are better than others; however, the overall quality of the book is high and her theoretical analysis remarkably keen.

Tito BALLARINO

BOOKS RECEIVED

Anuario español de derecho internacional privado, Madrid (Iprolex) 2000.

BALLARINO Tito, *Manuale breve di diritto internazionale privato*, Padova (CEDAM) 2002.

BERTHER Duri, *Die internationale Erbschaftsverwaltung bei schweizerisch-deutschen, -österreichischen und -englischen Erbfällen*, Zürich (Schulthess) 2001.

BOGGIANO Antonio, *Derecho internacional privado*, 4th ed., Buenos Aires (Abeledo-Perrot) 2001.

BOMMER Florian, *Die Zuständigkeit für Widerspruchs- und Anfechtungsklagen im internationalen Verhältnis*, Zürich (Schulthess) 2001.

BORN Hugues/ FALLON Marc/ VAN BOXSTAEL Jean-Louis, *Droit judiciaire international: chronique de jurisprudence 1991-1998*, Bruxelles (Larcier) 2001.

BORTOLOTTI Fabio, *Manuale di diritto commerciale internazionale*, 2nd ed., 2 Vol., Padova (CEDAM) 2001-2002.

BOUTIN ICAZA Gilberto, *Del objeto del derecho internacional privado*, Panamá (Imprenta de la Universidad) 2000.

CANO BAZAGA Elena, *Adopción internacional y nacionalidad española*, Sevilla (Mergablum) 2001.

CARBONE Sergio Maria, *Il nuovo spazio giudiziario europeo: dalla Convenzione di Bruxelles al Regolamento CE 44/2001*, 4th ed., Torino (Giappichelli) 2002.

CHABERT Cyril, *L'intérêt de l'enfant et les conflits de lois*, Aix-en-Provence (Presses universitaires d'Aix-Marseille) 2001.

CHEDLY Lotfi, *L'arbitrage commercial international et l'ordre public transnational*, Tunis (Centre de publication universitaire) 2002.

COLLIER John Greenwood, *Conflict of laws*, 3rd ed., Cambridge (University Press) 2001.

CONTALDI Gianluca, *Il trust nel diritto internazionale privato italiano*, Milano (Giuffrè) 2001.

Yearbook of Private International Law, Volume 4 (2002), pp. 415-420
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

DRAETTA Ugo, *Internet e commercio elettronico nel diritto internazionale dei privati*, Milano (Giuffrè) 2001.

DRAPPATZ Thomas, *Die Überführung des internationalen Zivilverfahrens-rechts in eine Gemeinschaftskompetenz nach Art. 65 EGV*, Tübingen (Mohr Siebeck) 2002.

FISCHER Nicole N., *Die Unmöglichkeit der Leistung im internationalen Kauf- und Vertragsrecht: die Haftungsbefreiung des Schuldners nach Art. 79 CISG, den Vorschriften der UNIDROIT Principles of International Commercial Contracts und der Principles of European Contract Law im Vergleich zum deutschen Unmöglichkeitsrecht*, Berlin (Duncker & Humblot) 2001.

FRICK Joachim G., *Arbitration and complex international contracts: with special emphasis on the determination of the applicable substantive law and on the adaptation of contracts to changed circumstances*, The Hague (Kluwer), Zürich (Schulthess) 2001.

FRUEHWALD Edwin Scott, *Choice of law for American courts: a multilateralist method*, Westport Conn. (Greenwood) 2001.

GEIMER Reinhold, *Internationales Zivilprozessrecht*, 4th ed., Köln (Schmidt) 2001.

GOLDT Arnd, *Sachenrechtliche Fragen des grenzüberschreitenden Versendungskaufs aus international-privatrechtlicher Sicht*, Berlin (Duncker & Humblot) 2002.

GONZÁLEZ MARTÍN Nuria/ RODRÍGUEZ BENOT Andrés, *Estudios sobre adopción internacional*, México (Universidad Nacional Autónoma) 2001.

GOTTSCHALK Eckart, *Allgemeine Lehren des IPR in kollisionsrechtlichen Staatsverträgen*, Berlin (Duncker & Humblot) 2002.

GRÄMIGER Jürg, *Zuständigkeit, Anerkennung und Vollstreckung ausländischer Entscheidungen des Schuldrechts in der Schweiz: unter Einschluss von Schiedsentscheidungen*, Zürich (Schulthess) 2001.

HARRIS Jonathan, *The Hague Trusts Convention: scope, application and preliminary issues*, Oxford (Hart) 2002.

HORN Norbert, *Cross-border mergers and acquisitions and the law*, The Hague (Kluwer) 2001.

HUSSEINI BEGDACHE Roula, *Le droit international privé français et la répudiation islamique*, Paris (L.G.D.J.) 2002.

JIMÉNEZ BLANCO Pilar, *El contrato internacional a favor de tercero*, Santiago de Compostela (Universidade de Santiago) 2002.

JUENGER Friedrich K., *Selected essays on the conflict of laws*, Ardsley N.Y. (Transnational) 2001.

KADNER GRAZIANO Thomas, *Gemeineuropäisches internationales Privatrecht: Harmonisierung des IPR durch Wissenschaft und Lehre (am Beispiel der ausservertraglichen Haftung für Schäden)*, Tübingen (Mohr Siebeck) 2002.

KLAUER Stefan, *Das europäische Kollisionsrecht der Verbraucherverträge zwischen Römer-EVÜ und EG-Richtlinien*, Tübingen (Mohr Siebeck) 2002.

KOLMANN Stephan, *Kooperationsmodelle im internationalen Insolvenzrecht: empfiehlt sich für das deutsche internationale Insolvenzrecht eine Neuorientierung?*, Bielefeld (Gieseking) 2001.

KROPHOLLER Jan, *Europäisches Zivilprozessrecht*, 7th ed., Heidelberg (Recht und Wirtschaft) 2002.

LAMM Martin Nyota, *Die Interamerikanischen Spezialkonferenzen für Internationales Privatrecht*, Würzburg (Ergon) 2000.

LAUFKÖTTER Regina, *Parteiautonomie im internationalen Wettbewerbs- und Kartellrecht*, Berlin (Duncker & Humblot) 2001.

LEICHT Steffen, *Die Qualifikation der Haftung von Angehörigen rechts- und wirtschaftsberatender Berufe im grenzüberschreitenden Dienstleistungsverkehr*, Tübingen (Mohr Siebeck) 2002.

LETTERMAN G. Gregory, *UNIDROIT's rules in practice: standard international contracts and applicable rules*, The Hague (Kluwer) 2001.

LIATOWITSCH Manuel, *Schweizer Schiedsgerichte und Parallelverfahren vor Staatsgerichten im In- und Ausland*, Basel, Genf (Helbing & Lichtenhahn) 2002.

LINDENMAYR Barbara, *Vereinbarung über die internationale Zuständigkeit und das darauf anwendbare Recht*, Berlin (Duncker & Humblot) 2002.

LUKOWICZ Daniela, *Divergenzen in der Rechtsprechung zum CISG: auf dem Weg zu einer einheitlichen Auslegung und Anwendung?*, Frankfurt am Main, Bern (Lang) 2001.

MAACK Anneke, *Die Durchsetzung des AGB-rechtlichen Transparenzgebots in internationalen Verbraucherverträgen: die Bestimmung des anwendbaren Rechts für die Frage der wirksamen Einbeziehung allgemeiner Geschäftsbedingungen im elektronischen Geschäftsverkehr*, Baden-Baden (Nomos) 2001.

MACDOUGAL Luther L./ FELIX Robert L./ WHITTEN Ralph U., *American conflicts law*, Ardsley, NY (Transnational) 2001.

MÄHR Hannes, *Das internationale Zivilprozessrecht Liechtensteins*, Schaan (GMG Juris) 2002.

MARCHAL ESCALONA Nuria, *El nuevo régimen de la notificación en el espacio judicial europeo*, Granada (Comares) 2002.

MAYER Pierre/ HEUZÉ Vincent, *Droit international privé*, 7th ed., Paris (Montchrestien) 2001.

MILLAUER Stephanie Sabine Dorothea, *Sonderanknüpfung fremder zwingender Normen im Bereich von Schuldverträgen (Art. 19 IPRG und Art. 7 Abs. 1 EVÜ)*, Buttikon (Prisma) 2001.

MONJARREZ SALGADO Luis, *Derecho internacional privado*, Managua (BITECSA) 2000.

MORRIS J.H.C., *The conflict of laws*, 5th ed., London (Sweet and Maxwell) 2000.

MOURA RAMOS Rui Manuel, *Estudos de direito internacional privado e de direito processual civil internacional*, Coimbra (Coimbra) 2002.

OREJUDO PRIETO DE LOS MOZOS Patricia, *La celebración y el reconocimiento de la validez del matrimonio en derecho internacional privado español*, Elcano (Aranzadi) 2002.

PARRA RODRÍGUEZ Carmen, *El nuevo derecho internacional de los contratos*, Barcelona (Bosch), Bogotá (Universidad Externado de Colombia) 2001.

PEDROTTI Matteo, *Le séquestre international: fondements, conditions et procédure du séquestre des biens du débiteur qui habite à l'étranger*, Zürich (Schulthess) 2001.

PEINZE Alexander, *Internationales Urheberrecht in Deutschland und England*, Tübingen (Mohr Siebeck) 2002.

PIMENTEL FELGUEIRAS MACHADO Maria João Gil, *Da falência em direito internacional privado: introdução aos seus problemas fundamentais*, Porto (Universidade Portucalense) 2000.

PITTET Luc, *Compétence du juge et de l'arbitre en matière de compensation: étude de droit interne et international*, Zürich (Schulthess) 2001.

POLIVKA Lukas, *Die gerichtliche Zuständigkeit in arbeitsrechtlichen Streitigkeiten nach revidiertem Lugano-Übereinkommen*, Zürich (Schulthess) 2001.

RAIMON Michaël, *Le principe de l'unité du patrimoine en droit international privé: étude des nationalisations, des faillites et des successions internationales*, Paris (L.G.D.J.) 2002.

RECHBERGER Walter H./ KODEK Georg E., *Orders for payment in the European Union = Mahnverfahren in der Europäischen Union = L'injonction de payer dans l'Union européenne*, The Hague (Kluwer) 2001.

REICHENBACH Jürg, *Das Retentionsrecht – Rechtsnatur und kollisions-rechtliche Qualifikation*, St. Gallen (Dike) 2002.

RIGOZZI Antonio/ SCHÖLL Michael, *Die Revision von Schiedssprüchen nach dem 12. Kapitel des IPRG*, Basel, Genf (Helbing & Lichtenhahn) 2002.

RODRÍGUEZ VÁZQUEZ Maria Ángeles, *Denegación de la eficacia de sentencias europeas por indefensión del demandado*, Barcelona (Bosch), Bogotá (Universidad Externado de Colombia) 2001.

ŠARCEVIC Petar/ VOLKEN Paul, *The international sale of goods revisited*, The Hague (Kluwer) 2001.

SCHACK Haimo, *Internationales Zivilverfahrensrecht: ein Studienbuch*, 3rd ed., München (Beck) 2002.

SCHÜMANN Kirsten, *Nichteheliche Lebensgemeinschaften und ihre Einordnung im Internationalen Privatrecht*, Frankfurt am Main, Bern (Lang) 2001.

SCHÜTZE Rolf A., *Rechtsverfolgung im Ausland: Probleme des ausländischen und internationalen Zivilprozessrechts*, 3rd. ed., Heidelberg (Recht und Wirtschaft) 2002.

SERAGLINI Christophe, *Lois de police et justice arbitrale internationale*, Paris (Dalloz) 2001.

SIEGHÖRTNER Robert, *Internationales Strassenverkehrsunfallrecht*, Tübingen (Mohr Siebeck) 2002.

SIEHR Kurt, *Internationales Privatrecht: deutsches und europäisches Kollisionsrecht für Studium und Praxis*, Heidelberg (Müller) 2001.

SIEHR Kurt, *Das Internationale Privatrecht der Schweiz*, Zürich (Schulthess) 2002.

SPAHL Dirk, *Die positive Forderungsverletzung und der Vertrag mit Schutzwirkung für Dritte im internationalen Privatrecht und internationalen Zivilprozessrecht*, Frankfurt am Main (Lang) 2001.

SPÜHLER Karl (ed.), *Internationales Zivilprozess- und Verfahrensrecht*, Zürich (Schulthess) 2001.

STRAUBE Gunnar, *Sozialrechtliche Eingriffsnormen im Internationalen Privatrecht*, Frankfurt am Main, Bern (Lang) 2001.

TAKAHASHI Koji, *Claims for contribution and reimbursement in an international context: conflict-of-laws dimensions of third party procedure*, Oxford (University Press) 2000.

UNION INTERNATIONALE DU NOTARIAT LATIN/ COMMISSION DES AFFAIRES DE L'UNION EUROPÉENNE, *Le partenariat enregistré néerlandais et ses effets et droit international privé: les points de vue allemand, anglais, belge, écossais, espagnol, français, grec, irlandais, italien et suisse*, Amsterdam (Fondation pour la promotion de la science notariale) 2001.

VAN HOUTTE Hans, *The law of international trade*, 2nd ed., London (Sweet & Maxwell) 2002.

VISMARA Fabrizio, *Le norme applicabili al merito della controversia nell'arbitrato internazionale*, Milano (Giuffrè) 2001.

WALTER Gerhard, *Internationales Zivilprozessrecht der Schweiz: ein Lehrbuch*, 3rd ed., Bern (Haupt) 2002.

WITZ Wolfgang/ SALGER Hanns-Christian/ LORENZ Manuel, *International Einheitliches Kaufrecht: Praktiker-Kommentar und Vertragsgestaltung zum CISG*, Heidelberg (Recht und Wirtschaft) 2000.

INDEX