Yearbook of Private International Law

Vol. V 2003

Edited by: Petar Šarčević and Paul Volken

YEARBOOK OF PRIVATE INTERNATIONAL LAW

YEARBOOK OF PRIVATE INTERNATIONAL LAW

VOLUME V – 2003

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

KLUWER LAW
INTERNATIONAL

A C.I.P. catalogue record for this book is available from the Library of Congress

Published by: *Kluwer Law International*
P.O. Box 85889
2508 CN The Hague, The Netherlands
http://www.kluwerlaw.com

in association with

Swiss Institute of Comparative Law
Dorigny
CH – 1015 Lausanne
http://www.isdc.ch

Sold and distributed in the USA and Canada by
Aspen Publishers Inc.
7201 McKinney Circle
Frederick, MD 21704
USA
E-mail: customer.care@aspenpubl.com

Sold and distributed in all other countries by
Extenza-Turpin Distribution Services
Stratton Business Park
Pegasus Drive
Biggleswade
Bedfordshire SG18 8QB
United Kingdom

DISCLAIMER: The material in this volume is in the nature of general comment only. It is not offered as advice on any particular matter and should not be taken as such. The editor and contributing authors expressly disclaim all liability to any person with regard to anything done or omitted to be done, and with respect to the consequences of anything done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this volume. No reader should act or refrain from acting on the basis of any matter contained in this volume without first obtaining professional advice regarding the particular facts and circumstances at issue. Any and all opinions expressed herein are those of the particular author and are not necessarily those of the editor or publisher of this volume.

ISBN: 90-411-2271-0

© 2004 Kluwer Law International and Swiss Institute of Comparative Law

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Kluwer Law International, Rights and Permissions Department, P.O. Box 85889, 2508 CN, The Hague, The Netherlands. Email: permissions@kluwerlaw.com.
Website: www.kluwerlaw.com

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
Lisbon/Coimbra

YASUHIRO OKUDA
Tokyo

GONZALO E. PARRA-ARANGUREN
The Hague/Caracas

SYMEON C. SYMEONIDES
Salem (Oregon)

PIERRE WIDMER
Lausanne

ASSISTANT EDITORS

ANDREA BONOMI
Professor at the
University of Lausanne

GIAN PAOLO ROMANO
Legal adviser
Swiss Institute of Comparative Law

ADDRESS
FOR MANUSCRIPTS AND CORRESPONDENCE

Swiss Institute of Comparative Law
Dorigny, CH – 1015 Lausanne

ENGLISH REVISION

SUSAN ŠARČEVIĆ
Faculty of Law, Rijeka

TABLE OF CONTENTS

Foreword ix

Abbreviations xi

Doctrine

Symeon SYMEONIDES
Resolving Punitive-Damages Conflicts 1

Ronald A. BRAND
The Hague Conference Working Group Draft Text on Choice of
Court Agreements 35

Andrea BONOMI
Conversion of the Rome Convention on Contracts into an EC Instrument:
Some Remarks on the Green Paper of the EC Commission 53

National Reports

Kwang Hyun SUK
The New Conflict of Laws Act of the Republic of Korea 99

Christa JESSEL-HOLST
Current State and Future Perspectives of
Bulgarian Private International Law 143

Krešo PUHARIČ
Private International Law in Slovenia 155

News from The Hague

J.H.A. VAN LOON
The Hague Conference on Private International Law –
Work in Progress (2002-2003) 169

News from Brussels

Marie-Odile BAUR
Projects of the European Community in the Field of
Private International Law 177

Forum

Alain DEVERS

Private International Law Aspects of Non-Marital Unions:
Some French Reflections on the Applicable Law 191

Michael TRAEST

Development of a European Private International Law
and the Hague Conference 223

Texts, Materials and Recent Developments

Hague Convention on the Law Applicable to Certain Rights
in Respect of Securities Held with an Intermediary 261

Council Regulation (EC) No 2201/2003 of 27 November 2003
concerning Jurisdiction and the Recognition and Enforcement
of Judgments in Matrimonial Matters of Parental Responsibility
repealing Regulation (EC) No. 1347/2000 277

Law Amending the Conflict of Laws Act of the Republic of Korea
(Law No. 6465 of 7 April 2001) 315

Institute of International Law, Session of Bruges, 2003:

- Resolution on the Doctrine of *Forum non conveniens*
  and Anti-Suit Injunctions.. 337
- Declaration on Multiparty Arbitration..339

Proposal for a Regulation by the European Parliament
and the Council on the Law Applicable to Non-contractual Obligations
('Rome II') 341

Book Reviews 393

Books Received..401

Index..409

FOREWORD

The *Yearbook of Private International Law* has entered its fifth year. Again we are privileged to offer our readers a series of important academic and documentary contributions. Three doctrinal articles are written by 'western' authors on punitive-damages conflicts in the United States, contractual obligations in European law, and choice of court agreements in the draft text of the Hague Convention. National reports provide insight into recent developments in private international law legislation in the Republic of Korea, Bulgaria and Slovenia. Documentary materials from international organizations active in private international law include the text of the Hague Convention on securities held with an intermediary, the EC Regulation concerning matrimonial matters of parental responsibility and the proposal for a Regulation on the law applicable to non-contractual obligations, as well as the Institute of International Law's latest Resolution on *forum non conveniens* and anti-suit injunctions and its Declaration on multiparty arbitration.

Over the past five years the *Yearbook* has experienced a positive development in both substance and size. In volume I the question was raised whether conflict rules are still an adequate means of resolving current problems in our age of globalization. Today, even more so than then, the answer is a resounding affirmative: conflict rules are probably not sufficient in themselves; however, they still play an important role in conjunction with other legal means. In recent years, the international community has witnessed the increasing difficulties encountered by international economic, environmental and social forums in their attempts to reach agreement on substantive issues. This confirms the old adage that progress in international harmonization can be achieved only after the ideas have been 'digested' and accepted in the minds and spirits of locals at national and regional levels.

In international contract law, the CISG probably achieved the highest degree of harmonization possible in the early eighties. Now it is anticipated that an even greater degree of harmonization might be achievable in this field in the near future. However, as a precondition, new concepts such as the Lando or Undroit Principles must first be accepted in both national and regional circles. A similar process can be witnessed in family law in general and the protection of minors in particular. Here the emphasis has shifted from the harmonization of conflict rules to attempts at establishing cooperation among the competent national authorities in cases of cross-border kidnapping, adoption and payment of maintenance. In our view, such forms of international cooperation are part of an interim phase that will prepare the ground for a future round of legislative harmonization at the international level.

In the meantime, national legal systems are contributing to the harmonization process by adopting the new solutions achieved through the international efforts of the last century. To some extent this is being done by the adoption of new national conflict rules. The importance of this interim phase should not be under-

estimated as it is preparing the ground for renewed unification efforts in the future. With this in mind, it is hoped that volume V of the *Yearbook* will make a modest contribution to this process by disseminating information on national developments in private international law.

Petar Šarčević Paul Volken

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

RESOLVING PUNITIVE-DAMAGES CONFLICTS

Symeon C. SYMEONIDES*

I. Introduction
II. The Purpose, Function, and Controversial Character of Punitive Damages
III. The Constitutional Framework
IV. The Pertinent Contacts and Typical Patterns
  A. Introduction
  B. Pertinent Contacts
  C. Laws
  D. Patterns
V. The Left Extreme: Pattern 1
VI. Left-of Center: Single-Contact Patterns
  A. Pattern 2: Defendant's Home State
  B. Pattern 3: State of Conduct
  C. Pattern 4: State of Injury
VII. The Solid Middle: Two-Contact Patterns
  A. Pattern 5: State(s) of Conduct and Defendant's Domicile Impose(s) Punitive Damages
  B. Pattern 6: State(s) of Conduct and Injury Impose(s) Punitive Damage
  C. Pattern 7: State(s) of Injury and Defendant's Domicile Impose(s) Punitive Damages
VIII. The Right Extreme: Pattern 8
IX. Conclusions

---

* Dean and Professor of Law, Willamette University College of Law, Oregon, USA; LL.B. (Priv. Law); LL.B. (Public Law) University of Thessaloniki (Greece); LL.M., S.J.D. Harvard Law School.

Yearbook of Private International Law, Volume 5 (2003), pp. 1-34
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

I. Introduction

> *'[Punitive damages are] a monstrous heresy[,] […] an unsightly and unhealthy excrescence, deforming the symmetry of the body of law'.*[1]
>
> *'[Punitive damages are] an outgrowth of the English love of liberty regulated by law. […] [They] elevate the jury as a responsible instrument of government, […] restrain[ ] the strong, influential, and unscrupulous, vindicate[ ] the right of the weak, and encourage[ ] recourse to, and confidence in, the courts of law by those wronged or oppressed by acts or practices not cognizable in, or not sufficiently punished, by the criminal law'.*[2]

1.1. As the above excerpts indicate, punitive damages are a subject on which opinions differ, and differ sharply. Although both excerpts are decades old, they reflect the two diametrically opposing viewpoints regarding punitive damages to date. The view expressed in the second excerpt gradually came to prevail in the majority of states of the United States, but not without strong opposition, which in many respects continues to this date. By the middle of the 19th century, many states had imposed punitive damages for certain cases of aggravated, egregious misconduct, and, by the early part of the 20th century, all but five states had done likewise.[3] Today only one state, Nebraska, prohibits punitive damages in all cases.[4]

In the 1970s and early 1980s, the frequency and size of punitive damages awards appeared to increase dramatically, causing some observers to speak of a virtual 'explosion'.[5] Since then, punitive damages have become the target of a movement

[1] *Fay v. Parker*, 53 N.H. 342, 382 (1872).

[2] *Luther v. Shaw*, 147 N.W. 18, 20 (Wis. 1914).

[3] See OWEN D./ MADDEN M./ DAVIS M., *Madden & Owen on Products Liability*, v. 2, § 18:1 n. 39 (3d ed. 2002). The five states were Louisiana, Massachusetts, New Hampshire, Nebraska, and Washington.

[4] See OWEN D./ MADDEN M./ DAVIS M. (note 3), at id. n. 41. Many states allow punitive damages only in certain narrowly defined cases. Among them is the mixed jurisdiction of Louisiana, which allows punitive damages for injury caused by drunk drivers, and for sexual abuse of minors. See La. Civ. Code arts. 2315.4 and 2315.7.

[5] See, e.g., *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 61 (1991) (O'Connor, J., dissenting) ('Recent years [...] have witnessed an explosion in the frequency and size of punitive damages').

known as 'tort reform',[6] which has had partial success in several states in limiting and/or making more difficult the recovery of punitive damages. The most common reforms have: (1) imposed monetary caps on punitive damages awards (20 states);[7] (2) raised the standard of proof for recovering punitive damages (19 states);[8] (3) bifurcated the trial by separating punitive damages from other issues (16 states);[9] (4) diverted a portion of the punitive damages award to a public fund (9 states);[10] or (5) reformed jury instructions or assigned to judges rather than to jurors the assessment of punitive damages (2 states).[11] In the meantime, the United States Supreme Court has also entered the fray by articulating criteria for defining the constitutionally permissible size of punitive-damage awards.[12]

1.2. In the rest of the world, the vast majority of civil-law systems continue to reject punitive damages, and to regard them as an aberration if not an abomination. Naturally, this is a judgment these systems are entitled to make for themselves. Indeed, the history, philosophy, and contemporary structure of most civil-law systems make their rejection of punitive damages *for fully domestic* cases entirely understandable. What is debatable, however, is whether this rejection should encompass all those *multistate* cases that, under the forum's choice-of-law rules, are governed by a foreign law that imposes punitive damages. Many civil-law systems have taken this very position. For example, some recent private international law (PIL) codifications contain blanket prohibitions against awarding punitive damages under any circumstances.[13] The same hostility towards punitive damages surfaces in recent efforts to

---

[6] For this movement, see DANIELS S./ MARTIN J., *Civil Juries and the Politics of Reform* (1995); DANIELS S./ MARTIN J., 'The Impact That It Has Had Is Between People's Ears: Tort Reform, Mass Culture, and Plaintiffs' Lawyers', in: 50 *DePaul L. Rev.* 453 (2000).

[7] See ROBBENNOLT J., 'Determining Punitive Damages: Empirical Insights and Implications for Reform', in: 50 *Buff. L. Rev.* 103, 168-69 (2002).

[8] See id. at 176.

[9] See id. at 178.

[10] See id. at 180; *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121 (Ohio 2002).

[11] See ROBBENNOLT J. (note 7), at 188, 184.

[12] See *infra,* §§ 3.1-3.7.

[13] For example, articles 135(2) and 137(2) of the Swiss PIL codification provide that, in products liability and obstruction to competition cases governed by foreign law, 'no damages may be awarded in Switzerland other than those provided [...] under Swiss law'. Similarly, article 40(3) of the EGBGB (Rev. 1999) prohibits non-compensatory or 'excessive' damages, while article 34 of the Hungarian PIL Decree of 1979 provides somewhat more cryptically that Hungarian courts 'shall not [...] impose legal consequences not known to Hungarian law'.

draft a new convention on judgment recognition under the auspices of the Hague Conference of PIL.[14]

It seems that implicit in these prohibitions is an *a priori* legislative assumption that punitive damages are so fundamentally repugnant to the forum's sense of justice and fairness that a forum court should not be allowed to contaminate itself by even considering the possibility of permitting them in multistate cases. This assumption operates even if the forum country has no connections (besides the jurisdictional nexus) that would implicate its prohibition of punitive damages, such as an affiliation with the defendant or the occurrence of critical events within its territory.[15] These prohibitions revoke in advance any and all discretion a court has in employing the traditional *ordre public* reservation, and effectively erase all the fine classical distinctions between *ordre public interne* and *ordre public international*. Why? Why have these systems *a priori* singled out punitive damages for such treatment and have not done so for slavery, prostitution, or polygamy?

1.3. This essay does not attempt to answer this rhetorical and partly facetious question. Nor does the essay purport to propose ways in which civil-law courts should resolve punitive-damages conflicts. However, the essay does aspire to facilitate a better understanding of these conflicts – or at least to dispel certain common misunderstandings about them – by discussing the way in which American courts have resolved tort conflicts involving punitive damages during the last three decades. Because most of these cases involve American interstate conflicts, and because most American states allow punitive damages, one might assume that these conflicts cannot be as acute as international conflicts. This assumption is not necessarily accurate. Although most American states allow punitive damages in general, these states often disagree on the specific cases, causes of action, or other circumstances in which punitive damages are available. When such disagreements exist, the resulting conflicts are as intense as they come, if only because they involve large sums of money. American courts have confronted these conflicts day in and day out, and have accumulated a rich experience that should have some relevance outside the United States.

---

[14] See Art. 33 of the Hague Preliminary Draft Convention on Jurisdiction and Recognition of Foreign Judgments in Civil an Commercial Matters of 30 October 1999 (providing that a foreign judgment that awards exemplary damages shall be recognized, but only to the extent that similar or comparable damages could have been awarded in the recognizing state).

[15] See *infra,* § 8.2.

II. The Purpose, Function, and Controversial Character of Punitive Damages

2.1. Punitive or exemplary damages are money damages assessed against a defendant in a civil action for misconduct that the legal system regards as heinous or egregious.[16] The adjectives 'punitive' and 'exemplary' are often used interchangeably and express the two purposes of punitive damages – punishment and deterrence. Punishment or retribution is individual but backward looking, in that it focuses on the individual wrongdoer and his or her specific misconduct. The degree of punishment depends on both the egregiousness of the specific misconduct, and the wrongdoer's financial capacity to bear and internalize the punishment. Deterrence or prevention is more general and forward looking, in that it focuses not only on the individual wrongdoer, but on others who might consider engaging in similar misconduct in the future. Deterrence is achieved by attaching on certain conduct a price tag that is much higher than the gains one might expect from engaging in that conduct. Thus, punitive damages differ in important respects from compensatory damages, the purpose of which is to compensate the victim, and hence are proportional to the victim's harm or loss.[17]

2.2. The fact that punitive damages are awarded to a private plaintiff, in a civil trial, indicates their differences from criminal and civil fines, both of which inure to a public fund. Although a recent movement to direct a portion of punitive damages to a public fund tends to blur this distinction, that movement has had only limited success so far.[18] At the same time, the fact that in a civil trial the defendant does not enjoy certain procedural protections of the criminal law (such as proof beyond a reasonable doubt, the right against self-incrimination, and the protection from double jeopardy and excessive fines) is one of the reasons for which punitive damages are controversial. Yet, precisely because punitive damages are sought, and their prerequisites proven, by private plaintiffs rather than by the state, one could argue that the above

---

[16] For the standard treatises on punitive damages, see BOSTON G., *Punitive Damages in Tort Law* (1993); GHIARDI J./ KIRCHER J., *Punitive Damages Law and Practice* (1994); and SCHUETER L./ REDDEN K., *Punitive Damages* (2d ed. 1989). For a state-by-state survey, see BLATT R./ HAMMERSFAHR R./ NUGENT L., *Punitive Damages: A State-by-State Guide to Law and Practice* (2002). For punitive damages in products liability cases, see OWEN D./ MADDEN M./ DAVIS M. (note 3).

[17] See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct.1513 at 1519 (2003) ('[I]n our judicial system compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes [...]. Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct [. . .]. By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution') (internal quotation marks omitted).

[18] See *supra,* § 1.1.

procedural protections of the criminal law are largely unnecessary and perhaps inappropriate.[19] For private plaintiffs possess neither the coercive power of the state nor its superior investigatory resources. Moreover, while punitive damages can carry severe economic consequences, they do not endanger the defendant's life or liberty. In any event, many states recently have raised the burden of proof for punitive damages from 'preponderance of the evidence' (which is the typical standard in civil cases) to 'clear and convincing evidence'.[20]

2.3. However, the major reason for which punitive damages are controversial has little to do with the conceptual anomaly of mixing criminal-law and civil-law objectives and means, and everything to do with the large size of punitive damages awards, at least those reported in the popular press. Perhaps the most notorious is the McDonald's 'hot coffee case' in which a New Mexico jury awarded $2.7 million in punitive damages to a 79-year old customer who suffered third degree burns after spilling on her lap a cup of MacDonald's exceedingly hot coffee.[21] The story circled the globe,[22] described as 'the epitome of frivolity'[23] and perhaps seen as one more example of 'American excessiveness'. The popular press hardly mentioned that the trial court reduced the award to $480,000, nor did it report that the case was later settled for an undisclosed lower amount. Nor was there much discussion of the fact that, even before being reduced by the court, the amount awarded by the jury corresponded to only two days of McDonald's national coffee sales, and that McDonald's had previously received more than 700 complaints of burns and had failed to warn its customers.[24]

2.4. This story suggests that simplistic or sensational reporting combined with shrewd campaigning by 'tort reformers' can generate a widespread impression of an out-of-control, arbitrary regime of frequent and exorbitant punitive damages awards. Yet, empirical studies covering different but partly overlapping periods and territories reveal that this impression is not borne out by the facts. For example, three recent

---

[19] For an excellent exposition of this argument, see GALANTER M./ LUBAN D., 'Poetic Justice: Punitive Damages and Legal Pluralism', in: 42 *Am. U. L. Rev.* 1393 (1993).

[20] See *supra,* § 1.1. One state, Colorado, has further raised the standard to 'beyond reasonable doubt', which is the criminal law standard.

[21] *Liebeck v. McDonald's Restaurants, P.T.S., Inc*., 1995 WL 360309 (N.M. Dist. Ct. 1994).

[22] See MEAD, 'Punitive Damages and the Spill Felt Round the World: A U.S. Perspective', in: 17 *Loy. L.A. Int'l & Comp. L.J.* 829 (1995).

[23] TORRY S., 'Tort and Retort: The Battle over Reform Heats Up', *Washington Post*, Mar. 6, 1995, at F7.

[24] See OWEN D./ MADDEN M./ DAVIS M. (note 3), at § 18:1.

studies report that only 3%, 4.9%, or 1-8%, respectively, of all civil cases have awarded punitive damages.[25] The same and other studies indicate that only 5% of grievances lead to lawsuits, and fewer than 10% of all lawsuits go to trial.[26] Regarding the size of the awards, the median jury award has been around $50,000. Only 25% of the awards exceeded $250,000, and only 8% or 12% exceeded $1 million.[27] Naturally, it is these latter awards that receive the greatest publicity. However, as with the MacDonald's case, trial or appellate courts tend to reduce most awards, especially those at the high end, and parties often settle for lesser amounts, so that defendants ultimately pay no more than 50% of the amounts initially awarded.[28]

Thus, the claims of 'too many' and 'too high' punitive damages are exaggerated. As the authors of an established treatise on products liability observed, 'Punitive damages are rarely awarded and even more rarely collected. When they are awarded, they are generally richly deserved'.[29] The authors note that, in most cases, products liability defendants 'had prior knowledge of a developing or known risk and failed to take remedial safety steps', and that plaintiffs were 'permanently disabled or killed by a product known by the manufacturer to be unnecessarily hazardous'.[30] The authors conclude that '[t]he popular perception of vast wealth being awarded in the form of punitive damages to greedy or extremely careless plaintiffs contrasts sharply with the profile that emerges from [the authors'] study'[31] of the cases.

2.5. If these conclusions are correct, then one can see why compensatory damages, based as they are on measuring the losses of the individual victim, cannot effectively punish nor deter economically powerful wrongdoers, especially corporate offenders who have the ability to pass this additional cost to the consumers. One might ask, why not employ the tools of criminal or administrative law enforcement? The American answer to this question is that these tools are largely inadequate and inefficient as a means of 'control[ling] […] the villainous rich, though [they] may work to control the

---

[25] See ROBBENNOLT J. (note 7), at 161 (reporting and documenting the results of several studies covering the 1980s and 1990s). For different numbers, see BLATT R./ HAMMERSFAHR R./ NUGENT L. (note 16), at § 1.4. Most of these awards have been made in cases involving business torts. The numbers are lower in products liability (2%), medical malpractice (3%), and personal injury (1-2%) cases. See ROBBENNOLT J. (note 7), at 162-63.

[26] ROBBENNOLT J. (note 7), at 162.

[27] Id. at 163-64. Because of these few very high awards, the mean award is higher than the median. Id.

[28] Id. at 165-66.

[29] OWEN D./ MADDEN M./ DAVIS M. (note 3), at id.

[30] Id.

[31] Id.

villainous poor'.[32] For example, corporate offenders, some of whom command more resources than the GNP of many nations[33] and certainly more than those of the average prosecutor, often can either avoid conviction or reduce the severity of the penalty, especially in intricate, hard-to-prove cases.[34] In a system in which, by design or by default, government is 'too small and too overstretched to regulate every area of life',[35] the pursuit of punitive damages by private plaintiffs can function as 'a partial offset to weak administrative controls',[36] which are often 'spottily enforced'.[37] Private plaintiffs and their enterprising attorneys fill the vacuum by acting as private attorneys-general or, one might say, bounty hunters.[38] The possibility of winning high awards gives them the financial incentive to invest and risk substantial resources in the investigation and prosecution of corporate wrongdoing that might otherwise remain undetected or unpunished. On balance, therefore, one could conclude that, in the American system, punitive damages constitute an effective 'means for social control and moral sanction of economically formidable wrongdoers',[39] and serve a 'vital function for which neither criminal punishment nor administrative controls can substitute'.[40]

2.6. One can question the wisdom, or even the morality, of a scheme in which such an important public-law function depends on the efforts of private enforcers. Nonetheless, for better or worse, this is the scheme that most states of the United States have

---

[32] GALANTER M./ LUBAN D. (note 19), at 1444. The latter tend to be prosecuted more frequently and convicted more easily. See id. at 1426 ('Criminal punishment is imposed mostly on the poor and marginal').

[33] One such corporation, the oil giant Exxon, has been assessed with $5 billion in punitive damages for its role in a massive oil spill in Alaskan waters caused by its ship Exxon Valdez. The Ninth Circuit Court of Appeals overturned the award as excessive. See *Baker v. Hazelwood*, 270 F.3d 1215, 1246 (9th Cir. 2001).

[34] See GALANTER M./ LUBAN D (note 19), at 1443 (explaining the difficulties of prosecuting corporate white collar wrongdoers and why 'corporate criminal offenders are not severely punished when they are convicted').

[35] Id. at 1445.

[36] Id. at 1426.

[37] Id. at 1442.

[38] See id. at 1441-42: 'Contingency fee lawyers have an unsavory reputation, but that is not surprising: they are professional bounty hunters, and bounty hunters are not nice people [...]. But that is irrelevant. Society needs the bounty hunter because without inducing wealthy private parties such as lawyers and law firms to invest substantial resources in the investigation of wrongdoing, we would end up with something much worse [...] [namely] wrongdoing that goes merrily along on its illegal and devastating way because nobody is around to blow the whistle'.

[39] Id. at 1395.

[40] Id. at 1426.

chosen to adopt, after trial and error for more than two centuries. The scheme is subject to continuous scrutiny and correction, as it should be. The function of private international law, to which this essay is confined, is not to gauge the wisdom of a state's substantive law, but rather to delineate the multistate cases to which this law should properly apply. As explained later below, a blanket refusal to apply a law that imposes punitive damages solely because the forum state disapproves of them is not justified, unless the forum state has those connections with the case or the parties that would implicate its policy of prohibiting such damages. This essay aspires to contribute to the task of identifying those multistate cases in which the award of punitive damages is appropriate by discussing the relevant experience of American courts in handling such cases. Before doing so, however, it would be helpful to briefly discuss some cases involving the constitutionality of punitive damages.

III. The Constitutional Framework

3.1. In a series of cases decided since the early 1990s, the United States Supreme Court enunciated standards for determining the constitutionality of punitive damages under the Due Process clause of the 14th Amendment of the US Constitution. In the first two cases, the Court focused on, and scrutinized, the process by which juries award and courts review punitive damages and, after finding that in both cases this process was unbiased and evenhanded, the Court upheld the challenged awards.[41] The Court refused to adopt a global formula or 'a mathematical bright line'[42] for measuring excessiveness, apparently recognizing that the amount it takes to attain optimum punishment and deterrence will differ for each conduct and each defendant.

3.2. In the third case, *BMW of North America, Inc. v. Gore*,[43] the Court enunciated a substantive test for determining the constitutionally permissible size of punitive damages awards.[44] Applying that test, the Court reversed as excessive a $2 million

---

[41] See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *TXO Production Corp. v. Alliance Resources Corp*., 509 U.S. 443 (1993). The Court found that the jury was guided by carefully phrased instructions that properly explained the purpose of punitive damages while reminding jurors that they were not required to award any punitive damages.

[42] *Haslip*, 499 U.S. at 18.

[43] 517 U.S. 559 (1996).

[44] In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc*., 532 U.S. 424 (2001), the Court held that, in determining whether a trial court has met this test, the intermediate courts must employ a *de novo* standard of review, as opposed to the less demanding abuse-of-discretion standard which governs the assessment of compensatory damages. Without entering

punitive damages award that an Alabama court imposed on a nationwide automobile seller who had engaged in fraudulent business practices in Alabama and elsewhere. The *Gore* test is neither mathematical nor rigid. It consists of three fairness 'guide-posts' or factors: (1) the degree of reprehensibility of the defendant's misconduct; (2) the ratio between the size of the punitive damages award and the plaintiff's actual or potential harm; and (3) the difference between the punitive damages award and the civil penalties authorized or imposed in comparable cases.[45] Employing these guide-posts, the *Gore* Court concluded that the Alabama award was excessive, because the conduct in question was not particularly reprehensible, the victim's harm was only economic, and the $2 million award was 500 times higher than the $4,000 the jury awarded as compensatory damages.

3.3. From the perspective of conflicts law, the most interesting part of the *Gore* decision is the Court's statements regarding the extent to which a state may take account of extraterritorial conduct in imposing punitive damages. The Court stated that a state's power to impose punitive damages for such conduct is coextensive with the state's 'interests in protecting its own consumers and its own economy'.[46] Thus, although in assessing 'the degree of reprehensibility of the defendant's conduct',[47] a state may consider evidence of the defendant's extraterritorial conduct, 'a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States'.[48]

The last quoted statement, as well as the statement that a state may not impose sanctions on a defendant 'in order to deter conduct that is lawful in other jurisdictions',[49] are ambiguous insofar as they do not take account of cross-border torts in which conduct in one state produces injury in another state. If read in isolation, these statements could mean that Alabama may not punish a defendant for conduct in Mississippi that was lawful in Mississippi, even if the conduct produced its detrimental effects in Alabama.

Obviously, this cannot be true. As early as 1911, the Court, speaking through Justice Holmes, has taken the position that '[a]cts done outside the jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in pun-

---

the merits, the Court vacated and remanded the Court of Appeals decision that had affirmed a $4.5 million punitive damages award in a trademark infringement case.

[45] See *Gore*, 517 U.S. 574-85.

[46] Id. at 572.

[47] Id. at 574 n. 21.

[48] Id. at 572. The Court concluded that the Alabama award had not violated this standard, thus prompting Justice Scalia to characterize the above statements as 'the purest dicta'. Id. at 604 (Scalia J., dissenting).

[49] *Gore*, 517 U.S. at 573.

ishing the cause of the harm'.[50] More recently, this notion came to be known as the 'effects doctrine', which the Court applied in international cases, such as *Hartford Fire Ins. Co. v. California*.[51] Although *Hartford Fire* did not involve punitive damages, it did involve conduct in England that was lawful there but which violated US antitrust law.[52] For this reason, the above quoted statements from *Gore* should be understood as being limited to cases in which the extraterritorial conduct produces its effects *outside* the state that imposes punitive damages. In other words, Alabama may not punish a defendant for Mississippi conduct that was lawful in Mississippi *and* produced its effects *outside Alabama*. In the end, the Court said as much when it stated that 'Alabama d[id] not have the power [...] to punish [defendant] for conduct that was lawful where it occurred and that had no impact *on Alabama or its residents*'.[53]

3.4. *State Farm Mutual Automobile Insurance Company v. Campbell*[54] is the Supreme Court's last word on the subject. *Campbell* was an action by a Utah domiciliary against his insurer, a nationwide insurance company, for the insurer's bad faith refusal to settle a third-party claim against the insured. At the trial, the plaintiff introduced, over defendant's objections, evidence that the defendant's refusal to settle was part and parcel of a nationwide fraudulent scheme which the defendant concocted outside Utah and which was designed to coerce insured into submission. The Utah Supreme Court affirmed a verdict of $1 million in compensatory damages and $145 million in punitive damages. The US Supreme Court reversed the punitive damages award as excessive under the three *Gore* guideposts.

The Court's discussion of the last two guideposts was relatively brief. Regarding the third factor, the court noted that the $145 million award was vastly out of proportion with the most relevant civil sanction for comparable misconduct – a $10,000 fine for business fraud. Regarding the second guidepost, the Court restated its reluctance to adhere to a bright mathematical ratio between the punitive damages award and the plaintiff's actual or potential harm. However, the Court noted that 'in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process',[55] and that, at a minimum, there was a 'presumption against an award that [as in *Campbell*] has a 145-to-1 ratio'.[56] The

---

[50] *Strassheim v. Daily*, 221 U.S. 280, 284 (1911).

[51] 509 U.S. 764 (1993).

[52] The Court held that US antitrust law 'applies to foreign conduct that was meant to produce and did in fact produce some substantial effects in the United States'. Id. at 795-96.

[53] *Gore*, 517 U.S. at 572-73 (emphasis added).

[54] 538 U.S. 408, 123 S.Ct. 1513 (2003).

[55] *Campbell*, 123 S.Ct. at 1524.

[56] Id.

Court easily confirmed the presumption by considering non-mathematical factors for assessing the proportionality and reasonableness of the punitive damages award.

3.5. More interesting, at least from a conflicts perspective, is the Court's discussion of the first *Gore* guidepost – the reprehensibility of the defendant's conduct. The Court did not dispute the Utah courts' findings that the defendant's conduct was reprehensible, or the premise that, in assessing the degree of reprehensibility, a court may consider evidence of the defendant's extraterritorial conduct. In fact, the Court reiterated earlier statements from *Gore* that 'out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action'.[57] However, the Court stressed that 'that conduct must have a nexus to the specific harm suffered by the plaintiff'.[58] The Court found that in this case most of the defendant's extraterritorial conduct was different – albeit equally reprehensible – from the conduct that caused the plaintiff's injury. 'A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business',[59] said the Court.

3.6. Finally, the *Campbell* Court reiterated a statement from *Gore* to the effect that a state 'cannot punish a defendant for conduct that may have been lawful where it occurred'.[60] As explained above, this is true only when this extraterritorial conduct does not produce predictable effects in the state that imposes the punishment. From another angle, this statement and the repeated use of the word 'lawful' in both *Gore* and *Campbell* raise a question regarding conduct that is *unlawful* in both the state of conduct and the state of injury. In *Gore*, the Court acknowledged this question and decided not to answer it.[61] In *Campbell*, the Court noted that the plaintiff did not dispute that 'much of the [defendant's] out-of-state conduct was lawful where it occurred',[62] and thus did not discuss this question further. In the meantime, three intermediate courts have faced this question and answered it in different ways.[63] In the last

---

[57] Id. at 1521.

[58] Id.

[59] Id. at 1523.

[60] Id. at 1522.

[61] See *Gore*, 517 U.S at 574 n. 20 ('We need not consider whether one State may properly attempt to change a tortfeasor's *unlawful* conduct in another State': emphasis in original).

[62] *Campbell,* 123 S.Ct at 1522.

[63] In addition to *White*, which is discussed in the text, see *Owens-Corning Fiberglas Corp. v. Ballard*, 739 So.2d 603, 606 (Fla.App. 1998) ('[W]here the defendant's conduct is considered tortious in all 50 states [...] the same due process concerns implicated in *BMW* do not arise'); *Continental Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634, 637 (10th Cir.1996)

of these cases, *White v. Ford Motor Company*,[64] the Ninth Circuit Court of Appeals concluded that it is immaterial whether the defendant's conduct was lawful or unlawful in other states. The pertinent question is '*how* the conduct is sanctioned rather than *whether* it is permitted',[65] said the court. The court noted that each state seeks to effectuate its substantive policy choices through different sanctions and deterrents, and that, in a federal system, one state 'should not be permitted to impose its choices on other states'.[66] 'If [the forum] imposes an award based on vindicating a national interest in safety', said the court, 'then it may deter not only conduct tortious in other states, but also innovations and economies of production that other states have purposely tailored their laws not to discourage so strongly'.[67]

3.7. In all likelihood, the Supreme Court will eventually address the above question and will further refine its test for determining the constitutionality of punitive damages. However, even in its present form and despite some unanswered questions,

---

('[W]e read the [*BMW*] opinion to prohibit reliance upon inhibiting unlawful conduct in other states').

[64] 312 F.3d 998 (9th Cir. 2002). *White* was a products liability action filed against Ford by a Nevada domiciliary whose three-year old child was killed in Nevada when the parking brakes of plaintiff's Ford car malfunctioned and the car rolled over the child. The plaintiff argued that Ford knew and failed to warn users of Ford cars that their brakes were defective. During the trial, the plaintiff's attorney made several statements (to which the defendant did not object) that could be interpreted as asking the jury to punish Ford for its conduct throughout the country. Ford asked the judge to issue a special instruction to the jury against punishing Ford for extraterritorial conduct that did not affect Nevada citizens. The judge refused to issue this instruction, in part because Ford had not shown that its conduct was *lawful* in other jurisdictions. The jury returned a verdict of $2.3 million in compensatory damages and $150 million in punitive damages. The Nevada federal district court remitted the punitive damages to $69 million. The Ninth Circuit reversed the punitive damages award for failing to meet the interstate standard of *BMW* and dismissed the district court's argument that the reduction of the award to $69 million had resolved the problem of the jury's possible reliance on extraterritorial conduct.

[65] 312 F.3d at 1017.

[66] See id. at 1018 ('Nevada is free [...] to choose a policy that may sacrifice some innovation in favor of safety, and Alaska is free to choose a policy that may sacrifice some safety in favor of innovation [...]. Neither state is entitled, in our federal republic, to impose its policy on the other').

[67] Id. The court further stated that, 'even if the *BMW* territorial limitation applied only to conduct lawful in other states, as opposed to unlawful conduct differently sanctioned by other states', id. at 1019, the court would still reverse, because the conduct at issue here, the failure to warn 'is probably not unlawful in all states. Id. The court explained that some states do not impose a post-sale duty to warn, while others differ on the identity of the party who should receive the warning. Because of these differences, said the court, 'the conduct for which the jury punished Ford was actually *lawful* in a number of other states'. Id.

the test is an important reminder that both the circumstances under which a state may impose punitive damages and the size of the award are subject to the watchful scrutiny of a Supreme Court that is not regarded as overly solicitous of plaintiffs. The message is clear, even if it is not mathematically precise: jury instructions must be clear and unbiased; the award may not punish the defendant for conduct that did not cause harm in the forum's territory or to its citizens; and the size of the award must be proportional to the reprehensibility of the conduct and the degree of harm.

IV. The Pertinent Contacts and Typical Patterns

A. Introduction

4.1. Among the many methodological changes the American conflicts revolution[68] has brought about, the two most pervasive are: (a) the notion that the choice of law should not be based on a single connecting factor such as the *locus delicti*, but rather on *multiple* such factors or contacts; and (b) the notion that the choice of law should be based on an examination of the content of the substantive laws of each contact state. This section discusses these two notions as they pertain to punitive damages conflicts and identifies the typical law-fact patterns of these conflicts.

A third development, which is limited to tort conflicts and is not as widely accepted as the above two methodological changes, is the emergence of a distinction between conduct-regulating and loss-distributing tort rules. The former are those rules that 'have the prophylactic effect of governing conduct to prevent injuries from occurring',[69] while the latter are those rules that 'prohibit, assign, or limit liability after the tort occurs'.[70] This distinction has been discussed in detail elsewhere.[71] Suffice it to say that rules imposing punitive damages are a prime example of conduct-regulating rules because their primary purpose is to regulate conduct, while rules imposing or limiting compensatory damages are a prime example of loss-distributing rule because their

[68] For a recent discussion of this revolution, see SYMEONIDES S., *The American Choice-of-Law Revolution in the Courts: Today and Tomorrow,* in: *Recueil des Cours,* Vol. 298 (2003).

[69] *Padula v. Lilarn Props. Corp*. 644 N.E.2d 1001, 1002 (N.Y. 1994).

[70] Id.

[71] See SYMEONIDES S., *Revolution* (note 68), §§ 105-123; SYMEONIDES S., 'Territoriality Versus Personality in American Tort Conflicts' in: *Intercontinental Cooperation Through Private International Law: Essays in Memory of Peter Nygh*, (EINHORN T./ SIEHR K. eds.) 405 (2004).

primary purpose is to allocate between the parties the economic consequences of admittedly wrongful conduct.[72]

B. Pertinent Contacts

4.2. Which contacts are relevant in a given case depends on the specifics of that case, and modern choice-of-law methodologies are unwilling to provide more than an illustrative list of potentially relevant contacts.[73] This is a prudent approach. Nevertheless, after four decades of experience with these methodologies, certain contacts have emerged as more important than others.

For example, in tort cases involving conflicts between loss-distribution rules, the list of relevant contacts includes – besides the traditional contact of the place of injury – the place of the conduct that caused that injury, the domicile of each party, and the place in which the parties' relationship, if any, was centered.[74] The parties' domiciles are particularly important in these conflicts, so much so that, if both parties are domiciled in the same state, the law of that state almost invariably governs.[75]

4.3. In contrast, in tort cases involving conduct-regulation conflicts, only two contacts are in principle relevant: the place of the injurious conduct, and the place of the resulting injury.[76] These contacts are also pertinent in punitive-damages conflicts because, as said earlier, rules imposing punitive damages are par excellence conduct-regulating rules. However, because punitive damages rules have the additional purpose of punishing the tortfeasor, the tortfeasor's domicile (or principal place of business or other similar affiliation) is also a relevant contact in punitive damages conflicts.

The reasons for which these three contacts are relevant in punitive damages conflicts is because a state that has one or more of these contacts will likely have an interest in applying its law, whether or not it imposes punitive damages. For example, the state of the conduct has the right to regulate (police, deter, punish, *or* protect)

---

[72] See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 1519 (2003) ('Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct […]. By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution').

[73] See, e.g., Restatement Second, Conflict of Laws 2d §§ 145, 188 (providing an illustrative list of contacts for torts and contracts, respectively).

[74] In product liability conflicts, one should add the place in which the product was put into the stream of commerce, hereafter referred to as the 'place of acquisition'. See SYMEONIDES S., *Revolution* (note 68), §§ 98-200.

[75] See SYMEONIDES S., *Revolution* (note 68), §§ 128-134.

[76] See SYMEONIDES S., *Revolution* (note 68), §§ 167-68.

conduct within its borders. Similarly, the state in which this conduct produces its effects – the injury – has a right to determine what sanctions are appropriate for such conduct. Finally, the state of the defendant's domicile has the right to determine whether the sanction of punitive damages should be imposed on one of its domiciliaries. If the law of that state provides for punitive damages, the application of that law serves its underlying purpose of punishing that tortfeasor and deterring him and other potential tortfeasors from engaging in similar conduct in the future. Conversely, when that law prohibits punitive damages, then its application would serve its underlying purpose of protecting that tortfeasor from excessive financial exposure.

This then leaves the domicile of the victim. If it is true that punitive damages are designed to punish and deter tortfeasors rather than to compensate victims (and their attorneys) who, *ex hypothesi*, are made whole through compensatory damages, then the victim's domicile should, in principle, be irrelevant in punitive-damages conflicts.

C. Laws

4.4. Another important lesson of the modern American conflicts experience is that one cannot resolve conflicts intelligently and rationally without considering the substantive content of the laws of each involved state, and without making that content an integral part of the whole choice-of-law process. Fortunately, with regard to punitive damages the differences among the laws of the involved states are not as many as with other tort issues. They boil down to only two categories (1) laws that impose punitive damages for the conduct in question; and (2) laws that do not impose punitive damages for the same conduct.[77]

D. Patterns

4.5. Putting factual contacts and substantive laws in the mix produces eight typical patterns of potential or actual punitive-damages conflicts. These patterns are depicted in the following table. The three columns in the middle represent the state or states that have the relevant contacts – the tortfeasor's (hereafter 'defendant') domicile or principal place of business, the place of the defendant's conduct, and the place of the resulting injury. These columns are flanked by a column representing the forum state

[77] To be sure, states that impose punitive damages may differ on the available or permissible amounts. For example, one state may limit the amount, either through an absolute cap, or in proportion to compensatory damages. These cases present a choice-of-law problem only if the claimant requests, and the court is prepared to grant, an amount exceeding this limit. However, this author is not aware of any cases in which such differences have caused problems.

and the plaintiff's home state, respectively. These columns are left blanc in order to underscore the point that the punitive-damages laws of these states are, or should be, irrelevant in resolving punitive-damages conflicts.

Table 1. Patterns in Punitive Damages Conflicts

Pattern	Forum	Defendant	Conduct	Injury	Plaintiff
1	---	No pun.	No pun.	No pun.	---
2	---	Pun.	No pun.	No pun.	---
3	---	No pun.	Pun.	No pun.	---
4	---	No pun.	No pun.	Pun.	---
5	---	Pun.	Pun.	No pun.	---
6	---	No pun.	Pun.	Pun.	---
7	---	Pun.	No pun.	Pun.	---
8	---	Pun.	Pun	Pun.	---

4.6. As discussed below, American courts have awarded punitive damages in cases falling within each one of the above eight patterns. However, the majority of cases that awarded punitive damages fall within patterns 5-8.

The thesis of this essay is that the award of punitive damages is:
(1) entirely inappropriate in cases falling within pattern 1;
(2) defensible in cases falling within patterns 2-4; and
(3) entirely appropriate in cases falling within patterns 5-8.

The balance of this essay examines the cases of each pattern, in the above order.

V. The Left Extreme: Pattern 1

5.1. In Pattern 1, the three pertinent contacts are in a state or states that do not impose punitive damages for the conduct in question. In such a case, it is highly inappropriate

to award punitive damages, even if, for example, the victim's home state imposes such damages, and even if that state is also the forum state. A case on point is *Phillips v. General Motors Corp.*,[78] in which the Montana Supreme Court awarded punitive damages to a Montana plaintiff under Montana law, even though Montana did not have any other pertinent contacts and the other involved states did not allow or limited such damages. *Phillips* was a products liability action filed against a Michigan manufacturer for injuries caused by one of its trucks that was manufactured in Michigan. The court reasoned that, because 'punitive damages serve to punish and deter conduct deemed wrongful – in this case, placing a defective product into the stream of commerce which subsequently injured a Montana resident',[79] Montana had a strong interest in 'deterring future sales of defective products in Montana and encouraging manufacturers to warn Montana residents about defects in their products as quickly and as thoroughly as possible'.[80]

However, the sale of the product took place not in Montana, but rather in North Carolina, which did not impose punitive damages. The purchaser was a North Carolina domiciliary who sold the truck to another North Carolina domiciliary, the victim, who later moved his domicile to Montana. He was killed not in Montana, but in Kansas (which limited punitive damages), while driving the car from Montana to North Carolina. Montana's interests in protecting its domiciliaries from harm was fully satisfied by applying Montana's compensatory damages law, which the court applied. Under the facts of this case, any additional interest Montana might have had in deterring conduct that injured Montana domiciliaries is far weaker than the contrary interests of Michigan in shielding from punitive damages Michigan manufacturers who manufacture products in Michigan.

---

[78] 995 P.2d 1002 (Mont. 2000).

[79] Id. at 1012.

[80] Id. For another case awarding punitive damages under the law of the plaintiff's domicile, see *Thiele v. Northwest Mut. Ins. Co.*, 36 F.Supp.2d 852 (E.D. Wis. 1999) (applying Wisconsin law as the better law in an action for bad faith insurance practices filed by a Wisconsin insured against a Michigan insurer who insured plaintiff's barn house in Michigan. Michigan did not allow punitive damages). For cases reaching the opposite result, see *Gadzinski v. Chrysler Corp.,* 2001 WL 629336 (N.D.Ill. 2001) (applying Indiana law limiting punitive damages to an action by an Illinois plaintiff who purchased the defective product, a car, from an Indiana dealer and was injured in Indiana); *Hernandez v. Aeronaves de Mexico, S.A.,* 583 F.Supp. 331 (N.D.Cal. 1984) (applying Mexican law and denying punitive damages in actions arising from the crash in Mexico of a Mexican airliner and resulting in death of California domiciliaries, but applying California's more generous compensatory damages law); *Tubos de Acero de Mexico, S.A. v. American International Investment Corp., Inc.*, 292 F.3d 471 (5th Cir. 2002) (holding that punitive damages were unavailable because the defendant was a Mexican corporation and the pertinent conduct and injury had occurred either in Mexico or in Louisiana, and neither jurisdiction allowed punitive damages).

5.2. Similar to *Phillips*, but more defensible, are certain cases decided under federal 'antiterrorist' statutes, such as the Antiterrorist and Effective Death Penalty Act of 1996 (AEDPA).[81] This Act imposes punitive damages for death or personal injury of United States citizens who are victims of attacks sponsored or aided by states designated as sponsors of terrorism. Thus, the Act authorizes the award of punitive damages under the law of the victim's nationality, even when the conduct, the injury, and the defendant's domicile are all in another state that does not allow such damages. One such case is *Flatow v. Islamic Republic of Iran*,[82] which arose out of the death of an American student killed in a suicide bomb attack in the Gaza Strip. The court held that the AEPDA applied extraterritorially because Congress enacted it with the express purpose of 'affect[ing] the conduct of terrorist states outside the United States, in order to promote the safety of United States citizens traveling overseas',[83] and that this express purpose negated the usual presumption against extraterritoriality.[84] The court awarded $42 million in compensatory damages and $225 million in punitive damages.

Another similar case is *Wagner v. Islamic Republic of Iran*,[85] which arose out of the death of a U.S. serviceman during the 1984 car-bombing of the U.S. embassy in Beirut, Lebanon. The court applied federal substantive law and awarded $12 million in compensatory damages and $300 million in punitive damages. Taking note of the September 11 attacks, the court said that 'now, more than ever, […] the acts of terrorists and their sponsors must be punished to the full extent to which civil damage awards might operate to suppress such activities in the future'.[86]

The reason cases like *Wagner* are more defensible than *Phillips* is that, while the victim's Montana domicile in *Phillips* was no more than a coincidence, the victim's U.S. citizenship in *Wagner* was anything but a coincidence – the victim was a target of the attack *because* of his citizenship. Under these circumstances, the application of American punitive damages law is defensible.

[81] 28 U.S.C. § 1605(a)(7). This Act lifts the sovereign immunity of foreign states designated by the U.S. State Department as sponsors of terrorism and provides a cause of action for U.S. citizens killed or injured by acts of terrorism sponsored or aided by these states.

[82] 999 F.Supp 1 (D.D.C. 1998).

[83] Id. at 15 (citing legislative history).

[84] Id. at 16. See also id. at 15 n. 7 (stating that such extraterritorial exception is consistent with international law, based on the principles of passive personality, protective, and universal).

[85] 172 F.Supp.2d 128 (D.D.C. 2001).

[86] Id. at 138.

VI. Left-of Center: Single-Contact Patterns

6.1. Several cases have awarded punitive damages under the law of a state that had only one of the three relevant contacts, even though the other two contacts were in a state or states that did not allow punitive damages. See Patterns 2-4, in table, *supra*, at § 4.4. These cases are discussed below. However, for every case that reached this result, there is at least one other case that reached the opposite result.

A. Pattern 2: Defendant's Home State

6.2. In Pattern 2, the defendant's home state imposes punitive damages and thus has an interest in punishing the defendant and deterring others from engaging in similar conduct in the future. However, both the defendant's conduct and the resulting injury occur in another state (or states) that does not impose punitive damages. In such a case, one could argue that the latter state has an interest in protecting, if not the defendant as such, at least the defendant's *activity* within its territory, which may be beneficial in other ways, such as by providing jobs for the local population. The resulting conflict is not an easy one, and this is why courts encountering such conflicts have reached different results. While most courts deny punitive damages,[87] a few courts have allowed them by applying the law of the defendant's domicile.

6.3. Among the latter cases is *Fanselow v. Rice*,[88] a traffic-accident case in which the state of injury had only a fortuitous connection with the defendants. *Fanselow* arose

---

[87] See, e.g., *In re Air Crash Disaster Near Chicago*, *infra,* at § 6.6 (with regard to the plane's manufacturer); *In re Air Crash Disaster Near Monroe*, Michigan on January 9, 1997, 20 F.Supp.2d 110 (E.D.Mich. 1998) (holding that actions arising out of Michigan crash of airplane operated by an airline headquartered in Kentucky, which allowed punitive damages, were governed by Michigan law, which did not allow such damages); *In re San Juan Dupont Plaza Hotel Fire Litigation*, 745 F.Supp. 79 (D.P.R. 1990) (applying Puerto Rico law, which did not allow punitive damages, to actions arising out of Puerto Rico hotel fire and filed against non-Puerto Rico defendants domiciled in states that allowed punitive damages); *George Lombard & Lomar, Inc. v. Economic Dev. Admin. of Puerto Rico*, 1995 WL 447651, (S.D.N.Y. 1995) (applying Puerto Rico law and denying punitive damages for Puerto Rico conduct and injury).

[88] 213 F.Supp.2d 1077 (D.Neb. 2002). Another case that also applied the punitive damages law of the defendant's principal place of business is *Bryant v. Silverman*, 703 P.2d 1190 (Ariz. 1985), a case arising out of an airplane crash in Colorado, which prohibited punitive damages. However, in this case the court was influenced by the fact that the record did not reveal the place of the critical conduct (as between Arizona and Colorado), and that the victim was also an Arizona domiciliary. The court concluded that, '[s]ince this case involves an Arizona corporate defendant causing injury to an Arizona domiciliary, Arizona has the dominant interest in controlling [defendant's] conduct'. Id. at 1196.

out of a two-car Nebraska collision that injured two Colorado domiciliaries riding in one of the cars. The defendants were the driver of the other car, a Texas domiciliary who moved to Oregon after the accident, and his employer, a Minnesota-based corporation. Of the four involved states, only Nebraska disallowed punitive damages. The court did not discuss the place of conduct, but one can assume that although the driver's conduct occurred in Nebraska, his employer's conduct or omission occurred in Minnesota. Focusing only on the domicile of the defendants, the court held that Minnesota law governed the plaintiffs' punitive damages claims against the employer, and Oregon law governed their claims against the driver.

The court correctly noted that the purpose of a rule imposing punitive damages is to punish defendants and to deter them and others from future wrongdoing, while the purpose of a rule prohibiting punitive damages is to protect defendants from excessive financial liability and to encourage entrepreneurial activity through lowering the cost of doing business in the state. For this reason, the court reasoned that the plaintiffs' home state did not have an interest in whether the defendants were subject to punitive damages. That state's interest was confined to assuring that the plaintiffs were adequately compensated, and did not encompass punishing the defendants. Thus, the only states concerned with punitive damages are those states 'with whom defendants have contacts significant for choice of law purposes'.[89] In *Fanselow*, those states were Nebraska, Minnesota, and Oregon. The court found that Nebraska's policy of protecting defendants from punitive damages was not implicated in this case because the defendants' only connection with that state was the occurrence of the accident there. In contrast, the court reasoned, the case implicated the policies of both Minnesota and Oregon in punishing and deterring defendants, because the defendants were domiciled in those two states.[90]

B. Pattern 3: State of Conduct

6.4. In Pattern 3, the state of conduct imposes punitive damages (and thus has an interest in punishing and deterring the particular conduct), while the defendant's domicile and the place of injury are in a state, or states, that do not impose punitive damages (and thus have an interest in protecting the defendant). This results in a true conflict

[89] 213 F.Supp.2d at 1084. The court rejected the argument that those states are interested in imposing punitive damages only when their residents are injured, as well as the argument that, because Nebraska's prohibition of punitive damages was contained in its Constitution, Nebraska had a stronger interest in denying punitive damages than Minnesota or Oregon had in allowing them.

[90] The court acknowledged that, insofar as the driver was not an Oregon domiciliary at the time of the accident, Oregon had less of an interest in punishing him. However, the court concluded that, because the driver was a *current* Oregon domiciliary, Oregon had an interest in deterring his future misconduct.

between the laws of the state of conduct and the state of the defendant's domicile, with the state of injury simply playing a secondary role. As the cases discussed below indicate, one can find cases applying the law of any one of these three states.

6.5. For example, *Long v. Sears Roebuck & Co.*,[91] a products liability case, applied the law of the place of wrongful conduct, which the court assumed to be the sale of a defective mower and a misrepresentation of its safety features. Both of these acts occurred in the District of Columbia.[92] The buyer, a Maryland domiciliary, was injured in Maryland while using the mower. The court applied D.C. law after concluding (a) that Maryland did not have an interest in applying its law, which disallowed punitive damages, because that law was not intended to protect foreign defendants; and (b) that the District of Columbia had an interest in deterring and punishing, through its punitive damages law, those defendants who engaged in reprehensible conduct in the District by selling unsafe products there and misrepresenting their safety features.

In contrast, in *Harlan Feeders v. Grand Laboratories, Inc.*,[93] a product liability action arising from injury in Nebraska, the court applied Nebraska law, which prohibited punitive damages, rather than Iowa law, which allowed them. The product was manufactured in Iowa and was sold to the Nebraska plaintiff in Nebraska. Noting that 'Nebraska has made a policy choice that punitive damages are inappropriate',[94] the court equated that choice to a state 'interest' and concluded that 'that interest is not outweighed by Iowa's contrary interest in imposing punitive damages as a deterrent, at least not […] where the plaintiff is a resident of Nebraska, not Iowa, where the alleged injury occurred in Nebraska, not Iowa, as a result of use of a product manufactured by a South Dakota, not an Iowa corporation, even when the corporation physically produced the product in Iowa'.[95]

6.6. In *In re Air Crash Disaster at Sioux City, Iowa*,[96] a multiparty case involving wrongful death and survival actions arising from the crash of a passenger plane in Iowa, the pertinent contacts were scattered in several states. Correctly discounting the victims' domiciles, the court held that the punitive damages liability of the manufacturers of the plane and engines should be governed by the laws of the states of manufacture. The engine manufacturer had its principal place of business in New York, which allowed punitive damages, and had manufactured the engines in Ohio, which

[91] 877 F.Supp. 8 (D.D.C. 1995).

[92] The mower had been manufactured in South Carolina, but neither party invoked that state's law.

[93] 881 F.Supp. 1400 (N.D. Iowa 1995).

[94] Id. at 1410.

[95] Id.

[96] 734 F.Supp. 1425 (N.D.Ill. 1990).

allowed such damages in survival actions, but not in wrongful death actions. The plane manufacturer had its principal place of business in Missouri, the law of which is not given by the court, and manufactured the plane in California, which allowed punitive damage in survival actions but not in wrongful death actions.[97]

In re Air Crash Disaster Near Chicago,[98] a similar case arising out of a passenger plane crash in Illinois, involved actions against both the plane's manufacturer and the airline company. The manufacturer's home state, Missouri, allowed punitive damages, but the state of manufacture, California, did not. The airline's home state, New York, did not allow punitive damages, but the state in which it maintained the aircraft, Oklahoma, allowed such damages. Examining each conflict separately for each defendant, the court found a true conflict between the states that allowed and the states that prohibited punitive damages. The court broke the tie by applying the law of a third state, Illinois, which was the place of injury and which did not allow punitive damages. The court found that Illinois had a 'strong interest in having airlines fly in and out of the state, and […] in protecting [them] by disallowing punitive damages'.[99] Similarly, in *Freeman v. World Airways, Inc.*,[100] a case arising out of an airplane crash in Massachusetts, the court found that Massachusetts, which did not allow punitive damages, 'ha[d] a significant interest in regulating conduct (deterrence or encouragement) of planes arriving at [its airports] during the winter'.[101] The negligent conduct that caused the crash arguably occurred in other states that imposed punitive damages.

C. Pattern 4: State of Injury

6.7. In Pattern 4, the state of the injury imposes punitive damages, but the state (or states) of the defendant's conduct and domicile prohibits such damages. Again, there is little doubt that this pattern presents the true conflict paradigm. The first state has an interest in punishing and deterring conduct and actors that cause injury within its territory, while the latter state has an interest in protecting its domiciliary actor from the heavy financial price of punitive damages.

---

[97] With regard to the third defendant, the airline, the court applied Illinois law, which did not allow punitive damages. Illinois was the airline's principal place of business and the place where the corporate decisions regarding the maintenance of the aircraft and the training of its flight crew were made.

[98] 644 F.2d 594 (7th Cir. 1981), cert. denied 454 U.S. 878, 102 S.Ct. 358, 70 L.Ed.2d 187 (1981).

[99] 644 F.2d at 615-16.

[100] 596 F.Supp. 841 (D.Mass. 1984)

[101] Id. at 847.

From a constitutional perspective, the application of the law of the state of injury must satisfy the test articulated in *BMW v. Gore*.[102] This means that, in assessing the amount of punitive damages, one should consider only the conduct that caused detrimental effects in the state of injury, and not the conduct that caused such effects in other states.

From a choice-of-law perspective (and perhaps a constitutional perspective as well), the application of the punitive-damages law of the state of injury must satisfy one additional requirement – a showing that the occurrence of the injury in that state was objectively foreseeable. This requirement depends on the facts of the particular case but, for example, in products liability cases, it can be satisfied by showing that the product had been available in the state of injury through ordinary commercial channels. *White v. Ford Motor Company*,[103] which was discussed *supra*, is a good example. In that case the court applied the punitive-damages law of the state of injury in circumstances in which the occurrence of the injury in that state was objectively foreseeable.[104] *Kramer v. Showa Denko K.K.*[105] is another products liability case, in which the court allowed punitive damages under the law of the state injury, New York (which was also the victim's domicile). Although the product had been manufactured by a Japanese defendant in Japan, the law of which did not allow punitive damages, the product reached the New York market through ordinary commercial channels and the victim bought it and used it in that state. Thus, the imposition of the financial burden of punitive damages under New York law was a foreseeable and insurable risk that the manufacturer should expect to bear in exchange for deriving financial benefits from the New York market.

6.8. On the other hand, some cases involving the same pattern have gone the other way. For example, in *Kelly v. Ford Motor Co.*,[106] another products liability case, the court refused to apply the punitive damages law of the state of injury, Pennsylvania, which was also the victim's domicile and the place where he had acquired the product. Instead, the court applied the law of Michigan, the manufacturer's home state and the

---

[102] See *supra*, §§ 3.2-3.6.

[103] 312 F.3d 998 (9th Cir. 2002), discussed *supra*, at § 3.6.

[104] For non-products cases awarding punitive damages under the law of the place of injury (and victim's domicile), see, e.g., *Cooper v. American Express Co.*, 593 F.2d 612 (5th Cir. 1979) (awarding punitive damages under the law of the state of injury, even though the law of the defendant's domicile and place of conduct prohibited such damages); *Ashland Oil, Inc. v. Miller Oil Purchasing Co.*, 678 F.2d 1293 (5th Cir 1982) (awarding punitive damages under the law of the place of injury, even though such damages were prohibited by the state of the defendant's domicile and place of conduct). In both cases the foreseeability condition had been satisfied.

[105] 929 F.Supp. 733 (S.D.N.Y. 1996).

[106] 933 F.Supp. 465 (E.D.Pa. 1996).

place of manufacture, which prohibited punitive damages. The court acknowledged Pennsylvania's interests 'in punishing defendants who injure its residents and […] in deterring them and others from engaging in similar conduct which poses a risk to Pennsylvania's citizens'.[107] However, the court also found that Michigan had 'a very strong interest'[108] in denying such damages, so as to ensure that 'its domiciliary defendants are protected from excessive financial liability'.[109] By insulating companies such as Ford, who conduct extensive business within its borders, said the court, 'Michigan hopes to promote corporate migration into its economy […] [which] will enhance the economic climate and well being of the state of Michigan by generating revenues'.[110]

6.9. *In re Air Crash Disaster at Washington D.C.*,[111] was a more complex, multiparty case that encompassed both products and non-products actions, arising from the crash of an Air Florida plane in the District of Columbia, which allowed punitive damages. The products liability actions were filed against Boeing, a company that manufactured the plane in its home state of Washington, which prohibited punitive damages. The other actions were filed against the airline, a Florida-based company. The court rejected Boeing's argument that Washington law should govern, by pointing out that, while Washington had chosen to protect manufacturers at the expense of victims, 'the sovereignty of other states prevents [Washington] from placing on the scales the rights of those injured elsewhere'.[112] The court then focused on the actions against the airline, which was allegedly negligent in overseeing the de-icing of the plane before takeoff from the airport, which is located on the Virginia side of the Virginia-D.C. border. Virginia (unlike D.C.) prohibited punitive damages. The District of Columbia court found that, as between these two jurisdictions, D.C. had 'the most significant relation-

[107] Id. at 470.

[108] Id.

[109] Id.

[110] Id. For other cases reaching the same result, see *Calhoun v. Yamaha Motor Corp., U.S.A.,* 216 F.3d 338 (3rd Cir. 2000) (action by Pennsylvania plaintiffs for injury they sustained in Puerto Rico while using a rented Japanese-made watercraft--holding that plaintiffs' claims for punitive damages were governed by Puerto Rico law (which did not allow such damages) because 'Puerto Rico's interest in regulating the activity that occurs in its territorial waters [...] is more dominant'. Id. at 348); *Beals v. Sipca Securink Corp.,* 1994 WL 236018 (D.D.C. 1994) (refusing to apply the punitive damages law of the District of Columbia to action arising from injury there and filed against a Virginia defendant who manufactured the product in Virginia. Virginia law limited punitive damages); *Selle v. Pierce*, 494 N.W.2d 634 (S.D. 1993) (refusing to apply punitive damages law of place of injury and applying instead non-punitive damages law of state of conduct and defendant's domicile).

[111] 559 F.Supp. 333 (D.D.C 1983).

[112] Id. at 359.

ship […] [because] the injurious effects of the [Virginia] conduct were predominantly felt in the District'.[113]

VII. The Solid Middle: Two-Contact Patterns

7.1. In Patterns 5-7, a state with two relevant contacts (or two states, each of which have one relevant contact) imposes punitive damages, while a state with the third relevant contact does not. As the following discussion illustrates, the majority of American courts have awarded punitive damages in these cases.

A. Pattern 5: State(s) of Conduct and Defendant's Domicile Impose(s) Punitive Damages

7.2. In Pattern 5, the tortfeasor is domiciled in a state that imposes punitive damages, and, while in that state, engages in conduct that causes injury in another state that does not impose punitive damages.[114] This case presents the false conflict paradigm. The first state has an interest in applying its punitive-damages law so as to punish the tortfeasor who engaged in egregious conduct in that state, and to deter similarly situated potential tortfeasors. In contrast, the state of injury does not have an interest in applying its non-punitive damages law, because that law is designed to protect tortfeasors who are either domiciled in, or have acted in that state, neither of which is the case here. Thus, the application of the law of the first state promotes the deterrence policies of that state, without impairing the defendant-protecting policies of the state of injury.

7.3. Many cases involving this pattern have reached this precise result. One example is *In re Air Crash Disaster at Stapleton Int'l Airport, Denver*,[115] a case arising from the crash of a passenger plane in Colorado. In this case, Texas was both the airline's principal place of business and the place of the conduct most likely responsible for the crash. Texas, but not Colorado, provided for punitive damages in wrongful death actions. The court reiterated a principle articulated by the Seventh Circuit in *In re Air Crash Disaster Near Chicago, Illinois*[116] and since followed in most air disaster cases to the effect that, '[b]ecause the place of injury is much more fortuitous than the place of misconduct or the principal place of business, its interest in and ability to control

[113] Id. at 356.

[114] A functionally analogous variation of this pattern appears when the tortfeasor acts outside his home state, but in a state that also imposes punitive damage.

[115] 720 F. Supp. 1445 (D.Colo. 1988).

[116] 644 F.2d 594 (7th Cir.) *cert. denied sub nom.* 454 U.S. 878 (1981),

behavior by deterrence or punishment, or to protect defendants from liability is lower than that of the place of misconduct or the principal place of business'.[117] The *Stapleton* court concluded that, since 'Texas is both the site of the conduct to which an award of punitive damages could attach and defendants' principal place of business, [...] its relationship to this litigation is most significant',[118] and its law should govern. The court acknowledged that Colorado might have an interest in regulating the conduct of corporations entering its territory to do business. However, the court concluded that this interest was 'somewhat lessened when a foreign corporation attempts to shield itself from the more onerous laws of its home state by seeking refuge under Colorado law',[119] and that '[t]he knowledge that the law of a corporation's principal place of business [...] will be applied in the event of litigation is not likely to discourage corporations like [the defendant airline] from doing business in Colorado'.[120]

7.4. Another example is *Jackson v. Travelers Ins. Co.*,[121] a case involving an action for bad faith insurance practices. In this case, the court held that Iowa's punitive-damages law applied to the insurer's conduct in that state,[122] even though the resulting injury to

[117] 720 F.Supp. at 1453.

[118] Id.

[119] Id.

[120] Id. For similar cases, see, e.g., *Lewis-De Boer v. Mooney Aircraft Corp.,* 728 F.Supp. 642 (D.Colo. 1990) (action by Colorado plaintiffs against the Texas manufacturer of a small airplane that crashed in Colorado, killing its Colorado passengers; Texas, but not Colorado, imposed punitive damages; after dismissing as fortuitous the occurrence of the injury in Colorado, the court concluded that, as the place of the defendant's conduct and principal place of business, Texas 'ha[d] a greater policy interest in applying its laws and providing deterrence than Colorado ha[d] in preventing a windfall to its citizens'. Id. at 645); *Offshore Logistics, Inc. v. Textron,* 1995 WL 555593 (E.D. La. 1995) (products liability case arising out of helicopter crash in Louisiana, which did not allow punitive damages; awarding punitive damages under the law of Texas, which was the place of the defendant's conduct and domicile). For a product liability case involving this pattern and applying instead the non-punitive damages law of the state of injury, see *Kemp v. Pfizer, Inc*., 947 F.Supp. 1139 (E.D. Mich. 1996). In *Kemp*, the product, a heart valve, was manufactured in California by a California corporation and caused the death of a Michigan patient in Michigan. The court acknowledged California's interest in applying its punitive damages law to 'punish its corporate defendants and deter future misconduct', id. at 1143. However, the court concluded that, because the defendant was also doing business in Michigan, Michigan had an interest in extending to defendant the benefit of its defendant-protecting law. The court resolved the dilemma under Michigan's *lex fori* approach and applied Michigan law.

[121] 26 F.Supp.2d 1153 (S.D.Iowa 1998).

[122] The insured was a nationwide company that did business in Iowa, but all decisions in this case were made at the company's offices in Iowa.

the Nebraska plaintiff had occurred in Nebraska, which did not allow such damages. The court found that Nebraska had no interest in protecting 'all insurance companies nationwide regardless of whether they are Nebraska businesses',[123] nor 'in preventing punitive damages awards from other states to Nebraska citizens'.[124] On the other hand, said the court, because Iowa 'was the location of the *cause* of the injuries[,] […] Iowa ha[d] a significant interest in using punitive damages to punish bad faith conduct that occurs in Iowa'.[125] Thus, 'failure to apply Iowa law […] would wholly frustrate Iowa's interest in deterring outrageous conduct'.[126]

B. Pattern 6: State(s) of Conduct and Injury Impose(s) Punitive Damages

7.5. In Pattern 6, a tortfeasor domiciled in a state that does not impose punitive damages, engages in conduct in another state that imposes such damages, and causes injury in the latter state.[127] This pattern presents a true conflict because both states have an interest in applying their laws. The first state has an interest in protecting its domiciliary tortfeasor from punitive damages, whereas the second state has an interest in deterring conduct in that state that causes injury there. On balance, the application of the law of the latter state is entirely justified. The fact that the defendant acted outside his home state weakens any argument that he relied on that state's law, and the fact that he acted in the other state destroys any argument of unfair surprise from the application of the latter state's law.

7.6. Cases involving this pattern have reached the result suggested above by applying the punitive-damages law of the state of conduct and injury. For example, in *Horowitz*

[123] 26 F.Supp.2d at 1162.

[124] Id. at 1165.

[125] Id. (emphasis added).

[126] Id. at 1164. For a similar case, see *Cunningham v. PFL Life Ins. Co.*, 42 F.Supp.2d 872 (N.D.Iowa 1999) (holding that Iowa punitive-damages law applied to action against an Iowa defendant who engaged in bad faith insurance practices in Iowa, causing injury to insureds domiciled in several states). For a slander case, see *Ardoyno v. Kyzar*, 426 F.Supp. 78 (E.D.La. 1976) (applying Mississippi law and allowing punitive damages in a slander action filed by a Louisiana plaintiff against a Mississippi defendant who made in Mississippi defamatory statements about plaintiff). For a case involving the same pattern as *Jackson* and reaching the opposite result, see *Northwestern Mutual Life Ins. Co. v. Wender,* 940 F.Supp. 62 (S.D.N.Y. 1996). In this action for bad faith insurance practices filed by a New York insured against a Wisconsin insurer, the court applied New York law which did not allow punitive damages, because, although the defendant acted from Wisconsin and had its principal place of business there, it also did business in New York, and New York had an interest in protecting it.

[127] A functionally analogous variation of this pattern is when the injury occurs in a third state that also imposes punitive damages.

v. Schneider Nat. Inc.,[128] the court applied Wyoming's punitive-damages law to an action arising from a Wyoming traffic accident, even though none of the parties were Wyoming domiciliaries. The court found that Wyoming had a 'paramount interest in the manner in which its highways are used and the care exercised by drivers'.[129] The court reiterated that '[t]he policy behind […] punitive damages is not compensation of the victim […] [but rather] deterrence through public condemnation'.[130] Likewise, in *Isley v. Capuchin Province*,[131] an action for sexual abuse arising out of events in Wisconsin and filed against an out-of-state religious order, a Michigan court applied Wisconsin law, which imposed punitive damages. The court concluded that 'Wisconsin's interest outweigh[ed] Michigan's interest',[132] because Wisconsin had a 'strong interest in protecting minors in Wisconsin from sexual abuse and in punishing those found guilty'.[133]

In *Schoeberle v. United States*,[134] the court held that the law of Iowa, which was the place of both the pertinent conduct and the injury, should govern the question of punitive damages, even though the plaintiffs and some of the defendants were domiciled in Wisconsin, which did not allow such damages for the action in question. The court concluded that 'Wisconsin's interest in protecting its resident corporate defendant […] from excessive liability [was] outweighed by Iowa's interest in applying its punitive damages law to conduct within its borders'.[135] The court reasoned that, '[w]hen a balance between punishment and deterrence on the one hand and protection from excessive liability on the other must be struck, it is fitting that the state

---

[128] 708 F.Supp. 1573 (D.Wyo. 1989).

[129] Id. at 1577 (quoting *Brown v. Riner*, 500 P.2d 524 at 526 (Wyo. 1972)).

[130] Id. in *Wang v. Marziani*, 885 F.Supp. 74 (S.D.N.Y. 1995), the court, after reiterating that 'the imposition of punitive damages is a conduct-regulating rather than loss-allocating rule', id. at 77, held that Pennsylvania's punitive damages rule applied to a Pennsylvania traffic accident involving out-of-state parties, because Pennsylvania had an 'overwhelming interest in regulating the conduct within its borders'. Id. at 77-78. Similarly, in *Villaman v. Schee*, 15 F.3d 1095, 1994 WL 6661 (9th Cir. 1994), an Arizona court applied Arizona punitive-damages law to a wrongful death action filed by the estate of a Mexican domiciliary who was killed in an Arizona accident caused by a non-Arizona defendant. The court found that 'Arizona tort law is designed in part to deter negligent conduct within its borders', and thus Arizona had 'a strong interest in the application of its laws allowing [...] punitive damages'. 1994 WL 6661 at **4.

[131] 878 F. Supp. 1021 (E.D. Mich. 1995).

[132] Id. at 1023.

[133] Id. at 1024. See also *Rice v. Nova Biomedical Corp.*, 38 F.3d 909 (7th Cir. 1994) (applying Illinois law to a defamation action filed against a Massachusetts defendant who defamed an Illinois plaintiff by statements made in Illinois; Illinois, but not Massachusetts, imposed punitive damages).

[134] 2000 WL 1868130 (N.D.Ill. 2000).

[135] Id. at *14.

whose interests are more deeply affected should have its local law applied'[136] That state was Iowa, said the court, because, as the place of both the misconduct and the injury, 'Iowa ha[d] an obvious interest […] in punish[ing] those responsible for [the] misconduct […] [and] in deterring such misconduct and occurrences in the future'.[137]

In re Aircraft Accident at Little Rock, Arkansas[138] reached the same result in a more complicated case arising from the crash-landing of an American Airlines passenger plane in Little Rock, Arkansas, while en route from Texas to Arkansas. Arkansas law imposed unlimited punitive damages on an employer for the acts of its employees. Texas law caped the amount of punitive damages generally, and did not allow punitive damages against an employer who had not authorized or ratified the employee's wrongful act. The court found that the critical conduct that caused the crash was pilot error, which occurred in Arkansas airspace as the aircraft approached the Little Rock airport. The court held that Arkansas law should govern the availability of punitive damages. The court acknowledged that Texas had an interest in shielding American Airlines from punitive damages. However, the court concluded that 'Arkansas' interest in both punishing and deterring allegedly egregious conduct that occurs within its borders and which is harmful to its citizens is much stronger than Texas' interest in protecting its business from liability for acts committed outside Texas'.[139]

C. Pattern 7. State(s) of Injury and Defendant's Domicile Impose(s) Punitive Damages

7.7. In Pattern 7, a defendant domiciled in a state that imposes punitive damages engages in conduct in another state that does not impose such damages, and causes injury in the defendant's home state. This scenario is factually uncommon, but a variation of it is not as unlikely – when, in the same case, the defendant's conduct causes injury in a third state that also imposes punitive damages. *In re Air Crash Disaster at Washington D.C.*[140] involved the latter pattern. The defendant, a Florida-based airline, engaged in conduct in Virginia that caused its airplane to crash a few hundred yards into the District of Columbia. Both Florida and the D.C., but not Virginia, imposed

[136] Id. at *13 (quoting In Re Air Crash Disaster Near Chicago, 644 F.2d 594, at 613 (7th Cir. 1981))

[137] Id.

[138] 231 F.Supp.2d 852 (E.D.Ark. 2002).

[139] Id. at 875. The court also noted that the Arkansas legislature had rejected efforts to limit punitive damages, and concluded that Arkansas' punitive-damages rule was 'better' than Texas' limited damages rule, because the latter deprived a jury of the ability to effectively deter a defendant as powerful as American Airlines.

[140] 559 F.Supp. 333 (D.D.C 1983).

punitive damages. The court correctly applied D.C. law allowing punitive damages. It is true that, when the conduct occurs in a state that does not allow punitive damages, that state has a certain interest in applying its law to protect that conduct. However, the fact that the consequences of that conduct are felt in another state and are caused by a tortfeasor domiciled in a third state that also imposes punitive damages, suggests that ultimately the interests of the conduct state must give way to the interests of the other two states.

VIII. The Right Extreme: Pattern 8

8.1. In cases involving Pattern 8, a state that has all three pertinent contacts (or three states each of which have a pertinent contact) imposes punitive damages. For example, a defendant acts in his home state and causes injury in that state to a domiciliary of another state. If the law of the former state imposes punitive damages for that conduct, that state has every interest in applying its law to punish that defendant and to deter other defendants from engaging in similar conduct in the future. Even if the victim's home state prohibits punitive damages, such a prohibition need not be heeded, because it is designed to protect tortfeasors acting or domiciled in that state, rather than to prevent victims domiciled there from recovering punitive damages.

The same rationale should apply if the state that denies punitive damages is the forum state, whether or not it is also the victim's home state. In most cases, the forum's denial of punitive damages is designed to protect either forum defendants, or forum conduct, or both, and in this case the forum has neither of these contacts. Thus, the award of punitive damages under the law of the other state in these cases does not undermine the forum's policies.

8.2. In the United States, this solution is widely accepted, even in states like Louisiana which prohibits punitive damages in the vast majority of cases.[141] As said earlier, most civil law systems take exactly the opposite position. One example is Switzerland. Article 135 of the Swiss PIL Act of 1987 provides that products liability claims are governed, at the choice of the injured party, by the law of the defendant's place of business or, subject to an escape, the law of the place where the product was acquired. However, the same article also provides that, when a products liability claim is governed by foreign law, ‘no damages may be awarded in Switzerland other than

[141] See La. Civ. Code art. 3546, which provides that punitive damages may be awarded if such damages are available under the law of a state or states that have any two or all of the following contacts: place of conduct, place of injury, or defendant's domicile. For discussion of the rationale of this article by its drafter, see SYMEONIDES S., ‘Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis’, in: 66 *Tul. L. Rev.* 677, 735-49 (1992).

those provided for such damage under Swiss law'.[142] Because Swiss substantive law does not allow punitive damages, the quoted phrase effectively functions as a prohibition of punitive damages. This prohibition protects defendants – primarily Swiss defendants, because they are more likely to be sued in Switzerland – [143] but also restores a certain balance to an article that is unduly skewed in favor of plaintiffs. However, this prohibition also protects foreign defendants who have 'a place of business' (but not their 'principal' place of business) in Switzerland, as well as defendants who either acted in Switzerland or caused injury there. Moreover, the same prohibition also applies to cases in which the plaintiff does not in fact have the option of choosing the products liability law that Article 135 provides.

Suppose for example that, while studying in Princeton, New Jersey, a Swiss student purchases a pharmaceutical manufactured and marketed in New Jersey by a New Jersey manufacturer. While back in Switzerland during the Christmas break, the student ingests the product which produces severe side effects. She sues the manufacturer in Switzerland. With regard to liability and other issues, the Swiss court will have to apply New Jersey law because the plaintiff's choices under Article 135 are confined to New Jersey law. With regard to punitive damages, however, the same article requires the court to apply Swiss law and deny punitive damages. The same requirement would apply if the plaintiff had used the product in New Jersey and had suffered the injury there.[144] In so doing, Article 135 protects a New Jersey manufacturer who had acted in New Jersey and caused injury there, even though New Jersey has a strong policy, demonstrated by New Jersey precedents,[145] of punishing that manufacturer and deterring others from engaging in similar conduct in the future.

---

[142] Swiss PIL Act, Art. 135(2). For a similar provision, see Art. 137 of the same Act, which applies to claims for obstruction to competition governed by foreign law. Interestingly, the articles dealing with other tort conflicts do not contain a prohibition against punitive damages. See Arts. 133 (general), 134 (traffic accidents) 136 (unfair competition), 138 (emissions), and 139 (injury to rights of personality).

[143] See id. Art. 129(1) (providing that Swiss courts have jurisdiction if the defendant has a domicile, habitual residence, or place of business in Switzerland).

[144] In such a case, Swiss courts would have jurisdiction if the New Jersey defendant had a 'place of business' though not the 'principal' place of business in Switzerland. See Art. 129(1). Jurisdiction would also exist if the plaintiff sues the manufacturer's insurer in a direct action under article 131.

[145] See, e.g., *Gantes v. Kason Corp.*, 679 A.2d 106 (N.J. 1996). *Gantes* was a products liability action brought by the survivors of a Georgia woman who was killed in Georgia while working with a machine that was manufactured thirteen years earlier by a New Jersey based corporation in New Jersey. The action was barred by Georgia's ten-year statute of repose, but was timely under New Jersey's two-year statute of limitations. Finding that New Jersey had a 'cognizable and substantial interest in deterrence that would be furthered by the application of its statute of limitations', id. at 113, the New Jersey court applied that statute, allowing the action. The court concluded that, because the machine had been 'manufactured in, and placed into the stream of commerce from, [New Jersey]', id., New Jersey had a 'strong interest in

To be sure, one may counter that Switzerland's denial of punitive damages in such a case is not motivated by an affirmative policy of protecting defendants as such, but rather by a philosophical, if not moral, opposition to the very notion of punitive damages.[146] Ordinarily, such an opposition is relevant by mere virtue of the fact that a Swiss court is called upon to assess punitive damages. Even so, however, one should juxtapose this policy to the policy of New Jersey, which, rightly or wrongly, assumes that punitive damages are the only effective means of punishing the tortfeasor and deterring such conduct in the future. In such a conflict, if a conflict it is, one should give due regard to the fact that New Jersey has most, if not all, the relevant contacts.

IX. Conclusions

9.1. The preceding discussion provides a wide-ranging sample of tort cases involving punitive damages conflicts. These cases have been decided under a variety of modern choice-of-law methodologies, such as the Restatement Second, interest analysis, and Leflar's choice-influencing considerations. However, as in many other tort conflicts, the use of one or another methodology does not appear to have had a perceptible bearing on the outcome of the cases. Consequently, it is unnecessary to dwell much on methodology and more fruitful to focus on the outcomes of cases.

As the above discussion indicates, American courts have awarded punitive damages in cases involving each of the eight patterns depicted in the above table. Following the same order as the table, these cases can be grouped into cases in which the court awarded punitive damages under the law of:

(a) a state that did not have any of the three contacts that this essay considers pertinent for punitive damages conflicts, but had other contacts, such as the victim's domicile or nationality (Pattern 1);
(b) a state that had one of the three pertinent contacts (Patterns 2-4); and
(c) a state that had two or more pertinent contacts (Patterns 5-8).

9.2. If one were to compress these results into a *descriptive* choice-of-law rule, the rule would provide as follows:

> Subject to some exceptions, American courts award punitive damages if such damages are imposed by one or more of the following states: (1) the state of the defendant's domicile or principal place of

encouraging the manufacture and distribution of safe products for the public and, conversely, in deterring the manufacture and distribution of unsafe products within the state'. Id. at 111-12. See also *D'Agostino v. Johnson & Johnson, Inc.*, 628 A.2d 305 (1993).

[146] One might also invoke the lack of a procedural mechanism and experience in assessing punitive damages in the context of a civil trial.

business; (2) the state of the defendant's conduct; or (3) the state of the injury.[147]

This rule does not include cases falling within Pattern 1 (the domicile cases) because these cases are both uncommon and extreme, but it does include the cases falling within Patterns 2-4 (one contact), which are more common and more defensible.

9.3. However, while being 'defensible' is an acceptable attribute of de facto practice, it is not a sufficient attribute of a *prescriptive* rule, namely a rule that seeks to guide future practices. One who attempts to draft a prescriptive rule should aspire to a higher standard – a rule that has a solid foundation in judicial practice *and* takes a more evenhanded position towards these sharp conflicts. The view of this author is that such a rule must be grounded on the cases of Patterns 5-8, which are both more numerous and better-reasoned.

The Louisiana PIL codification of 1991 has adopted this view,[148] as has the American Law Institute in drafting the Complex Litigation Project of 1994.[149] Although phrased differently,[150] the punitive damages rules of these two projects are based upon the three contacts discussed above: the place of conduct, the place of the defendant's domicile, and the place of injury. These rules provide that *punitive damages may be awarded if all three or any two of the above contacts are located in a state or states that allow such damages*. Thus, these rules steer a middle course between outright hostility and undue liberality toward punitive damages. For this reason, these rules can be challenged both from the left and from the right. The criticism from the left (mostly the American criticism) would be that the two-contact requirement is too restrictive. The criticism from the right (including perhaps from Europe) would be that these rules are not restrictive enough since, after all, they do not eradicate the 'monstrous heresy'[151] of punitive damages. However, the role of PIL is not to eradicate heresies, but rather to define their proper spatial boundaries.

---

[147] If punitive damages are available only in the state of injury, the application of that state's punitive damages law is subject to the proviso that the occurrence of the injury in that state must have been objectively foreseeable. See *supra,* §§ 6.7-6.9.

[148] See La. Civ. Code art. 3546, described *supra,* note 141.

[149] See American Law Institute, *Complex Litigation: Statutory Recommendations and Analysis* § 6.06 (1994). For a discussion of this provision, see SYMEONIDES S., 'The ALI's Complex Litigation Project: Commencing the National Debate', in: 54 *La. L. Rev.* 843 (1994).

[150] For a comparison of these two provisions, see SYMEONIDES S., PERDUE W./ VON MEHREN A., *Conflict of Laws: American, Comparative, International*, 282-83, 301-302 (1998).

[151] See *supra,* note 1.

THE HAGUE CONFERENCE WORKING GROUP

Draft Text on Choice of Court Agreements

Ronald A. BRAND*

I. Introduction
II. History of the Project
III. The Substance: The Working Group Draft Text on Choice of Court Agreements
   A. The Basic Concept
   B. Convention Scope
   C. Convention Structure
   D. The Three Basic Rules
      1. Rule Number 1: The court chosen by the parties in an exclusive choice of court agreement has jurisdiction
      2. Rule Number 2: If an exclusive choice of court agreement exists, a court not chosen by the parties does not have jurisdiction, and shall decline to hear the case
      3. Rule Number 3: A judgment resulting from jurisdiction exercised in accordance with a choice of court agreement (exclusive or non-exclusive) shall be recognized and enforced in the courts of other Contracting States
   E. Validity of Choice of Court Agreements under the Draft Text
   F. Article 15 and 16 Declarations
   G. Intellectual Property Rights
   H. Damages Limitations
IV. Conclusions

* Professor of Law and Director, Center for International Legal Education, University of Pittsburgh. The author has participated as a member of the U.S. Delegation at the Hague Conference on Private International Law in the negotiations aimed at concluding a convention on jurisdiction and the effect of foreign judgments in civil and commercial matters, and was a member of the Working Group session that produced the Draft Text on Choice of Court Agreements in March 2003. This article represents the personal views of the author and should not be taken to reflect the position of the U.S. government or the Hague Conference Working Group.

Yearbook of Private International Law, Volume 5 (2003), pp. 35-51
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

I. Introduction

In March of 2003, an informal working group at the Hague Conference on Private International Law prepared a Draft Text on Choice of Court Agreements ('Draft Text') to be considered by the Hague Conference Member States as the basis for concluding a convention dealing with aspects of jurisdiction and the recognition and enforcement of judgments.[1] This draft is more limited in its scope and effect than drafts previously considered by the Special Commission charged with considering these issues. It offers the possibility, however, both of realistic success in its conclusion and adoption, and of providing a foundation from which to consider possible future work on multilateral cooperation on issues of jurisdiction and the enforcement of judgments.

In this article, I begin by tracing some of the events that have preceded the Draft Text, on the assumption that historical context is important to a clear understanding of the current project. I then review the substance of the Draft Text in order to explain its purpose, recognize its limits, and acknowledge issues yet to be decided. I conclude with my reasons for believing that the Draft Text presents a workable foundation for a valuable convention as well as for future developments.

II. History of the Project

The jurisdiction and judgments project at the Hague Conference has consumed more than a full decade of work. It began as an effort to build a 'mixed' convention that would (1) catalogue agreement on acceptable and unacceptable bases of jurisdiction, while leaving bases of jurisdiction upon which no agreement could be reached outside of the convention structure, and (2) provide rules for reciprocal recognition and enforcement of judgments founded on acceptable bases of jurisdiction.[2] As the process continued, however, the resulting drafts included compre-

---

[1] The official report of the proceedings of the Working Group is contained in *Report on the Work of the Informal Working Group on the Judgments Project, In Particular on the Preliminary Text Achieved at its Third Meeting – 25-28 March 2003*, Hague Conference on Private International Law, Prel. Doc. No. 22 (June 2003) [hereinafter Working Group Report]. Official Hague Conference documents relating to the negotiations may be found at http://www.hcch.net/e/workprog/jdgm.html.

[2] See *Conclusions of the Working Group Meeting on Enforcement of Judgments*, Hague Conference on Private International Law, Doc. L.c. ON No. 2 (1993). Single (sometimes referred to as 'simple') conventions on the recognition and enforcement of judgments deal only with indirect jurisdiction and apply only to the decision of the court asked to enforce a foreign judgment. Thus, jurisdiction of the court issuing a judgment is considered 'indirectly' by the second court in deciding whether to recognize the judgment of

hensive sets of jurisdictional rules in which almost all possible jurisdictional bases were either enshrined as proper or wholly rejected as inappropriate in all circumstances.[3] This created impediments to global adoption, and led to the decision to build up from the point of greatest consensus: jurisdiction based on the consent of the parties to the dispute through a choice of court agreement. While the informal working group assigned the task of preparing a draft text was charged with considering other bases of jurisdiction on which substantial agreement might exist,[4] the group ultimately limited the Draft Text to jurisdiction based on choice of court agreements.

A brief history of the negotiations provides context for consideration of the Draft Text. In May of 1992, Edwin Williamson, then Legal Adviser at the U.S. Department of State, wrote the Secretary General of the Hague Conference on Private International Law proposing that the Conference take up the negotiation of a multilateral convention on the recognition and enforcement of judgments.[5] The

---

the issuing court. Double conventions, like the Brussels and Lugano Conventions, not only deal with recognition, but also provide direct jurisdiction rules applicable in the court in which the case is first brought – thus addressing the matter from the outset and limiting the need for indirect consideration of the issuing court's jurisdiction by the court asked to recognize the resulting judgment. The mixed convention is a variation on the double convention, providing rules for both jurisdiction and recognition of judgments, but not purporting to be exhaustive in its lists of allowed and prohibited bases of jurisdiction. Thus, it would not 'cover the entire field,' and leaves some bases of jurisdiction available but not subject to the convention's rules for recognition and enforcement of a resulting judgment. Under the mixed convention approach, there would exist a list of required bases of jurisdiction and a list of prohibited bases of jurisdiction. Judgments founded on required bases of jurisdiction would be entitled to recognition under the convention. Since courts should not take jurisdiction on bases on the prohibited list, only limited exceptions to recognition would apply. Any jurisdictional basis not included on one of the two lists would be permitted, but a resulting judgment would not be entitled to recognition under the convention. Instead, such judgments would be subject to review in the recognizing court in the manner applicable absent a treaty. The 1992 Hague Working Group recommended the negotiation of such a mixed convention: *ibid*. This was not the approach during the negotiations, however, when the Special Commission attempted first to work toward a double convention.

[3] See *Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 June 2001 – Interim Text*, Hague Conference on Private International Law, Nineteenth Session (2001). For a good description of the issues involved in categorizing jurisdictional bases, see von Mehren A. T., 'Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions', in: 24 *Brooklyn J. Int'l L.* 17 (1998).

[4] See *Reflection Paper to Assist in the Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters,* Hague Conference on Private International Law, Preliminary Doc. No. 19 (August 2002).

[5] Letter of May 5, 1992 from Edwin D. Williamson, Legal Adviser, U.S. Department of State, to Georges Droz, Secretary General, The Hague Conference on Private

matter was considered by a Working Group at The Hague in October of 1992, which 'unanimously recognized the desirability of attempting to negotiate multilaterally through the Hague Conference a convention on recognition and enforcement of judgments.'[6]

Upon the recommendation of a Special Commission of the Hague Conference in June of 1994,[7] the Conference decided to include the question of such a convention on the Agenda of its Nineteenth Session.[8] The formal negotiations began with meetings in June 1997,[9] and March of 1998.[10] The first partial text came from the Drafting Committee at a further meeting in November 1998.[11] That document was considered further during two weeks in June and one week in October of 1999, at which time a Preliminary Draft Convention (PDC) text was produced.[12]

A Diplomatic Conference originally was contemplated for fall 2000. After a letter from Jeffrey Kovar, Assistant Legal Adviser for Private International Law at the U.S. State Department, indicated substantial problems with the PDC text, however, it was decided to delay the Diplomatic Conference. The first part of a split Diplomatic Conference was held in June 2001, resulting in a new text, following the 1999 text, but with many more bracketed provisions, footnotes, and explana-

---

International Law, distributed with Hague Conference document L.c. ON No. 15 (1992). The United States submitted a report proposing a 'mixed' convention: von Mehren A. T., *Recognition Convention Study: Final Report* (copy on file with the author).

[6] *Conclusions of the Working Group Meeting on Enforcement of Judgments*, Hague Conference on Private International Law, Doc. L.c. ON No. 2 (1993).

[7] See *Conclusions of the Special Commission of June 1994 on the Question of the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, Hague Conference on Private International Law, Prel. Doc. No. 1 (1994).

[8] *Final Act of the Eighteenth Session of the Hague Conference on Private International Law*, 19 October 1996, at 21.

[9] See *Preliminary Results of the Work of the Special commission concerning the Proposed Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Hague Conference on Private International Law, Information Document (September 1997).

[10] See Kessedjian C., *Synthesis of the Work of the Special Commission of March 1998 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters*, Hague Conference on Private International Law, Prel. Doc. No. 9 (July 1998).

[11] See *Working Document No. 144 of the Special Commission on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters*, Hague Conference on Private International Law (20 November 1998).

[12] *Informational note on the work of the informal meetings held since October 1999 to consider and develop drafts on outstanding items, drawn up by the Permanent Bureau*, Hague Conference on Private International Law, Prel. Doc. No. 15 (May 2001) (containing the text of the Preliminary Draft Convention).

tions of various positions.[13] Those brackets, footnotes, and explanations made clearer some of the many remaining differences in legal, economic, and political systems that stood between the 2001 draft and a successful convention.

Given the obstacles to achieving a comprehensive convention on the lines of either the 1999 or the 2001 text, on April 24, 2002, Commission I of the Nineteenth Session of the Hague Conference acted to establish an informal working group to consider drafting a convention based on the jurisdictional provisions on which substantial consensus existed, beginning with jurisdiction based on agreement of the parties. That group met three times,[14] and in March 2003 produced the Draft Text.[15] The Secretary General of the Hague Conference then asked Member States whether further negotiations should be held on this text. The responses to the Secretary General's inquiry were positive, and a Special Commission on Judgments was convoked for December 1-9, 2003, with the goal of working from the Draft Text to a final convention.[16]

While this process was going on in The Hague, the European Community was moving forward on deepening cooperation among its Member States, and increasing competence of Community institutions. While private international law specialists were representing the Community Member States at The Hague in June of 1997, their trade law counterparts were meeting in the Amsterdam Treaty process to draft language that would change the role of those specialists. Whether the trade specialists ever consulted the private international law specialists on these

---

[13] *Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 June 2001 – Interim Text*, Hague Conference on Private International Law, Nineteenth Session (2001).

[14] The initial charge to the working group, and the reports on its first two meetings are contained in *Reflection Paper to Assist in the Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, Hague Conference on Private International Law, Preliminary Document No. 19 (August 2002); *Report on the First Meeting of the Informal Working Group on the Judgments Project – October 22-25, 2002*, Hague Conference on Private International Law, Prel. Doc. No. 20 of November 2002; *Report on the Second Meeting of the Informal Working Group on the Judgments Project – January 6-9, 2003*, Hague Conference on Private International Law, Prel. Doc. No. 21 (January 2003).

[15] *Preliminary Result of the Work of the Informal Working Group on the Judgments Project*, Hague Conference on Private International Law, Prel. Doc. No. 8 (March 2003) (corrected) for the attention of the Special Commission of April 2003 on General Affairs and Policy of the Conference. The Draft Text is more thoroughly discussed in the Working Group Report, *supra* note 1.

[16] *Convocation Special Commission on Judgments, 1-9 December 2003*, Hague Conference on Private International Law, Doc. L.c. ON No. 35(03) (19 August 2003). This does not mean that the goal of a more comprehensive jurisdiction and judgments convention is completely off the table. Indeed, the General Affairs meeting of April 2003 formally stated that any decision on the choice of court text 'shall not preclude subsequent work on the remaining issues.': *ibid*.

changes is not clear. What is clear is that the Treaty of Amsterdam amendments to the Treaty Establishing the European Community have changed the role of national private international law specialists in the Hague negotiations.

The transfer of internal competence for matters of judicial cooperation to Community institutions became clear with amended Article 65 of the Treaty Establishing the European Community.[17] The implications of that competence for external relations became a matter of discussion in the Hague negotiations, with national delegations clearly hoping it would not change their roles, and Community observers quietly preparing for that change. The result was a shift in negotiating dynamics after the Treaty of Amsterdam entered into force on May 1, 1999. While Article 65 of the amended European Community Treaty provides only internal competence for matters of judicial cooperation,[18] promulgation of Council Regulation 44/2001 furthered this shift by exercising internal competence in a manner that appears necessarily to affect external competence.[19] Despite such appearance, how-

---

[17] See, e.g., KOTUBY, Jr. Ch. T., 'Internal Developments and External Effects: The Federalization of Private International Law in the European Community and Its Consequences for Transnational Litigants', in: 21 *J. L. & Com.* (2002); WILDERSPIN M., 'The Foundations and the Implementation of the Transfer of Competence in the Area of Judicial Cooperation in Civil Matters to the Community Institutions', in: 21 *J. L. & Com.* (2002).

[18] See Consolidated Version of the Treaty Establishing the European Community, art. 65 (ex. art. 73m), 1997 O.J. C 340 at 173, 203 (Nov. 10, 1997), available at http://europa.eu.int/eur-lex/en/treaties/index.html. Article 65 provides 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;
>
> (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.

[19] The Council Regulation replacing the Brussels Convention was finalized on Dec. 22, 2000, and became effective on March 1, 2002. Council Reg. (EC) No. 44/2001 of 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in: *OJ* L 12/1, of 16 January 2000). [hereinafter Brussels Regulation]. The Brussels Regulation replaced the European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, done at Brussels, Sept. 27, 1968, in: *OJ* C 27/1, of 26 January 1998 (consolidated and updated version of the 1968

ever, some ambiguity remains regarding the matter of external competence, which could complicate authority for negotiations in The Hague. Some clarity may come with a decision of the European Court of Justice on competence for signing the amended Lugano Convention,[20] a matter which the author understands was submitted to the Court in March of 2003.

III. The Substance: The Working Group Draft Text on Choice of Court Agreements

A. The Basic Concept

The Draft Text is perhaps most easily understood if one thinks of it as the litigation counterpart to the New York Arbitration Convention.[21] Like the New York Convention, this treaty would (1) establish rules for enforcing private party agreements regarding the forum for resolution of any resulting disputes, and (2) establish rules for recognizing and enforcing decisions issued by the chosen forum. Thus, a Hague Choice of Court Convention would serve the business world by providing for choice of court agreements a measure of predictability similar to that now provided for arbitration agreements under the New York Arbitration Convention.[22] The discussion that follows highlights the most important provisions of the Draft Text in order to provide some understanding of how it is intended to operate in practice.[23]

B. Convention Scope

Article 1(1) is an affirmative approach to the issue of scope, providing that:

Convention and the Protocol of 1971, following the 1996 accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden).

[20] Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, art. 62(1)(b), in: *OJ* 1988 L 319/9, reproduced in: 28 *I.L.M.* 620 (1989). The Lugano Convention effectively extended the Brussels Convention (*supra* note 19) rules to relationships with EFTA States.

[21] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter New York Convention].

[22] The existence of the New York Convention often is noted as a reason for preferring arbitration over litigation for commercial disputes.

[23] A fully-detailed discussion is beyond the scope of this article. A more complete discussion can be found in the Working Group Report (*supra* note 1).

> 'This Convention shall apply to agreements on the choice of court concluded in civil or commercial matters.'

Thus, the only basis of judicial jurisdiction covered in the convention (unlike the broad approach of the 1999 and 2001 texts) is jurisdiction based on mutual agreement of the parties. Further, this provision makes clear that the convention applies only to such agreements 'concluded in civil or commercial matters.'

Article 1(2) takes a carve-out approach to the scope issue by listing *types of contracts* to which the convention does not apply. Article 1(3) is similar in approach, listing exclusions from Convention coverage in terms of *subject matter of the dispute*. Of these exclusions, the most important is that found in Article 1(2)(a), which limits the Convention to business-to-business choice of court agreements by excluding coverage of consumer contracts. This is done by adopting language very close to that found in Article 2(a) of the U.N. Sales Convention,[24] stating that the Convention shall not apply to agreements in which one party is a consumer ('acting primarily for personal, family or household purposes') and the other is a merchant, or to agreements in which both parties are consumers. Article 1(2)(b) provides the second type-of-contract exclusion, removing from Convention scope choice of court agreements found in 'individual or collective contracts of employment.'

The Article 1(3) exclusions based upon the subject matter of the dispute are explained in the Secretariat's report on the Draft Text by stating that, '[i]n some of these areas, party autonomy is typically limited while others are often subject to exclusive jurisdiction under national law, or governed by special conventions.'[25] This list of exclusions serves to modify further the Article 1(1) general statement of scope relating to 'civil or commercial matters.' Thus, the Convention would not have application to 'proceedings relating to' family and estate matters,[26] bankruptcy proceedings,[27] rights *in rem* in immovable property,[28] and internal corporate

---

[24] United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/CONF.97/18, Annex 1, English version reprinted in: 52 *Fed. Reg.* 6264 (1987), and in: 19 *I.L.M.* 668 (1980).

[25] Working Group Report (*supra* note 1), at 7.

[26] Family and estate matter exclusions are found in the following provisions of Article 1(3):

(a) the status and legal capacity of natural persons;
(b) maintenance obligations;
(c) matrimonial property regimes and other rights and obligations arising out of marriage or similar relationships;
(d) wills and succession.

[27] See art. 1(3)(e) ('insolvency, composition or analogous matters').

[28] Art. 1(3)(i).

matters.[29] Exclusion of certain other types of matters is clearly intended, with bracketed language indicating the need to clarify the concepts. These include admiralty and maritime matters,[30] anti-trust matters,[31] and claims based on the validity of patents and trademarks.[32] Claims involving nuclear liability are also excluded from scope.[33]

Perhaps the most difficult issues remaining in terms of scope involve determining just how to treat different types of claims based on intellectual property rights. This is reflected in the bracketed language of Article 1(4), which would provide an 'incidental questions' exception to exclusion of intellectual property rights cases from scope of the convention. Thus, parties could agree upon the court that would determine validity issues in disputes involving their rights to certain intellectual property, but that determination would have effect only if it were incidental to other issues in the case, and 'only as between the parties.' As with other bracketed provisions, this one invites further discussion.

C. Convention Structure

The Draft Text makes an important distinction between exclusive and non-exclusive choice of court agreements, basing much of the operation of its terms on a presumption in favor of the former. Thus, Article 2(1)(b) creates a presumption in favor of exclusivity by stating that 'a choice of court agreement which designates the courts of one State or one specific court shall be deemed to be exclusive unless the parties have provided otherwise.' This is an important presumption and results in a reversal of the general rule favoring non-exclusivity that is applied by many courts in the United States.[34] The effect of the presumption of exclusivity is to make choice of court agreements more easily and clearly enforceable by removing the uncertainty that results from non-exclusive agreements.

---

[29] See art. 1(3)(j) ('validity, nullity, or dissolution of a legal person and decisions related thereto').

[30] Art. 1(3)(f).

[31] Art. 1(3)(g).

[32] Art. 1(3)(k).

[33] Art. 1(3)(h).

[34] See, e.g., *Steve Weiss & Co., Inc. v. Inalco, S.P.A.*, 1999 U.S. Dist. LEXIS 8811, 1999 WL 386653 (S.D.N.Y. 1999) (stating that 'where parties only specify in a contract clause where jurisdiction is proper' the clause generally will not be enforced unless other language clearly identifies 'the parties intent to make jurisdiction exclusive'); *Hull 753 Corp. v. Flugzeugwerke*, 58 F. Supp. 2d 925 (N.D. Ill. 1999) (holding that a clause granting jurisdiction to German courts was not exclusive absent clear language that only German courts shall have jurisdiction).

The structure of the Draft Text is primarily evident in Chapters II and III which set up the basic rules on Jurisdiction and Recognition and Enforcement, respectively.[35] Within these rules, the Draft Text indicates some basic choices that may not be readily apparent, but make important the definitions found in Article 2.[36] Article 2(1) sets out the distinction between a 'choice of court agreement' and an 'exclusive choice of court agreement.' This distinction becomes important because the jurisdictional rules of Articles 4 and 5 apply only to exclusive choice of court agreements, while the scope of the recognition and enforcement rule found in Article 7 is broader, covering all choice of court agreements. The definition of habitual residence of a non-natural person in Article 2(2) further helps set up the structure of the Convention, allowing the Article 4(2) rule that prevents application of the basic rule on jurisdiction to purely domestic transactions.

D. The Three Basic Rules

The Draft Text creates three basic rules upon which the operation of the Convention turns. They are:

1) The court chosen by the parties in an exclusive choice of court agreement has jurisdiction;
2) If an exclusive choice of court agreement exists, a court not chosen by the parties does not have jurisdiction, and shall decline to hear the case; and
3) A judgment resulting from jurisdiction exercised in accordance with a choice of court agreement (exclusive or non-exclusive) shall be recognized and enforced in the courts of other Contracting States.

The interaction among these rules explains the basic operation of the Convention.

1. Rule Number 1: The court chosen by the parties in an exclusive choice of court agreement has jurisdiction

Article 4(1) sets out the basic rule that the court chosen by the parties 'shall have jurisdiction':

> 'If the parties have agreed in an exclusive choice of court agreement that a court or the courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or the courts of that

[35] See Part III.A.3, below.

[36] The inclusion of a definitions article is a novel element of the Draft Text since most Hague Conventions do not contain definition provisions.

> Contracting State shall have jurisdiction, unless the court finds that the agreement is null and void, inoperative or incapable of being performed.'

This rule applies only to international business-to-business contracts containing choice of court agreements. Thus, Article 4(2) provides that the rule does not apply 'if all the parties are habitually resident' in the Contracting State in which a case is brought, and they have 'agreed that a court or courts of that same Contracting State shall have jurisdiction to determine the dispute.'

What is not explicit in this rule is whether a court which is chosen in an exclusive choice of court agreement may decline to hear the case based on discretionary doctrines such as *forum non conveniens*. At one point in the Secretariat's Report, it is stated that one of the Convention's 'three aims' is that 'the chosen court has to hear the case.'[37] This, however, is inconsistent with the explicit language of Article 5 that allows a court not chosen in such an agreement to hear the case if 'the chosen court has declined jurisdiction.'[38] Thus, the explicit language of Article 5(c) would suggest that such discretionary doctrines are not affected by the Draft Text.[39]

Article 4(3) does make explicit that the Convention rules govern only *in personam* jurisdiction, and that private parties cannot create subject matter jurisdiction that does not otherwise exist in a national legal system. Thus, for example, parties cannot agree to submit a dispute to a specialized court when only the local courts of general jurisdiction have subject matter jurisdiction over the type of dispute in question within the chosen legal system.

2. *Rule Number 2: If an exclusive choice of court agreement exists, a court not chosen by the parties does not have jurisdiction, and shall decline to hear the case*

While Article 4 serves to tell the chosen court how to respond to an exclusive choice of court agreement, Article 5 provides the rule applicable in courts that are not chosen. Thus, a court in a Contracting State that is not selected in an exclusive choice of court agreement 'shall decline jurisdiction or suspend proceedings.' The only exceptions to this rule occur when

---

[37] Working Group Report (*supra* note 1), at 6.

[38] Art. 5(c).

[39] One might argue that the chosen court's Article 4(1) authority to determine that 'the agreement is null and void, inoperative or incapable of being performed,' or the domestic case exception under Article 4(2), constitute explicit Convention rules by which the chosen court could 'decline jurisdiction.' This runs counter to the explicit language of the text, however, since these are exceptions to jurisdiction under the Convention and not authority to decline jurisdiction that otherwise exists.

(a) that court finds that the agreement is null and void, inoperative or incapable of being performed;

(b) the parties are habitually resident in that Contracting State and all other elements relevant to the dispute and the relationship of the parties, other than the choice of court agreement, are connected with that Contracting State; or

(c) the court chosen has declined jurisdiction.[40]

Specifically omitted from this list is a general public policy exception to enforcement of a choice of court agreement. This is consistent with the structure of the New York Convention, which provides no public policy exception in its Article II obligation of Contracting States to recognize arbitration agreements, but does have an Article V public policy exception to the Article III obligation to recognize and enforce the resulting arbitral awards.[41]

The second exception to derogated court deference is the counterpart to the Article 4(2) domestic case rule for chosen courts. Thus, Article 5(b) allows a court not chosen to determine that the case is a local matter within the Contracting State in which that court sits, and thereby refuse to respect the choice of the parties in the choice of court agreement. This can occur, however, *only* if 'all other elements relevant to the dispute and the relationship of the parties, other than the choice of court agreement, are connected with that Contracting State.'

3. Rule Number 3: A judgment resulting from jurisdiction exercised in accordance with a choice of court agreement (exclusive or non-exclusive) shall be recognized and enforced in the courts of other Contracting States

Article 7 provides the basic rule on recognition and enforcement of a judgment issued by a court of a Contracting State, and for which jurisdiction was founded on a choice of court agreement. Such a judgment 'shall be' recognized and enforced.

Here it is important once again to note that the scope of the Chapter on recognition and enforcement is broader than the scope of the Chapter on jurisdiction. This results from the definitions mentioned earlier.[42] Unlike the language of Articles 4 and 5, the terms of Article 7 do not limit the recognition and enforcement obligation to judgments resulting from exclusive choice of court agreements, but include judgments resulting from all choice of court agreements. Under the definitional provisions of Article 2(1), this means that Contracting States are obligated to enforce judgments resulting from both exclusive and non-exclusive choice of court agreements. This is an intentional result, reflecting the fact that rules obligating

[40] Art. 5.

[41] See New York Convention (*supra* note 38), Arts. II, III, and V.

[42] See *supra* notes 34-36 and accompanying text.

courts to respect non-exclusive choice of court agreements would have been much more complex and difficult than rules obligating jurisdictional respect for exclusive choice of court agreements. At the recognition and enforcement stage, however, all that is necessary is that the originating court was in a Contracting State, and that it had jurisdiction resulting from an agreement of the parties. It is no longer necessary to sort out what other court or courts might have been jurisdictionally proper as a result of the same agreement.

While the scope of the general recognition and enforcement rule is broader than the general jurisdictional rule, it is also subject to more exceptions. Here, there again arises a basic issue of definition and structure. Article 7(1) provides an exhaustive list[43] of grounds for refusing recognition and enforcement if the judgment is based on an exclusive choice of court agreement. Article 7(2) then provides additional grounds for refusal if the judgment is based on 'a choice of court agreement other than an exclusive choice of court agreement.' This reflects the fact that the general rule on recognition and enforcement found in Article 7(1) applies beyond the types of cases emanating from Article 4 jurisdiction under the Convention.

The list in Article 7(1) includes grounds for non-recognition that should seem familiar to anyone accustomed to the Brussels Convention and Regulation, the New York Arbitration Convention, or the U.S. Uniform Foreign Money-Judgments Recognition Act. A court in a Contracting State may refuse recognition or enforcement if:

(a) the court addressed finds that the choice of court agreement was null and void;

(b) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence;

(c) the judgment was obtained by fraud in connection with a matter of procedure;

[(d) the judgment results from proceedings incompatible with fundamental principles of procedure of the State addressed;] or

(e) recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.[44]

[43] Under Article 7(1), recognition or enforcement may be refused '*only*' if one of the listed grounds is satisfied. Note, however, that courts '*may*' refuse recognition and enforcement under this provision, meaning that non-recognition is not mandatory if one of the listed grounds is satisfied.

[44] Art. 7(1).

The notice, fraud, and public policy grounds for denial of recognition and enforcement all are common in other sets of rules on the recognition of foreign judgments. The subparagraph (a) authorization of non-recognition where the choice of court agreement was null and void places the recognizing court in the same position on issues of substantive validity as both the chosen court and the derogated court at the jurisdictional stage. This issue of validity is discussed further below. The bracketed subparagraph (d) is considered by some to be subsumed in the fraud and public policy grounds for non-recognition, so was marked for further discussion.

The Article 7(2) grounds for non-recognition represent an acknowledgment that non-exclusive choice of court agreements may produce parallel proceedings resulting in inconsistent judgments. Thus, non-recognition may be allowed where contrary obligations exist as a result of parallel proceedings.

While the provisions of paragraphs (1) and (2) of Article 7 allow non-recognition, they do so only in limited circumstances. Paragraph (3) follows by strengthening the effect of the original judgment, providing that the court asked to recognize and enforce a judgment cannot review the merits of the decision in the originating court.

E. Validity of Choice of Court Agreements under the Draft Text

One of the more difficult issues dealt with in the Draft Text is that of validity. Article 3 provides rules on 'formal' validity, requiring that the choice of court agreement be either in writing or in some other form subject to proper evidentiary standards. It leaves open the question of whether a Contracting State may enforce choice of court agreements that fall below the stated requirements. The more difficult question, however, is that of 'substantive' validity.

The Draft Text reflects a clear decision not to have a unique Convention rule on substantive validity. In this regard, it follows the approach taken in Article II(2) of the New York Convention. The incorporation of a Convention rule on substantive validity, such as a rule that would reject clauses that are 'manifestly unjust,' was discussed. There was discomfort with such an approach, however, in part because of the desire in some countries to avoid introducing a discretionary test to be applied by judges. Neither was a choice of law rule written into the Draft Text. Either approach would have run up against national mandatory rules, substantive legal rules on contract formation, and rules dealing with unconscionability and unequal bargaining power. The likelihood of uniform application of such a rule was also in doubt. Thus, including a rule on substantive validity in the Draft Text simply offered too many problems, without providing sufficient offsetting benefits.

The decision not to have a substantive validity rule in the Draft Text did not mean, however, that the issue could be avoided in the text. Each of the Articles stating the Convention's three basic rules (Articles 4, 5, and 7) necessarily acknowledges that issues of substantive validity are for the court seised at the time of

application of the relevant rule. In addition, at the jurisdictional stage, the chosen court (Article 4) and the derogated court (Article 5) may also address whether the agreement is 'inoperative or incapable of being performed.'[45]

The Draft Text may easily be criticized for allowing the party objecting to the enforcement of a choice of court agreement 'three bites at the apple' in contesting the validity of the agreement. To some extent, such criticism is legitimate. The Working Group decided, however, that this approach was better than any of the alternatives on the substantive validity issue. Like the public policy basis for non-recognition, such rules place importance on the willingness of courts in the Contracting States to keep in mind the purpose and goals of the Convention and not to create aberrant results.

Some of the effects of this approach to substantive validity of choice of court agreements are not as troublesome as they first might seem. For example, under Article 5(a), a derogated court may determine that a choice of court agreement is null and void, and proceed to hear the case even though it is not the court chosen by the parties. This raises the question of what effect courts in other Contracting States must give to that judgment. The answer seems rather clear from Article 7(1), which provides a Convention obligation to recognize only judgments 'given by a court of a Contracting State designated in a choice of court agreement.' Since the derogated court is not such a court, no recognition and enforcement obligation exists under the Convention. Since no Convention rule *prohibits* recognition and enforcement of such a judgment, the matter falls outside the Convention and is governed by the private international law rules of the court in which recognition is requested.

F. Article 15 and 16 Declarations

Both Article 15 and Article 16 authorize declarations on the part of Contracting States at the time of ratification of the Convention. Article 15 addresses the State that may not want to become a magnet for civil and commercial litigation, allowing the state to declare that its courts would refuse to recognize a choice of court agreement that selects that court when, 'except for the choice of court agreement, there is no connection between that State and the parties or the dispute.' While some States, like the U.K., have a tradition of welcoming foreign litigation in their courts, others, like Switzerland, prefer that foreign cases be tried elsewhere. Article 15 allows a Contracting State to continue its current tradition in this regard.[46]

[45] Such grounds were determined unnecessary at the recognition and enforcement stage governed by Article 7, since by that time the choice of court agreement will already have been performed and will in fact have resulted in a judgment.

[46] Some forums, like New York, have a tradition of imposing conditions on foreign parties who agree to select their courts, including choice of local law and a minimum amount in controversy. See N.Y. General Obligations Law § 5-1402 (McKinney's 2001).

The declaration allowed in Article 16 provides potential for problems in the application of the Convention. It allows a Contracting State, upon ratification, to declare

> 'that its courts may refuse to recognise or enforce, as the case may be, a judgment of a court in another Contracting State if all parties are habitually resident in the State addressed, and all other elements relevant to the dispute and the relationship of the parties, other than the choice of court agreement, are connected with the State addressed.'

This provision may appear at first glance to be the recognition and enforcement counterpart of Article 4(2), which takes a purely domestic case out of the Convention at the jurisdictional stage if all parties are habitually resident in the forum State and have agreed that the courts of that state shall have jurisdiction. Article 16 may, however, create problems in certain circumstances by subjecting truly transborder transactions to purely domestic rules. For example, if a Contracting State requires local incorporation for certain types of investment, then a choice of court agreement in a contract between a wholly foreign-owned – but locally incorporated – business, and a local government or firm, could by Article 16 declaration be excluded from Convention coverage, unless the court were to recognize that it represents a truly international transaction. If the courts of a declaring State took an overly restrictive interpretation of the declaration where a choice of court agreement selects the courts of another state for dispute resolution purposes, it may then ignore the parties' choice and refuse recognition of a judgment rendered in accordance with the choice of court agreement, even though the real parties to the transaction are in fact from different Contracting States. Only the formality of local incorporation requirements would make the case seem domestic and within the Article 16 rules.

G. Intellectual Property Rights

Final decisions are yet to be made on the application of the Convention to intellectual property rights issues. While the exclusion in Article 1(2)(k) means that the Convention rules do not apply to the 'validity' of patents and trademarks, it leaves for future work whether other intellectual property rights (*e.g.,* copyrights, mass works, semi-conductor chips, integrated circuit topography, *etc.*) will be dealt with similarly. Distinctions between registered and unregistered rights, and the natural territorial nature of intellectual property rights, raise issues that are not yet fully resolved in the language of the Draft Text. The same is true of the Article 1(4) provision that would allow even patent and trademark validity to be considered if it arose as an 'incidental question' and the result bound only the parties to the dispute.

H. Damages Limitations

Article 11 of the Draft text provides a special rule for recognition and enforcement of non-compensatory (*e.g.*, punitive, multiple, and other exemplary) damages. Such damages '*shall* be recognized to the extent a court in the State addressed could have awarded similar or comparable damages,' and that court *may* (but need not) recognize damages beyond such amount. In considering damages amounts, however, paragraph (2) requires that the court consider the extent to which the damages in excess of those that would have been awarded in the recognizing court 'serve to cover costs and expenses relating to the proceedings.' Thus, if the judgment comes from a jurisdiction that does not award attorney fees, but the damages awarded 'serve' to cover those fees, they should be recognized and enforced.

Unlike Article 33 of the 1999 and 2001 Hague drafts, Article 11 of the Draft Text does not allow a court to recognize and enforce a judgment in an amount less than the full compensatory damages granted by the original court. This flows logically from the fact that the parties have submitted to the jurisdiction of the originating court, and that consent can and should be taken to extend to all results of that submission, including the originating court's rules on damages.

IV. Conclusions

With over 130 Contracting States, the New York Convention has had a significant impact on dispute resolution practice in international transactions. The existence of a system that supports the enforcement of both agreements to arbitrate and the resulting arbitral awards adds predictability and efficiency that cause business parties often to favor arbitration over litigation. The availability of a convention that would do for litigation what the New York Convention has done for arbitration would serve to place litigation and arbitration on a more equal footing in global commerce, thus allowing parties to transnational transactions the opportunity to select the form of dispute resolution based on its individual merits, rather than discrepancies in international rules of enforcement.

The Draft Text on Choice of Court Agreements offers a solid framework for the negotiation of a workable Hague Convention. Such a convention would both present a valuable opportunity to place litigation on a more equal status with arbitration for international private dispute resolution, and serve as a foundation for discussion and development of further progress in the realm of cross-border jurisdictional practice in national courts. Thus, it seems that the Draft Text can bring the focus of jurisdiction and judgments work at the Hague Conference into the realm of the possible, building on the consensus that does exist for a convention dealing with jurisdiction and the recognition and enforcement of judgments. It offers a valuable opportunity that brings with it few, if any, disadvantages.

CONVERSION OF THE ROME CONVENTION ON CONTRACTS INTO AN EC INSTRUMENT:

Some Remarks on the Green Paper of the EC Commission

Andrea BONOMI*

I. Introductory Remarks
II. The Opportunity of the Conversion of the Rome Convention into an EC Regulation
III. The Need for Revision of the Rome Convention
IV. The Scope of Application of the Future Instrument
  A. The Spatial Scope of Application
  B. The Scope of Application *ratione materiae*
    1. Matters Expressly Excluded
      a) Arbitration and Choice-of-Forum Agreements
      b) Insurance Contracts
    2. The Notion of Contractual Obligation
V. Freedom of Choice of the Applicable Law
  A. The Principle of Freedom of Choice and its Liberal Application
  B. Choice of Non-State Rules
  C. Tacit Choice of Law
  D. Purely 'Intra-Community' Contracts and Mandatory EC Provisions
VI. The Law Applicable in the Absence of Choice
  A. The Definition of the Characteristic Performance
  B. The Relationship Between the Principle of the Closest Connection and the Presumptive Rule
VII. Consumer Contracts
  A. The Need for a Special Rule
  B. The Revision of Art. 5
    1. The Material Scope of Application of the Protective Rules
      a) Types of Contract to Be Included in the Sphere of Protection
      b) The Notion of Consumer
    2. The Protection Mechanism
    3. Passive and Active Consumers
    4. Theory of Appearance
VIII. Employment Contracts

---

* Professor of Comparative Law and Private International Law at the University of Lausanne. The author is very grateful to Ms Susan Šarčević for the thorough linguistic correction of his text.

Yearbook of Private International Law, Volume 5 (2003), pp. 53-98
© Swiss Institute of Comparative Law
Printed in the Netherlands

IX. Internationally Mandatory Rules
  A. Mandatory Rules of the Forum State
    1. Definition of Internationally Mandatory Rules
    2. Internationally Mandatory Rules and EC Law
      a) Internationally Mandatory EC Rules
      b) Compliance of the Internationally Mandatory Rules of a Member State with EC Law
    3. A 'Rule of Reason' Based on the Principle of Proportionality
  B. Internationally Mandatory Rules of a Third State
    1. The Future of Art. 7(1)
    2. Mandatory Rules of Other Member States of the EU
X. Assignment of Receivables
  A. Effects of the Assignment Between the Parties and Towards the Debtor
  B. Effects of the Assignment Towards Third Parties
XI. Conclusions

I. Introductory Remarks

Since the new Article 65 of the EC Treaty was introduced by the Amsterdam Treaty, the process of 'communitarization' of private international law initiated by the European institutions has been advancing at a rapid pace.

After the adoption of six regulations[1] and the presentation of a further proposal[2] in the field of international procedural law, the Commission has now begun to tackle some questions relating to the conflict of laws.

The proposal for a Regulation on the law applicable to non-contractual obligations ('Rome II') was presented in July 2003.[3]

---

[1] EC Regulation No 1346/2000 of 29 May 2000 on insolvency proceedings; EC Regulation 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; EC Regulation No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extra-judicial documents in civil or commercial matters; EC Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; EC Regulation 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; EC Regulation No 2201/2003 of 27 November 2003 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.

[2] Proposal for a Council Regulation creating a European enforcement order for uncontested claims, COM(2002)159 final.

[3] Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ('Rome II'), COM(2003)427 final. The text of this

Prior to this, at the beginning of 2003, the Commission had presented a Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation.[4] Intended to launch a wide-ranging debate on the topic, this document invited interested parties to answer certain questions and send other comments and information until 15 September 2003. A public hearing on the subject was held on 27 January 2004.

The purpose of this article is to give a short overview of the content of the Green Paper and to discuss some of the most important modifications envisaged by the EC Commission. Some personal suggestions will be made on the points discussed in the Green Paper and other issues, which, in our opinion, are particularly important in the framework of the revision of the Rome Convention.[5]

II. Advantages of Converting the Rome Convention into a EC Regulation

As the Commission notes in the Green Paper[6], there are numerous arguments in favour of converting the Rome Convention[7] into a Community instrument on the basis of Articles 61 and 65 of the EC Treaty.

---

proposal is published in this *Yearbook*, *infra*, 'Texts, Materials and Recent Developments'. See one of the first commentaries on the preliminary draft: NOURISSAT C./ TEPPOZ E., 'Quelques observations sur l'avant-projet de proposition de règlement du Conseil sur la loi applicable aux obligations non contractuelles 'Rome II'', in: *JDI* 2003, pp. 7-32.

[4] COM(2002)654 final, of 14 January 2003.

[5] On the revision of the Rome Convention see JAYME E./ KOHLER Ch., 'Europäisches Kollisionsrecht 2003: Der Verfassungskonvent und das Internationale Privat- und Verfahrensrecht', in: *IPRax* 2003, pp. 485-495, at p. 493 *et seq.*; HANDIG Ch., 'Grünbuch über Rom I', in: *ecolex* 2003, pp. 290 *et seq.*; the collective book *Convergences and Divergences Between 'Brussels I' and 'Rome I'* (eds. MEEUSEN J./ PERTEGAS M./ STRAETMANS G.), Antwerpen (to be published in 2004); BOSCHIERO N., 'Verso il rinnovamento e la trasformazione della convenzione di Roma: problemi generali', in: PICONE P. (ed.), *Diritto internazionale privato e diritto europeo*, Padova (to be published in 2004). See also the 'Second consolidated version of a proposal to amend Articles 1, 3, 4, 5, 6, 7 and 9 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, and Article 15 of the Regulation 44/2001/EC (Brussels I)' (2002), by the European Group of Private International Law (hereinafter: EGPIL proposal) and the 'Deuxième commentaire consolidé' on that proposal (hereinafter: EGPIL *commentaire*), both at the website of the EGPIL, http://www.drt.ucl.ac.be/gedip/.

[6] Green Paper, §§ 2.2. - 2.4.

[7] Convention on the law applicable to contractual obligations, signed in Rome on 19 June 1980 and entered into force on 1 April 1991. The consolidated text is published in:

It should first be noted that, of the instruments now generally referred to as European private international law, the Rome Convention is the last one remaining in the form of an international treaty. The Brussels Convention of 1968, which was the logical antecedent of the Rome Convention, was converted into EC Regulation No 44/2001 ('Brussels I'). In the near future, the law applicable to non-contractual obligations – a subject matter originally included in the *travaux préparatoires* of the Rome Convention[8] – will also be the object of an EC regulation.[9]

Stressing the complementarity of all these instruments, the Commission points out in the Green Paper[10] that 'the rules on jurisdiction and choice of law applying to contractual and non-contractual obligations of a civil and commercial nature form an entity' and that an instrument in the form of a treaty 'does not improve the consistency of this entity'.

Furthermore, for the implementation of Articles 61 and 65 of the EC Treaty, the European institutions envisage the introduction of uniform choice-of-law rules in different areas of private law (not only contractual and non-contractual obligations but also divorce, parent-child relationships, matrimonial property, succes-

---

OJ C 27, 26.1.1998, pp. 34-54. The explanatory report, written by M. GIULIANO and P. LAGARDE, is published in: *OJ* C 282 (hereinafter: GIULIANO/LAGARDE Report). Of the extensive literature on the Convention, only a few general works are mentioned here: BIANCA C.M./ GIARDINA A. (eds.), *Convenzione sulla legge applicabile alle obbligazioni contrattuali (Roma, 19 giugno 1980)*, in: *Le nuove leggi civili commentate* 1995, pp. 901-1127; CZERNICH D./ HESS H. (eds.), *EVÜ – Das Europäische Schuldvertragsübereinkommen. Kommentar*, Vienna 1999; KASSIS A., *Le nouveau droit international européen des contrats internationaux*, Paris 1993; KAYE P., *The New Private International Law of Contract of the European Community*, Aldershot (etc.) 1993; LAGARDE P. 'Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 juin 1980', in: *Rev. crit. dr. int. pr.* 1991, pp. 287 *et seq.*; PLENDER R./ WILDERSPIN M., *The European Contracts Convention*, 2nd ed., London 2001; SACERDOTI G./ FRIGO M. (eds.), *La Convenzione di Roma sul diritto applicabile ai contratti internazionali*, 2nd ed., Milan 1994; TREVES T. (ed.), *Verso une disciplina comunitaria della legge applicabile ai contratti*, Padova 1983; VILLANI U., *La Convenzione di Roma sulla legge applicabile ai contratti*, 2nd ed., Bari 2001. The case law on the Convention is now collected in an on-line database edited by O. LANDO and L. BERNARDEAU under the auspices of the Trier Academy of European Law with the support of the European Union, at the website http://www.rome-convention.org.

[8] Work on codifying the rules on conflicts of laws in the Community began in 1967. On 23 June 1972, the experts presented a first preliminary draft Convention on the law applicable to contractual and non-contractual obligations: see K. LIPSTEIN (ed.), *Harmonisation of Private International Law by the EEC*, London 1978. It was only 1978 – six years after the accession of the United Kingdom, Ireland and Denmark – that the decision was taken to focus attention on contractual obligations so as to enable the negotiations to be completed within reasonable time.

[9] The so-called 'Rome II' Regulation; see *supra*, note 3.

[10] Green Paper, § 2.2.

sions and non-marital relationships) as 'ancillary measures' for implementing the principle of mutual recognition of decisions in civil and commercial matters.[11]

Therefore, all measures adopted by the European institutions in the field of private international law are to be regarded as the expression of a unitary policy, which has its *raison d'être* in one of the general goals set forth in the basic instruments of the European Union, i.e. the establishment of an area of liberty, security and justice (Art. 2 EU Treaty). In this framework, the use of international treaties and other measures of intergovernmental cooperation is anachronistic. On the contrary, it is reasonable that furthering the (formal and material) consistency of the various European instruments will facilitate their uniform and teleological interpretation.

These considerations are per se sufficient to justify the conversion of the Rome Convention into an EC instrument. Moreover, the Green Paper also mentions some practical reasons. One is that an EC regulation would enter into force much more rapidly and be directly applicable in all new Member States of the European Union.[12] In particular, it would not be necessary to conclude separate accession conventions, as was the case in the past,[13] nor to wait until the conclusion of the long ratification procedures by the Member States. Of particular importance is the argument in the Green Paper that conversion of the Convention into a Community instrument would automatically confer jurisdiction on the European Court of Justice (ECJ) to interpret the new instrument,[14] thus promoting its uniform application.[15]

In view of the above reasons, there can be no doubt as to the advantages of the conversion. As regards the type of Community instrument to be adopted, it should undoubtedly be a regulation. Not only has this solution been chosen for all other private international law instruments adopted or proposed until now, but also and more important is the fact that problems have occurred in the past when the conflict of law rules (or better 'rules on applicability') in several harmonisation directives were implemented at national level.[16] The diversity and sometimes inaccuracy of national implementation measures causes uncertainty, which is often

---

[11] See the *Draft Programme of Measures for the implementation of the principle of mutual recognition of decisions in civil and commercial matters*, in: *OJ* C 12, 15.1.2001.

[12] Green Paper, § 2.4.

[13] See the 'Accession Conventions' of 1984 (Greece), 1992 (Spain and Portugal) and 1996 (Austria, Finland and Sweden). The 1996 Convention is not yet in force in all Member States.

[14] Green Paper, § 2.3.

[15] Art. 68 EC Treaty empowers only national courts of last instance to raise an interpretative question before the ECJ. The same limitation was also provided by the First Protocols on the interpretation of the Convention, which did not enter into force.

[16] See WILDERSPIN M./ LEWIS X., 'Les relations entre le droit communautaire et les règles de conflit de lois', in: *Rev. crit. dr. int. priv.* 2002, pp. 1 *et seq.*, 289 *et seq.*

more detrimental than no harmonisation at all.[17] It is thus submitted that the future instrument should take the form of a regulation.

III. Need for Revision of the Rome Convention

The act of conversion would also provide an opportunity to modernise and revise some of the current rules of the Convention. The Green Paper mentions several arguments for the revision of the present text:[18]

- There is a need to increase the consistency between the European rules on choice of law and those on jurisdiction in contractual matters, in particular with respect to the innovations included in Articles 5, 15 and 22 of the Brussels I Regulation;
- The conflict rules of the Convention should be harmonised with the rules on applicability laid down in several EC directives, in particular in the field of insurance, consumer protection and placement of workers;
- According to many commentators, there is also a need to revise Article 5 of the Rome Convention concerning consumer protection, which has been the source of several interpretation problems involving its practical application;
- Finally, the Commission notes in the Green Paper that 'certain essential rules of the Convention are criticised on the ground of insufficient precision'. Reference is obviously made here to basic provisions such as Articles 3 (freedom of choice) and 4 (law applicable in the absence of a choice), which have often been the object of divergent interpretations in different contracting States.

All the above arguments will be examined in the following sections, each of which deals in greater detail with individual modifications to be introduced in the future regulation. Generally speaking, they confirm that converting the Convention into an EC regulation a quarter of a century after its adoption would provide a good opportunity to improve the functionality of this successful treaty.

[17] See also EGPIL *commentaire*, No. 6, p. 2.

[18] Green Paper, § 3.

IV. Scope of Application of the Future Instrument

A. Spatial Scope of Application

Like most international treaties containing uniform conflict rules – but contrary to European instruments in the field of international procedural law – the Rome Convention is applicable *erga omnes*, i.e., even in the absence of reciprocity and if it leads to the application of the law of a third State (Art. 2).

Some doubts arise as to the possibility and the advantage of retaining this approach when the Convention is converted into an EC regulation. On the one hand, it is not absolutely clear whether Articles 61 and 65 of the EC Treaty confer power on the European institutions to adopt uniform conflict rules applicable in relations with third countries.[19] On the other hand, in light of the close link between the 'communitarization' of private international law and the implementation of specific European goals, such as the mutual recognition of decisions and the creation of an 'area of freedom, security and justice', the question arises whether European conflict of laws instruments should be conceived as a set of rules for purely 'intra-European' situations, i.e., as a system of 'interlocal' rules, for instance, like those in the United States. It could be argued that such approach more adequately

---

[19] Such doubts, however, would no longer exist if Article III-170 of the Draft Treaty establishing a Constitution for Europe is adopted in its current version. This text reads as follows:

> '(1) The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and decisions in extra-judicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.
> (2) To this end, laws or framework laws shall lay down measures aimed *inter alia* at ensuring: *a*) the mutual recognition and enforcement between Member States of judgments and decisions in extra-judicial cases; *b*) the cross-border service of judicial and extra-judicial documents; *c*) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction; *d*) cooperation in the taking of evidence; *e*) a high level of access to justice; *f*) the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States; *g*) the development of alternative methods of dispute settlement; *h*) support for the training of the judiciary and judicial staff. (...).'

Contrary to Art. 65 EC Treaty, this text does not require that private international law measures adopted by the European institutions are 'necessary for the proper functioning of the internal market'. This means that the future European conflicts system could deal with all situations falling under the jurisdiction of the national courts of the Member States, even if they have no other connection with these States. See JAYME E./ KOHLER Ch. (note 5), p. 486.

reflects the special nature of the European Union as an integrated and quasi-federal entity, allowing specific European interests, such as the implementation of the fundamental freedoms, to be taken into account.

The Green Paper completely ignores this issue, thus suggesting that the universal character of the Convention will also be a feature of the future instrument. This is confirmed by Article 2 of the 'Rome II' proposal, which clearly provides for universal application of the regulation:

> 'Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.'

The discussion on features of the European system of private international law is still in an initial stage, thus making it difficult to take a position on such a fundamental question. At first glance, however, we are of the opinion that the *erga omnes* approach should be retained to the greatest extent possible.

First it should be noted that this approach has the obvious merit of avoiding the coexistence of two different sets of conflict rules, one applicable in purely 'intra-European' situations and the other in relations with third States. From the point of view of national courts and lawyers, this factor of simplicity is important and should be retained in the future.[20]

It is true that all European instruments adopted to date in the field of international civil procedure limit their scope of application to situations having a significant connection with one Member State (for instance, the domicile of the defendant or one of the parties in a Member State, the fact that proceedings are pending or that a decision has been rendered in another Member State). It should be noted, however, that considerations such as reciprocity and 'mutual trust' play a considerably more important role in matters of jurisdiction and recognition of judgments than in choice of law. This is particularly true in a field like contracts, where the freedom of the parties is widely recognised.

Moreover, the *inter partes* limitations of several jurisdictional rules of the Brussels Convention have proved not to be fully justified in certain situations. As a result, some commentators and courts have attempted to extend them to relations with third States by recognising *effets réflexes* to certain rules of the Convention (in particular Art. 16).[21] In exercising their sovereign discretion, a number of national legislators have even ruled that some jurisdictional rules of the Brussels Convention should be applied *erga omnes*.[22]

---

[20] As observed in the 'Rome II' proposal (p. 10), private international law rules are 'perceived as highly complex' by the legal profession, and this complexity is even greater when uniform law instruments have 'the effect of doubling the sources of conflict rules'.

[21] GAUDEMET TALLON H., 'Compétence et exécution des jugements en Europe', 3rd ed., Paris 2002, No. 100, p. 72, referring to the opinion of G.A.L. DROZ.

[22] See Art. 3(2) of the Italian Private International Law Act No. 218, of 31.5.1995, which provides for the application of sections 3 to 5 of the Brussels Convention 'even if the defendant is domiciled in a third State'. The national jurisdictional systems of other (current

These considerations show that the distinction between 'intra-Community' and external situations is not always justified.[23] This is also confirmed – to a certain extent – by the United States experience, since it is well known that American private international law rules originally conceived for interlocal situations are often applied in international cases as well. This is true of choice-of-law rules and fundamental jurisdictional principles such as due process.[24]

Another argument in favour of an *erga omnes* approach can be inferred from the functional link existing between choice-of-law rules and the free circulation of judgments. One of the main *raisons d'être* of the Rome Convention is to prevent *forum shopping*, a phenomenon that – in the absence of uniform conflict rules – can be favoured by the principles of the Brussels Convention and Regulation (concurrent fora, a strictly chronological *lis pendens* rule and a simplified mechanism of recognition and enforcement of foreign decisions). This makes it easy to observe that uniformity is of interest not only in purely 'intra-Community' cases but also when 'external' elements are present, and even when the law of a third State is applicable.[25] The establishment of an 'area of freedom, security and justice' implies that the place of the proceedings should not have any influence on the issue of the dispute. In the absence of uniform substantive rules, this result can only be achieved by uniform conflict rules applicable *erga omnes*.[26]

Finally, with respect to the opportunity to adapt the conflict rules to specific European interests (in particular, the freedom of circulation of goods and services), in our opinion, such interests can (and should) to some extent be taken into account in the framework of an *erga omnes* instrument. This can be done by improving some crucial rules of the Convention, in particular those of Articles 3 and 4 (see *infra*, sections V. and VI.). Such 'internal' policies, however, should not systematically prevail over the goal of uniformity.

---

or future) Member States are almost entirely modeled on that of the Brussels Convention: this is the case, for instance, in Spain and Hungary.

[23] See also the interesting remarks included in the 'Rome II' proposal, pp. 9-10.

[24] The extension of personal jurisdiction over a defendant domiciled in a foreign State must be in accordance with the due process clause and the 'minimum contact test', as in the case of a defendant domiciled in a sister State.

[25] If, for instance, a US corporation that has delivered goods to the Belgian branch of a Dutch company wants to initiate proceedings for payment of the price, the 'Brussels I' Regulation is applicable and gives the plaintiff the choice between Dutch and Belgian courts (domicile of the defendant, Art. 2 – place of delivery and seat of the branch, Articles 5(1) and 5(5) of the 'Brussels I' Regulation). In the absence of an *erga omnes* choice-of-law instrument, the conflict rules in Belgium and the Netherlands could be different, thus leading to diverging results. Nevertheless, the decision of the court first seized would benefit from the European system of mutual recognition.

[26] Elimination of the reference to the 'proper functioning of the internal market' in Art. III-170 of the Draft Treaty establishing a Constitution for Europe (see *supra*, note 19) appears to confirm this point of view.

B. Scope of Application *ratione materiae*

1. Matters Expressly Excluded

With respect to the substantive scope of application of the future instrument, the Green Paper takes into consideration only two matters which are presently excluded – in whole or in part – from the material field of the Convention: arbitration and choice-of-forum agreements, on the one hand, and insurance contracts, on the other.

a) Arbitration and Choice-of-Forum Agreements

Arbitration and choice-of-forum agreements are expressly excluded from the scope of application of the Rome Convention by Article 1(2)(d). The rationale of this exclusion was primarily to avoid all interference with other instruments, notably with the New York Convention of 1958[27] and the Brussels Convention.[28] However, these texts (like the 'Brussels I' Regulation now) include rules only on the formal validity of arbitration *viz.* choice-of-court agreements, without determining the law applicable to the material validity and interpretation of such agreements.

As regards the Brussels system, the need for special conflict rules could be questioned, since the ECJ has repeatedly indicated that the rules on formal validity are to be interpreted broadly so as to cover all issues relating to the existence and validity of consent of the choice of court.[29] However, it is evident that certain specific questions of validity cannot be resolved on the basis of Article 23 of the 'Brussels I' Regulation. This is notably the case where one of the parties assumes that his or her consent was manipulated as a result of mistake or fraud.

Within such limits, uniform conflict rules can be of some interest. The question is then how such rules should be conceived. The application of the general rules of the Convention is not a good solution. On the one hand, arbitration or choice-of-court agreements do not have a 'characteristic performance' and, on the other, it would be very difficult to determine the country with which they are most closely connected. In reality, only two options make sense: 1) to determine the validity of such agreements in accordance with the law applicable to the contract to which they refer or 2) to apply the *lex fori*. The first approach obliges the court or arbitrators to determine the law applicable to the merits in order to verify their competence. Moreover, it can be applied only when an agreement is made with respect to contractual disputes, but not in all other cases. Nevertheless, in our

---

[27] UN Convention on the recognition and enforcement of foreign arbitral awards of 10 June 1958.

[28] GIULIANO/LAGARDE Report, pp. 11-12.

[29] See ECJ, 20.2.1997, C-106/95, *MSG*, in: *ECR* 1997-I, p. 911; ECJ, 16.3.1999, C-159-97, *Castelletti*, in: *ECR* 1999-I, p. 1597; ECJ, 9.11.2000, C-387/98, *Coreck*, in: *ECR* 2000-I, p. 9337.

opinion, this solution is preferable to application of the *lex fori* as it promotes uniformity between the Member States.

b) Insurance Contracts

Insurance contracts covering risks located in the territory of the Union are currently excluded from the field of application of the Rome Convention. In such cases, the applicable law is to be determined in accordance with the conflict rules of certain harmonisation directives.[30] As illustrated in the Green Paper,[31] it is thus necessary to distinguish between three hypothetical situations:

- When the risk is located outside the territory of the Union, the Rome Convention is applicable. This can lead to the application of Articles 3 and 4 (if the insurance contract is not a consumer contract) or of Article 5 (if the policyholder is a consumer);
- When the risk is located in the Union and is covered by an insurer established in the Community, the applicable law is determined in accordance with the insurance directives;
- When the risk is located in the Union but is covered by an insurer established in a third country, neither the Convention nor the directives apply. Instead, the applicable law is to be determined in accordance with the national conflict rules of each Member State.

These distinctions are not objectively justified and reduce the transparency of the system. It is thus reasonable to drop them and to have one single conflict rule for all insurance contracts, irrespective of the location of the risk and the establishment of the insurer. In the absence of a choice of law by the parties, this rule could be based on the application of the law of the insurer's establishment but should provide for a mechanism of protection for the policyholder when he or she can be regarded as a consumer (i.e., when the contract is concluded for personal or family reasons).

2. Notion of Contractual Obligations

The Green Paper is silent with respect to the notion of contractual obligations, thus leaving it to the courts to limit its scope. To this end, the ECJ case law concerning the interpretation of Article 5(1) of the Brussels Convention and, in the future, of

[30] EC Directive No 88/357 on non-life insurance (Articles 7 and 8) and EC Directive No 2002/83 on life insurance (Art. 32).

[31] Green Paper, § 3.2.2.

Regulation No 44/2001 can provide useful guidance.[32] While this is a reasonable approach, it does not preclude the inclusion of some provisions on interpretation that would promote uniform interpretation of the future instrument.

A question often discussed by national commentators of the Convention is the applicability of the Convention to gifts. This issue has arisen in the United Kingdom and Ireland, where gifts are knowingly not characterized as contracts at common law because of the lack of consideration. While English commentators of the Convention suggest adopting a broader notion of contract for the Convention's purposes,[33] it is uncertain whether their argument will convince the courts. In civil law jurisdictions, it is generally admitted that gifts are a contract and are thus regulated by the Rome Convention. This view, however, did not prevent some national legislators from adopting special conflict rules for donations, thus raising the question of the compatibility of these rules with the Convention.[34] In our opinion, the future instrument could make it clear that it also applies to gifts and other gratuitous contracts.

V. Freedom of Choice of the Applicable Law

A. Principle of Freedom of Choice and its Liberal Application

The freedom of choice of the applicable law by the parties is one of the cornerstones of the Rome Convention and will certainly be retained in the future regulation.

Notwithstanding some necessary adaptations to assure application of the mandatory rules of EC law whenever the contract is exclusively or closely connected with the European Union (see *infra*, point D), the liberal approach of the Convention should be preserved. In the framework of an increasingly globalised world, the parties to international contracts should be granted the power to designate the law they deem to be most appropriate to govern their relations. This means that the contracting parties will continue to have the right:

- To choose the law of a State with which their relationship has no other objective connection;

---

[32] See, for instance, the recent decision of the ECJ, 17.9.2002, C-344/00, *Tacconi*, in: *ECR* 2002-I, p. 7357, concerning pre-contractual liability.

[33] DICEY & MORRIS, *The Conflict of Laws*, 13th ed. (by L. COLLINS), London 2000, No. 32-023, p. 1204.

[34] See, for instance, Art. 24 of the Italian PIL Act of 31.5.1995; FUMAGALLI L. 'La Convenzione di Roma e la legge regolatrice delle donazioni', in: *Riv. dir. int. priv. proc.* 1995, pp. 589 *et seq*.

- To 'split' the contract by making a partial choice of law, and
- To conclude a choice of law agreement at any time, i.e., before or after the conclusion of their contract.

The preservation of these principles is not questioned in the Green Paper. The document prepared by the Commission focuses on three other issues: the opportunity to admit the choice of non-State rules of law, the conditions for a tacit choice, and restrictions of the party autonomy in purely 'intra-Community' cases.

B. Choice of Non-State Rules

The question of the admissibility of a choice of non-State rules arises especially when references in international commercial contracts are made to notions such as customs of international trade, general principles of law or the *lex mercatoria*.

In the past, such expressions were regarded by State courts and numerous private international law scholars with considerable mistrust due to their indefiniteness. How should the content of general principles of law or the *lex mercatoria* be ascertained in the absence of any codification of such rules?

The situation has evolved significantly since the publication of compilations or restatements of principles, for example, the Principles of European Contract Law ('PECL', also known as the 'Lando Principles')[35] and, in particular, the UNIDROIT Principles on International Commercial Contracts.[36] These texts can be (and increasingly are) referred to in clauses of international contracts. Even in the absence of an explicit reference to such texts, they offer the courts a tangible basis for the concretisation of expressions such as general principles of law or the *lex mercatoria*. In both situations, they significantly reduce the uncertainty and risk of gaps. In this framework, the issue of the admissibility of the choice of non-State rules takes on a different and much more concrete importance.

The current text of Article 3 of the Convention contains no reference to the choice of non-State rules. The wording of the provision ('A contract is governed *by the law* chosen by the parties.') is generally regarded as referring exclusively to the choice of *State* laws. The correctness of this restrictive construction is indirectly confirmed by the fact that texts intending to admit the choice of non-State rules generally underline this possibility by referring to the choice of 'rules of law' or by using similar expressions. This is true, for instance, in the case of Article 28 of the

---

[35] Ole LANDO was chairman of the Commission on European Contract Law that elaborated the Principles. For the text and more information on the PECL, see the website: http://www.cbs.dk/departments/law/staff/ol/commission_on_ecl/index.html.

[36] See the UNIDROIT website: http://www.unidroit.org. Court decisions and arbitral awards based on the Principles are accessible online at the UNILEX databank.

UNCITRAL Model Law on International Commercial Arbitration[37] and various national provisions concerning the rules applicable to the merits of a dispute submitted to arbitration.[38]

The exclusion of the choice of non-State law does not mean that the parties' reference to such rules must be completely ignored. State courts will normally regard a reference to non-State rules as the 'incorporation' of such rules into the contract and will consider it valid within the limits accorded to party autonomy by the State law applicable to the contract. Since there is no valid choice of law, however, the applicable law is to be determined by the objective connecting factors laid down in Article 4 of the Convention. As a result of this interpretation, *all* mandatory rules of the applicable law (not only the 'internationally mandatory rules' or the 'overriding statutes') always have priority over non-State rules chosen by the parties.[39]

This solution is not satisfactory because it implies an unnecessary restriction of party autonomy. Furthermore, it contravenes the solution that normally prevails when the dispute is resolved by arbitration: arbitrators tend (and are generally allowed) to respect the parties' choice of law even though non-State rules are designated.

The future regulation should put an end to such inconsistencies by expressly admitting the choice of non-State rules. This result could be achieved by simply stating that 'a contract shall be governed by the rules of law chosen by the parties', as in the texts mentioned above. This solution, however, would raise many questions about limitations of the parties' freedom. For the sake of clarity, it would be better to have a more explicit and detailed provision specifying:

- The kind of non-State rules that can be chosen (general principles of law or also customs of international trade, the *lex mercatoria* and international conventions not yet or no longer in force);
- That such a choice is binding on the judge only if he can ascertain the content of the rules designated by the parties;
- That in the absence of sufficient ascertainment of the content and in the case of gaps, the contract will be governed by the State law designated by objective connecting factors.

---

[37] This provision reads: 'The arbitral tribunal shall decide the dispute in accordance with such *rules of law* as are chosen by the parties as applicable to the substance of the dispute.'

[38] See, for instance, Art. 187 of the Swiss PIL Act of 1987 and Art. 834(1) of the Italian Code of Civil Procedure, both of which refer to 'the rules' chosen by the parties.

[39] This means, for instance, if the UNIDROIT Principles are chosen, the rules on vices of consent of the law applicable to the contract (which are regarded as mandatory in most national laws) will always prevail over Articles 3.4 to 3.9 of the Principles.

C. Tacit Choice of Law

Another issue discussed in the Green Paper with respect to party autonomy is a tacit choice of law. The second sentence of Article 3(2) of the Convention provides that the choice need not be express but can also be 'demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case'.

The term *certainty* – though tempered by the adjective *reasonable*[40] – makes it clear that the drafters of the Convention intended to make a distinction between tacit choice – i.e., a choice which the parties certainly had in mind, although they did not declare it *expressis verbis* – and a purely *hypothetical* choice – i.e., a choice which the parties would probably have made if they had considered the issue of the applicable law. In practice, however, the borderline between these two situations is rather vague. It is thus not surprising that the courts in different contracting States have been more or less strict about discerning a tacit choice of law.[41]

In the framework of the revision, the question arises whether this source of divergence can be eliminated by modifying the wording of the relevant provision. The Commission uses extreme caution,[42] noting that the drafters of the Convention intended 'to leave the court considerable room for manoeuvre in interpreting the parties' choice', and that accordingly Article 3 'is voluntarily written in general terms'. Moreover, it underlines that the European Court of Justice – which will have competence to interpret the instrument under the conditions of Article 68 of the EC Treaty – can contribute to reducing 'the most glaring uncertainties'. While the Commission advocates alignment of the various language versions of Article 3, it only abstractly evokes the possibility of modifying this provision in the future instrument, without making a concrete proposal.

In our opinion, two options should be considered. The first one is to simply drop the possibility of a tacit choice. There are some good arguments in favour of such a radical solution. One should keep in mind that the main goal of the future instrument is to promote simple and uniform solutions of choice-of-law issues within Europe. The admission of an express choice of law by the parties meets this objective perfectly; however, the same cannot be said of a tacit choice. In such situation the parties (both of them!) take it for granted that the contract is subject to a certain law, but fail to mention it! The interpretation of this silence can be the

[40] This qualification is also present in the German (*mit hinreichender Sicherheit*) and Italian (*in modo ragionevolmente certo*) versions of the Convention, but not in the French (*de façon certaine*), Spanish (*de manera cierta*) and Portuguese (*de modo inequívoco*) texts. According to the Green Paper, 'it is not impossible that this difference is at the root of divergent interpretations in the countries concerned'. In our opinion, however, the weight of this slight terminological divergence should not be overestimated.

[41] German courts have often found that the parties made an implied choice in the sense of Art. 3(1) of the Convention. See, for instance, the decisions of the *Bundesgerichtshof* of 28.1.1997, in: *RIW* 1997, p. 426, and of 14.1.1999, *ibid.* 1999, p. 537.

[42] Green Paper, § 3.2.4.3.

beginning of long and complicated discussions between the parties to the dispute. Obviously this runs counter to the goals of simplicity and predictability.

Another reason for excluding tacit choice could be to increase the convergence between jurisdiction and choice-of-law instruments. For the formal validity of choice-of-court agreements, Article 23 of the 'Brussels I' Regulation requires the compliance with certain formal requirements that have often been the object of interpretation by the Court of Justice. If the choice-of-law clauses were made subject to the same conditions, their interpretation could benefit from the experience acquired through the application of the Brussels system.

We are conscious, however, that this solution is contrary to the tradition of most European private international law systems and could therefore evoke strong resistance on the part of both judges and scholars in the Member States. Furthermore, it contravenes the more general principle of freedom of form in international contracts, as codified in Article 1(2) of the UNIDROIT Principles.

An alternative (and less radical) solution would be to have the future instrument contain 'more precise information regarding the definition and the minimum requirements for there to be a tacit choice', as mentioned in rather general and vague terms in the Green Paper.[43] This could be achieved in two ways.

First, it could be stipulated that a tacit choice may only be inferred if the terms of the contract or circumstances of the case clearly indicate that the parties were aware of the choice-of-law issue. Such precision would prevent the courts from inferring an implicit choice of law in situations where the parties did not consider the choice-of-law issue at all.

The other option is to expressly specify certain circumstances which, taken by themselves and without other elements, may not be regarded as constituting a tacit choice. In this sense, the EGPIL suggested including a new provision providing that 'the choice of a court or of the courts of a given State shall not in itself be equivalent to a choice of the law of that State'.[44]

D. Purely 'Intra-Community' Contracts and Mandatory EC Provisions

Although the freedom of choice is very broad in the system of the Rome Convention, it is subject to some restrictions to prevent derogation from mandatory rules.

The first restriction, which is laid down in Article 3(3), applies to purely 'internal' contracts. While a choice of law by the parties is possible in such contracts, it may not prevent the application of mandatory provisions of the State where 'all other elements relevant to the situation' are located. On the contrary, when some international elements are present, freedom of choice is subject only to the general restrictions of Articles 7 and 16, i.e., to the application of 'internation-

[43] Green Paper, § 3.2.4.3.

[44] EGPIL proposal, § III.

ally mandatory rules' (*lois de police*, *norme di applicazione necessaria*, overriding statutes) of the forum State or of a third State, and to the public policy exception.

Special restrictions apply to consumer and employments contracts, in which the choice of law cannot deprive the weaker party of the protection granted to him by the mandatory rules of the law that would otherwise be applicable in the absence of a choice by the parties.[45] With respect to consumers, however, this limitation of the parties' freedom only concerns the 'passive' consumer, i.e., a consumer who has contracted under the conditions set out in Article 5(2).[46]

In certain cases, these limitations have proved to be insufficient to guarantee the application of the mandatory provisions of EC law, especially the rules included in harmonisation directives. If the contractual relation is international (and if the special rules of Articles 5 and 6 are not applicable), the contracting parties may choose the applicable law without the restrictions of Article 3(3), even if the situation is exclusively connected with two or more EU Member States (e.g., a contract between two parties established in two Member States). For instance, they can designate the law of a third State, in which EC law is obviously not in force, or the law of a Member State where an EC directive has not yet been implemented, thus avoiding the mandatory application of EC law.

In such situations, the application of EC law can only be assured if the relevant provisions are characterised as 'internationally mandatory rules', within the meaning of Article 7 or by way of the public policy exception.

In order to guarantee more efficient protection of the 'minimum standard' provided for by EC law, the Green Paper endorses an EGPIL proposal to include a new paragraph in Article 3, which would read as follows:

> 'The fact that the parties have chosen the law of a non-Member State whether or not accompanied by the choice of a tribunal of a non-Member State, shall not, where all other element relevant to the situation at the time of the choice are connected with one or more of the Member States, prejudice the application of the mandatory rules which are contained in or originate in acts of the institutions of the European Community and which are applicable in a Member State whose law would be applicable in the absence of a choice of law by the parties'.

This solution is very reasonable because it takes account of the special features of EC law as a 'supranational' system of law, whose rules are directly applicable in the Member States. The application of the Community standard is thus ensured in

[45] I.e., by the law of the habitual residence of the consumer (Art. 5(3)) or, in the case of employment contracts, by the law of the habitual place of work or by that at the place of business through which the employee was engaged (Art. 6(2)).

[46] For a more detailed discussion of this aspect, see *infra* point VII.B.3.

all purely European situations, in particular in all relationships involving the functioning of the common market.

However, it is important to note that the proposed rule would apply only to purely 'internal' (in the sense of 'intra-Community') situations, such as the one that gave rise to the well-known *Gran-Canaria-Fälle* before German courts.[47] In such situations, the choice of the law of a third State would not exclude the application of mandatory provisions of EC law.

On the contrary, the scope of the new rule would not be as broad as that of certain 'rules on applicability' included in several directives in the field of consumer protection. These rules tend namely to impose the mandatory application of the directive implementation rules even in situations with an 'extra-Community' element (i.e., situations which are not purely 'internal' from the point of view of the Union), on condition that there is 'a close connection with the territory of the Member States'.[48] Contrary to the opinion of the EGPIL,[49] it appears therefore that the inclusion of the proposed 'Community standard clause' in Article 3 would not permit the rules of the directives to be repealed.

For similar reasons, the proposed rule would not cover the type of situations decided by the ECJ in the well-known *Ingmar* case.[50] In that case, the contractual relation was not purely European since one of the parties (the principal) was established in a third country.

As a consequence, the application of Community law standards in real 'international' (i.e., not purely European) situations will have to be granted – in the

---

[47] In those cases, the disputes concerned contracts (in particular, sales and time-sharing contracts) concluded by German tourists during their holidays in Spain. The application of the Community rules on withdrawal from the contract was not assured because Spain had not yet implemented the relevant EC directives. Art. 5 of the Rome Convention could not apply because the buyers were not 'passive' consumers within the meaning of that provision.

[48] Such formulation is used in several directives in the field of consumer protection: see e.g. Art. 7(2) of the EC Directive No 1999/44 of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, in: *OJ* L 171, of 7.7.1999, or Art. 6(2) of the EC Directive No 93/13 of 5 April 1993 on unfair terms in consumer contracts, in: *OJ* L 95, of 21.4.1993.

[49] According to the EGPIL, '*le texte proposé répondrait à l'objectif des règles d'applicabilité que contiennent certaines directives* (...). *Il y aurait donc lieu d'abroger ces dispositions*': EGPIL *commentaire*, No. 14, p. 5.

[50] ECJ, 9.11.2000, *Ingmar GB Ltd. v. Eaton Leonard Technologies Inc.*, C-381-98, in: *ECR* 2000-I, p. 9305; *Rev. crit. dr. int. priv*. 2001, p. 107, note IDOT L.; in: *JDI* 2001, pp. 511 *et seq*., with note by J.-M. JACQUET. In this decision, the ECJ found that certain rules of the EC Directive on commercial agents (notably Articles 17 and 18) are to be applied in favour of an agent domiciled in a Member State, although the contract had been explicitly submitted to the law of a third State.

future as well – by means of the 'internationally mandatory rules' laid down in Article 7.

VI. The Law Applicable in the Absence of Choice

The determination of the law applicable to the contract in the absence of a choice by the parties is one of the key issues dealt with by the Rome Convention. The present mechanism is based on the interaction between the general principle of the closest connection (Art. 4 (1) and (5)) and the presumptive concretisation of that principle by way of the concept of characteristic performance (Art. 4(2)). This complex provision raises numerous complicated issues and has been the object of divergent applications by the courts of the contracting States. For the sake of simplification and uniformity, it is thus desirable and urgent to clarify this rule, reducing the discretion presently enjoyed by national courts.

The discussion in the Green Paper is limited to the relationship between the presumption and the principle of the closest connection. In our opinion, however, the new text should also tackle another issue, notably the definition of 'characteristic performance'.

A. Definition of Characteristic Performance

The present text of the Convention does not include a definition of characteristic performance. From the Report by Giuliano and Lagarde, it can be inferred that the characteristic performance is, in general, non-pecuniary; however this criterion is not always conclusive, as many commentators of the Convention have pointed out. Nonetheless, the current text provides no other guidance for interpretation. As a result, national courts enjoy a wide discretion prejudicial to the predictability of the applicable law. At the same time, the uncertainty linked with the definition of characteristic performance weakens the presumption vis-à-vis the general principle of the closest connection. As a matter of fact, a national court that has no guidance in determining the characteristic performance often tends to rebut the presumption or simply to ignore it.[51]

---

[51] The following decision of the Italian *Corte di cassazione* is a good example of this attitude. In a dispute concerning the execution of a sale, which involved not only delivery of the machines but also their montage, the Italian court completely ignored the presumption (which probably would have led to the application of the law at the seat of the German seller) and applied Italian law on the basis of the principle of the closest connection: *Corte di cassazione*, 10.3.2000 No. 58, in: *Riv. dir. int. priv. proc.*, 2000, p. 773.

To reinforce the presumptive rule and thus increase predictability, the EGPIL has suggested that the future instrument should contain a catalogue specifying the characteristic performance for the most common contractual types.[52] Of course, this solution is not new as it was adopted in the Swiss Private International Law Act of 1987 (Art. 117(3)). The Swiss model has been followed – with some variations – in other recent national private international law codifications, including the Russian Civil Code[53] and the South Korean PIL Act.[54]

The Swiss experience shows that courts and lawyers appreciate the precision of the catalogue of Article 117(3). A legislative definition often avoids long and abstract speculation on how to determine the characteristic performance, thus facilitating the settlement of disputes arising in international commercial relations.

The proposed specification is also consistent with the new formulation of Article 5(1) of the 'Brussels I' Regulation, which can be regarded as a first attempt to identify the characteristic performance in broad categories of contracts such as those for the supply of goods or services. This text can be regarded as an embryo for the catalogue to be included in the 'Rome I' Regulation.

B. Relationship Between the Principle of the Closest Connection and the Presumptive Rule

In the framework of the revision of Article 4 of the Convention, the European institutions should strive for a better definition of the relationship between the principle of the closest connection and the presumption of Article 4.[55] As a matter of fact, the use of the concept of presumptive rule – which is not very common, at least in civil law jurisdictions – has given rise to rather divergent interpretations by commentators and courts of the contracting States.

According to one view, the presumption of Article 4(2) should not be regarded as a veritable rule, but rather as simple guidance that is not binding on the

[52] EGPIL proposal, point IV. The proposal does not (yet) include any concrete example.

[53] Art. 1211, introduced in 2001. In this text, it is not a question of the 'characteristic performance' but of the performance 'of crucial significance for the content of the contract': see this *Yearbook* 2002, p. 358, and the comment of LEBEDEV S., MURANOV A., KHODYKIN R., KABATOVA E., 'New Russian Legislation on Private International Law', *ibid.*, pp. 130-132.

[54] Art. 26(2) of the Conflict of Laws Act, as amended 2001, in this *Yearbook*, *infra*, 'Texts, Materials and Recent Developments'. See also the commentary by SUK K. H., 'The New Conflict of Laws Act of the Republic of Korea', *infra*, pp. 99-141.

[55] Our discussion is limited to the presumption of Art. 4(2), which is of particular importance in light of its general scope; however, similar considerations could also be made in respect of the 'special' presumptions of Art. 4(3) and (4).

courts.[56] The consequence of this flexible approach is that the presumption can be rebutted whenever the circumstances of the case reveal that the contract has a closer connection with a different country. Therefore, the so-called 'escape clause' of Article 4(5) plays a central role in determining the applicable law. This approach has been followed in some English and French decisions.[57]

On the contrary, other commentators and courts of different contracting States have preferred a more rigid interpretation of the choice-of-law mechanism of Article 4. According to this view, the presumption normally indicates the country with which the contract is most closely connected. The escape clause of paragraph 5 should therefore be used only in exceptional situations, in particular – as was formulated by the Supreme Court of the Netherlands in a well-known decision of 1992[58] – when the country of habitual residence of the party carrying out the characteristic performance has 'no real value as a connecting factor'.

In our opinion, this second approach presents several obvious advantages.[59] The trend towards more flexible conflict rules that characterised American and European conflict of laws in the course of the twentieth century was a necessary reaction against traditional connecting factors that could lead to fortuitous solutions or raise unsolvable problems in practice, for instance, the place of conclusion or the place of execution of the contract. Flexible mechanisms, such as the search for the closest connection, are based on a casuistic approach and thus generally prevent arbitrary results.

Their practical application, however, constitutes a constant source of uncertainty that increases the risk of judicial litigation. This is in contradiction with the liberalisation and development of international trade that we have been experiencing on a regional and global scale since the end of the last century. Both the European and the global market require simple and clear-cut conflict rules that facilitate the task of the courts, thus reducing the time and costs of the judicial resolution of contractual disputes. Furthermore, a more rigid choice-of-law mecha-

---

[56] See, for instance, DICEY & MORRIS (note 33), No. 32-123, pp. 1240 *et seq.*; BARATTA R., in: BIANCA C.M./ GIARDINA A. (note 7), pp. 961 *et seq.*; FRIGO M., in: SACERDOTI G./ FRIGO M. (note 7), pp. 24 *et seq.*

[57] *Bank of Baroda v. Vysya Bank*, Q.B. (Com. Ct.), 13.12.1193, in: *Lloyd's Law Reports*, 1994, p. 87; *Definitely Maybe (touring) Ltd v. Marek Lieberg Konzertagentur GmbH*, in: [2001] *All England Reports*, Commercial Cases 1; *Caledonian Subsea Ltd. v. Micoperi Srl*, in: 2001 *Scots Law Times* 1186. *Cour d'appel* Versailles, 6.2.1991, in: *Rev. crit. dr. int. pr.,* 1991, p. 745, with a critical note by P. Lagarde. See also the Italian decision quoted above (note 51).

[58] Hoge Raad, *Nouvelles des Papeteries v. BV Machinenfabriek BOA,* 25.9.1992. See the note by HUDIG-VAN LENNEP W., in: *Netherlands International Law Review* 1995, p. 259.

[59] For a *plaidoyer* in favour of a more rigid application of Art. 4 of the Rome Convention, see recently MANKOWSKI P., 'Rechtssicherheit, Einzellfallgerechtigkeit und Systemgerechtigkeit bei der objektiven Anknüpfung im Internationalen Schuldvertragsrecht – Zur Reichweite des Artikel 4 Absatz 5 EVÜ', in: *ZeuP* 2002, pp. 804-822.

nism enhances the predictability of court decisions, lowering the risk and costs of uncertainty.[60]

This is particularly true in contractual relations, a field where – with the notable exceptions of contracts concluded by a weak party and of certain internationally mandatory rules – the standards of protection granted to the parties by the different national legal systems are generally regarded as more or less equivalent. The very liberal attitude of the Rome Convention towards party autonomy implicitly confirms this philosophy and reduces the importance of the principle of the closest connection. The parties are permitted to submit their relations to any legal system whatsoever, because there is a tacit assumption that the vast majority of legal systems are capable of realizing a proper and equilibrate composition of the parties' interests. As a result, there is no need to devote significant private and judicial resources to determining the governing law.

Last but not least, a more rigid choice-of-law rule is also more coherent with one of the main objectives of the Convention and the future Regulation, i.e., establishing uniform criteria for determining the law applicable to a contract in Europe. This goal is particularly important in the framework of the European judicial area, where the rule on *lis pendens* of the 'Brussels I' Regulation, combined with the automatic recognition of court decisions, can lead – in the absence of uniform conflict rules – to an increase of *forum shopping* or even to a 'race to courts' that ought to be discouraged as far as possible.

From the above it follows that it is more reasonable to rely on simple and significant connecting factors, permitting a derogation (i.e., the search for the closest connection) only under exceptional circumstances. From this point of view, the residence of the party carrying out the characteristic performance has proved to be a good criterion. On the one hand, it leads to the application of a law that is usually familiar to at least one of the parties and does not 'surprise' the other; on the other hand, it favours the exporter of goods and services, i.e., the party who is more active and whose performance is more complex and involves greater risks – in a word the real protagonist of both the European and the global market. This choice-of-law rule is thus perfectly coherent with the objective and philosophy of EC law, in particular with the free circulation of goods and services and the State of origin principle.

As clearly indicated in the Green Paper, the Commission is also in favour of establishing a more rigid choice-of-law mechanism. To this end, it suggests two possible solutions. The first one would be 'purely and simply to delete paragraph 1 (*scil.* of Art. 4) so as to emphasise the exceptional character of paragraph 5'. In other words, the current presumption would become the rule, and the escape clause

---

[60] The uncertainty linked with the principle of the closest connection is clearly illustrated by the recent decision of the French *Cour de Cassation* of 4 March 2003, in which a contract of carriage has (quite surprisingly) been subjected to the law at the place of destination (i.e., to the *lex fori*): *Rev. crit. dr. int. pr.* 2003, p. 285, with critical observations by P. LAGARDE.

the exception. The alternative option is to 'amend paragraph 5 itself' and to reformulate it in accordance with the exception clause included in Article 3(3) of the proposal for a 'Rome II' Regulation that only operates 'where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country.'[61]

The shortcoming of the first solution is that a conflict rule based on the notion of characteristic performance cannot be truly general, since it is widely admitted that in certain contract types no performance can be qualified as 'characteristic'.[62] In our opinion, it is not very reasonable to upgrade the presumption to a general rule, especially if one has to recognise that the rule cannot have a truly general scope of application.

Furthermore, there are several arguments for retaining the principle of the closest connection, as it is currently expressed in Article 4(1). Under the influence of the Rome Convention (and the Swiss PIL Act of 1987), the principle of the closest connection has been incorporated into many national codifications of private international law and at least one important uniform law instrument, the CIDIP Convention of Mexico of 1994.[63] Furthermore, some features of this principle are also present in the American notion of 'most significant relationship', which is embodied in § 188 of the Second Restatement on Conflict of Laws and which – under the influence of that text – is applied by the courts of many US jurisdictions. For these reasons, we believe that, in the future, the principle of the closest connection can serve as the first brick in the edifice of a unified system of conflict rules in the field of contracts at a universal level. On the contrary, it is rather unlikely that a universal instrument could be built on the notion of characteristic performance, which is unknown in many non-European systems and has already been rejected by the drafter of the Mexico Convention.

In view of the above, we favour the second option envisaged by the Commission, as it would substantially reduce the operation of the escape clause, without altering the general structure of the current text. In our opinion, however, the formulation of the exception clause should be even more restrictive than that chosen for the 'Rome II' proposal. The model could be the well-known Article 15 of the Swiss PIL Act of 1987, according to which the law designated can be displaced 'as an exception' only

---

[61] The wording adopted in the 'Rome II' proposal is motivated by the remark that 'this clause generates a degree of unpredictability as to the law that will be applicable' and therefore 'must remain exceptional'.

[62] This is obvious, for instance, in the case of barter. This circumstance is also taken into account in the present wording of Art. 4 (5), according to which '[p]aragraph 2 shall not apply if the characteristic performance cannot be determined'.

[63] FERNANDEZ ARROYO D.P., 'Convention interaméricaine sur la loi applicable aux contrats internationaux : certains chemins conduisent au-delà de Rome', in: *Rev. crit. dr. int. pr.* 1995, pp. 178-186.

> 'if, considering all the circumstances, it is apparent that the case has only a very loose connection with such law and that the case has a much closer connection with another law.'

The Swiss experience shows that, because of the double cumulative condition required for its operation – a very loose connection with the designated law *and* a much closer connection with another law – the courts are extremely prudent and apply this rule only in very exceptional circumstances.[64]

As a result of this modification, the escape clause would apply only in cases where, in light of the particular circumstances, the residence (or place of administration) of the party carrying out the characteristic performance cannot be considered as a significant connecting factor for the relationship at stake. This could occur, for instance, when the residence of the party concerned is situated (e.g. for tax reasons) in an offshore country with which the contract has no other significant connection, or when the actual residence or place of administration of that party is unknown to the counterpart.

In addition to formulating the escape clause as a real 'exception' clause, some other drafting adaptations could be made in the future Article 4 of the Convention to improve the definition of the relationship between the closest connection and the characteristic performance. In this respect, it would be better to eliminate all references to a 'presumption' and simply state that – subject to the exception clause and special rules for certain categories of contracts – 'the contract *is* most closely connected' with the country of the residence or the central administration of the party carrying out the characteristic performance. This wording would have the merit of eliminating all discussions about the meaning and implications of the term 'presumption', making it clear that it should be regarded not as mere guidance for the courts but as a veritable rule of law.

VII. Consumer Contracts

A. The Need for a Special Rule

The Green Paper devotes considerable space to the revision of Article 5 of the Rome Convention on consumer protection. Some of the reasons for a modernisation of this rule have already been mentioned above (guaranty of a 'Community minimum standard', harmonisation with the 'Brussels I' Regulation and with the

[64] See the case analysis by von Overbeck A.E., 'The Fate of two Remarkable Provisions of the Swiss Statute on Private International Law', in this *Yearbook* 1999, pp. 119 *et seq.* Since 1999, there has been no major change in the courts' attitude towards Art. 15 of the PIL Act.

rules of applicability of several consumer protection directives).[65] The revision of this provision would also provide the opportunity to 're-think' the issue of the law applicable to e-commerce transactions and to 're-define' the relationship between the special connecting factors of Article 5 and the 'internationally mandatory rules' of Article 7 of the Convention.

Before examining the problems arising in connection with this provision and possible improvements envisaged by the Commission, it is necessary to stress that the importance of the issue should not be exaggerated. Consumers in Europe already enjoy considerable protection on both the substantive and the private international law level. The real problem is not the *content* of the protective rules, but rather their *effectiveness*. Consumer disputes are small claims rarely brought before the courts. Thus the best way to improve consumer protection is to create effective alternative dispute resolution mechanisms, a goal the European institutions are actively pursuing.[66] Therefore, we caution against overestimating the reform of Article 5 in the framework of the revision of the Rome Convention. This opportunity can admittedly be used to re-organise the (already excellent) protection mechanism of the Convention; however, the issue should not be an obstacle to the adoption of a new and more efficient instrument.

The first issue relating to consumer protection has already been discussed in connection with the freedom of choice. The introduction of a 'Community standard clause' such as that discussed above (see *supra*, section V.D) would protect consumers in all purely 'intra-European' cases, ensuring the application of mandatory Community rules despite the choice of the law of a third State. This proposal, however, would not protect consumers in the presence of an 'extra-Community' element, and more generally in the absence of Community substantive rules. A special choice-of-law provision will still be needed in such situations.

B. Revision of Article 5

Three aspects need to be taken into account when discussing the revision of Article 5: 1) the material scope of application of the protective rule, i.e., the notion of consumer contract; 2) the modality of protection: should it be based on a special connecting factor or on the mandatory application of the protective rules? should freedom of choice be admitted and to what extent? and 3) the spatial conditions for application of the protection mechanism: should it benefit only the 'passive' or also the 'mobile' consumer? Although these aspects are interconnected, they will be discussed separately for the sake of clarity.

---

[65] See *supra*, notes 16 and 48.

[66] See the Green Paper on alternative dispute resolution in civil and commercial law, COM(2002)196 final.

1. Material Scope of Application of the Protective Rules

a) Types of Contracts to Be Included in the Sphere of Protection

Without discussing the material scope of the protective rule in detail, the Green Paper merely makes reference to the possibility that 'the types of contracts currently excluded'[67] would be included in the future provision.

In our opinion, such enlargement is certainly desirable. One of the most evident problems raised by Article 5 of the Convention is its inapplicability in situations that cannot be characterised as 'supply of goods or services'. For instance, in a well-known decision of 1997,[68] the German Federal Court found that time-sharing contracts were not included in the scope of application of Article 29 EGBGB (the equivalent of Article 5 of the Rome Convention) and refused to apply that provision by analogy. Such result is evidently unsatisfactory and should be prevented in the future instrument.

In light of the above, the EGPIL suggested that the protective rule of the future instrument should apply to all contracts, 'the object of which is the supply of property, whether movable or immovable, or of services'.[69] Compared with the present wording, this proposal would certainly be a step forward; however, it could still be a source of confusion. The reference to 'property' could raise doubt whenever the object of the contract is the use of (material or immaterial) rights, as in a contract of license. The notion of 'services' could also lead to complicated problems of construction, in particular in connection with Article 5(1) of the 'Brussels I' Regulation, which also refers to the 'provision of services'. One can assume that the notion of service to be retained is very broad and that the ECJ will be inspired by the broad formulation of Article 50 of the EC Treaty. If this is correct, almost all contracts that do not concern the supply of goods or the property of immovables will be qualified as the provision of services. However, the rule of Article 5(1) of the Regulation, and in particular the much criticised (and tautological) provision of subparagraph c),[70] seems to indicate that the drafters of the Regulation did not regard the categories of 'supply of goods' and 'provision of services' as exhaustive. As a result, certain contractual types are not covered by either of them. With respect to consumer contracts, this more restrictive interpretation would entail that certain categories of contracts would not be included in the sphere of protection provided under the future Article 5.

---

[67] Green Paper, § 3.2.7.3.(ii).

[68] *Bundesgerichtshof*, 19.3.1997, in: *Die Deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts* (*IPRspr.*) 1991, No. 3; a French translation is published in: *Rev. crit. dr. int. priv.* 1998, p. 610, with note by P. LAGARDE.

[69] EGPIL proposal, § V(1).

[70] Art. 5(1)(c) provides: 'if subparagraph (b) does not apply the subparagraph (a) applies.'

In order to avoid such uncertainty (and resulting litigation), we deem it is more reasonable to avoid the temptation of 'categorizing' consumer contracts and to extend the scope of application of the protective rule to all contracts concluded by a consumer, i.e., to all contracts concluded by a person 'for a purpose which can be regarded as outside his trade or profession'. This simple solution would also have the advantage of increasing the convergence with Article 15 of the 'Brussels I' Regulation.

b) Notion of Consumer

Not questioned in the Green Paper (or in the EGPIL proposals), the notion of consumer (a person who is contracting for a purpose outside his trade or profession) will probably be retained in the future instrument. It would, however, be reasonable to include some elements of the 'theory of appearance' (see *infra*, para. 4).

2. Protection Mechanism

The protective goal of Article 5 of the Rome Convention is currently realized by means of a double mechanism. On the one hand, the law of the State of the consumer's habitual residence is applicable in the absence of a choice of law by the parties (Article 5(3)), in derogation from the general connecting factors of Article 4 of the Convention. On the other hand, the parties' choice of a different law is allowed but does not deprive the consumer of the application of the mandatory rules of his/her State of residence (Article 5(2)).

Of the alternative options considered by the Commission in the Green Paper,[71] only the most radical one is discussed in this article: 'generalisation of Articles 3 and 4, the law of the place of the business being applied in exchange for generalised application of the mandatory rules of the State of the consumer's residence' (point iii). This option was directly inspired by a proposal of the EGPIL, formulated as follows:

> 'The law applicable by virtue of Articles 3, 4 and 9 cannot deprive the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence at the time of the conclusion of the contract (...).'[72]

In the presence of a choice of law, this formulation would not change any elements of the current solution (freedom of choice, with the restriction resulting from the concurrent application of the mandatory rules of the consumer's State of residence). In the absence of a choice, however, the modification would be quite

[71] Green Paper, § 3.2.7.3.(i to viii).

[72] EGPIL proposal, § V(2).

significant. Since the applicable law would be determined in accordance with general criteria (residence of the party carrying out the characteristic performance), the law of the professional's place of business would normally apply.

This solution would favour the provider of goods or services who could rely (at least in principle) on the application of the law of its country of business. Therefore, it appears to be more in conformity with the principle of the State of origin, one of the cornerstones of the European common market. This advantage, however, should not be overestimated: the proposed provision would not eliminate the need to ascertain the content of the law at the consumer's residence, whose mandatory rules would prevail whenever they guarantee a higher standard of consumer protection. Furthermore, the rule would also apply in 'extra-Community' cases, as a result of which a professional established in a third country could be favoured to the detriment of a European consumer in situations where the principle of origin and the interests of the common market no longer play a role.

In certain situations, the proposed rules could also be of benefit to the consumer, in particular when the law at his place of residence is less protective than that at the professional's place of business. This is true, in particular, when European professionals offer their goods or services to consumers in less developed countries. In such situations, the consumers concerned could benefit from a greater degree of protection than in a purely 'internal' relationship in their own country of residence. Although this result is certainly positive from the viewpoint of a 'universal' consumer protection, we do not regard it as a priority.

On the other hand, the proposed modification would have some significant shortcomings, the most evident being a generalisation of *dépeçage.* As pointed out in the Green Paper, it would often be necessary to apply the rules of two different legal systems to the same contractual relation. Furthermore, the courts would have to determine which rules of the consumers' residence are mandatory and ascertain whether they afford a higher standard of protection to the consumer. Currently confined to cases involving a parties' choice under Article 5(2), such problems would arise in all situations covered by Article 5.

Another disadvantage would be that, in most cases, the court seized with an action would have to apply a foreign law, despite all the problems and costs that entails. As a matter of fact, the great majority of consumer litigation cases are decided in the country of the consumer's residence:[73] the application of the law at the professional's place of residence (even though it sometimes provides greater consumer protection) compromises the usual unity between jurisdiction and applicable law. In consumer litigation this factor should not be underestimated, as it can constitute an additional 'barrier' to the consumer's access to justice.

[73] The 'Brussels I' Regulation provides that the courts of the State of the consumer's domicile are competent for proceedings brought by the consumer and are exclusively competent for proceedings brought by the professional against the consumer (Art. 16(1) and (2)).

The latter observation also raises the issue of coherence between the jurisdiction and choice-of-law instruments. Despite the pressure of certain lobbies to abandon or limit the forum of the consumer's domicile, the 'Brussels I' Regulation has retained this option without any restriction, although it could be regarded as contradicting the country of origin principle. A modification of the basic philosophy underlying Article 5 of the Rome Convention would not be entirely consistent with such option.

In our opinion, these shortcomings outweigh the advantages of the proposed solution. Furthermore, there is no apparent practical need to change the current approach. The interpretation problems raised by Article 5 have almost exclusively concerned its material and spatial scope of application, not the concrete modality of protection.

Finally, a comparative law argument also weighs in favour of retaining the present solution. If recent codifications of private international law contain a special provision on consumer contracts, such provision is generally based on the application of the law of the consumer's place of residence.[74] Therefore, in the interest of achieving international uniformity of solutions on a broader scale, the current approach should not be modified.

3. Passive and Active Consumers

The protective rules of Article 5 are only applicable when the contract has been concluded under the circumstances specified in Article 5(2), i.e., when the consumer is not 'mobile'. Hence, only 'passive' consumers have a legitimate right to be entitled to the protection guaranteed by the standards of their country of residence, whereas 'mobile' consumers who cross national borders on their own initiative and contract on a foreign market assume 'the risk of foreign trade' and should therefore be prepared to be subject to the application of foreign law.

Questioning this fundamental approach in the Green Paper, the Commission seems to accept the view that the 'mobile consumer is not given proper protection', in particular when he is 'deprived of the benefit of the mandatory rules of Art. 7.'[75] Therefore, including the 'mobile' consumer in the sphere of protection under Article 5 is among the possible alternative solutions envisaged for the future regulation.

The possibility of such change raises a policy question: is it desirable to provide protection to a consumer who travels abroad and takes the steps necessary to conclude a contract outside his country? In other words, should the future instrument enable the travelling consumer to 'take in his baggage' the protective

---

[74] See, for instance, Art. 1212(2) of the Russian Civil Code, in this *Yearbook* 2003, pp. 359 *et seq*., and Art. 27(2) of the new Korean PIL Act, in this *Yearbook*, *infra*, section 'Texts, materials and Recent Developments', pp. 315-336.

[75] Green Paper, § 3.2.7.2.

standards in force in his State of residence, entitling him to enforce them in his relations with foreign professionals?

While the goal of consumer protection could lead to a positive answer, one should also consider the point of view of the professional involved in the contract. The latter would be obliged to take into account the protective rules of a foreign law (those at the consumer's place of residence), even though he carries out his trade or profession exclusively within the boundaries of his own country. In our opinion, this is manifestly exorbitant. In purely 'intra-Community' cases, it would run counter to the State of origin principle. In 'extra-Community' cases involving EC consumers, it would amount to imposing an extraterritorial, potentially universal application of the 'Community protective standard'. Finally, in 'extra-Community cases' involving third State consumers, it would impose on EC-based professionals the burden of taking into account the protective rules of the countries of origin of all tourists travelling in Europe.

In our opinion, another argument for not changing the basic philosophy of Article 5 is that it does not lead to injustice for consumers. Some authors will take the opposite view in light of the above-mentioned *Gran-Canaria-Fälle*, which have caused some problems in German courts. In those cases, however, the situation always had a very close connection with the State of the consumer's residence (Germany), although the contracts were concluded in another State (Spain): the sellers were sometimes German companies; the goods were sometimes manufactured in Germany; moreover, delivery always had to take place in Germany. The problem arose because of the rigid criteria set forth in Article 5 and the refusal of most German courts to apply that provision by analogy, thus making it impossible to apply the German protective rules.

This case law adequately shows that the real problem turns not on extending protection to all 'mobile' consumers but rather on re-defining the application of the criteria of Article 5(2) so as to make it more flexible. Such modification is also necessary to adapt the current rule to the new distance selling techniques and to re-establish uniformity with Article 15 of the 'Brussels I' Regulation.

In this context, the EGPIL has proposed a new formulation for both Article 5 of the Rome Convention and Article 15 of the 'Brussels I' Regulation. These provisions would not be applicable:

> '*a*) when the consumer travels to the supplier's country and there concludes the contract, or
> *b*) when the property or services were or ought to have been supplied in the country in which the place of business through which such supply was or ought to have been effected was situated, unless, in either case, the consumer was induced by the supplier to travel to the aforementioned country to conclude the contract.'

While the proposed provision has the merit of simplifying the current text of both the Convention and the Regulation, it would raise extremely complex construction

issues. For instance, determining the place of 'conclusion' of the contract can be very complicated in distance contracts, especially in online contracts. Similarly, interpreting the expression 'the consumer was induced to travel' could cause problems, and it would be particularly difficult to determine the place where 'the property or services were or ought to have been supplied'.

More generally, it appears that the proposed criteria are not much more flexible than those currently set out in Article 5. Such rigidity promotes certainty; however, it will not help resolve complicated situations such as in the above-mentioned *Gran-Canaria-Fälle*.

For these reasons, we prefer a simpler solution, i.e., taking over the wording of Article 15 of the 'Brussels I' Regulation. The protective rules of the two instruments would thus be applicable if the professional pursues his activities in the State of the consumer's domicile/residence or 'by any means, directs such activities' to that State, or to several States including the consumer's State, provided that the contract falls within the scope of such activities. This rather flexible wording would enable the courts to cope with e-commerce cases and complicated situations such as those giving rise to the *Gran-Canaria-Fälle*.

When introducing such criteria into the framework of the 'Rome I' Regulation, drafters should also take advantage of the opportunity to provide a more precise definition of the notion of 'directing his activity' towards a certain State. It is clear by now that the use of certain language or currency does not preclude the activity from being directed towards a particular country.[76] The future instrument could include some additional criteria to facilitate the application of the provision by the courts and to reduce uncertainty.

4. Theory of Appearance

Under the heading 'Consumer protection', the Green Paper also discusses the possibility of incorporating into the future instrument some 'elements involving the theory of appearance'. In particular, the EGPIL proposal is being considered, according to which the mandatory rules of the State of the consumer's residence apply, 'unless the supplier can establish that he was not aware of the country in which the consumer had his habitual residence, as a result of the conduct of the consumer'.[77]

As a result of the expansion of e-commerce, this issue has taken on new importance and thus we recommend that it be dealt with in a broader perspective. As a matter of fact, problems connected with the lack of information of one of the parties are not limited to the habitual residence of the consumer but can also

[76] See the joint declaration of the EC Council and the EC Commission accompanying the amended proposal for a 'Brussels I' Regulation of 24.11.2000.

[77] EGPIL proposal, § V(2).

concern other essential facts having an impact on the determination of the applicable law.

One of these facts is the classification of the other party as a consumer. When the contract is concluded online, it can be difficult (and sometimes impossible) for the provider of goods or services to know whether its counterpart is contracting for a purpose that is inside or outside his trade or profession. This is particularly true when the order is sent by a consumer from his professional e-mail address or vice-versa by a professional from his private address. In this framework, the provider will not be able to determine in advance which law is applicable to the contract.[78]

Outside the field of consumer protection, the applicable law is normally determined by the habitual residence or central administration of the party carrying out the characteristic performance. In e-commerce, however, the localisation of such elements can be difficult for the counterpart. This is, for instance, the case when the website of the seller of goods or services is on a server situated in a country different from that of his residence or central administration.[79]

While these difficulties are not entirely new, they can acquire a significantly greater statistical importance in the Internet era. The revision of the Rome Convention could provide the first opportunity to tackle some of these problems in the text of an international instrument.

The text proposed by the EGPIL could serve as a good basis for discussion. Inspiration could be taken also from the UN Convention on contracts for the international sale of goods, which is not applicable to the sale of goods

> 'bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use' (Art. 2(a) CISG).

VIII. Employment Contracts

The special conflict rules for employment contracts set out in Article 6 of the Convention have proved to be a good solution and should be retained almost unchanged in the future instrument. Some modifications, however, could be introduced to achieve greater coherence with other texts or clarify certain points.

---

[78] FALLON M./ MEEUSEN J., 'Le commerce électronique, la directive 2000/31/CE et le droit international privé', in: *Rev. crit. dr. int. pr.* 2002, p. 444.

[79] This would be the case, for instance, if a US enterprise offers its products or services on a French or German website, identified by a domain name ending in '.fr' or '.de'.

If the general rule of Article 4 of the Convention is changed as discussed above (see *supra*, section VI.B.), for the sake of internal coherence, the 'escape clause' of Article 6(2) should be re-formulated as well. The new text should provide that the search for the 'closest connection' is possible only 'in exceptional circumstances' and, in particular, if it appears that the situation lacks a significant connection with the State designated by the objective connecting factors.

The conflict rules of Article 6 are generally consistent with those of the new Section 5 of Chapter II of the 'Brussels I' Regulation (Articles 18 - 21); however, several slight differences could be corrected in the future text. For instance, the Regulation makes it clear that the 'habitual place of work' can also be a past one (Article 19(2)(a)), whereas Article 6(2) of the Convention only refers to the current place of work. Moreover, in the absence of a habitual place of work, the Regulation confers jurisdiction on the courts of the place where the business which engaged the employee 'is *or was* situated', whereas the Convention only refers to the place of business in the present situation, thus raising doubt as to whether the provision applies in cases where the engaging establishment has been transferred or closed in the period between the engagement and the dispute. These minor differences should be eliminated in the future text, thus promoting uniform interpretation and application of the two instruments.

The issue of consistency has also been raised in regard to EC Directive No 1996/71 on the posting of workers.[80] In situations where employees of one Member State are temporarily posted in another, Article 3 of the Directive – without changing the law applicable to the employment contract as such – stipulates the mandatory application of certain provisions of the host State, such as minimum wage regulations and health and safety requirements, 'whatever the law applicable to the working relationship'. In other words, for the purpose of the Directive such domestic rules are classified as 'internationally mandatory rules' within the meaning of Article 7 of the Rome Convention, i.e., as rules that are mandatory irrespective of the law applicable to the contract. Although there is no contradiction between the two instruments, it would be reasonable to follow the EGPIL proposal by including an express reference to the Directive in the text of the future regulation.[81]

Some uncertainty exists regarding the interpretation of the expression 'temporary employment', which, in the meaning of Article 6(2), does not alter the applicability of the law at the habitual place of work. With respect to this issue, the EGPIL has proposed minor changes in the wording of the future text. The first proposal is to replace the expression 'temporary' by 'for a limited period', which would supposedly indicate that the temporary character of the assignment is to be assessed *ex ante*, on the basis of the intention of the parties, and not *ex post*, on the

[80] EC Directive No 1196/71 of 16 December 1996, in: *OJ* L18, 21.1.1997, p. 1.

[81] EGPIL proposal, § VI: 'The foregoing provisions are without prejudice to the application of the mandatory rules of the law of the country to which the employee is posted as provided for by Directive 96/71 of 16 December 1996, concerning the posting of workers in the framework of the provision of services'.

basis of the actual duration. In our opinion, it is uncertain whether this slight change of wording would actually help the courts.

More convincing is the second suggestion that the future text should indicate that the conclusion of a contract with an employer belonging to the same group as the original employer does not exclude that the posting abroad is only a temporary one. Though not essential, this specification would increase the predictability of the applicable law, thus aiding the courts when resolving complicated issues arising when an employee is transferred within the same group of companies.[82]

IX. Internationally Mandatory Rules

A. Mandatory Rules of the Forum State

It is well known that Article 7(2) of the Convention allows the application of the rules of the forum State that are 'mandatory irrespective of the law otherwise applicable to the contract' (internationally mandatory rules, *lois de police* or *d'application immédiate*, *norme di applicazione necessaria*, overriding statutes). The revision of this provision raises several issues.

1. Definition of Internationally Mandatory Rules

The Green Paper mentions the possibility of including a definition of *lois de police* in the future regulation. Reference is made to the following definition taken from the ECJ decision in the *Arblade* case:

> 'national provisions, compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all person present on the national territory of that Member State and all legal relationship within that State.'[83]

---

[82] EGPIL proposal, § VI.

[83] ECJ, 23.11.1999, C-369/96 and C-376/96, *Arblade*, No. 30, in: *ECR* 1999-I, p. 8453; *Rev. crit. dr. int. pr.* 2000, p. 710, with note by M. FALLON. The French text of the decision is clearer: '[...] *une disposition nationale dont l'observation a été jugée cruciale pour la sauvegarde de l'organisation politique, sociale ou économique de l'Etat, au point d'en imposer le respect à toute personne se trouvant sur le territoire ou à tout rapport juridique localisé dans celui-ci*'.

In our opinion, this proposal raises both methodological and substantive issues, thus casting doubt on its effectiveness.

First of all, the *Arblade* case concerned neither Article 7 nor the Rome Convention. In that decision, the ECJ did not purport to give a general definition of *lois de police*, but rather to verify whether such classification – accorded to certain national rules in the legal system of a Member State (Belgium) – could have the effect of exempting the rules in question from complying with fundamental EC principles, such as the free circulation of goods and services. From a methodological point of view, it is not very orthodox to borrow a definition from the internal law of a Member State and use it as the basis of an official interpretation of a uniform rule of the Rome Convention, especially without any discussion on the matter. In reality, there is no reason to believe that, if requested to interpret Article 7 of the Convention, the ECJ would simply take over the *Arblade* definition. Instead, it would probably attempt to formulate an 'autonomous' definition of 'internationally mandatory rules' based on comparative and Community law elements and, in particular, on the purpose and the *effet utile* of the Convention.

The content of the proposed definition also merits some critical remarks. If the notion 'protection of the political, social or economic order' of a State is interpreted literally, the suggested definition would have the effect of denying internationally mandatory character to all rules that are not intended to protect *State* interests, but rather the interests of certain categories of *individuals* because of their weaker position, such as rules protecting workers, consumers, investors, tenants, agents, franchisees, and so on. Although it corresponds to the views of some (particularly German) scholars,[84] this result would lead to an unjustified restriction of the scope of application of Article 7. It would certainly be wrong to assume that all protective rules are internationally mandatory; however, it cannot be excluded *a priori* that some of them belong to this category.

Moreover, such restrictive interpretation would openly contradict the position of the Community legislator and, paradoxically, of the ECJ itself. We already mentioned that several EC directives expressly prescribe the mandatory application of certain (Community or national) rules on consumer or worker protection, irrespective of the law applicable to the contract.[85] This confirms that, in the view of the Community institutions, protective rules can also be internationally mandatory. The same conclusion can be inferred from the well-known *Ingmar* case, in which the ECJ – without referring to Article 7 of the Convention – ruled that certain European rules on the protection of commercial agents must prevail over the choice of the law of a third State.[86]

---

[84] See, for instance, MANKOWSKI P., 'Art. 34 EGBGB erfasst § 138 BGB nicht!', in: *Recht internationaler Wirtschaft* 1996, pp. 8-12. For further reference, see BONOMI A., *Le norme imperative nel diritto internazionale privato*, Zurich 1998, pp. 172 *et seq*.

[85] See *supra*, notes 48 (consumer protection) and 80 (posting of workers).

[86] ECJ, 9.11.2000 (note 50).

For all these reasons, it is premature to include a binding definition of internationally mandatory rules in the future instrument, and it would be wrong to try to exclude rules from this category that aim to protect weaker parties.

The Commission should not forget that the definition of *lois de police* is one of the most controversial questions in modern private international law. Numerous criteria have been advanced by scholars and courts, but none has proved to be conclusive.[87] Experience shows that the distinction between mandatory rules at national level (i.e., rules of *ius cogens*) and 'internationally mandatory rules' (i.e., rules that prevail over the law designated by choice-of-law rules) can be drawn only on the basis of a functional case-to-case approach.

2. *Internationally Mandatory Rules and EC Law*

a) Internationally Mandatory EC Rules

Both EC directives and recent ECJ case law have confirmed that EC rules can also be internationally mandatory. Since the current text of Article 7(2) refers only to the rules of the forum State, it can be useful to make it clear that EC rules – when directly applicable by the courts of the Member States – are also covered by this provision, as suggested in the Green Paper.[88]

b) Compliance of the Internationally Mandatory Rules of a Member State with EC Law

The impact of EC law on the mandatory application of the rules of a Member State is a completely different problem.

This was the main issue in the *Arblade* decision, in which the ECJ found that the fact that certain internal rules are recognised as internationally mandatory by the national legal system to which they belong 'does not mean that they are exempt from compliance with the provisions of the Treaty'[89] The ECJ has thus made it clear that, from the point of view of EC law, even *lois de police* are to be treated like all other national measures, and that

> 'the considerations underlying such national legislation can be taken into account by Community law only in terms of the exceptions to Community freedoms expressly provided for by the Treaty and,

[87] For an overview, see BONOMI A. (note 84), pp. 165 *et seq.*

[88] Green Paper, § 3.2.8.3.

[89] ECJ, 23.11.1999 (note 83), No. 31.

> where appropriate, on the ground that they constitute overriding reasons relating to the public interest'.[90]

The EGPIL proposed that this idea be incorporated into the text of the future instrument, by indicating that

> '[e]ffect may only be given to the mandatory rules of a Member State to the extent that their application does not constitute an unjustified restriction on the principle of freedom of movement provided for by the Treaty'.[91]

While this added precision could admittedly be useful, the question arises as to whether a broader formulation would be more appropriate for such type of 'Community law clause'. On the one hand, it is not clear why it refers only to the principle of freedom of movement, and not to all fundamental principles of EC law (e.g., non-discrimination on the ground of nationality and sex). On the other hand, it appears to us that the clause could be formulated as a more general exception to the application of the law designated by private international law rules. As a matter of fact, there should be no doubt that the application of the law governing a contract determined by the general connecting factors of Articles 3 to 6 of the Convention is also subject to compliance with the fundamental principles of EC law.[92]

3. A 'Rule of Reason' Based on the Principle of Proportionality

Instead of attempting to adopt a definition of internationally mandatory rules based on their content, we suggest that the new instrument impose some restrictions on their mode of operation.

The current wording of paragraph 2 of Article 7 – contrary to that of paragraph 1 on foreign mandatory rules – appears to leave full discretion to the Member States to decide whether certain domestic rules qualify as internationally mandatory and whether they will be applicable in international situations. In our opinion, this approach should be corrected by introducing into the future text certain elements of a 'rule of reason' with the intention of limiting the indiscriminate application of internal rules of the forum.

Such restrictions would be useful not only for national courts (which have demonstrated remarkable self-restraint in the application of Article 7(2) of the

---

[90] *Ibid.* On the necessary submission of the *lois de police* of the Member States to Community law, see BONOMI A. (note 84), pp. 130 *et seq.*

[91] EGPIL proposal, § VIII.

[92] FALLON M./ MEEUSEN J., 'Private International Law in the European Union and the Exception of Mutual Recognition', in this *Yearbook* 2002, pp. 37-66, observed that the application of the choice-of-law rules is subject to the 'exception of mutual recognition'.

Convention), but also – and particularly – for the ECJ, which created in *Ingmar* the basis for a very broad (and perhaps excessive) mandatory application of EC rules.[93]

The model for a more restrictive provision could be the proportionality test elaborated by the ECJ itself in its case law concerning the free movement of goods and services.

Before applying an internal (national or Community) rule as internationally mandatory, a national court (and the ECJ) should first be assured that the rule in question is the expression of an essential interest – similar to what the ECJ does under Article 30 or 59 EC Treaty to determine whether the national measure is the expression of a 'mandatory requirement'.

While necessary, this step should not be deemed sufficient in itself. The principle of proportionality also requires the courts to be assured that the mandatory application of a domestic (national or Community) rule in an international situation is necessary and represents the most effective way of promoting the underlying policy. This means that the domestic rule need not be subject to mandatory application if the same (or an equivalent) result can be achieved by applying the rules of the foreign *lex causae*.

Our proposal for the formulation of the relevant provision of the future instrument is as follows:

> 'Nothing in this Regulation shall restrict the application of the rules of the law of the forum or of EC law, if they are the expression of a fundamental policy, provided that their application is necessary and represents the most effective way of promoting the underlying policy. When considering whether to apply these rules, regard shall be given to the content of the law that would govern the contract according to the other rules of the Regulation.'

This innovation would certainly imply abandonment of the traditional approach, according to which internationally mandatory rules are *lois d'application immédiate*, i.e., they are applicable regardless of the content of the law designated by the choice-of-law rules. Their mode of operation would be more similar to that of the public policy exception. Nonetheless, in our opinion, this methodological

[93] See ECJ, 9.11.2000 (note 50) Nos. 23-24, where the ECJ first finds that 'the harmonising measures laid down by the Directive [*on commercial agents*] are intended, *inter alia*, to eliminate restrictions on the carrying-on of the activities of commercial agents, to make the conditions of competition within the Community uniform and to increase the security of commercial transactions' and then concludes that 'those provisions [*notably, Articles 17 and 18 of the Directive*] must therefore be observed throughout the Community if those Treaty objectives are to be attained'. It seems to us that this reasoning could theoretically lead to the internationally mandatory application of the rules included in *all* EC instruments, a result which should be rejected as the expression of an extremely parochial attitude.

change is important since it would promote the goal of uniformity of the future instrument.

B. Internationally Mandatory Rules of a Third State

1. The Future of Article 7(1)

Under certain conditions, Article 7(1) of the Rome Convention gives national courts the power of 'giving effect' to the mandatory rules of a 'third' State, i.e., of a State different both from that of the court and from that whose law governs the contract.

This provision has been the target of much criticism. Some opponents object to the principle itself, maintaining that the contract should be governed by one legal system, to the exclusion of mandatory rules emanating from another foreign country. Others argue that the formulation of Article 7(1) is too vague and that this provision provides no clear guidance to the courts as to when the mandatory rules of a foreign state should be applied. As a result of these objections, Article 22(1)(a) allowed the contracting States to enter a reservation against the application of this provision. Such reservation was entered by Germany, Ireland, Luxembourg, Portugal and the United Kingdom. Since a reservation cannot be included in an EC instrument, especially if it takes the form of a regulation, the European institutions must resolve this problem as well.

In our opinion, the rule of Article 7(1) should be retained because it makes it possible to take account of important State and party interests, such as the spontaneous cooperation between States and the quest for international uniformity of decisions.[94]

To facilitate the task of the courts and enhance the predictability of decisions, the criteria presently set out in Article 7(1) could be formulated more precisely.[95] In particular, a list could be included specifying what is to be

[94] Since this point cannot be examined in detail within the framework of this contribution, we take the liberty of referring to BONOMI A. (note 86), pp. 297 et seq.; ID., 'Mandatory Rules in Private International Law', in this *Yearbook* 1999, pp. 235 *et seq.*

[95] Inspiration could be taken from Art. 19 of the Swiss PIL Act: '(1) When interests that are legitimate and clearly preponderant according to the Swiss conception of law so require, a mandatory provision of another law than the one referred to by this Act may be taken into consideration, provided that the situation has a close connection with such law. (2) In deciding whether such a provision is to be taken into consideration, one shall consider its aim and the consequences of its application, in order to reach a decision that is appropriate having regard to the Swiss conception of law.' (translation by BUCHER A./ TSCHANZ P.-Y., *Private International Law and Arbitration*, Basel 2001).

considered as a 'close connection' for certain types or categories of mandatory rules.[96]

2. *Mandatory Rules of Other EU Member States*

In our opinion, the future instrument should stress the significant role of Art. 7(1) as a factor promoting uniformity within the European Union.

It is well known that, in the system of the Brussels Convention and Regulation, the chronological priority of a lawsuit is sometimes conclusive for the outcome of litigation. In this framework, it is not reasonable – and could be very unjust – to ignore the mandatory rules of another Member State, particularly if the courts of this State had concurrent jurisdiction to decide the dispute. Furthermore, the violation of an internal mandatory rule of another Member State can be a ground for non-recognition of the decision in that State,[97] thus hampering the principle of mutual recognition and jeopardizing the consistency of the 'area of freedom, security and justice'.

In the field of contracts, this conclusion is reinforced by the existence of uniform choice-of-law rules. If the mechanism of the Rome Convention (and of the future regulation) operates as intended, the uniformity of decisions can be hindered only by the mandatory application of some domestic rules of the forum State. To counterbalance this possibility, it is reasonable to grant the courts of other Member States the right to apply foreign mandatory rules when they are directly seized of the proceedings. By means of Article 7(1), uniformity can be re-created on a different level.

Another argument for applying the mandatory rules of another EU Member State can be deduced from EC law itself. Under Article 10 of the EC Treaty, the Member States are obliged to co-operate for the purpose of facilitating the accomplishment of the Community's tasks. This means that they are required to reduce, to the extent possible, the risk of conflicts and frictions arising as a result of the co-

---

[96] For instance, in antitrust laws the place of the effect. See the considerations in HELLNER M., 'Private International Enforcement of Competition Law', in this *Yearbook* 2002, pp. 296-297.

[97] It is widely recognised that non-compliance with an internationally mandatory rule of the State concerned can lead to the non-recognition of a foreign decision under Art. 34(1) of the 'Brussels I' Regulation on the ground of public policy: BECKER M., 'Zwingendes Eingriffsrecht in der Urteilsanerkennung', in: *RabelsZ* 1996, pp. 705 *et seq*.; MUIR WATT H., 'L'affaire Lloyd's: globalisation des marchés et contentieux contractuel'. in: *Rev. crit. dr. int. pr.* 2002, p. 520. A different view is expressed by RADICATI DI BROZOLO L., 'Mondialisation, juridiction, arbitrage: vers des règles d'application semi-nécessaires?', *ibid*., 2003, pp. 18 *et seq*.

existence of separate national legal systems.[98]

In light of the above reasons, it could even be argued that the application of the *lois de police* of another EU Member State should be mandatory, not subject to discretion. Of course, such obligation would be made subject to certain conditions:

- The situation must have a close connection with the foreign State concerned; such a close connection, however, could not be denied if the courts of that State would have had jurisdiction under the 'Brussels I' Regulation;
- The rules in question should not be contrary to fundamental principles or interests of the forum State and of the European Union; and
- Their application should not lead to a decision that is manifestly unjust for one of the parties.

X. Assignment of Receivables

Despite the growing importance of the assignment of receivables as a financial instrument,[99] its use in international relations is often hampered by the existence of extremely divergent national regulations.[100]

This operation deserves special treatment in private international law because three parties are usually involved: the assignor, the assignee and the debtor. Moreover, since it purports the transfer of an immaterial good (the receivable) from assignor to assignee, it has effects vis-à-vis third parties, such as creditors and other assignees of the same right. These peculiarities make it necessary to provide for special rules that protect the debtor and third parties.

---

[98] See VON WILMOWSKY P., 'EG-Vertrag und kollisionsrechtliche Rechtswahlfreiheit', in: *RabelsZ* 1998, pp. 1-37, at 25 *et seq*.

[99] Assignment is the basic mechanism used for several transactions connected with financial purposes, such as factoring, forfaiting, securization, and global assignment of receivables as a guaranty for a loan.

[100] The need to unify both substantive and private international rules on assignment is confirmed by the efforts of several uniform law organizations in this area. Since the entry into force of the Ottawa Convention on international factoring of 1988, UNIDROIT has continued to work on the subject of assignment. The Working Group in charge with the preparation of Part II of the Principles on international commercial contracts has recently published a draft chapter nine of the Principles devoted to 'assignment of right, transfer of obligations, assignment of contracts'. UNCITRAL has recently elaborated a very ambitious Convention on the assignment of receivables in international trade (2001), which includes both substantive and conflict rules on the subject: http://www.uncitral.org.

A. Effects of the Assignment Between the Parties and Towards the Debtor

Article 12 of the Rome Convention contains two conflict rules on the voluntary assignment of receivables.

The first one (Art. 12(1)) provides that the mutual obligations of assignor and assignee (i.e., the *inter partes* effects of the assignment) are governed by the law applicable to the assignment contract. This law is to be determined in accordance with the general provisions of Articles 3 and 4 of the Convention. In other words, the parties are free to choose the applicable law within the limits of Articles 3(3) and 7. In the absence of a choice of law by the parties, the assignment is governed by the law designated pursuant to Article 4. The characteristic performance is normally that of the assignor, unless the assignment is part of a more complex operation, as, for instance, in a factoring contract (in which case the characteristic performance is usually that of the factor).

To protect the debtor from unexpectedly being made subject to the application of a particular law, Article 12(2) provides that certain effects of the assignment are to be governed by the law governing the original relationship between the assignor and the debtor (*lex obligationis*). This special rule is applicable to all issues directly concerning the debtor, such as the assignability of the receivable (e.g. to the effects of a *pactum de non cedendo*), the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any matter concerning discharge of the debtor's obligations.

The splitting of the *inter partes* effects of the assignment and its effect vis-à-vis the debtor is generally regarded as a necessary solution imposed by the triangular relationship of the assignment.[101] Accordingly, it should be retained in the future Regulation.

The only disadvantage is that it can result in the application of two different laws to different aspects of the same transaction. Such *dépeçage* can be avoided without depriving the debtor of adequate protection only by granting him the option to adhere to the applicable law chosen by the parties to the assignment. Exercising such option would result in all effects of the assignment, including those vis-à-vis the debtor, being governed by the law chosen by the parties.[102]

Of course, such extension of the party autonomy should be subject to the mandatory rules of Articles 3(3) and 7. When the debtor is a consumer or an employee, he should also have access to the protection mechanisms under Articles 5(2) and 6(1).

---

[101] A similar rule has been included in the UN Convention on the assignment of receivables in international trade (Art. 29).

[102] A similar solution is found in Art. 145(1) of the Swiss PIL Act of 1987, according to which 'a choice made by the assignor and the assignee may not be asserted against the debtor without the latter's assent.'

B. Effects of the Assignment Towards Third Parties

The current text of the Rome Convention does not deal with the 'proprietary' aspects of assignment, i.e., with its effects towards third parties, such as creditors or other assignees of the same right.[103] This lacuna has already been the source of divergent interpretations by the highest courts of two contracting States, Germany and the Netherlands.

Confronted with the question of the law applicable to the proprietary aspects of assignment, the German Federal Court found that this issue should be decided in accordance with the law governing the assigned obligation, like that of the effect of the assignment towards the debtor.[104] On the contrary, the Dutch *Hoge Raad* opted for a broad interpretation of Article 12(1) of the Convention, ruling that the law applicable to the assignment should govern all its effects, including those towards third parties, the only exception being those matters specifically indicated in Article 12(2).[105]

Both possible solutions are considered in the Green Paper; however, neither is satisfactory. The application of the law governing the original claim raises numerous difficulties for third parties who are not always able to determine such law. Moreover, such approach fails to provide a solution whenever the dispute concerns a global assignment of receivables or the assignment of future rights. In the first situation, individual obligations which are the object of the assignment could be governed by different laws, thus making it impossible to achieve a common solution; as regards future receivables, it is not always possible to know in advance which law will govern a right that has not yet been created.

The application of the law governing the assignment also creates problems. First, since this law can be designated by the parties (assignor and assignee), there is no guarantee that the chosen law will adequately protect the interests of third parties. Furthermore, this approach does not always resolve the specific problem of priority that arises when two assignments of the same right are subject to two different laws that provide for divergent priority rules.

It would be better for the future instrument to contain a special rule modelled on the UN Convention on the assignment of receivables. According to

---

[103] The question referred to is normally that of priority between the assignee, on the one hand, and the creditor of the assignor or other assignees of the same right, on the other. The importance of the conflict rules governing this issue is enhanced by the fact that national laws apply very different priority criteria. Furthermore, there is no uniform regulation of the matter in the substantive law treaties mentioned above (note 100).

[104] *Bundesgerichtshof*, 8.12.1998, in: *IPRax* 2000, p. 128, with note by STADLER A. (at pp. 104 *et seq.*).

[105] *Hoge Raad*, 16.5.1997, in: *Rechtspraak van de Week* 1997, No. 126. See JOUSTRA C., 'Proprietory Aspects of Voluntary Assignment in Dutch Private International Law', in: *IPRax* 1999, p. 280.

Articles 22 and 30 of this instrument, the law of the State where the assignor is established shall apply.

This solution guarantees appropriate and neutral protection of third party interests since the applicable law can be determined by all parties without serious problems and cannot be altered by a choice of law to the detriment of third parties. It also makes it possible to find a solution in cases of multiple assignments of the same right and of global assignment. Moreover, the applicable law can be determined even if the assignment concerns future rights. Finally, it usually coincides with the law applicable to insolvency proceedings initiated against the assignor, i.e., the situation in which priority issues most commonly arise.

XI. Conclusions

The conversion of the Rome Convention into an EC instrument is a necessary step in the creation of a European system of private international law. Such undertaking will provide an opportunity to re-think certain rules of the Convention, adapting them to the new situations that have arisen as a result of the challenges of both European integration and the globalisation of private law relationships.

This article discusses the main issues to be addressed in the future instrument. As in the Green Paper, all proposed modifications have been placed on equal footing as if they were all of equal importance. Since this obviously is not the case, the main task of this conclusion is to establish a hierarchy by distinguishing between modifications of secondary importance and those constituting the core of the envisaged revision.

The first category encompasses all questions concerning the material scope of application of the future regulation, the admissibility of a tacit choice of law, modifications of the rules on employment contracts and on assignment of receivables. In our opinion, the safeguard of the 'minimum Community standard' and most of the issues relating to consumer protection – such as the definition of consumer contract, the choice of the protection mechanism and the distinction between passive and active consumer – are also mere technical or detail issues.

On the contrary, the success of the revision will be determined by the solutions given to the following crucial problems:

- The choice of an *erga omnes* instrument, i.e., the creation of a European private international law with a universal scope, not a mere interlocal conflict-of-laws system;
- The extension of the principle of party autonomy by permitting the parties to choose non-State rules of law to govern their contractual relations: in this respect, the future instrument can break new ground by

anticipating the future role of party autonomy in a globalised environment;

- The adoption of a more rigid choice-of-law mechanism in the absence of a choice of law by the parties, thus reducing the uncertainty and costs connected with the process of determining the applicable law;
- The elaboration of realistic solutions for e-commerce relations, with respect not only to consumer protection but more generally to information and transparency problems arising from online transactions; and
- The introduction of a proportionality test for 'internationally mandatory rules' of the forum, together with increased emphasis on the application of foreign *lois de police*, in particular within the European Union so as to achieve a greater equilibrium between parochial (State or Community) interests and the quest for uniform solutions.

'Here thy nobility shall be manifest!'[106] If the future regulation successfully resolves these core issues, it will rightfully be regarded as the worthy successor of the Rome Convention. As such, it will continue to serve as a model for national and international legislators around the world in the course of the new century.

[106] '*Qui si parrà la tua nobilitate!*', Dante Alighieri, *The Comedy*, *Inf.* 02.009, translations by H. W. Longfellow and A. Mandelbaum, both accessible at the website: http://dante.ilt.columbia.edu/new/comedy/index.html.

NATIONAL REPORTS

THE NEW CONFLICT OF LAWS ACT OF THE REPUBLIC OF KOREA

Kwang Hyun SUK*

I. Introduction

II. Process of Amending the Conflict of Laws Act
- A. Establishing the Working Group
- B. Deliberation by the Expert Committee
- C. Public Hearing, Resolution of the National Assembly, and Publication

III. Direction of the Amendment of the Prior Act
- A. Change of Title
- B. Structural Changes
- C. Filling of *Lacunae* and Striving for a Complete Conflict of Laws Regime
- D. Realization of Gender Equality in the Conflict of Laws Act
- E. Expansion of Provisions on International Jurisdiction
- F. Strengthening the Principle of the Closest Connection
- G. Introducing Flexible Connecting Factors
- H. Retaining the Principle of *Lex Patriae* and Introducing Habitual Residence as a New Connecting Factor
- I. Considering the Contents of Substantive Law
- J. Expansion of Party Autonomy
- K. Taking Account of International Conventions

IV. General Provisions
- A. Habitual Residence as a New Connecting Factor
- B. Examination and Proof of Foreign Law
- C. Scope of the Designated Governing Law
- D. Introduction of the Concept of International Mandatory Rules
- E. Exception Clause
- F. Expansion of the Scope of *Renvoi*

V. International Jurisdiction
- A. General Rules
- B. Protection of Socio-Economically Weaker Parties
  1. Consumer Contracts
  2. Individual Employment Contracts

---

* Professor of Hanyang University, Seoul, Republic of Korea; Doctor Jur. (Seoul National University); LLM. (Freiburg i. Br.); Member of the Korean Delegations to the Hague Conference and UNCITRAL for various projects.

Yearbook of Private International Law, Volume 5 (2003), pp. 99-141
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

VI. *Lex Societatis* of Legal Persons or Associations

VII. Juridical Act
- A. Formal Validity of Juridical Acts
- B. Law Governing Agency

VIII. Real Rights (Rights *in Rem*)
- A. Acquisition and Transfer of Real Rights
- B. Means of Transportation
- C. Bearer Securities
- D. *Res in Transitu*
- E. Contractual Security Interests over Claims, Shares and Other Rights

IX. Intellectual Property Rights

X. Contracts
- A. Party Autonomy
- B. Objective Governing Law
- C. Protection of Socio-Economically Weaker Parties

XI. Non-Contractual Claims
- A. Unjust Enrichment
- B. Torts

XII. Law of International Claims: Matters Common to Contractual and Non-Contractual Claims
- A. Law Governing the Assignment of Claims
- B. Law Governing the Assumption of Obligations
- C. Transfer of Claims by Operation of Law

XIII. Kinship
- A. Law of International Marriage
  - 1. Formation of Marriage
  - 2. General Effects of Marriage
  - 3. Matrimonial Property Regime
  - 4. Divorce
- B. Law of International Parent-Child Relationships
  - 1. Formation of Parent-Child Relationships
  - 2. Rights and Obligations of Parents and Children
- C. Law of International Maintenance
- D. Law of International Guardianship

XIV. Inheritance
- A. Basic Issues
- B. Issues Relating to the Will

XV. Commercial Matters

XVI. Maritime Commerce

XVII. Recognition and Enforcement of Foreign Judgments

XVIII. Concluding Remarks

I. Introduction

After two years of preparation, the Law Amending the Conflict of Laws Act of the Republic of Korea ('Korea')[1] was promulgated on 7 April 2001 and became effective as of 1 July 2001. Accordingly, the earlier pre-amendment Conflict of Laws Act, called *Seoboesabeop* in Korean ('Prior Act'), was replaced by the new Conflict of Laws Act, which is referred to as *Gukjesabeop* in Korean ('New Act'). Promulgated in 1962, the Prior Act was regarded as outdated from the very moment of its promulgation. This is because it was modelled on the chapter of Private International Law of the *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (*EGBGB*) of the Federal Republic of Germany ('German PIL') and the Japanese Private International Law ('Japanese PIL'), both enacted towards the end of the 19th century. As a result of the drastic change in the environment of international trade, which occurred parallel to the global information technology revolution, the scope of issues to be addressed by conflict of laws principles has expanded remarkably, giving rise to an entirely new type of issues. In the field of conflict of laws in its narrow sense, a revolution or crisis of the traditional conflict of laws was brought about by the advent of a new methodology for the conflict of laws in the United States. In the process of overcoming this crisis, the conflict of laws on the European continent has undergone substantial changes: diversification of the connecting factors, expansion of the principle of party autonomy, consideration of the contents of substantive law[2] protecting socio-economically weaker parties, and the introduction of a methodological pluralism for the conflict of laws. Since the seventies many countries have amended their conflict of laws acts, and progressive unification of the rules of private international law has been consistently pursued by the Hague Conference on Private International Law ('Hague Conference').

The Prior Act, which was based on mechanical connecting factors and contained various outdated provisions, could not cope with the issues raised as a result of the internationalization and globalization of Korean society. Furthermore, it contained no rules on international jurisdiction to adjudicate or international adjudicatory jurisdiction ('international jurisdiction'), whereas the public expected the Conflict of Laws Act to function as a 'basic law of international legal relationships', encompassing rules on international jurisdiction to deal with the increasing number of international disputes. Private international law has also attracted more attention from the Korean public since Korea became a member of the Hague Conference in August 1997 and a Contracting State to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965, the only Hague Conference Convention to which Korea is a

[1] Law No. 6465 of 7 April 2001. In this Article the terms *conflict of laws* and *private international law* are used interchangeably, unless the context requires otherwise.

[2] Substantive law in this context refers to *Sachrecht* in German, which is referred to in English as the 'internal' or 'domestic' law of a country.

Contracting State. Against this background, the Prior Act was finally amended in an effort to meet the needs of the changing Korean society.

In Korea, the recognition and enforcement of foreign judgments was governed by the prior Korean Code of Civil Procedure ('Prior CCP'). However, as of 1 July 2002, the Prior CCP was amended and split into two separate acts: the amended Code of Civil Procedure[3] ('New CCP') and the newly enacted Code of Civil Enforcement[4] ('CCE'). Although the New Act does not govern the recognition and enforcement of foreign judgments, Korean academics nevertheless treat this subject matter as part of private international law; therefore, it is briefly discussed in this article. An English language translation of the New Act prepared by the author is included in the Section 'Texts and Materials' of this volume of the *Yearbook* (pp. 315-336).

After a discussion of the process of amending the Prior Act in section II, the direction taken by the amendments of the Prior Act is reviewed in section III. Thereafter, a discussion of the major contents of the general provisions of the New Act is presented in section IV, followed by a discussion of the contents of each chapter of the New Act in sections V to XVI. Finally, section XVII deals with the amendments to the relevant provisions of the Prior CCP on the recognition and enforcement of foreign judgments.

II. Process of Amending the Conflict of Laws Act

A. Establishing the Working Group

In April 1999 the Ministry of Justice of Korea ('MOJ') commenced preparations for amending the Prior Act by establishing a 'Working Group' consisting of nine experts, including the author. Acting as an advisory team to the MOJ, the Working Group did basic research and prepared a draft of the proposed amendments for deliberation by the Expert Committee, which was set up later. The Working Group prepared its draft of proposed amendments ('Working Group Draft') during 17 meetings held between 26 June 1999 and 13 May 2000.

B. Deliberation by the Expert Committee

In June 2000 the MOJ established an Expert Committee for the Amendment of the Conflict of Laws Act ('Expert Committee') consisting of 11 experts, including the author. Dr. Lee Ho-Chung, then professor at Seoul National University, was

[3] Law No. 6626 of 26 January 2002.

[4] Law No. 6627 of 26 January 2002.

appointed Committee Chairman. After discussing major issues based on the Working Group Draft, the Expert Committee finalized its own draft of the proposed amendments on 4 November 2000 after 14 meetings. Comments on the draft submitted by various academic institutions, including the Korean Association of the Code of Civil Procedure and the Korean Association of Family Law, were taken into account by the Expert Committee in its final draft ('Expert Draft').

C. Public Hearing, Resolution of the National Assembly, and Publication

The Expert Draft was sent by MOJ to the relevant government ministries and non-governmental organizations for review and comment and then published for review and comment by the public. In addition, the MOJ held a public hearing to gather as many opinions as possible from the public. When preparing its final version of the proposed new Conflict of Laws Act on 4 December 2000, the Expert Committee considered the comments made by the relevant institutions and at the public hearing. The final draft was reviewed by the Korean Ministry of Legislation and submitted to the National Assembly on 30 December 2000. After its enactment on 7 March 2001 at the 219th Session of the National Assembly, the Law Amending the Conflict of Laws Act was promulgated on 7 April 2001 and entered into force on 1 July 2001. In February 2000, the MOJ published a book entitled *Conflict of Laws in Various Countries* as part of its series of publications and in May 2001 an explanatory report entitled *Gukjesabeop Haeseol* (Commentary on the New Conflict of Laws of Korea).

III. Direction of the Amendment of the Prior Act[5]

A. Change of Title

The Korean title of the Conflict of Laws Act was changed from *Seoboesabeop* to *Gukjesabeop*. While the meaning of the word *Seoboe* was not clearly understood by the public, the equivalent of the word *Gukjsabeoep* is widely used internationally, for example at The Hague Conference on Private International Law, the Swiss *Bundesgesetz über das internationale Privatrecht* of 18 December 1987, which became effective on 1 January 1989 ('Swiss PIL Act'), the Austrian *Bundesgesetz über das internationale Privatrecht* of 15 June 1978, which entered into force on

---

[5] For more details see BEOPMUBU (MINISTRY OF JUSTICE), *Gukjesabeip Haeseol (Commentary on the New Conflict of Laws of Korea)*, Seoul 2001, p. 4 *et seq*., and SUK K.H., *Gukjesabeop Haeseol (Commentary on Private International Law)*, 2nd ed., Seoul 2003, p. 15 *et seq*.

1 January 1979, and the Italian *Legge di riforma del diritto internazionale privato,* which entered into force on 1 September 1995 ('Italian PIL').

B. Structural Changes

The Prior Act contained 47 articles divided into three chapters: General Provisions, Provisions on Civil Matters and Provisions on Commercial Matters. The then existing provisions were rearranged and new provisions added, as a result of which the New Act contains a total of 62 articles in nine chapters: General Provisions, Persons, Juridical Acts, Rights *in rem* (Real Rights), Claims (*chaekwon*[6]), Kinship, Inheritance, Promissory Notes, Bills of Exchange and Checks, and Maritime Commerce. Chapter 3 of the Prior Act entitled 'Provisions on Commercial Matters' consisted of three sections: Special Provisions on Commercial Matters, Provisions on Bills of Exchange, Promissory Notes and Checks, and Provisions on Maritime Matters. Previously criticized as unnecessary and unreasonable, most of the provisions of the first section (Special Provisions on Commercial Matters) were deleted, while several surviving provisions such as Article 29 (Capacity of a Commercial Company to Act) and Article 31 (Provision on Bearer Securities) of the Prior Act were moved to the relevant chapters of the New Act, with slight modifications.

C. Filling of *Lacunae* and Striving for a Complete Conflict of Laws Regime

Characterized by numerous legislative *lacunae,* the Prior Act contained no provisions on the capacity of natural persons, legal persons or associations, on agency based on juridical acts, on real rights in means of transportation, *res in transitu* and security interests over claims (*chaekwon*). Furthermore, it lacked provisions on intellectual property, transfer of claims (*chaekwon*) by the operation of law, the assumption of obligations, legitimation, etc. By introducing new provisions containing choice of law rules for these subject matters, the New Act purports to achieve a more complete private international law regime, thus enhancing legal certainty and predictability.

D. Realization of Gender Equality in the Conflict of Laws Act

Provisions of the Prior Act in the area of international family law had been criticized for violating the principle of gender equality, one of the paramount principles guaranteed by the Constitution of Korea. In particular, the Prior Act designated the

[6] *Chaekwon* is the Korean counterpart for *la créance* in French and *die Forderung* in German.

husband's *lex patriae* as the law governing the general effects of marriage (Article 16), the matrimonial property regime (Article 17) and divorce (Article 18), and the father's *lex patriae* as the law governing legal relationships between parents and children (Article 22). In keeping with the principle of gender equality, the New Act designates firstly the *lex patriae* of the spouses if they have the same *lex patriae* and secondly the law of their habitual residence if they have the same law of habitual residence. In addition, it removes other factors that could be viewed as discriminatory against women, thereby eliminating the possibility of unconstitutionality (Articles 37 to 39).

E. Expansion of Provisions on International Jurisdiction

While the purpose of the Prior Act was to set forth choice of law rules for various legal relationships with a foreign element, the New Act expressly declares that determining international jurisdiction is also a matter of conflict of laws in Korea. In the past, court decisions and prevailing views of Korean legal scholars recognized that Korea had no statutory law regulating international jurisdiction in civil and commercial matters. In fact, the rules on international jurisdiction have been developed mainly on the basis of a series of court decisions. The Prior Act contained provisions on international jurisdiction, but only on a limited number of noncontentious matters, such as quasi-incompetence and incompetence (Article 7), declaration of disappearance (Article 8), and guardianship (Article 25). However, the New Act introduced in Chapter 1 (General Provisions) a new provision (Article 2) setting forth general principles on international jurisdiction and in Chapter 5 (Claims) special provisions on international jurisdiction (Articles 27 and 28) to protect the interests of consumers and employees regarded as socio-economically weaker parties. Aware that the provisions of the New Act on international jurisdiction are not complete, drafters and legislators expect them to be supplemented or completed in due course by subsequent legislation.

F. Strengthening the Principle of the Closest Connection

Pursuant to the New Act, the law of the country having the closest connection with the various issues of a dispute shall apply. For example, as regards the objective law governing an international contract, the mechanical principle of the Prior Act designating the place of the contract's conclusion (Article 9, second sentence) was replaced in the New Act by the law of the country most closely connected with the contract (Article 26). Other examples include Article 32(2), which provides that a tort shall be governed by the law of the country of the common habitual residence of the tortfeasor and the injured party, Article 30(1) on the so-called accessory connection (*akzessorische Anknüpfung*), as well as the provisions of Articles 31 and 32(3) providing that the management of affairs without mandate, unjust

enrichment or tort shall be governed by the law applicable to the existing legal relationship between the parties if the event in question occurred in respect of such relationship. In addition, the New Act purports to strengthen the principle of the closest connection by introducing a general exception clause (Article 8) requiring a Korean court to apply the law of the country most closely connected with the case if application of the rules of the New Act would lead to a result inconsistent with the closest connection principle.

G. Introducing Flexible Connecting Factors

The Prior Act provided for an alternative connecting factor only in respect of the form of a juridical act, without designating other subsidiary or cascade connecting factors, as they are called. However, the New Act diversifies the connecting factors by adding alternative connecting factors in respect of the form of a juridical act and by introducing (i) alternative connecting factors for the formation of relationships between parents and legitimate children and between parents and illegitimate children (Articles 40 and 41), legitimation (Article 42), and the form of a will (Article 50(3)); and (ii) a subsidiary or cascade connecting factor in respect of the general effects of marriage (Article 37) and the matrimonial property regime (Article 38), thus enabling greater flexibility when the courts must determine the governing law. In addition, the New Act has expanded the scope of application of *renvoi* (Article 9).

H. Retaining the Principle of *Lex Patriae* and Introducing Habitual Residence as a New Connecting Factor

While retaining the principle of *lex patriae* in matters of personal status, family law and inheritance law, the New Act has diversified the connecting factors in an effort to follow the international trend in the relevant area. For example, the New Act introduces the common habitual residence of spouses as a subsidiary connecting factor for the general effects of marriage (Article 37), the matrimonial property regime (Article 38) and divorce (Article 39). The habitual residence of the testator has also been introduced as an alternative connecting factor in respect of the form of a will (Article 50(3)).

I. Considering the Contents of Substantive Law

Following traditional conflict of laws principles, the Prior Act designated laws as applicable solely on the basis of their geographical and spatial connection with the case at hand, without taking account of the content of the substantive law to be applied. However, the New Act has introduced some special connecting factors

intended to promote the interests and welfare of children and protect the interests of consumers and employees generally regarded as socio-economically weaker parties. By taking account of whether the substantive laws are favorable for the particular party, the New Act has elevated this question to the level of the conflict of laws. For example, as a means of promoting the interests of the child, matters such as establishing a relationship between a parent and an illegitimate child and legitimation may now be governed by the law of the child's habitual residence (Articles 41 and 42). As a means of protecting the interests of consumers and employees, a choice of law made by the parties cannot deprive the consumer or the employee of the protection afforded to him by the mandatory rules of the law of the country of the consumer's habitual residence or where the employee habitually performs his work (Articles 27 and 28). The New Act has also introduced special rules on international jurisdiction to protect the interests of consumers and employees. In addition, as a means of protecting a person's right to maintenance, the New Act provides that the law of the habitual residence of the maintenance creditor rather than the maintenance debtor shall apply, which is in clear contrast to the Prior Act. Moreover, the New Act enables the maintenance creditor to receive maintenance under a so-called corrective connecting factor, which provides that a creditor who is unable to obtain maintenance from the debtor under the law of his habitual residence shall have the option of resorting to the law of their common nationality (Article 46(1)).

J. Expansion of Party Autonomy

Whereas the Prior Act permitted party autonomy only in the context of international contracts, the New Act has introduced party autonomy also in the context of international family law in respect of the matrimonial property regime (Article 38) and inheritance law in general (Article 49). In addition, even in cases of management of affairs without mandate, unjust enrichment and tort, the parties are allowed to agree on the application of the *lex fori* after the event has occurred (Article 33). On the contrary, in the case of consumer contracts and individual employment contracts, the New Act restricts party autonomy to a certain extent as a means of protecting the socio-economically weaker parties (Articles 27 and 28).

K. Taking Account of International Conventions

In the field of international contracts, the New Act has tried to achieve an international decisional harmony (*internationaler Entscheidungseinklang*) by incorporating key provisions of the Convention on the Law Applicable to Contractual Obligations of the European Community of 1980 ('Rome Convention') and the Inter-American Convention on the Law Applicable to International Contracts of 1994 (Articles 17, 25 *et seq.*). In addition, the New Act has also incorporated substantial

parts of the Convention on the Law Applicable to Maintenance Obligations of 1973 and the Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions of 1961, both adopted by the Hague Conference (Articles 46 and 50(3)). In regard to international jurisdiction, the New Act also takes account of the relevant provisions of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of the European Community of 1968 ('Brussels Convention'), and the Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ('Brussels Regulation'), the Lugano Convention and the 1999 Preliminary Draft of the Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters[7] ('1999 Draft Convention'), which was then under negotiation on a worldwide basis (Article 27(4)-(6) and Article 28(3)-(5)).

IV. General Provisions

This section focuses on major issues dealt with in Chapter 1 of the New Act entitled 'General Provisions' (Articles 1-10). Although set forth in the General Provisions, the general rules on international jurisdiction in Article 2 are discussed separately in section V below.

A. Habitual Residence as a New Connecting Factor

The New Act has introduced habitual residence as a new connecting factor. Accordingly, Article 4 of the New Act provides that, in cases where the law of the habitual residence of the party concerned is applicable but it is impossible to ascertain his habitual residence, the law of his residence shall apply. The New Act does not define the term *habitual residence*. However, it is generally understood as referring to the place where a person has his 'center of life' (so-called *Lebensmittelpunkt* in German). In Korea, habitual residence is similar to the concept of domicile, which Article 18(1) of the Civil Code of Korea defines as the center of a person's life, without requiring the existence of the subjective element, i.e., *animus manendi*. Although it is not defined in the New Act, the habitual residence of a legal person is understood to be its principal place of business.[8]

[7] The text is available at the home page of the Hague Conference at http://www.hcch.net/e/workprog/jdgm.html.

[8] LEE H.C., *Gukjesabeop (Private International Law),* Seoul 1983, p. 194. To provide guidelines for registration in the family register, the Supreme Court of Korea revised its relevant regulation in September 2001. Pursuant to this regulation, a foreigner permitted

B. Examination and Proof of Foreign Law

The Prior Act did not expressly specify which party bears the burden of proof when the governing law is a foreign law and how the Korean court should proceed in the event the contents of the foreign law cannot be established. Following the prevailing views in Korea, Article 5 of the New Act expressly provides that the court shall examine and apply *ex officio* the contents of the foreign law designated as the governing law under the New Act and may request the parties' cooperation for that purpose. Cooperation includes providing the relevant source of law or court precedent, which is not easily accessible to the Korean court, or providing information on the relevant authority or expert on the issue under examination. While the New Act does not sanction a party who fails to provide the necessary cooperation, the negative consequence suffered by the party in such case is the application of a substitute law in lieu of the governing law.

C. Scope of the Designated Governing Law

Article 6 of the New Act, which is modelled on the 1975 resolution[9] of the *Institut de droit international* and the first sentence of Article 13 of the Swiss PIL Act, provides that the application of provisions of a foreign law designated as applicable under the New Act shall not be excluded for the sole reason that they are public law in nature. The rationale behind this was that it is not always easy to distinguish between private and public law. Moreover, the criteria used to make such distinction vary from country to country. Most importantly, the decision whether to apply the public law of a country should be based mainly on conflict of laws considerations, not on the nature of the provisions of the foreign law. It should be noted, however, that Article 6 does not state that public law provisions of the *lex causae* must be applied as part of the *lex causae*. Following the first sentence of Article 13 of the Swiss PIL Act, Article 7 of the Working Group Draft in fact provided: 'The governing law designated by this Act encompasses all the provisions of law applicable to the relevant legal relationship under the law of that country.' However, this provision was deleted because of strong opposition by members of the Expert Committee who feared that such an explicit provision could hinder further development of the issue by scholarly views and court decisions.

---

under the Enforcement Decree of the Immigration Law to enter Korea for the purpose of taking up residence in Korea shall be treated as having his habitual residence in Korea if he continues to live in Korea for no less than one year.

[9] Resolution A I No. 1 of 8 November 1975, in: *Rev. crit. dr. int. pr.* 1976, pp. 423-424.

D. Introduction of the Concept of International Mandatory Rules

Article 7 of the New Act expressly provides that provisions of 'a mandatory law of Korea', which in view of its legislative purpose is applicable irrespective of the governing law, shall apply even if a foreign law is designated as applicable under the New Act. While this principle was taken for granted under the Prior Act, the decision to express the principle in Article 7 makes it clear that conflict of laws considerations come into play. Article 7 was modelled on Article 18 of the Swiss PIL Act and Article 7(2) of the Rome Convention. In this context, 'a mandatory law of Korea' refers not to so-called ordinary mandatory rules of law[10] from which the parties may not depart by agreement, but to international mandatory rules of law that cannot be excluded by the parties' agreement and apply even when a foreign law is designated as the *lex causae*. Examples of such international mandatory rules in Korea include the Foreign Exchange Management Act, the Foreign Trade Act and the Regulation of Monopoly and Fair Trade Act. Article 7 introduces international mandatory rules as a concept of private international law in Korea. International mandatory rules are generally classified into three categories: international mandatory rules belonging to the *lex cause*, international mandatory rules of the forum, and international mandatory rules of third countries. The New Act contains provisions only on mandatory rules in the first two categories.[11] The drafters of the New Act considered incorporating Article 7(1) of the Rome Convention or Article 19 of the Swiss PIL Act; however, the idea was finally rejected because the theory on the application of international mandatory rules of third countries is not well established in Korea. Furthermore, both the United Kingdom and Germany have placed a reservation against Article 7(1) of the Rome Convention.

E. Exception Clause

All the connecting factors adopted by the New Act purport to designate the law that is most closely connected with the case as applicable. However, there may be situations where the application of the New Act fails to achieve this desired result in a concrete case. To implement the 'appropriate connecting principle' by applying the most closely connected law in such situations, the New Act has adopted a

[10] The mandatory rules referred to in Article 25(4) on party autonomy, Article 27(1) on consumer contracts and Article 28(1) on individual employment contracts are understood to mean ordinary mandatory rules rather than international mandatory rules. Obviously some mandatory rules on consumer contracts and individual employment contracts could be international mandatory rules.

[11] Although it is not expressly mentioned, Article 6 deals with international mandatory rules belonging to the *lex causae*. Under Article 6 one may argue that international mandatory rules of the *lex causae* should apply as part of the *lex causae* or pursuant to a special connecting principle such as the *Sonderanknüpfungslehre* in Germany.

so-called 'general exception clause' (also known as an escape clause) modelled on Article 15 of the Swiss PIL Act. In this sense, Article 8(1) of the New Act provides that, if the governing law designated by the New Act is only slightly connected with the legal relationship concerned, and it is evident that the law of another country is more closely connected with the legal relationship, the law of the other country shall apply. In this context 'appropriate' means that the most closely connected law should apply and not the substantive law providing the best solution for the case at hand. Whereas the exception clause shall not apply where the principle of party autonomy is applicable, it may be applied in various cases of special types of torts and where a flag of convenience is involved. Application of the exception clause should be permitted only in very limited cases. Although it was recognized that the introduction of the exception clause would cause greater legal uncertainty than previously, the drafters of the New Act regarded it as an inevitable means of achieving the paramount goal of applying the law most closely connected with the case at hand.

F. Expansion of the Scope of *Renvoi*

Like the Prior Act, the New Act does not permit transmission, except in respect of the capacity of a person who assumes obligations under a bill of exchange, promissory note or check, which is expressly permitted under Article 51(1). However, Article 9 of the New Act has substantially expanded the scope of *renvoi* (remission) to Korean law. The rationale behind this change is the desire to achieve an international decisional harmony (*internationaler Entscheidungseinklang*), to apply a more appropriate law instead of insisting on strict adherence to the connecting factors of the New Act and to avoid difficulties in applying foreign laws. Under the Prior Act (Article 4), *renvoi* was permitted only when the *lex patriae* was designated as the governing law. On the contrary, Article 9 of the New Act expands the scope of *renvoi* to Korean law by listing cases where *renvoi* is not permitted. Namely, under Article 9(2) of the New Act, *renvoi* is not permitted in cases where the parties have chosen the governing law or where the law governing a contract is designated by the New Act. In addition, *renvoi* is not permitted in cases where *renvoi* would be contrary to the very purpose of designating the governing law by the New Act. This general principle is modelled on Article 4(1) of the German PIL with slight modifications. Accordingly, it is important to decide whether permitting *renvoi* would be contrary to the purpose of the New Act.[12] Since *renvoi* is now permitted in more cases than under the Prior Act, the Korean courts will need to examine the conflict of laws rules of foreign countries. Moreover, parties who are dissatisfied with the governing law designated in a specific case will try to resort to *renvoi*, if the application of Korean law would be more favorable.

[12] For examples where *renvoi* is excluded by this provision, see SUK K.H. (note 5), p. 113 *et seq*.

V. International Jurisdiction[13]

The drafters believed that in the long run it would be desirable to set forth detailed and refined rules on international jurisdiction for various categories of legal relationships regulated by the New Act. From that perspective, the Swiss PIL Act would serve as the most appropriate model. However, given the absence of a well-balanced discussion on the subject matter, they also believed that it was premature to develop such detailed rules and that it was advisable to wait and monitor the progress of the 1999 Draft Convention. Accordingly, as an interim measure, the drafters decided to incorporate only three articles on international jurisdiction into the New Act. The first of these provisions is Article 2 in the General Provisions that lays down general rules on international jurisdiction. Article 2 is based on principles originating in decisions of the Supreme Court of Japan, as accepted by the Supreme Court of Korea.[14] However, in an effort to streamline the principles, Article 2 made some modifications, underlining the difference between venue provisions of various domestic laws and international jurisdiction. The other provisions – Articles 27 and 28 – introduce special rules to protect consumers and employees.

A. General Rules

Established court precedents and legal scholars in Korea are of the opinion that there are no statutory provisions in Korea on international jurisdiction in civil or commercial matters. Instead, principles for determining international jurisdiction have been developed on the basis of court decisions. Decisions of the Supreme Court of Korea[15] explain the process of determining international jurisdiction by the following four-stage formula:

- There are no treaties, established principles of international law or statutory provisions in Korea on the international jurisdiction for cases involving a foreign element.
- Accordingly, it is reasonable to determine in accordance with *jori,*[16] based upon the basic ideas of fairness to the parties, justice and

[13] For more details on international jurisdiction under Korean law, see SUK K.H., *Gukjejaepangoanhale goanhan Yeongu* (Study on International Jurisdiction), Seoul 2001.

[14] The positions of the Japanese Supreme Court and the lower courts of Japan are explained by DOGAUCHI M., 'Chapter 14 Japan', in: FAWCETT J. J. (ed.), *Declining Jurisdiction in Private International Law*, Oxford 1995, p. 304 *et seq*.

[15] For example, Supreme Court Decision of 28 July 1992, Docket No. 91 Da 41897, and Supreme Court Decision of 21 November 1995 Docket No. 93 Da 39607.

[16] *Jori* means 'nature of the thing'.

promptness of trial whether Korean courts may have international jurisdiction in cases involving a foreign element.

- In the light of such premise and the fact that the provisions of the CCP allocating domestic territorial jurisdiction to the local courts[17] are also based on the basic ideas mentioned above, it is reasonable to conclude that a Korean court has international jurisdiction when the court has domestic territorial jurisdiction under the venue provisions of the CCP.
- However, if any special circumstance exists that renders it contrary to *jori* to conclude that a Korean court has international jurisdiction with respect to a particular case, it is to be deemed that the Korean court does not have international jurisdiction with respect to that case.

The views of legal scholars on how international jurisdiction was to be determined under the Prior Act are now obsolete.[18] In essence, Article 2 says that detailed and refined rules on international jurisdiction should be developed by consulting, but without being bound by, the venue provisions of domestic laws and regulations (most notably those of the CCP in civil or commercial matters). At the same time it is necessary to take account of the special characteristics of international jurisdiction, as distinct from domestic territorial jurisdiction. Accordingly, the venue provisions of the CCP may be classified into the following three categories for the purpose of determining international jurisdiction: a) provisions that could be used unmodified as a basis for international jurisdiction, b) provisions that could be used as a basis for international jurisdiction only if modified, and c) provisions that could not be used at all as a basis for international jurisdiction and should therefore be excluded entirely. In addition, there may other bases for international jurisdiction, although no corresponding venue provisions exist. Thus it is necessary to determine whether such bases exist and, if so, to examine their contents.

Apart from jurisdiction provisions on consumer contracts and individual employment contracts, the New Act contains only fragmentary provisions on international jurisdiction. Therefore, the practice of developing rules on international jurisdiction on the basis of venue provisions of the CCP based on court precedents could in principle be used even under the New Act. However, when using special circumstances as an adjusting tool to draw a correct conclusion in a concrete case, the problem arises that the concept of special circumstances is so vague that it might give the judge deciding the case too much discretion. The underlying idea of Article 2 is to require judges to establish more detailed and refined rules on international jurisdiction after considering the special characteristics of international jurisdiction instead of mechanically assuming that 'rules on international jurisdiction = venue provisions', which could lead them to invoke special circumstances to rectify a conclusion based on an incorrect assumption. In this

[17] This refers to venue provisions.

[18] For details of these opinions see SUK K.H. (note 5), p. 33.

process the focus should be on how to identify the venue provisions that fall into category b) and how to modify them, thus enabling them to be used as a basis for determining international jurisdiction. Our future task is to further develop and refine rules on international jurisdiction by classifying general jurisdiction and special jurisdiction and further subclassifying special jurisdiction into various grounds of jurisdiction.[19] To establish internationally acceptable rules on international jurisdiction, we need to use domestic venue provisions such as the CCP as a starting point and do extensive comparative law research on the Brussels Convention (Brussels Regulation), the 1999 Draft Convention and the Interim Text of 2001.[20]

During the preparation of the New Act, the drafters disagreed on whether the New Act should introduce the doctrine of *forum non conveniens* with very strict requirements. Even though Korean courts have international jurisdiction, this would permit them to refuse to exercise their jurisdiction by staying or dismissing proceedings in cases where there is an alternative forum in a foreign country that is clearly more appropriate to resolve the dispute at hand. Although the final decision was to exclude such a provision, this should not be interpreted as meaning that resorting to the doctrine of *forum non conveniens* is not permitted under the New Act. In my view, it is up to the courts and academics to decide; personally I am in favor of applying the doctrine under very strict conditions.

B. Protection of Socio-Economically Weaker Parties

The New Act sets forth special rules on international jurisdiction in respect of consumer contracts, without including any provision on general jurisdiction or special jurisdiction, in particular special jurisdiction in matters relating to contracts or jurisdiction agreements. From the viewpoint of the jurisdiction system, this approach is not desirable. However, the drafters believed that, despite the urgent need to protect consumers or employees, it was difficult to expect that special rules on consumer contracts or individual employment contracts could be established on the basis of Article 2 or developed by court decisions, whereas jurisdiction rules in matters relating to contracts or jurisdiction agreements could be, even without separate provisions. The provisions on international jurisdiction in Articles 27 and 28 were modelled on Articles 13 to 15 of the Brussels Convention, Articles 15 to 17 of the Brussels Regulation and on Article 7 and 8 of the 1999 Draft Convention.

---

[19] For detailed rules on international jurisdiction see SUK K.H. (note 5), pp. 32-76.

[20] This refers to the ‘Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 June 2001 Interim Text Prepared by the Permanent Bureau and the Co-reporters’, which is available at the website of the Hague Conference at http://www.hcch.net/e/workprog/jdgm.html.

1. Consumer Contracts

In cases where a consumer contract falls under Article 27(1) of the New Act,[21] Article 27(4) permits the consumer to bring an action also in the country of his habitual residence. This is very important because, as a means of protecting consumers, the New Act introduces a special rule that is clearly against the principle of *actor sequitur forum rei,* which constitutes the backbone of the venue provisions of the CCP. On the contrary, Article 27(5) specifies that, in cases where a consumer contract falls under Article 27(1), the other party may bring an action against the consumer only in the country of the consumer's habitual residence. The same result could be reached under the general principles of Korean law. However, the novelty of this provision is that the designated forum has exclusive jurisdiction. In addition, in order to protect consumers from an undue agreement on international jurisdiction, Article 27(6) recognizes a consumer's agreement on international jurisdiction only if such agreement is entered into after the dispute has arisen, or in cases were such agreement has been entered into before the dispute arises, if it allows the consumer to bring an action in another court in addition to the courts having jurisdiction under Article 27.

2. Individual Employment Contracts

Article 28 of the New Act contains a special rule to protect employees similar to the one on consumer contracts. Whereas the consumer's habitual residence is relevant in consumer contracts, the place where the employee habitually performs his work is relevant in individual employment contracts.[22] In the case of an individual employment contract, an employee may also bring an action against the employer in the country where the employee habitually performs his work or in the last country where he did so, or, if the employee does not or did not habitually perform his work in any one country, in the country where the place of business that engaged the employee is or was situated (Article 28(3)). On the contrary, an action against an employee may be brought by the employer only in the country of the employee's habitual residence or in the country where the employee habitually performs his work (Article 28(4)). Although the same result could be reached under the general principles of Korean law, this forum is exclusive under Article 28 of the New Act. In addition, Article 28(5) protects employees from an undue agreement on international jurisdiction by recognizing an employee's agreement on international jurisdiction only if such agreement is entered into after the dispute has arisen, or when such agreement has been entered into prior to the dispute, if it

---

[21] This will be explained below in section X.C.

[22] Article 28 refers to *Geunlogyeyak,* which literally means employment contract. However under Korean law *Geunlogyeyak* is interpreted as meaning an individual employment contract.

allows the employee to bring an action in another court in addition to the courts having jurisdiction under Article 28.

VI. *Lex Societatis* of Legal Persons or Associations

The Prior Act contained no provision on the law governing legal persons or associations (*lex societatis*), except for Article 29 on the legal capacity of a commercial company to act. Therefore, the views were divided on this issue, with supporters mainly for the 'incorporation theory' and the 'real seat theory'. The drafters were of the opinion that the New Act should include provisions on the law governing legal persons and associations as this is a basic conflicts issue. Furthermore, one of the purposes of amending the Prior Act was to prepare a more complete conflict of laws system. After discussing the pros and cons of the two theories, the drafters favored the incorporation theory. Not only did this view prevail under the Prior Act, but it also respects the interests of the parties more appropriately and promotes legal certainty by being easily ascertainable. In addition, the governing law remains unchanged even when the real seat of a company is moved to another country. Accordingly, the first sentence of Article 16 of the New Act adopts the incorporation theory. Had the New Act endorsed the real seat theory, it would have run the risk of denying the legal personality of foreign companies incorporated in a country where they do not maintain their real seat because the New Act does not permit transmission. As an exception to the foregoing principle, the second sentence of Article 16 provides that Korean law shall apply if the head office of the legal person or association is located in Korea or the principal activities of such person or association are conducted in Korea. The purpose of this provision, which is modelled on Article 617 of the Commercial Code of Korea,[23] is to protect third parties who engage in business transactions with such legal persons and associations in Korea.

VII. Juridical Act

Under the Prior Act the concept of juridical act, the Korean counterpart of *Rechtsgeschäft* under the German *Bürgerliches Gesetzbuch* (*BGB*), played a very im-

[23] Article 617 of the Commercial Code of Korea reads as follows: 'A company which has been incorporated in a foreign country shall be subject to the same provisions as companies incorporated in Korea if its headquarter is located in Korea or its principal purpose is to engage in business in Korea.' For more details see SUK K.H. (note 5), p. 139 *et seq*.

portant role because most of the provisions related to contracts focused on that concept. It was quite natural for the Prior Act to do so in light of the importance of the juridical act in the Civil Code of Korea. Although this is still the case in the Civil Code of Korea, the relevant provisions have been rearranged in the New Act. While most of the provisions of the Prior Act focused on contracts, the chapter on juridical acts in the New Act deals only with the formal validity of such acts and the law governing agency. The rationale behind this decision was that the concept of juridical act is not well known internationally, in particular in the common law jurisdictions, and is not familiar to laymen even in Korea. On the other hand, the concept could be useful in these two areas since Korean lawyers are familiar with it.[24] As a result, the concept of juridical act has become less important in the New Act.

A. Formal Validity of Juridical Acts

Both the Prior Act and the New Act adopted the principles of *favor negotii.* As in the Prior Act (Article 10), the formal validity of a juridical act is determined by the law governing the juridical act pursuant to Articles 17(1) and (2) of the New Act. However, a juridical act is also formally valid if it satisfies the formal requirements of the law where the juridical act is effected (the so-called principle of *locus regit actum*). To strengthen the foregoing principle, Article 17(3) of the New Act has inserted a new provision providing that, if the parties are in different countries at the time the contract is concluded, it is formally valid if it satisfies the formal requirements of a contract under the law of one of those countries. Article 17(4) of the New Act contains a provision providing that, in cases where a juridical act is effected by an agent, the country in which the agent is located at the time of the act is relevant for determining the place of the act. These two provisions are modelled on Article 9 of the Rome Convention.

B. Law Governing Agency

The Prior Act contained no rule for determining the law governing agency. The term 'agency' in this context means an agency relationship established by the parties' agreement or by a unilateral juridical act on the part of the principal, not by operation of law. Several views prevailed among legal scholars concerning the law governing agency.[25] The Supreme Court decisions[26] took the view that the external

[24] It was also considered that, under the substantive agency law of Korea, it is well established that the authority of an agent may be granted by a unilateral act of the principal rather than by a contract.

[25] LEE H.C. (note 8), p. 257 *et seq*.

relationship, namely the relationship between the principal and the third party was governed by the law of the place of the act, namely, the place where the agent entered into the contract in his capacity as agent of the principal. While adopting this connecting factor, Article 18 of the New Act contains more detailed provisions providing that the internal relationship between principal and agent shall be subject to the law governing the legal relationship between the parties, whereas the external relationship shall be governed by the law of the country of the agent's place of business or, if there is none or if the agent's place of business is not ascertainable by the third party, then by the law of the country where the agent has actually acted in the particular case. Article 18(4) of the New Act has also introduced party autonomy by allowing the principal to choose the governing law, provided the principal's choice is expressly stated in the document proving the agent's authority (such as a power of attorney) or is notified in writing to the third party by either the principal or the agent.[27] Under the Prior Act, there were disagreements as to whether party autonomy was permitted at all in this connection. Finally, Article 18(5) provides that the relationship between an agent without authority and a third party shall be governed by the law applicable to the external relationship. The reasoning behind this is to avoid a conflict that could arise if the external relationship between the principal and the third party, on the one hand, and the relationship between an agent without authority and the third party, on the other, were subject to different laws.

VIII. Real Rights (Rights *in Rem*)

The Prior Act contained only one Article (Article 12) dealing with the law governing real rights in general. While the New Act introduced several new provisions supplementing this article, it does not contain any separate provision on the law governing trusts, as did the Prior Act.[28]

---

[26] For example, see Supreme Court Decision of 24 March 1987, Docket No. 86 Daka 15 and Supreme Court Decision of 9 February 1988, Docket No. 84 Daka 1003.

[27] In allowing such party autonomy, the drafters took account of the Hague Convention on the Law Applicable to Agency of 1978. However, the requirements stipulated in Article 14 of the Convention have been slightly eased.

[28] Korea is not a Contracting State to the Hague Convention on the Law Applicable to Trusts and on Their Recognition of 1985.

A. Acquisition and Transfer of Real Rights

As under the Prior Act (Article 12(1)), Article 19(1) of the New Act provides that real rights concerning immovables and movables and other rights subject to registration are to be governed by the *lex situs* of the subject matter. Under Article 19(2) of the New Act, acquisition, loss or change of real rights are to be governed by the *lex situs* of the subject matter at the time of the completion of the causal action or event. Article 19(2) applies, for example, in the case of an export transaction from Korea to a foreign country, in which the *situs* of a movable changes before the requirements for the transfer of title are completed.

B. Means of Transportation

The New Act introduces a new connecting factor for means of transportation since the *lex situs* of a means of transportation changes constantly. Under Article 20 of the New Act, real rights to an aircraft are governed by the law of its nationality, whereas real rights to rolling stock are governed by the laws of the country approving its traffic service. There is a separate provision designating the law applicable to the real rights to a ship in Article 60 in the chapter on Maritime Commerce (see section XVI below). Believing that automobiles should be subject to the *lex situs* like other ordinary movables, the drafters decided not to introduce a separate provision on automobiles.

C. Bearer Securities

Bearer securities are negotiable instruments and the rights represented by such securities may be diverse. Nonetheless, they are treated as movables and are thus subject to the *lex cartae sitae*. The Prior Act (Article 31) expressly provided that 'matters relating to the acquisition of bearer securities shall be subject to the law of the place of acquisition'. While Article 21 of the New Act adopts the same connecting factor as the Prior Act, the provision has been slightly expanded to read: 'The acquisition, loss and change of rights concerning bearer securities shall be governed by the law of the site (*lex situs*) of such security at the time of the completion of the causal action or event.' This change aligns Article 21 with Article 19, the basic provision on real rights. In addition, the provision has been moved to the chapter on Real Rights. The 'rights concerning bearer securities' in this context refer to the rights represented by bearer securities, as well as the rights to the security certificate as such. In this respect, bearer securities are treated differently than non-bearer securities.[29] The question whether a certain instrument

[29] Although it is not expressly set forth in the New Act, except for bearer securities, a distinction should be made between the law governing the rights represented by a certificate

is a bearer security is determined by the law governing the right represented by the bearer security. It is evident that the acquisition and disposition of a right to a bearer security certificate is a matter to be governed by the *lex cartae sitae*. However, the change of the right represented by a bearer security is not to be governed by the *lex cartae sitae,* but by the law governing the right itself. In this regard, Article 21 is misleading and should be so construed.[30] Article 21 is intended to apply to securities that exist in the form of a certificate and are directly held by investors. Therefore, Article 21 should not apply in cases where investors hold their securities indirectly through intermediaries and cross-border securities transactions are concluded by a mere account transfer; in such cases the bearer securities cannot be treated as movables. Instead, the law of the place of the relevant intermediary where the rights of the security interest provider and the security interest holder are registered should apply.[31] This is the so-called 'place of the relevant intermediary approach (PRIMA)'. However, *de lege lata*, it appears to be impossible to reach the same conclusion under the New Act as under the Hague Convention on the Law Applicable to Certain Rights in respect of Securities Held with an Intermediary, adopted in December of 2002.[32]

D. *Res in Transitu*

Article 22 of the New Act provides that the acquisition, loss and change of real rights to goods in transit (i.e., *res in transitu*) shall be governed by the law of the country of destination. The drafters decided not to insert a separate provision on the law governing the acquisition, loss and change of real rights to goods in transit that are represented by a document of title such as a bill of lading. Article 39 of the

---

and the law governing the rights to the certificate itself. The former varies depending on the kind of right, whereas the latter is governed by the *lex cartae sitae*. For details see STOLL H., in: *Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, *Internationales Privatrecht,* 13th ed., Berlin 1996, No. 412 *et seq*.; KREUZER K., in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch,* Vol. 10, 3rd ed., Munich 1998, No. 117 *et seq*.

[30] This is due to a technical mistake in the legislation. Article 31 of the Prior Act was correct because it mentioned only 'acquisition of bearer securities'. However, Article 21 of the New Act has inadvertently expanded this to 'acquisition, loss and change of rights concerning bearer securities' without properly considering the consequences.

[31] Determining the governing law raises difficult issues if the two places of relevant intermediary are different, i.e., the place where the rights of the security interest provider are registered and the place where the rights of the security interest holder are registered.

[32] Article 4 of the Convention provides that securities held indirectly by intermediaries are to be governed by the law of the state expressly chosen in the account agreement. For more details on the governing law under Korean law, see SUK K.H. (note 5), p. 175 *et seq*.

Working Group Draft offered two proposals: one supporting the law of the country of destination and the other the *lex cartae sitae*; however, neither was adopted.

E. Contractual Security Interests over Claims, Shares and Other Rights

The Prior Act contained no provision on the law governing contractual security interests over claims (*chaekwon*), shares, other rights, or the securities representing or embodying such claims, shares and other rights. In the Prior Act the view prevailed that such security interests should be governed by the law applicable to the right over which such security interest is created. This view has been adopted by Article 23 of the New Act; however, contractual security interests over bearer securities are governed by the law of the place of the certificates (*lex cartae sitae*) as explained above. It should be noted that Article 23 designates the law governing the right represented by a security certificate only, not the law governing the right to the certificate itself. The latter is governed by the *lex cartae sitae*. Article 23 is intended to apply to securities existing in the form of a certificate and held directly by investors. Therefore, it should not apply in cases where investors hold their securities indirectly through intermediaries and cross-border securities transactions are effected by a mere account transfer, in which case the PRIMA would apply.

IX. Intellectual Property Rights

Since the Prior Act contained no provision on matters relating to intellectual property rights, Korean lawyers were not well aware that international disputes involving such matters raise conflict of laws issues. To correct this lack of understanding and prepare a complete conflict of laws regime, the drafters decided to embody the principle of the law of the protecting country (*lex loci protectionis*) in Article 24: 'The protection of intellectual property rights shall be subject to the law where the right was infringed.' Article 24 mentions only 'protection' and 'infringement' of intellectual property rights instead of using a more general expression such as 'matters relating to intellectual property rights'. The reasons for adopting this narrow wording were twofold: 1) it was technically difficult to generally specify the law of the protecting country without running the risk of giving the impression that the *lex fori* had been adopted;[33] and 2) the infringement of intellectual property rights is the most problematic issue raising the question of the governing law. Although the language of Article 24 is limited to the 'protection' and 'infringement'

[33] The expression 'intellectual property rights shall be subject to the law of the country for whose territory the protection of the rights is sought' (if translated into Korean) could be misunderstood as meaning the *lex fori*.

of intellectual property rights, in my opinion, Article 24 should be interpreted broadly as designating the law of the protecting country in matters relating to intellectual property rights in general. However, if the relevant international treaty on a specific intellectual property right includes conflict of laws rules, such rules will override Article 24. Since copyright is not treated differently than other intellectual property rights such as patents, Article 24 applies to matters of copyright as well, unless a special treaty is applicable. In both the Working Group Draft and the Expert Draft, Article 24 was in a separate chapter entitled Intellectual Property Rights. However, it was later moved to the chapter on Real Rights as it was deemed unusual for a chapter to consist of only one article. Accordingly, the fact that Article 24 appears in the chapter on Real Rights is solely a technical matter and should not play a role in the characterization of matters involving intellectual property rights.

X. Contracts

As mentioned above, Articles 25 to 29 on international contracts are modelled on the Rome Convention with some modifications.

A. Party Autonomy

As for the subjective governing law of a contract, the Prior Act (Article 9) contained a very simple provision declaring the principle of party autonomy. Article 25 of the New Act has introduced more detailed rules modelled on the provisions of the Rome Convention and the Inter-American Convention on the Law Applicable to International Contracts of 1994. The rules laid down in Article 25 of the New Act are more detailed, but do not differ significantly from the prevailing views of Korean legal scholars under the Prior Act. Articles 25(2) and 25(3) expressly permit *dépeçage* and a subsequent change of the governing law of the contract, respectively. Without discussing whether or not *dépeçage* was permitted under the Prior Act, a decision of the Supreme Court of Korea held that, despite the so-called 'English governing law clause' of the Institute of London Underwriters Cargo Clauses (ICC) as used by Korean insurance companies,[34] the formation of the contract was governed by Korean law since the clause actually subjected 'only the liability for and settlement of any and all claims' to English law. Furthermore,

[34] The actual language of the clause was as follows: 'Notwithstanding anything contained herein or attached hereto to the contrary, this insurance is understood and agreed to be subject to English laws and practice only as to liability for and settlement of any and all claims'.

it was unclear under the Prior Act whether the parties were free to designate a foreign law as the governing law of a contract in cases where all relevant elements were connected with another country. Removing this legal uncertainty, Article 25(4) of the New Act expressly provides that, even if all the elements relevant to a case are connected with only one country, the parties are free to select the law of another country as the governing law of the contract. However, the application of the mandatory rules of the law of the former country cannot be excluded in such cases. The purpose of this proviso is to ensure application of the ordinary mandatory rules of the country with which all the elements are connected. Articles 25(5) and 29 provide that the formation and validity of the parties' choice of law clause are to be determined by the law that would govern these matters under the New Act if the contract were valid.[35]

B. Objective Governing Law

The Prior Act (Article 9) designated the law of the place of the act, i.e., the place of the conclusion of the contract, as the objective governing law. Accordingly, it was necessary to include a rule for determining the place of the conclusion of a contract between two persons in two different countries. Under the Prior Act (Article 11), the place where the offer was dispatched was deemed to be the place of the conclusion of a contract. This solution was later criticized as inappropriate, schematic and even anachronic because it did not consider the concrete situations of individual cases and the features of various types of contracts. Moreover, in modern society where the movement of persons is very easy and common, the place where a contract is concluded is often determined by chance and thus has lost the meaning it once had.

Therefore, Article 26(1) of the New Act has abandoned the rule of the place of the act and adopted the principle of the most closely connected law. Namely, in the absence of a choice of law by the parties, the contract shall be governed by the law of the country with which the contract is most closely connected. As in Article 4 of the Rome Convention and Article 117 of the Swiss PIL Act, Articles 26(2) and 26(3) introduce a rebuttable presumption to assist the courts and parties in determining the objective governing law of a contract. Under Article 26(2) of the New Act, a contract is presumed to be most closely connected with the country where the party who carries out one of the following performances has his habitual residence at the time of the conclusion of the contract:

[35] Although it was not directly on point, Supreme Court Decision of 24 March 1987, Docket No. 86 Daka 715, held that the law chosen by the parties shall apply only if the contract itself was validly formed. According to this rationale, it would be logically impossible for the law chosen by the parties to apply to the formation and validity of the contract.

1) in contracts of transfer, the performance of the transferor;
2) in contracts granting the use of a thing or a right, the performance of the party granting the use; or
3) in mandate contracts,[36] contracts for completion of work and similar contracts for services, the performance of the party providing the services.

In the case of a legal person or association, the contract shall be presumed to be most closely connected with the country where the party has its principal place of business. If the contract is concluded during the course of a party's profession or business activity, the country where that party's place of business is situated shall be presumed to be most closely connected with the contract.

Although Article 26(2) effectively contains an illustrative list of characteristic performances, the term *characteristic performance* is not used because the drafters held the term unknown in Korean law.[37] Article 4(5) of the Rome Convention[38] was not adopted because of the general exception clause in Article 8 of the New Act.

C. Protection of Socio-Economically Weaker Parties

The freedom of contract has been considerably limited by the introduction of substantive laws designed to protect consumers and employees, i.e., socio-economically weaker parties in modern society. These laws and regulations are mandatory in nature in that they cannot be excluded by the parties' agreement. If the parties were free to exclude the application of such laws by subjecting an international contract to foreign law, the purpose of the substantive law would become meaningless. Accordingly, as a means of protecting socio-economically weaker parties at the conflict of laws level, Articles 27 and 28 of the New Act, which are modelled on Articles 5 and 6 of the Rome Convention,[39] restrict party autonomy and modify the general rules on determining the objective governing law of an international contract.

---

[36] This may be translated as 'entrustment contract'. The Korean term *uiim* is the counterpart for *le mandat* in French and *der Auftrag* in German.

[37] For examples where the objective governing law is disputed, see SUK K.H. (note 5), p. 217 *et seq.*

[38] According to Article 4(5) of the Rome Convention, Article 4(2) shall not apply if the characteristic performance cannot be determined, and the presumptions in Articles 4(2) to 4(4) shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

[39] The drafters took account of Article 120 of the Swiss PIL Act, which does not allow a choice of law by the parties for consumer contracts, but considered it too strict.

Under Article 27(1), if a contract entered into by a consumer for a purpose that can be deemed to be outside his profession or business activity falls into one of the categories mentioned below, a choice of law by the parties cannot deprive the consumer of the protection afforded to him by the mandatory rules of the law of the country of his habitual residence. In addition, in the absence of a choice of law by the parties, under Article 27(2) a contract falling into such category shall be governed by the law of the country of the consumer's habitual residence. A consumer contract is eligible for protection under Article 27 only:

1) where, prior to the conclusion of the contract, the other party engaged in or directed to that country professional or business activities including soliciting business through publicity, and the consumer had taken in that country steps necessary for the conclusion of the contract;

2) where the other party received the consumer's order in that country; or

3) where the other party arranged the consumer's journey to a foreign country for the purpose of inducing the consumer to order.

Consumers in this context are referred to as 'passive consumers'. Originally modelled on Article 5(2) of the Rome Convention, sub-paragraph 1) above has been slightly modified to cover consumer contracts concluded via the Internet.[40] Nonetheless, there may be cases where it is difficult to decide whether or not the requirements are satisfied. Though not defined, the term *consumer contract* is broader than under Article 5 of the Rome Convention and even Article 120 of the Swiss PIL Act. The scope should be determined by duly considering the purpose of the protection provided under Article 27.[41]

Similarly, in the case of individual employment contracts, Article 28 of the New Act purports to protect the interests of employees at the private international law level. The difference is that in such cases the law of the country where the employee habitually carries out his work (*locus laboris*) shall apply, or if the employee does not habitually carry out his work in any one country, the law of the country of the place of the business that engaged him. The last part of Article 6(2) of the Rome Convention[42] was not adopted because of the general exception clause

[40] This language was inspired by Article 7(1) of the 1999 Draft Convention.

[41] In this regard, the question arises in Korea to which extent the Act on the Regulation of Standard Contract Conditions (modelled on the German *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen. AGBG*) is applicable to international transactions. For details see SUK K.H. (note 5), p. 228 *et seq.*

[42] According to Article 6 of the Rome Convention, if it appears from the circumstances as a whole that the individual employment contract is more closely connected with another country, the contract shall be governed by the law of that country.

in Article 8 of the New Act. Employment contracts of seamen are also subject to Article 28 of the New Act. Difficult questions may arise in cases where the ship sails under a flag of convenience.[43]

XI. Non-Contractual Claims

Whereas the Prior Act contained one Article (Article 13) stipulating the connecting factors for the management of affairs without mandate, unjust enrichment and tort, the New Act deals with each of these matters in a separate Article (Articles 30 to 32). Only unjust enrichment and tort are discussed below since they are more important in practice.

A. Unjust Enrichment

Article 31 provides that unjust enrichment shall be governed by the law of the country where the enrichment took place. If the unjust enrichment resulted from an act based on an existing legal relationship between the parties, the law governing that legal relationship shall apply. The proviso adopts the so-called 'accessory connecting factor' (*akzessorische Anknüpfung*) under Article 38(1) of the German PIL and Article 128(1) of the Swiss PIL Act. Unlike Article 32(2), Article 31 does not expressly specify the application of the law of the common habitual residence of the parties. However, in my opinion, the same conclusion could be reached by applying Article 8 in connection with Article 31. In addition, Article 33 specifies that, after an unjust enrichment has occurred, the parties may agree that the law of Korea shall apply, provided that the rights of third parties shall not be prejudiced by such agreement. Article 33 permits party autonomy, but the parties' choice of law is limited to the *lex fori*. When determining the law governing enrichment under the New Act, the law chosen by the parties shall apply first, then the accessory connecting factor and then the law of the parties' common habitual residence. Finally, the law of the country where the enrichment took place, the sole connecting factor under the Prior Act, shall apply only when the governing law cannot be determined by the foregoing methods.

[43] For details see SUK K.H. (note 5), p. 257 *et seq.*

B. Torts

Similar to the so-called 'double actionability' under English law,[44] torts were governed under the Prior Act by the law of the place where the tort occurred (*lex loci delicti*) and by the *lex fori* cumulatively. This cumulative application has been abolished by Article 32 of the New Act, which provides only that the law of the place where the tort has occurred shall apply. The rationale behind this decision is that the interests of the forum are sufficiently protected by the *ordre public* clause in Article 10. Despite several suggestions, the drafters decided not to introduce a special rule dealing with the so-called *Distanzdelikt,* which occurs when the place of the tortious act and the place of the injury are in different countries. This issue will be resolved by court decisions and scholarly opinions.[45] In this respect, the New Act differs from Article 40(1) of the German PIL and Article 133(2) of the Swiss PIL Act, both of which have special rules for such torts.

Under the New Act the scope and amount of damages to be awarded are determined by law governing the tort, as these are effects of the tort. In this regard, Article 32(4), which is modelled on Article 40(3) of the German PIL, provides that, in cases where a tort under Articles 32(1) to 32(3) is governed by a foreign law, damages arising from the tort shall not be awarded if the nature of the damages is clearly not appropriate so as to merit compensation to the injured party or if the damages so awarded would substantially exceed the amount of compensation deemed appropriate in the particular case. A famous example of the former is punitive damages awarded under the laws of various states of the United States; an example of the latter is the 'grossly excessive damages' awarded by foreign courts. Note that Article 32(4) applies in the latter cases only if the damages to be awarded would be substantially in excess of the amount of compensation deemed appropriate. In other words, Article 32(4) cannot be invoked unless the damages to be awarded under the foreign law substantially exceed the amount of compensation deemed appropriate. This differs considerably from the Prior Act (Article 13(3)), which provided that the application of a foreign law could be excluded if the damages to be awarded under that law would exceed the amount awarded under Korean law.

Notwithstanding Article 32(1), if the tortfeasor and the injured party had their habitual residences in the same country at the time of the tort, it shall be gov-

---

[44] For reference see *Phillips v. Eyre* (1870) LR 6 QB 1; *Boys v. Chaplin* [1971] A.C. 356.

[45] Supreme Court Decision of 22 February 1983, Docket No. 82 Daka 1533, and Supreme Court Decision of 28 May 1985, Docket No. 84 Daka 966, held that the 'place of the tort' included the place of the tortious act as well as the place of injury. However, it is not clear whether the injured party may select the law more favorable to him or whether it is up to the court to select *ex officio* the law more favorable to the injured party. The recent Seoul District Court Decision of 23 May 2003, Docket No. 99 Gahap 84123, expressly takes the stand that the injured party may select the law more favorable to himself.

erned by the law of that country. Under the Prior Act, the Supreme Court[46] applied Korean law in tort cases between two Koreans that took place in foreign countries. This is based on the rationale that Korean law was most closely connected with such cases and that they should thus be viewed as having no foreign element at all. Although the conclusions of these decisions were welcomed, the reasoning was strongly criticized. While expressly upholding the conclusions of these Supreme Court decisions, the New Act adopts the common habitual residence rather than the common nationality as the decisive connecting factor.

Notwithstanding Articles 32(1) and 32(2), if the tort violates an existing legal relationship between the tortfeasor and the injured party, the tort shall be governed by the law applicable to the legal relationship. This is the 'accessory connecting factor'. Accordingly, if the existing relationship, for example, a contractual relationship between the parties, is prejudiced by a tortious act, the tort is subject to the governing law of the contract, i.e., the tort law of the country whose contract law is applicable to the contract.

Notwithstanding Article 32, the parties may, after the tort has occurred, agree that the law of Korea shall apply to the tort, provided that rights of third parties shall not be prejudiced by such agreement. The proviso protects the rights of third parties such as an insurer. It should be noted that, when determining the law governing a tort under the New Act, party autonomy shall apply first, subsidiarily the accessory connecting factor and then the common habitual residence. Finally the law of the place where the tort occurred, which was the only connecting factor applied in connection with the *lex fori* under the Prior Act, applies only when the foregoing connecting factors are not applicable.

During the drafting process there was considerable discussion on whether conflicts rules should be adopted for special types of torts such as traffic accidents or products liability.[47] The final decision was not to include such rules, mainly because special rules for torts are not well developed in Korea. Furthermore, when necessary, special rules can be developed under the New Act by applying the connecting factors applicable to tort and the exception clause under Article 8. Such special rules should be developed by the courts in the future.

---

[46] See Supreme Court Decision of 13 November 1979, Docket No. 78 Da 1343, and Supreme Court Decision of 10 February 1981, Docket No. 80 Da 2236.

[47] Examples of such special rules are Articles 134 to 139 of the Swiss PIL Act. In addition, there are two Hague Conventions: the Hague Convention on the Law Applicable to Traffic Accidents of 1971 and the Hague Convention on the Law Applicable to Products Liability of 1973. Korea is not a Contracting State to either of these Conventions.

XII. Law of International Claims: Matters Common to Contractual and Non-Contractual Claims

Articles 34 and 35 of the New Act are modelled on the Rome Convention with some modifications, except for the assumption of obligations.

A. Law Governing the Assignment of Claims

The Prior Act contained only one Article on the law governing the assignment of claims. Namely, Article 13 of the Prior Act provided that the effect of the assignment of a claim *vis-à-vis* third parties was governed by the law of the debtor's domicile. Third parties here meant persons other than the parties to the contract for an assignment of claim, including the debtor. Following the German model, the Civil Code of Korea distinguishes between contracts for an assignment of claim (*Abtretungsvertrag*) and their underlying contracts such as sales contracts. Such assignment contract is understood to exist conceptually and is legally a quasi-real rights act in nature. Given the absence of express provisions on this point in the Prior Act, the scholarly view prevailed that the contractual relationship between assignor and assignee and the conceptual assignment contract should be subject to the law governing the assigned claim. Modelled on Article 12 of the Rome Convention with some modifications, Article 34(1) of the New Act makes it clear that the legal relationship between the assignor and the assignee of a contractual assignment of claim is to be governed by the law governing the contract between assignor and assignee. However, the law governing the claim to be assigned shall apply when determining its assignability and the effects of assignment as against the debtor and third parties. Unlike the Prior Act, which was interpreted as favoring the debtor's interests at the conflict of laws level, the drafters decided that balancing the interests of the related parties requires that the law governing the claim to be assigned be applied when determining its assignability and the effect of assignment as against the debtor and third parties. The latter includes issues such as priority among competing claimants. The drafters of the New Act rejected a proposal to follow the conflict of laws rules set forth in Article 22 and Articles 26 to 30 (Chapter V) of the United Nations Convention on the Assignment of Receivables in International Trade,[48] adopted in December of 2001. Considering it premature to adopt the rules of the United Nations Convention for general application to the assignment of all claims, they followed the traditional rules instead. In this regard, the question may arise whether the assignment contract in a conceptual sense (*Abtretungsvertrag*) should be governed by the law applicable to the contract between assignor and assignee. Namely, Article 34(1) provides that 'the legal rela-

[48] For the English text of the Convention, see the website of UNCITRAL at http://www.uncitral.org/en-index.htm.

tionship between assignor and assignee' rather than 'the mutual obligations of assignor and assignee' shall be governed by the law applicable to the contract between assignor and assignee. According to the literal reading of the text, the answer should be affirmative. Article 34(1) is applicable to the assignment of both contractual and non-contractual claims. For this reason Article 34(1) follows the provisions on non-contractual claims.

B. Law Governing the Assumption of Obligations

The Prior Act contained no provision on the law governing the assumption of obligations. However, the assumption of obligations may be regarded as the opposite of the assignment of claim. In this sense, Article 34(2) of the New Act provides that provisions on the assignment of claim shall apply *mutatis mutandis* to the assumption of obligations. This is consistent with the views of Korean legal scholars under the Prior Act. Article 34(2) is applicable to the assumption of both contractual and non-contractual obligations.

C. Transfer of Claims by Operation of Law

The Prior Act had no provision on the law governing the transfer of claims by operation of law, including subrogation by an insurer or a person who made payment on behalf of another person such as a guarantor. The New Act inserted Article 35, which is modelled on Article 13 of the Rome Convention and Article 146 of the Swiss PIL Act.

Under Article 35(1), the transfer of a claim (*chaekwon*) by operation of law is subject to the law governing the underlying legal relationship between the former and the new creditors (such as an insurance contract or guaranty agreement), on the basis of which the transfer takes place. However, if any provision in the law governing the claim to be assigned protects the debtor, such provision shall apply. On the other hand, Article 35(2) provides that, if no underlying legal relationship exists between the former and the new creditors, the transfer of a claim by operation of law shall be subject to the law governing the claim itself. The rationale behind this is that the transfer of a claim by operation of law is the effect or consequence of payment of the claim. The New Act contains no provision on the law applicable to the reimbursement claim of joint and several obligors or the reimbursement claim of a guarantor against the principal debtor, thus leaving the matter to the judges and legal scholars for further development.

XIII. Kinship

Under the influence, *inter alia,* of the relevant provisions of the Japanese PIL (as amended in 1989), the New Act presents the conflict of laws rules on international kinship in the context of the following four categories: 1) international marriages, 2) international parent-child relationships, 3) international maintenance, and 4) international guardianship.

A. Law of International Marriage

1. Formation of Marriage

As under the Prior Act (Article 15(1)), Article 36(1) of the New Act provides that the requirements for the formation of a marriage are to be governed by the *lex patriae* of each of the parties. Under Article 36(2) of the New Act, the formal validity of a marriage is to be governed by the law of the place where the marriage ceremony took place or the *lex patriae* of any one of the parties. Under the Prior Act (Article 15(1)), the formal validity of a marriage was governed only by the law of the place where the marriage ceremony took place. Article 15(2) of the Prior Act, which expressly permitted a consular marriage exception, has been deleted since a consular marriage is possible pursuant to Article 36(2). However, if the marriage ceremony took place in Korea and one of the parties is Korean, Article 36(2) provides that the formal validity of such marriage shall be governed by the law of Korea. The purpose of this proviso is to ensure that the marriage is registered in the family register maintained in Korea.

2. General Effects of Marriage

The Prior Act (Article 16(1)) designated the husband's *lex patriae* as the law governing the general effects of a marriage and was thus criticized as discriminatory. Adopting the so-called 'cascade connecting principle', Article 37 of the New Act provides that the general effects of a marriage are to be governed first by the common *lex patriae* of the spouses, secondly by the law of the common habitual residence of the spouses, and thirdly by the law of the place with which the spouses are most closely connected. This is a modification of the *Kegelsche Leiter* (Kegel's ladder), as suggested by the Max-Planck Institut[49] and adopted by Article 14 of the Japanese PIL. In light of the increasing number of foreign migration workers who come to Korea, marry Korean women and settle in Korea, this amendment brought about by the New Act will have a very important practical impact.

[49] *RabelsZ* 1983, p. 69 *et seq.*

3. Matrimonial Property Regime

Whereas the matrimonial property regime was governed by the husband's *lex patriae* at the time of marriage under the Prior Act (Article 17), pursuant to Article 38 of the New Act, it is now governed by the law applicable to the general effects of marriage, which may change from time to time. In addition, following the models of the Hague Convention on the Law Applicable to Matrimonial Property Regimes of 1978 and the codifications of various countries,[50] Article 38(2) of the New Act has introduced party autonomy with certain restrictions. Namely, the types of law that may be chosen by the parties to govern their matrimonial property regime are restricted and their agreement on the choice of law is subject to some formal requirements.

4. Divorce

The Prior Act (Article 18) designated the husband's *lex patriae* at the time of the event causing the divorce as the law governing the divorce. In addition, under the Prior Act (Article 18, proviso) Korean courts could not issue a divorce order if the event causing the divorce did not constitute a ground for divorce under Korean law. The Prior Act was criticized in respect of the following three points: First, it was contrary to the principle of gender equality. Secondly, it was based on the system of 'fault' and as such was against the trend in the domestic divorce laws of various countries to permit a divorce once the marriage is irretrievably broken down, although the requesting party is responsible for the breakdown. Thirdly, it made divorce more difficult to obtain since the ground for divorce had to be recognized by both the governing law and by Korean law. To avert such criticism, Article 39 of the New Act subjects divorce to the law governing the general effects of marriage, which may change from time to time. In addition, to relieve the Korean family registration officers of the practical burden of determining the law governing a divorce, the New Act has introduced the so-called 'Korean clause', which subjects a divorce to Korean law if one of the spouses is a Korean with his or her habitual residence in Korea.

B. Law of International Parent-Child Relationships

The Prior Act distinguished between the act of establishing a parent-child relationship, on the one hand (Articles 19-21), and the rights and obligations arising therefrom, on the other (Article 22). While Articles 40-45 of the New Act retain this structural distinction, the substance differs.

---

[50] Examples are Article 15(2) of the German PIL, Article 52 of the Swiss PIL and Article 15 of the Japanese PIL.

1. Formation of Parent-Child Relationships

Like the Prior Act, the New Act makes a distinction between relationships between a parent and a legitimate child and relationships between a parent and an illegitimate child, specifying different connecting factors for each of them. This is in keeping with the treatment under the Civil Code of Korea. Therefore, it can be said that, as far as parent-child relationships are concerned, the New Act is in the same stage of development as the Civil Code of Korea.

Under the Prior Act (Article 19), the formation of a relationship between a parent and a legitimate child was governed by the *lex patriae* of the mother's husband. Thus the Prior Act was criticized as violating gender equality and as insufficient for the purpose of protecting the interests of the child. To facilitate the formation of relationships between a parent and a legitimate child, Article 40 of the New Act designates the *lex patriae* of one of the parents at the time of the child's birth as the law governing the formation of such relationships.

As to the formation of a relationship between a parent and an illegitimate child, the Prior Act contained a provision on child recognition but did not deal with other matters relating to the formation of such relationships. However, child recognition is not the only way of establishing a relationship between a parent and an illegitimate child. For example, there are countries with a 'system of consanguinity' (*Abstammungssystem),* where such relationship is formed by the mere existence of a factual blood relationship. Accordingly, Article 41(1) of the New Act subjects the formation of a relationship between a parent and an illegitimate child to the mother's *lex patriae* at the time of the child's birth. To facilitate the formation of a parent-child relationship between a father and an illegitimate child, the second sentence of Article 41(1) stipulates two additional alternative governing laws: a) the law of the father's *lex patriae* at the time of the child's birth, or b) the law of the child's current habitual residence.

As to child recognition, the Prior Act (Article 20) made such recognition difficult by subjecting the requirements of recognition to the respective *lex patriae* of the father, mother and child. As a means of facilitating child recognition, Article 41 of the New Act provides that such recognition shall be governed by either the law generally applicable to the formation of a relationship between a parent and an illegitimate child or by the recognizing party's *lex patriae* at the time of recognition. As a result, if the recognizing party is the mother, the recognition is to be governed by: a) the mother's *lex patriae* at the time of the child's birth or b) the mother's *lex patriae* at the time of recognition. On the other hand, if the recognizing party is the father, the recognition is to be governed by one of the following four laws: a) the mother's *lex patriae* at the time of the child's birth, b) the father's *lex patriae* at the time of the child's birth, c) the father's *lex patriae* at the time of recognition, or d) the law of the child's habitual residence at the time of recognition.

Whereas the Prior Act contained no provisions on legitimation, Article 42(1) of the New Act facilitates the legitimation of an illegitimate child by

subjecting such legitimation to the *lex patriae* of the father or the mother, or to the law of the child's habitual residence at the time the event constituting the legitimation is completed.

Turning to adoption, the Prior Act (Article 21) distinguished between the requirements of adoption and the effects of adoption, designating a different governing law for each of them. By subjecting the requirements of adoption to the cumulative application of the *lex patriae* of the adoptive parent and the adopted child, the Prior Act made it relatively difficult to satisfy the requirements. Accordingly, Article 43 of the New Act provides that the requirements, formation and effects of adoption shall be governed by the *lex patriae* of the adoptive parent at the time of adoption. The policy underlying this connecting factor is that the adopted child becomes a member of the family of the adoptive parent and that the adoptive parent's country usually constitutes the center of life of the adopted child. However, if the child's *lex patriae* requires the child's or a third party's consent or approval of the formation of the parent-child relationship, Article 44 of the New Act provides that such requirement must also be satisfied. Obviously this is to protect the interests of the child. Under Article 43 of the New Act, the dissolution of an adoption is also governed by the adoptive parent's *lex patriae* at the time of adoption.

At present Korea is a Contracting State neither to the Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions of 1965 nor to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of 1993. I believe that Korea should accede to the latter Convention.

2. Rights and Obligations of Parents and Children

Under the Prior Act (Article 22), once a parent-child relationship was established as described above, the rights and obligations of the parent and child were determined by the father's *lex patriae* and, if there was no father, subsidiarily by the mother's *lex patriae*. Retaining this structure, the New Act distinguishes between the establishment of a parent-child relationship, on the one hand, and the rights and obligations arising from the relationship, on the other. In light of the shortcomings of the connecting factor of the Prior Act, which was contrary to the principle of gender equality and unable to properly protect the child's interests, the rights and obligations arising from a parent-child relationship are determined by the law of the child's habitual residence under Article 45 of the New Act. However, if the child's *lex patriae* is also the *lex patriae* of both father and mother, then that law shall apply.

C. Law of International Maintenance[51]

The Prior Act (Article 23) merely provided that maintenance obligations shall be governed by the *lex patriae* of the maintenance debtor. However, the majority of Korean legal scholars regarded maintenance obligations as being most closely connected with the underlying relationship between maintenance creditor and maintenance debtor. Accordingly, they contended that matters concerning maintenance between spouses should be governed by the law applicable to the general effects of marriage, matters concerning maintenance between a parent and a minor child by the law governing the parent-child relationship and matters concerning maintenance between divorced spouses by the law governing the divorce. As a result, it was held that Article 23 of the Prior Act was applicable only to parents' maintenance obligations towards their adult children, adult children's maintenance obligations towards their parents, and maintenance obligations between siblings and other relatives.

Modelled on the Hague Convention on the Law Applicable to Maintenance Obligations of 1973, Article 46 of the New Act has adopted a unified approach by treating maintenance obligations as an independent subject matter subject to a uniform connecting factor.[52] Under Article 46(1), maintenance obligations are governed by the law of the habitual residence of the maintenance creditor. However, if the maintenance creditor is unable to obtain maintenance from the debtor under such law, the law of their common nationality shall apply.[53] This exception protects the interests of the maintenance creditor.[54] In regard to maintenance obligations between divorced spouses, Article 46(2) provides that, if the divorce was granted or recognized in Korea, maintenance obligations between divorced spouses are governed by the law that actually applied to the divorce. In the case of divorce, it was held that the issue of maintenance is so closely connected with the dissolution

---

[51] Maintenance is often referred to as support, especially in the United States. In this Article the term *maintenance* is used in keeping with the terminology of the Hague Maintenance Convention.

[52] At present, Korea is not a party to any treaty or convention on maintenance obligations, including the Hague Maintenance Convention.

[53] As a measure to protect the interests of the maintenance debtor, in cases of a maintenance obligation between persons related collaterally or by affinity, the debtor may argue that no maintenance obligation exists under the law of their common nationality or, in the absence of a common nationality, under the law of the debtor's habitual residence (Article 46(3)).

[54] However, unlike the Hague Maintenance Convention, the New Act does not provide for application of the *lex fori* in the event the maintenance creditor is unable to obtain maintenance from the debtor by applying both the law of the creditor's habitual residence and the law of their common nationality. The rationale behind this was the drafters' uncertainty whether the Korean law on maintenance obligations would adequately protect the interests of the maintenance creditor.

of marriage that both matters should be governed by the same law. Hence, it was decided to introduce a special rule on maintenance obligations between divorced spouses in the New Act.

In cases where the existence of a parent-child relationship is disputed as an incidental question in connection with a maintenance claim, the question arises as to the law governing the parent-child relationship. While there was no doubt under the Prior Act that this question was to be treated as a separate conflict of laws issue, under the New Act it could be held: 1) that the question should be treated independently or 2) that the law applicable to the maintenance obligation in question should apply to the parent-child relationship as well. The Hague Maintenance Convention is also open to these two possibilities.

D. Law of International Guardianship

Matters relating to international guardianship were governed by the ward's *lex patriae* under the Prior Act (Article 25). Accordingly, a Korean court could also have jurisdiction over a foreigner having his domicile or residence in Korea in cases where there was no person to perform the guardianship duties, even if the grounds for commencement of guardianship existed under the ward's *lex patriae* or a declaration of quasi-incompetence or incompetence had been issued in Korea. Article 48 of the New Act retains the principle of the *lex patriae* and, like the Prior Act, makes no differentiation between minors and adults. However, the scope of cases where a Korean court may have jurisdiction over a foreigner having his habitual or residence in Korea has been slightly expanded to include cases where the person to perform the guardianship duties cannot perform his duties or where there is an otherwise urgent need to protect the ward.

XIV. Inheritance

A. Basic Issues

Article 49 of the New Act provides that matters of inheritance shall be governed by the *lex patriae* of the deceased, as under the Prior Act (Article 26). It is held that the *lex patriae* is best suited to ensure legal stability and certainty and to protect the interests of the parties concerned. Like the Prior Act, the New Act adopts the 'principle of unity', according to which the entire estate of the deceased is subject to one and the same law regardless of whether it comprises immovable or movable property. The New Act differs from the Prior Act on two points: First, the New Act expressly designates the *lex patriae* of the deceased 'at the time of his death', whereas the Prior Act had no such time restriction. Nonetheless, the result should

be the same. Secondly, in keeping with the Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons of 1989 and Article 25(2) of the German PIL, the New Act introduces party autonomy to a limited extent. It was held that inheritance concerns not only the status of the deceased but also the passage of his property to his family or other persons entitled to succession. The scope of party autonomy permitted under the New Act is broader than that under the German PIL, which permits the deceased to select German law as the law governing the inheritance of immovable property located in Germany. The scope of the provision of the New Act appears to be similar to the one in Article 46(2) of the Italian PIL.

B. Issues Relating to the Will

Pursuant to Article 50 of the New Act, issues relating to the will are to be governed by the testator's *lex patriae* at the time he made the will, the amendment or withdrawal of a will by the testator's *lex patriae* at the time the will was amended or withdrawn. In this respect, there has been no change in the substance of the Prior Act (Article 27). As regards the form of a will, the New Act follows the principles of the Hague Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions of 1961 by adopting the principle of *favor testamenti*.[55] To be more specific, the New Act provides for five alternative governing laws: the law of the testator's habitual residence either at the time the will was made or at the time of his death, the law of the testator's nationality either at the time of his death or at the time the will was made, and the law of the place where the testator made the will. The Prior Act permitted only the last two laws.

XV. Commercial Matters

While most of the provisions in the chapter of the Prior Act on Commercial Matters were deleted, the provisions on bills of exchange, promissory notes and checks have been moved to a separate chapter of the New Act (Chapter 8), without any substantive change. The connecting factors therein are based on the principles laid down in the Convention for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange and Promissory Notes of 7 June 1930 and the Convention for the Settlement of Certain Conflicts of Laws in Connection with Cheques of 19 March 1931, which purport to unify the relevant conflict of laws rules on a global basis. It is characteristic of Korean law to deal with conflicts issues relating

[55] However, at present Korea is not a Contracting State to the above Hague Convention.

to bills of exchange, promissory notes and checks in the Conflict of Laws Act rather than in the Bills of Exchange and Promissory Notes Act and the Checks Act.

XVI. Maritime Commerce

In keeping with the tradition of Korean law, the drafters of the New Act prepared a separate chapter (Chapter 9) with special conflicts rules for maritime commerce. The rule providing that the ownership and mortgage of a ship are governed by the law of the country of the ship's registration was not disputed.[56] However, there was considerable disagreement on whether maritime lien and global limitation of the shipowner's liability, both of which are peculiar to maritime commerce, should also be governed by the law of the country of the ship's registration.[57] After a long debate, the drafters of the New Act retained the connecting factors set forth in the Prior Act but decided to supplement and clarify them. The New Act has simplified the corresponding provisions of the Prior Act (Article 44, sub-paragraphs 1 to 4) by combining them in one sub-paragraph covering 'ownership, mortgage, maritime lien and other real rights (rights *in rem*) in a ship'. In particular, it is noteworthy that sub-paragraph 4 of Article 60 provides that the law of the country of the ship's registration shall also apply when determining whether a shipowner, charterer, manager, operator or other user of the ship is entitled to invoke limitation of liability and the scope of such limitation of liability. This provision has the effect of correcting the conclusion of a decision of the Supreme Court of Korea,[58] which denied application of the law of the country of the ship's registration to global limitation of the shipowner's liability under the Prior Act (Article 44, sub-paragraph 6). It should be kept in mind that determining the law governing the matters dealt with in Article 60 is not as mechanical as it used to be under the Prior Act, especially because of the possibility to apply the exception clause in Article 8 of the New Act. As mentioned above, the application of the law of the country of the

---

[56] In Korea the term *seonjeokguk* mentioned in Article 60 of the New Act means the 'country of the registration of a ship' rather than the 'country of the flag of a ship': SUK K.H. (note 5), p. 401.

[57] Korea is not a party to the Convention on Limitation of Liability for Maritime Claims of 1976. Nonetheless, most of the provisions of the Convention have been incorporated into the Commercial Code of Korea (Article 746 *et seq*.).

[58] Article 44, sub-paragraph 6 of the Prior Act provided that the law of the country of the ship's registration applies when determining whether a shipowner may be relieved of its liability by abandoning the ship and freight. Supreme Court Decision of 28 January 1994, Docket No. 93 Da 18167, held that the global limitation of liability of a shipowner who caused a tort did not fall under sub-paragraph 6 and that the matter was to be decided pursuant to the law governing the tort.

ship's registration could be denied if such registration came about as a result of a flag of convenience and is the only link with that country. However, this does not mean that, for the purpose of applying Article 60, the ship's registration will be totally disregarded in cases involving a flag of convenience. A case-by-case analysis will be necessary in order to determine whether the requirements of Article 8 are satisfied.[59]

XVII. Recognition and Enforcement of Foreign Judgments

As mentioned above, the recognition and enforcement of foreign judgments in Korea is now governed by the New CCP and the CCE. Pursuant to Article 217 of the New CCP, a foreign judgment may be recognized in Korea only if five requirements are satisfied.

First, the judgment must be final, conclusive and no longer subject to ordinary forms of review.

Secondly, the foreign court must have had international jurisdiction under the principles of international jurisdiction laid down in Korean law or international treaties. Sub-paragraph 1 of Article 217 differs from the corresponding provision of the Prior CCP in two respects: 1) The New CCP expressly requires that the foreign court had international jurisdiction, whereas the Prior CCP required that the foreign court had *jaepankwon*, which literally means *facultas jurisdictionis* or *Gerichtsbarkeit* in German.[60] In this regard, the New CCP has been influenced by the New Act, which expressly deals with international jurisdiction. International jurisdiction in this context refers to indirect international jurisdiction. The New CCP is consistent with the views expressed in Supreme Court decisions and by legal scholars under the Prior CCP.[61] 2) The New CCP expressly provides that the same criteria apply to both indirect and direct international jurisdiction. This is also consistent with the views expressed in Supreme Court decisions and by legal scholars under the Prior CCP.

Thirdly, the defendant must have been served with the complaint (or equivalent document) and the summons or any orders in a lawful manner (other than public notice or similar methods) in advance so as to allow sufficient time for preparation of his defense, or the defendant may have responded to the suit without

---

[59] For details see SUK K.H. (note 5), p. 258 *et seq.*, p. 401 *et seq.*

[60] Under the influence of German theory, Korean legal scholars and Supreme Court decisions distinguish between *Gukjejaepangoanhal* (international jurisdiction) and *jaepankwon* (*facultas jurisdictionis*).

[61] SUK K.H. (note 5), p. 448.

having been served. Sub-paragraph 2 of Article 217 differs from the corresponding provision of the Prior CCP in four respects: 1) The New CCP is applicable irrespective of the nationality of the defendant, whereas the Prior CCP was applicable only to cases where the losing defendant was Korean. 2) The New CCP provides that the defendant must have been served in a lawful manner in advance, thus allowing him sufficient time to prepare his defense. The Prior CCP merely provided that the defendant must have been served, without specifying the 'lawfulness' or 'timeliness' of service. The requirement that service be 'lawful' was clearly postulated by a Supreme Court decision[62] rendered under the Prior CCP. The New CCP is similar to Article 27, sub-paragraph 2 of the Brussels Convention. However, Article 34, sub-paragraph 2 of the Brussels Regulation no longer requires that service be performed lawfully. The purpose of the service requirement is to protect the defendant's right to be heard and, more importantly, to ensure that the defendant had sufficient time to prepare his defense by being served the necessary documents. From this point of view, the position of the Brussels Regulation is preferable. 3) The New CCP cites service 'by public notice or similar methods' as an example of unlawful service, whereas the Prior CCP referred only to public notice in this context. 4) The New CCP provides that 'the defendant must have been served with the complaint (or equivalent document) and the summons or any orders', whereas the Prior CCP provided merely that the defendant must have been served with the summons or any orders necessary to commence the proceedings.

Fourthly, the recognition of the foreign judgment must not be contrary to Korean public policy.

Fifthly, there must be a guarantee of reciprocity between Korea and the foreign country in which the judgment was rendered. The first, fourth and fifth requirements were also in the Prior CCP and were adopted unchanged.

In the past, Korean courts have been rather reluctant to take a more liberal approach to the recognition and enforcement of foreign judgments; however, their attitude is now more favorable. A recent judgment of the Seoul District Court[63] recognizing the judgment of a Chinese court may be taken as an indication of such trend.

It should be noted that the enforcement of a foreign judgment does not take place automatically even if the above-mentioned requirements are satisfied. This is due to the fact that Article 26 of the CCE permits the enforcement of a foreign judgment only when the legality of the enforcement has been declared by a Korean court in an enforcement judgment (*exequatur*). Article 27 of the CCE expressly requires that, in order for a Korean court to render an enforcement judgment, the foreign judgment must fulfill the requirements for the recognition of foreign judgments specified in the New CCP. In my opinion, it would be desirable for the pro-

[62] Supreme Court Decision of 14 July 1992, Docket No. 92 Da 2585.

[63] Seoul District Court Decision of 5 November 1999, Docket No. 99 Gahap 26523.

visions on the recognition and enforcement of foreign judgments in the New CCP and the CCE to be incorporated into the New Act. As a result, the New Act would contain provisions on international jurisdiction, choice of law and the recognition and enforcement of foreign judgments, the three major topics of private international law.

XVIII. Concluding Remarks

Thanks to the promulgation of the New Act at the beginning of the new millennium, I believe that Korea has succeeded in achieving the modest goal of codifying substantial parts of its private international law, keeping it abreast of major developments in the field achieved by the leading advanced continental European countries in the course of the last century. From the foregoing discussion it is clear that the New Act follows the approach of the traditional conflict of laws on the European continent. It is a product of the efforts to eliminate the problems existing under the Prior Act and to modernize Korean private international law by adopting the standards laid down in international conventions and national laws of advanced countries. Unlike the Prior Act, which was strongly influenced mainly by the former Japanese PIL and the former German PIL, the drafters of the New Act took account of the Rome Convention, the Swiss PIL Act, the new German PIL, which entered into force in 1986, and various Hague Conventions, thus gaining a relatively greater universal validity for Korean private international law. The fact that the New Act expressly declares that questions of international jurisdiction are a matter of conflict of laws is a clear sign that it has departed from the German tradition of confining conflict of laws principles to choice of laws rules. This in itself is a move towards a broader and more practical approach widely accepted in the conflict of laws today. It is hoped, and I am personally confident that the New Act will be able to achieve its intended objectives in the 21st century as a basic law capable of regulating an ever-increasing number of legal relationships with a foreign element.

CURRENT STATE AND FUTURE PERSPECTIVES OF BULGARIAN PRIVATE INTERNATIONAL LAW

Christa JESSEL-HOLST*

I. Introduction
II. Transformation of the Rome Convention
III. International Adoption
IV. International Child Abduction

I. Introduction

Bulgaria belongs to the countries without a specific statute on private international law; furthermore, there is no Civil Code, thus ruling out the possibility of incorporating a chapter on the conflict of laws. Instead, a relatively small number of conflict of laws rules is dispersed throughout various laws, such as the rules on international family law in the Family Code of 1985[1] and the relatively extensive conflicts rules in the Maritime Commercial Code of 1970.[2] A few individual provisions on the applicable law are found in several other laws, including the Commercial Code, which consists of four books regulating the general part, commercial companies, commercial transactions and insolvency. The law of international civil procedure is governed by the Code of Civil Procedure of 1952.[3] Bulgaria has concluded bilateral treaties on mutual judicial assistance with several countries, mainly from the former East Bloc, some of which contain conflict of laws rules having precedence over provisions of national law. Some Bulgarian laws containing conflicts rules have been translated into other languages, for example, into German; however, the translations are scattered in various loose-leaf collections and legal periodicals. A comprehensive collection of the sources of

* Doctor iuris, Senior Research Associate, Max-Planck-Institute for Foreign Private and Private International Law, Hamburg.

1 *Dăržaven Vestnik* (Bulgarian legal gazette, hereinafter: *DV*) 1985 No. 41, as amended by *DV* 2003 No. 84.

2 *DV* 1970 No. 55/56, as amended by *DV* 2002 No. 113.

3 *Izvestija* 1952 No. 12, as amended by *DV* 2003 No. 84.

Yearbook of Private International Law, Volume 5 (2003), pp. 143-153
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

Bulgarian private international law does not exist in Bulgarian, let alone in a foreign language.

Thus, Bulgarian private international law is not easily accessible, especially to foreigners. Moreover, it is full of gaps. Particularly sensitive is the absence of provisions regulating the general part of private international law; at present only a few fragments exist, mainly in the Family Code. Other essential parts of private international law are not regulated at all, for example, international inheritance law, the law of property, non-contractual obligations, the right to use a name etc. To complete the picture, the court practice is very scarce in these fields.

As for the existing Bulgarian conflict of laws rules, many of them date from socialist times and thus fail to meet modern standards. Of course, this has been known in Bulgaria for a long time and continues to be discussed at length in Bulgarian legal literature. While the majority of Bulgarian scholars favoured the adoption of a separate codification of private international law, which would coordinate the various existing provisions and regulate all open questions, the Bulgarian government preferred another solution. For years the plan was to adopt comprehensive provisions on private international law within the framework of a Bulgarian Civil Code. However, to date, Bulgaria has not yet succeeded in codifying its civil law, although several draft codes have been submitted, all of which included a chapter on private international law. The draft codes regulated neither family law nor labour relations and consequently contained no conflicts rules on these matters. Since the failure of the last draft in 1999, the project of elaborating a Civil Code appears to have disappeared from the agenda, at least for the time being. As a result, there has been no radical reform or substantial development of Bulgarian private international law in recent years.

After a period of stagnation, however, in 2003 no less than three reform laws were passed in private international law and international civil procedure: the Rome Convention on the Law Applicable to Contractual Obligations was incorporated into Bulgarian law, as well as the Hague Intercountry Adoption Convention, the Hague Child Abduction Convention and the European Convention on recognition and enforcement of decisions concerning child custody. The legislative reforms of 2003 make it opportune not only to examine the new laws but also to evaluate the current state and future perspectives of Bulgarian private international law as a whole.

II. Transformation of the Rome Convention

The first reform law concerns contractual obligations. The Bulgarian Law on Obligations and Contracts of 1950,[4] which is still in force today, originally consisted of only two parts (general and special). In 2003, a third part was added entitled 'The law applicable to contracts with an international element' (see Articles 437-449).[5] The amendment is directly connected with Bulgaria's preparation for accession to the European Union.[6] The earlier provisions on the law applicable to contractual obligations laid down in Articles 605–606f of the Commercial Code (Part III) dealt strictly with commercial transactions. Although they were generally oriented on the Rome Convention, in essence they amounted to a very free and simplified 'Bulgarian version' that deviated from the Convention on basic points.

Now incorporated into the Law of Obligations and Contracts, the Bulgarian provisions on the law governing contractual obligations are no longer restricted to commercial transactions but apply to civil contracts in general. Despite considerable expansion of their scope of application, the conflicts rules for obligations are still not complete: Part I of the Law of Obligations and Contracts deals with substantive law, including non-contractual obligations, however, in Part III devoted to applicable law, there are no conflicts rules for non-contractual obligations.

It should be noted however that a EU Regulation on the law applicable to non-contractual obligations is being prepared, as well as a Regulation on the law applicable to contractual obligations, which will replace the Rome Convention. Accordingly, if Bulgaria becomes a Member State of the EU, such regulations will apply directly.

Under the present conditions, legal harmonization could be achieved only by transforming the Rome Convention into national law. From the perspective of other countries in a similar situation, it is interesting to examine the transformation technique chosen by Bulgaria. One possibility was to simply declare the Rome Convention applicable in Bulgaria. Italy opted for such a method.[7] In Austria (and other countries) the original text of the Rome Convention is also made to apply

---

[4] *DV* 1950 No. 275, as amended by *DV* 2003 No. 19.

[5] Law amending the Law of Obligations and Contracts, *DV* 2003 No. 19. In this context, see also JESSEL-HOLST C., *Zur Übernahme des Römer EG-Schuldvertragsübereinkommens in Bulgarien,* in: *IPRax* (in print), with a German translation of the legal provisions.

[6] Bulgaria entered into a Treaty of Association with the European Union in 1993 (*OJ* L 358, 31 December 1994) and has already fulfilled most of its obligations under this Treaty. The current strategy of the Bulgarian government is to conclude negotiations for accession to the European Union by the end of 2004.

[7] See Article 57 of Law No. 218/1995 on the reform of the Italian system of private international law.

directly.[8] Bulgaria decided differently, probably to make things easier for domestic courts. To be more precise, the Bulgarian transformation technique comes closer to the German method of incorporating the text of the Rome Convention almost word for word (but not one hundred percent) into an already existing law (see Articles 27-37 of the German Introductory Law to the Civil Code). However, there is a major difference: Whereas the German law identifies the Rome Convention as the source of the provisions on contractual obligations (Article 36 EGBGB), the European origin of Articles 437-449 of the Bulgarian Law of Obligations and Contracts is not expressly mentioned. This omission will not facilitate uniform interpretation and application in Bulgaria. From the Bulgarian perspective, the provisions of the Rome Convention are difficult enough in themselves. Moreover, legal practitioners in Bulgaria are not familiar with the terminology of the Convention and therefore run the risk of misconstruing the new provisions. Since legal unification can be effective only if it results in uniform application, this may present quite a challenge in the case of Bulgaria.

For the most part, it can be said that Articles 437-449 of the Law of Obligations and Contracts are a direct and complete translation of the Rome Convention. Nonetheless, some differences can be detected upon closer examination of the details. An example is Art. 438 of the Law of Obligations and Contracts. In substance, this provision is in agreement with Art. 4 of the Rome Convention, but it is divided into eight paragraphs instead of only five as is the case in the Convention. Another example is Art. 11 of the Rome Convention, which deals with 'incapacity', whereas Art. 441 of the Law of Obligations and Contracts is restricted to the capacity to act (*deesposobnost*). The fundamental principle of party autonomy is embodied in paragraph 1 of Article 437. Generally speaking, the substance of paragraphs 1-6 of Article 437 may be regarded as a combination of Article 3 of the Rome Convention and Article 9(2) of the Vienna UN Sales Convention (CISG) of 1980 (applicability of the usages of international trade).[9]

---

[8] Austrian BGBl. III 1998/208.

[9] Art. 437 of the Law of Obligations and Contracts reads as follows: '(1) Contracts with an international element shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, the parties to contracts of the type involved in the particular trade concerned. (3) By their choice the parties can select the law applicable to the whole or a part only of the contract. (4) The parties may at any time agree to subject the contract to a law other than that which previously governed it. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity or adversely affect the rights of third parties. (5) The fact that the parties have chosen a foreign law shall not, where all the other elements relevant to the contract at the time of the choice are connected with one country only, prejudice the application of the mandatory rules of that country. (6) The

As in numerous other Central and Eastern European countries, consumer contracts are regulated by a separate law in Bulgaria: the Law on Consumer Protection and Rules of Commerce of 1999.[10] Article 5 of the Rome Convention has been transformed into national law by incorporating a new provision on international consumer contracts into Article 37a of the said law.[11]

Although the Bulgarian Labour Code dates from 1985, it still does not contain a provision corresponding to Article 6 of the Rome Convention on labour contracts.

A legal comparison reveals that the Bulgarian reform law constituting Part III of the Law of Obligations and Contracts does not differ significantly from the Slovenian model. Articles 19 et. seq. of the Slovenian Law on Private International Law and Procedure of 1999 are also largely identical with the Rome Convention but contain some deviations and do not expressly refer to the Convention.

The remaining discrepancies in the Bulgarian law can easily be brought into line with the Rome Convention. Furthermore, it should not be difficult to adopt provisions designating the law governing labour contracts.

Therefore, it may be said that, on the whole, Bulgaria has fulfilled its obligation with respect to the *acquis communautaire* and successfully filled a gap in its positive law.

III. International Adoption

Bulgaria became a Member State of the Hague Conference on Private International Law on 22 April 1999.[12] The recent reform in the field of international adoption was triggered by its accession to the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, which entered into force in Bulgaria on 1 September 2002, thus forcing the legislator to bring not only its substantive and procedural law but also the conflicts rules of the Family Code into line with the Convention.

Bulgaria is also a Member State of the Council of Europe but has not yet signed the European Convention on the Adoption of Children of 1967. On the other hand, the UN Convention of 1989 on the Rights of the Child entered into

existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 440-442'.

[10] *DV* 1999 No. 30.

[11] *DV* 2003 No. 19 (see *supra*, note 5).

[12] BGBl. 1999 II 435.

force in Bulgaria in 1991, leading to the adoption of the Law on the Protection of the Child in 2000.[13]

Intercountry adoptions are no rarity in Bulgaria, where many orphans and children without parental care are committed to an institution. Many of them are able to find adoptive parents only abroad, especially if they are not healthy. In addition to adoptions for humanitarian reasons, there are also adoptions of step-children, in which a foreigner adopts the child of his or her Bulgarian spouse. Bulgarian legislation also expressly permits intercountry adoptions between grand-parents and grandchild. In Bulgarian substantive law, this is possible under the conditions laid down in Article 52(2) and (3) of the Family Code, i.e., if the child is illegitimate or at least one parent has died. It is said that the provision permitting adoptions by grandparents was incorporated into the Bulgarian Family Code following the sudden death of the daughter of the long-time President of the State and chairman of the Communist party Todor Živkov, enabling him to adopt Ludmila Živkova´s children.

The legislator of intercountry adoptions may find himself in a conflict. On the one hand, there is a strong desire to guarantee legal security and thus prevent the abuse of the adoptee by the adoptive parents. A former Bulgarian implementing provision of 1992[14] went so far as to oblige future adoptive parents to provide a statement, certified by a notary, confirming that the adoptee would not be subjected to medical experiments and that his organs would not be donated (Art. 3(7)). On the other hand, there is a definite and legitimate attempt to ensure that adoptions are contracted in the best interests of the child. *De lege lata*, the Bulgarian legislator shows a special interest in making intercountry adoptions watertight, as a result of which a highly complicated system has been created to guarantee the adoptee's safety.

The Bulgarian private international law provisions on adoptions are set forth in Article 136 of the Family Code and some implementing regulations. The Law on Modification and Amendment of the Family Code of 11 July 2003[15] has incorporated certain parts of the Hague Convention on intercountry adoption into Bulgarian substantive provisions (Articles 49 *et seq.,* Family Code), which now apply to all types of adoption, domestic or international. These include the prohibition of commercial activities in connection with adoption (Art. 67c, Family Code). Moreover, adoptees now have the right to obtain information about their biological parents if justifiable grounds exist after they reach the age of majority (Art. 67b, Family Code).

---

[13] *DV* 2000 No. 48, as amended by *DV* 2003 No. 63.

[14] Order No. 17/1992 of the Minister of Justice, *DV* 1992 No. 65 (repealed in 2003).

[15] *DV* 2003 No. 63. German translation in: HENRICH D. (ed.), *Internationales Ehe- und Kindschaftsrecht mit Staatsangehörigkeit,* Bulgarian Country Report, loose-leaf (supplement forthcoming).

Article 136 of the Family Code determining the applicable law was modified in 2003;[16] however, the unusually complicated structure of the new provision makes it difficult to interpret or apply. The only simple rule concerns the effects of adoption, which are governed, as before, by the *lex patriae* of the adoptive parent (Art. 136(8)). Termination of the adoption is governed by the adoptee's *lex patriae*, 'unless the *lex patriae* of the adoptive parent is more favourable for the adoptee' (Art. 136(9) as amended in 2003). The law does not specify any criteria for defining the most favourable law in a given situation. It is sometimes in the best interests of the child to terminate an adoption, whereas the contrary holds true in other cases.

The requirements for the conclusion of an adoption are laid down in paragraphs 1-7 of Article 136 of the Family Code. The main connecting factor for adoption and family law in general is nationality. A problem arises in this respect because Bulgarian private international law generally prefers unilateral conflicts rules.[17] Moreover, two or more applicable laws are often applied cumulatively. This occurs when the parties concerned have a different *lex patriae*, in the case of multiple nationality or when a citizen of a given state habitually resides in another state.

If one party is a Bulgarian citizen, the transaction shall be governed by Bulgarian law (Art. 136(1)). As a rule, a foreign national may adopt a Bulgarian child only if the child is at least one year old. The foreigner will have to provide proof of permission to adopt under his *lex patriae*. If the foreigner has his habitual residence in a third country, he must also satisfy the requirements of adoption of that state (Art. 136(2)). Adoption between persons of the same nationality is governed by their common *lex patriae*; if the persons are of different nationalities, the *lex patriae* of each party applies cumulatively, and the Bulgarian prohibition of adoption between relatives must be respected (Art. 136(3)). In addition, Bulgarian citizens who have multiple nationality and live abroad must also satisfy the requirements of the law of their habitual residence (Art. 136(4)). Finally, a Bulgarian citizen desiring to adopt a foreign child must fulfil the requirements of Bulgarian law, as well as those of the child's *lex patriae* 'if required by that law' (Art. 136(5)).

Matters relating to mutual judicial assistance are regulated in new provisions of the Family Code: the authority of the Bulgarian Ministry of Justice with respect to intercountry adoption (Art. 136a), agency (Art. 136b), revocation or termination of the permission (Articles 136c and 136d), the activities of accredited organizations (Art. 136e), the Council for Intercountry Adoptions (Art. 136f),

---

[16] See *supra*, note 15.

[17] One example is Art. 139 of the Family Code, which is the only conflict of law rule on maintenance: 'The maintenance claim of a foreigner, directed against a Bulgarian citizen, is ruled by this Code, and Bulgarian courts are competent for such claims'.

application and procedure for intercountry adoption (Articles 136g and 136h). Without going into further detail, it suffices to mention that the public prosecutor participates in proceedings involving intercountry adoption (Art. 136h(3)[18]).

The recognition of adoptions of children who are citizens of a Member State of the Hague Convention on intercountry adoption is guaranteed by Article 136(6) of the Family Code.

Intercountry adoption is further regulated by Order No. 3 of the Minister of Justice concerning the requirements and steps for granting permission to a foreigner to adopt a Bulgarian national.[19] Expressly referring to Article 21 of the UN Convention on protection of the child, the Order provides that all activities relating to intercountry adoption must guarantee protection of the best interests of the child.

When a Bulgarian child is to be adopted, Article 57c(9) of the Family Code obliges the authorities to first search in their own country for potential adoptive parents. Intercountry adoption is permitted only if there is no suitable adoptive parent in Bulgaria.

IV. International Child Abduction

The third legislative reform came about as a result of Bulgaria's accession to both the Hague Convention on the Civil Aspects of International Child Abduction, which entered into force in Bulgaria on 1 August 2003, and the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, which is in force in Bulgaria since 1 October 2003.

As is well known, the Hague Convention deals with questions of mutual judicial assistance, whereas the European Convention regulates the recognition and enforcement of decisions concerning child custody.

It can be presumed that cases of international child abduction are no more frequent in Bulgaria than elsewhere. At least, Bulgarian legal literature and court practice apparently do not often deal with such cases.

For the purpose of transforming the two Conventions into Bulgarian law, the Code of Civil Procedure of 1952 was amended.[20] As regards the European Convention, Chapter XXXIIa entitled 'Special rules for recognition and enforce-

---

[18] Art. 136h(3), as amended by *DV* 2003 No. 84.

[19] *DV* 2003 No. 82 and No. 86.

[20] Law on Modification and Amendment of the Code of Civil Procedure, *DV* 2003 No. 84. German translation in: HENRICH D. (ed.) (note 15).

ment of decisions of foreign courts and other foreign bodies' has been incorporated into Articles 307a – 307e of the Code of Civil Procedure (hereinafter: CCP). In addition, the basic provision of Article 303 CCP has been modified.[21]

Article 303(1) CCP provides that court decisions and decisions of other foreign bodies 'that are competent under the law of the foreign state' may be recognized. The Sofia City Court is competent to decide on the respective applications; participants in the court proceedings include the parties named in the foreign decision and, in certain circumstances, the Ministry of Justice and the public procurator. The Directorate for Social Welfare at the child's place of residence must present its opinion in court and the child must be heard in person. The court may order interim measures if necessary. The decision must be rendered within 30 days; appeal may be filed at the Sofia Court of Appeal, which renders the final decision within 30 days in its capacity as court of last instance.

The Hague Convention on child abduction has resulted in a new Part VII of the Code of Civil Procedure entitled 'Procedure for returning the child or exercising the right to personal relations' (Articles 502-507 CCP). The procedure for filing application for the return of a child or for exercising the right to personal relations is laid down in Chapter XXXIIa CCP. In such procedures the court may take evidence on its own initiative and provide support to parties wishing to exercise their procedural rights.

Finally, a general rule has been introduced permitting the enforcement of court decisions regarding parental rights and personal relations between parents and children, as well as the enforcement of court decisions rendered in accordance with Chapter XXXIIa CCP (see Art. 423a CCP).

V. Conclusion

The recent reforms in the field of private international law have been triggered by Bulgarian membership in the Hague Conference and the Council of Europe and by the Bulgarian Treaty of Association with the European Union of 1993.[22] All of the reforms do not achieve the same standards. The transformation of the Rome Convention certainly deserves an overall positive evaluation, although some details are open for discussion. The new provisions on adoption clearly show the good will of the legislator; however, it is feared that intercountry adoption will become more complicated, thus resulting in higher costs. It is also disappointing that a law

[21] See also Article 137(2) and (3) of the Family Code on powers of the Minister of Justice in connection with measures relating to personal relations between parents and children.

[22] See *supra*, note 6.

adopted in 2003 still resorts to unilateral conflicts rules. Unfortunately, the opportunity was missed to revise the system as such and make use of comparative law.

The new rules on adoption also demonstrate the negative consequences when an international treaty is merely mechanically transformed into national law. In particular, the detailed provisions on mutual judicial assistance in Articles 136a *et seq.* of the Family Code appear foreign and do not fit into the framework of the Bulgarian Family Code. Examples of the organic integration of EU directives, EU regulations and international treaties, or of pieces of foreign law into Bulgarian legislation appear to be the exception rather than the rule. This is due mostly to the fact that, at a time of severe economic problems and continuous political instability, too much had to be done in a short period of time. The initiative for legal reforms usually comes from abroad and aims at specific changes without taking due account of the legal order as a whole, which is not always well balanced at present. For example, after the fall of socialism the legislator merely eliminated the socialist elements from the law of obligations and family law, without substantially amending the basic rules. Therefore, the Bulgarian provisions on adoption are now very extensive, but the important question of matrimonial property is still governed by the 1985 provisions, as a result of which matrimonial property agreements and other matters are not regulated at all. Similarly, the provisions on divorce have not yet been updated. And the list continues. The substantive provisions in the Law of Obligations and Contracts of 1950 have remained largely unchanged, except for the repeal of express socialist provisions. European consumer protection rules have been adopted in a special law.

While such matters will undoubtedly be put into order sooner or later, significant progress has been made in harmonizing legislation with the *acquis communautaire*. On the other hand, as regards Bulgarian private international law as a whole, the main problems have not yet been solved. This is especially true in regard to the provisions on international civil procedure, which are in serious need of comprehensive reform. The addition of the new detailed rules for recognition and enforcement of decisions concerning child custody in Article 307a *et seq*. CCP does not conceal the fact that the recognition and enforcement of foreign decisions as a whole is not regulated satisfactorily. Bulgaria introduced the principle of *de facto* reciprocity in 1983, as a result of which an international treaty is no longer needed. Thus, in principle, Bulgaria favours the recognition of foreign court decisions; however, there is no legal presumption of reciprocity, as, for example, in the countries of former Yugoslavia. As specified in Article 303(2) CCP, it is up to the Ministry of Justice to determine with which countries reciprocity exists. However, the Ministry has remained largely passive in this respect since 1983. When a foreign court must decide whether or not to accept reciprocity with Bulgaria, it can hardly address the matter to the Bulgarian Ministry of Justice. Of course, the intent of provisions such as Article 303 CCP is to permit recognition unless there is an obstacle. Nonetheless, it would be preferable to have some kind of confirmation by

the other side before taking the first step. This applies not only to recognition but also to foreign *lis pendens*. Accordingly, basic measures must be taken to bring Bulgarian international civil procedure into line with European standards.

The biggest problem concerning conflicts rules is that many areas are not regulated at all or very poorly. As mentioned above, this is especially true of the general part. Just to mention one example, the whole question of *renvoi* is not regulated and no clear stand is taken on the matter. On the other hand, there are several provisions on *ordre public* that are not identical. Moreover, the existing provisions are not compatible with each other and often do not meet international standards.

Of course, this all has been known in Bulgaria for a long time. However, in times of political and economic turmoil, private international law does not enjoy priority with legislators. On the other hand, well-developed provisions on private international law are indispensable for enlargement of the European Union, the development of international trade and cross-border relations. Therefore, over the past years many European countries, including those in Central and Eastern Europe, have codified their conflict of laws rules.

Therefore, the official strategy in Bulgaria is now to abandon the idea of reforming private international law within the framework of a future Civil Code, which would take too long anyway. Instead, a political decision has been taken in favour of adopting a separate codification of private international law, including procedure. This gives Bulgaria a realistic opportunity to adopt comprehensive and modern legislation in the not too distant future.

PRIVATE INTERNATIONAL LAW IN SLOVENIA

Krešo PUHARIČ*

I. Introductory Remarks
II. Structure and Contents of the PILPA
III. Priority of International Conventions and Treaties
IV. General Provisions on the Applicable Law
  A. Principle of the Closest Connection
  B. *Renvoi*
  C. Application of Foreign Law
V. Special Rules on the Applicable Law
  A. Natural and Legal Persons
  B. Property Relations
  C. Law of Contracts
  D. Non-Contractual Liability for Damages
  E. Personal and Family Matters
  F. Succession
VI. International Civil Procedure
  A. Jurisdiction and Other Procedural Issues
    1. Jurisdiction of Slovene Courts
    2. Jurisdiction of Other Slovene Authorities
    3. Other Procedural Rules
  B. Recognition and Enforcement of Foreign Decisions
    1. Foreign Court Decisions
    2. Recognition and Enforcement of Foreign Arbitral Awards
VII. Closing Remarks

I. Introductory Remarks

The Private International Law and Procedural Act of the Republic of Slovenia of 1999[1] (hereinafter: PILPA) was adopted primarily for two reasons.

---

* Professor of International Trade Law at the Faculty of Economics of the University of Ljubljana, President of the Permanent Court of Arbitration attached to the Chamber of Commerce and Industry of Slovenia.

[1] *Zakon o mednarodnem zasebnem pravu in postopku*, of 30 June 1999, in: *Uradni list Republike Slovenije* (*Official Gazette of the Republic of Slovenia*), 1999, No. 56. An official English translation of the PILPA was published in: *Riv. dir. int. priv. proc.* 2000, pp. 829 *et seq*. On the new statute see CONETTI G., 'La legge sul diritto internazionale privato della Repubblica di Slovenia', in: *Riv. dir. int. priv. proc.* 2000, pp. 569-578.

Yearbook of Private International Law, Volume 5 (2003), pp. 155-167
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

Pursuant to Article 4 of the Enabling Statute for the Implementation of the Basic Constitutional Act on the Autonomy and Independence of Slovenia (1991),[2] the federal laws of the former Socialist Federal Republic of Yugoslavia (SFRY) applied *mutatis mutandis* on the date of entry into force of the said Enabling Statute, provided they did not contravene the legal order of the Republic of Slovenia and unless provided otherwise. The competences of the bodies and institutions of the former SFRY granted under those laws were thereby conferred upon the respective bodies and institutions of the Republic of Slovenia.[3]

A more restrictive approach was taken in the later Enabling Statute for the Implementation of the Constitution of the Republic of Slovenia (1991)[4] requiring the Constitutional Court of Slovenia to confirm that former federal laws in force were in conformity with the new Constitution, in particular with its provisions on human rights and fundamental freedoms. Thus it can be said that the Republic of Slovenia became independent on the basis of the principle of continuity of legislation.[5] However, the changed situation made it necessary to prepare and adopt new legislation in the field of private international law.

Furthermore, having signed the European Agreement establishing an Association between the Republic of Slovenia and the European Communities and their Member States,[6] Slovenia had begun the process of approximating its laws with those of the European Union. As stipulated in Article 70 of the European Agreement, the major precondition for economic integration into the Community was Slovenia's obligation to gradually make its existing and future laws compatible with Community legislation.

The first Draft Proposal for a Private International Law and Procedural Act (PILPA),[7] which took account, *inter alia*, of the private international law acts of

---

[2] *Ustavni zakon za izvedbo temeljne listine o samostojnosti Republike Slovenije* (*Official Gazette of the Republic of Slovenia*), 1991, No. 1.

[3] See UDE L./ GRAD F./ CERAR M., *Ustava Republike Slovenije z uvodnim komentarjem*, *Časopisni zavod Uradni list Republike Slovenije*, Ljubljana 1992, pp. 12 *et seq*.

[4] *Ustavni zakon za izvedbo Ustave Republike Slovenije* (*Official Gazette of the Republic of Slovenia*), 1991, No. 33.

[5] ILEŠIČ M./ POLAJNAR-PAVČNIK A./ WEDAM-LUKIČ D., 'Mednarodno zasebno pravo, komentar zakona, II. Dopolnjena izdaja', in: *Časopisni zavod Uradni list Republike Slovenije,* Ljubljana 1992, p. 8.

[6] European Agreement establishing an Association between the European Communities and their Member States, acting within the Framework of the European Union, of the one part, and the Republic of Slovenia, of the other part. The Agreement, together with its Annexes, Protocols, Final Act, Annexed and Unilateral Declarations, was published in the *Official Gazette of the Republic of Slovenia*, *International Treaties*, No. 13 of 24 July 1997, and entered into force on 1 February 1999.

[7] *Poročevalec Državnega zbora Republike Slovenije*, Ljubljana, 16 October 1995, Vol. XXI, No. 43, pp. 69 *et seq*.

Austria (1978), Germany (1986) and Switzerland (1987),[8] was sent to the Slovene Parliament on 28 September 1995. The Draft Proposal was approved on 29 May 1997; however, the Government was charged with the task of drawing up a new Draft in line with the opinion adopted by the Parliament. The final Draft of the PILPA[9] was submitted to Parliament on 4 March 1999. Promulgated in the *Official Gazette of the Republic of Slovenia* on 13 July 1999, the PILPA entered into force 15 days later. With the entry into force of the PILPA, the Act Regulating the Conflict of Laws with Regulations of Other Countries in Certain Relations, i.e., the Private International Law Act of the former SFRY[10] was repealed.

Compared with the PIL Act of the former SFRY, the Slovene PILPA contains a large number of new and revised articles. In some cases, however, not only the numeration, but also the contents of the articles are practically identical.[11]

II. Structure and Contents of the PILPA

The structural changes introduced by the Slovene Act are minimal. The PILPA contains a total of 119 articles, 10 more than the PIL Act of the former SFRY. Both Acts are divided in six chapters. The Slovene PILPA includes the following:

Chapter I:	Basic Provisions (Articles 1 - 12);
Chapter II:	Applicable Law (Articles 13 - 47);
Chapter III:	Jurisdiction and Procedure (Articles 48 - 93);
Chapter IV:	Recognition and Enforcement of Foreign Decisions (Articles 94 - 111);
Chapter V:	Special Provisions (Articles 112 -117);
Chapter VI:	Final Provisions[12] (Articles 118 - 119).

[8] See *supra* (note 7), at p. 71. While the relevant German and Austrian provisions deal only with conflicts rules, the Swiss Act also addresses issues relating to jurisdiction, the recognition and enforcement of foreign decisions, bankruptcy and international arbitration.

[9] *Poročevalec Državnega zbora Republike Slovenije*, Ljubljana, 23 March 1999, Vol. XXV, No. 16, p. 37.

[10] *Zakon o ureditvi kolizije zakonov s predpisi drugih držav v določenih razrnerjih* (hereinafter: PIL Act of the former SFRY), in: *Official Gazette of the SFRY* 1982, No. 43 and 72.

[11] See, e.g., Articles 16-18 in Chapter 2 of the PILPA and the PIL Act of the former SFRY.

[12] Whereas the titles of Chapters 1 to 5 of both Acts are identical, Chapter 6 of the PILPA is entitled 'Final Provisions', Chapter 6 of the PIL Act of the former SFRY 'Transitional and Final Provisions'.

The scope of the PILPA is limited to civil law; hence, it does not regulate all conflicts situations.[13] The conflicts rules laid down in the Act are based on the premise that they apply only in relations with a foreign (international) element.[14] The PILPA also contains rules on jurisdiction and procedure, as well as on the recognition and enforcement of foreign judgments, arbitral awards and decisions by other bodies.

III. Priority of International Conventions and Treaties

The provisions of the PILPA do not apply to matters regulated by another act or international treaty (Article 4). Accordingly, international conventions and treaties, both multilateral and bilateral, are also a commonly recognized source of Slovene private international law. The treaty provisions prevail whenever conflicts arise between Slovene municipal law and treaties signed or ratified by Slovenia.[15]

Slovenia is party to an increasing number of important multilateral treaties relating to private international law, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958),[16] the United Nations Convention on Contracts for the International Sale of Goods (1980),[17] the Paris Industrial Property Convention (1967),[18] the Patent Cooperation Treaty (1970),[19] the Universal Copyright Convention (1952),[20] the Bern Convention for the

---

[13] See HOTCKIS C., *International Law for Business*, New York (McGraw Hill, Inc.) 1994, pp. 37-45. See also TETLEY W., 'Mixed jurisdictions: common law vs. civil law (codified and unmodified) - Part II', in: *Uniform Law Review/Revue de droit uniforme* 1999, Vol. IV, pp. 883 *et seq.*

[14] See PARRA ARANGUREN G.E., 'The Venezuelan Act on Private International Law', in this *Yearbook* 1999, Vol. I, pp. 107 *et seq.*

[15] See HOTCKIS C. (note 13), at pp. 25-38. Article 153 of the Slovene Constitution provides that statutes must conform to the generally accepted principles of international law and international treaties that have been ratified by the National Assembly and are currently in force. Regulations and other legislative measures must also conform to international treaties. Pursuant to Article 160 of the Constitution, the Constitutional Court is empowered to rule on matters relating to the conformity of statutes with the Constitution, as well as on matters relating to the conformity of statutes, regulations and by-laws with international treaties ratified by the State, on the one hand, and with general principles of international law, on the other.

[16] *Official Gazette of the SFRY – International Treaties* 1981, No. 11.

[17] *Official Gazette of the SFRY – International Treaties* 1984, No. 10.

[18] *Official Gazette of the SFRY – International Treaties* 1974, No. 5.

[19] *Official Gazette of the Republic of Slovenia – International Treaties* 1993, No. 19.

[20] *Official Gazette of the SFRY – International Treaties* 1996, No. 4.

Protection of Library and Artistic Works (1886),[21] the Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters (1965),[22] and others. Slovenia is also a Member State of the Hague Conference on Private International Law. In addition, Slovenia has signed numerous bilateral treaties on private international law, including bilateral treaties on judicial assistance in civil, commercial and/or criminal matters.[23]

IV. General Provisions on the Applicable Law

A. Principle of the Closest Connection

The most significant innovation of the PILPA is the general escape clause in Article 2(1), which reads:

> 'The law designated as applicable by the provisions of this Act shall not apply in exceptional cases, where, having regard for all circumstances of the case, it is evident that the connection with that law is not of greatest importance and that the case is more closely connected with some other law.'

Not included in the PIL Act of the former SFRY, this provision embodies the principle of the closest connection. It is modeled on the well-known provision of Article 15 of the Swiss PIL Act of 1987, which is also formulated as an 'escape clause' of exceptional application.

Paragraph 2 of Article 2 provides that the exception clause shall not apply when the applicable law chosen by the parties successfully resolves the potential conflict between the principle of autonomy and the closest connection.

B. *Renvoi*

Similar to the Yugoslav Act, Article 6 of the PILPA accepts *renvoi* in principle: If a foreign conflicts rule refers back to the law of the Republic of Slovenia, Slovene substantive law shall apply.

However, a new paragraph (para. 3) has been added, which provides that *renvoi* shall be completely excluded when the parties are permitted to choose the applicable law. Such solution is entirely reasonable, as it would be wrong to admit *renvoi* in situations where it contradicts the principle of party autonomy.

---

[21] *Official Gazette of the SFRY – International Treaties* 1975, No. 14.

[22] *Official Gazette of the Republic of Slovenia – International Treaties* 2000, No. 19.

[23] See *GV Register* (*Gospodarski vestnik Register – veljavni predpisi Republike Slovenije*), Ljubljana 2003, No. 11, pp. 868-870.

C. Application of Foreign Law

Dealing with ascertaining the contents of a foreign applicable law, Article 12 of the PILPA provides that courts and other competent authorities shall establish, by themselves and *ex officio*, the contents of a foreign applicable law in accordance with the *iura novit curia* principle. To this effect, they may request information on the foreign law from the Ministry of Justice or obtain its contents in another appropriate manner. Information concerning the contents of the foreign law may be submitted to the court by the parties to the proceedings.

In this respect, the provision does not differ from Article 13 of the Yugoslav Act. However, paragraph 4 has been added to Article 12 of the Slovene PILPA, making it clear that the law of the Republic of Slovenia shall apply if the court is unable to establish the contents of the foreign law in question.

V. Special Rules on the Applicable Law

A. Natural and Legal Persons

In keeping with Slovene legal tradition, citizenship is the basic connecting factor in the PILPA. Accordingly, the legal capacity of citizens of the Republic of Slovenia in foreign countries should be determined by Slovene law. As a rule, citizenship is used for determining the legal capacity of natural persons, and any restrictions of the same (Article 13(1) PILPA). However, as a means of safeguarding the security of legal transactions, a natural person who is legally incapable under his national law, but possesses legal capacity under the law of the place where he carries out his business or legal activity, shall be regarded as possessing legal capacity in respect of such activities, except in family and inheritance matters (Article 13(2) PILPA).

National law is also of primary importance in matters concerning a person's name (Article 14) and guardianship (Article 15), in which the authorities of the country of which a person is a citizen are usually deemed to have exclusive jurisdiction. This also applies in cases where a missing person is pronounced dead (Article 16).

Under Article 17 PILPA, the status of commercial companies and other legal entities is governed primarily by the law of the country where the entity was established (principle of incorporation). If the head office of the company is situated in a country other than the one where it was incorporated and it is regarded as a national entity under the laws of that country, then it shall be considered to have the nationality of that country (Article 17(3) PILPA).

B. Property Relations

Property relations are generally governed by the *lex rei sitae*. In this sense, paragraph 1 of Article 18 reads:

> 'Matters relating to property and other rights *in rem* shall be governed by the law of the place where the property is situated.'

Goods in transit are governed by the law of the place of destination, whereas means of transportation are subject to the law of the country of their owner, unless otherwise provided by the laws of Slovenia.

C. Law of Contracts

A contract is governed by the law chosen by the parties, unless the PILPA provides otherwise (Article 19 PILPA). Recognition of the principle of party autonomy is crucial because it ensures that the will of the parties prevails over other connecting factors. The choice of law should be expressly declared by the parties; if this is not the case, an implied choice of law must be clear from the contractual provisions or other circumstances. This new provision of the PILPA is modeled on Article 3 of the Rome Convention of 1980 and other national codifications of private international law.[24]

Other factors come into play in the absence of a choice of law by the parties. As a rule, the law most closely connected with the contract shall apply. Unless special circumstances designate another applicable law, the law most closely connected with the contract shall be considered to be the law of the habitual residence or head office of the party carrying out the characteristic performance of the contract (Article 20 PILPA). Based on Article 4 of the Rome Convention, Article 20 of the PILPA differs from the corresponding provision of the PIL Act of the former SFRY, which contained a detailed list of connecting factors for various types of contracts.

Furthermore, in keeping with Articles 5 and 6 of the Rome Convention, the Slovene PILPA contains special rules to protect the weaker party in consumer[25] and employee contracts.[26] Such provisions were not contained in the PIL Act of the

---

[24] See Article 35 of the Austrian PIL Act and Article 116 of the Swiss PIL Act.

[25] Article 22 (3) PILPA defines the 'consumer' as a person who acquires goods, rights and services primarily for his personal use or for use in his own household.

[26] See Articles 2 and 22 to 24 of the Consumer Protection Act, (in: *Zakon o varstvu potrošnikov – ZVPot*), in: *Official Gazette of the Republic of Slovenia* 2003, No. 14. Article 77 of the Consumer Protection Act provides that a legal or natural person who commits an offense relating to the practice of an independent or self-employed activity shall be sentenced to a minimum fine of 3'000'000 SIT (237,09 SIT = 1 Euro, official rate of the Bank of Slovenia on 21 January 2004). This, e.g., is the case, if upon conclusion of a contract, a consumer is not issued the corresponding warranty, technical instructions and a

former SFRY. As regards contracts concerning immovable property, the law of the country where the immovable is located applies in all cases, thus excluding party autonomy.[27]

D. Non-Contractual Liability for Damages

Pursuant to Article 30(1) of the PILPA, the law of the place where the conduct took place shall apply in cases of non-contractual liability. However, the law of the place where the damage occurred shall apply if it is more favorable for the injured party, unless the offender could not have foreseen the place of the damage. Not included in the PIL Act of the former SFRY, this new provision is inspired by the Hague Convention on the law applicable to matters relating to products liability (1973),[28] which makes the application of the law of the place where the damage occurred dependent on its foreseeability (Art. 7).

As in some foreign legal systems,[29] paragraph 2 of Article 30 of the PILPA permits the application of another law if the law designated as applicable under paragraph 1 is not closely connected with the particular matter, providing that a close connection exists with another law.

E. Personal and Family Matters

Marital relations with a foreign element are regulated in Articles 34-41 of the PILPA. Divorce is governed by the law of the common citizenship of the spouses or, in the absence of a common citizenship, by the cumulative application of the national laws of the spouses. However, if the divorce cannot be granted under the applicable foreign law, Slovene law shall apply if one of the spouses is a resident of Slovenia or has Slovene citizenship (Article 37 PILPA).

The personal and property relations of spouses are governed by the law of their common citizenship or, in the absence of a common citizenship, by the law of their joint habitual residence or their most recent joint habitual residence (Article 38 PILPA). If the spouses never had a habitual residence in the same State,

---

list of authorized service facilities, or if the mentioned documents have not been written entirely in the Slovene language and cannot be easily understood, (Articles 16 (1) and (3) and 77 (4) of the Consumer Protection Act).

[27] See HUMMER W., 'Ausländergrundverkehr in Slowenien, verfassungsrechtliche Probleme anläßlich der Ratifikation des Europa-Abkommens EG-Slowenien', in: 97 *ZvglRWiss* 1998, pp. 320-339.

[28] WEBER R. H./ THÜRER D./ ZACH R., *Produkthaftpflicht im europäischen Umfeld*, Zürich 1995, pp. 116 *et seq*.

[29] See HUANG J./ LÜ G., 'New Developments in Chinese Private International Law', in this *Yearbook* 1999, Vol. I, pp. 146-147.

the law of the country most closely connected with the relationship shall apply (Article 38(4) PILPA).

Party autonomy is permitted only in respect of contracts regulating the marital property regime and only if such contracts are permitted by the (foreign) law governing the personal and property relations of the spouses (Article 39(2) PILPA).

Pursuant to paragraphs 1 and 2 of Article 41, the law governing the property relations of a man and woman cohabiting without formal marriage is determined in a manner similar to that of married couples as specified in paragraphs 1 to 3 of Article 38 PILPA. The only difference is that the provision of Art. 38(4), providing for the application of the law most closely connected with the relationship, does not apply to persons cohabiting without formal marriage. The provisions on the property relations of cohabitees were taken over unchanged from the PIL Act of the former SFRY.

Set forth in Articles 42-47 of the PILPA, the choice of law rules for parent and child relations give priority to the application of the law of the country of the child's citizenship. For example, if the parents and their children are citizens of different countries and do not have their habitual residence in the same country, the law of the country of the child's citizenship shall apply (Article 42(3)). Similarly, the law of the country of the child's citizenship shall apply to proceedings concerning the establishment or the contestation of maternity or paternity (Article 43).

F. Succession

Matters relating to succession are governed by the law of the country of the deceased testator's citizenship at the time of his death. However, the law of the country of the testator's citizenship at the time the testament was made (Article 32 PILPA) shall apply when determining the testamentary capacity of the deceased. Special criteria based on the Hague Convention relating to the Form of Testamentary Dispositions and the principle of *favor validitatis* are applicable to the form of the will (Article 33).

VI. International Civil Procedure

A. Jurisdiction and Other Procedural Issues

1. Jurisdiction of Slovene Courts

The third and largest chapter of the PILP (Articles 48 to 93) regulates the jurisdiction of Slovene courts and other national authorities in matters with a

foreign element in civil court and out-of-court proceedings. The general rule on international jurisdiction in Article 48 PILPA provides that Slovene courts have jurisdiction if the defendant has his habitual residence or head office in the Republic of Slovenia. A similar rule applies *mutatis mutandis* in out-of-court proceedings.

In proceedings involving only one person, Slovene courts have jurisdiction if the person concerned has his habitual residence or head office in the Republic of Slovenia, unless otherwise provided (Article 48(3) PILPA).

In cases where one suit has been filed against several defendants whose obligations are based on the same legal and factual grounds, Article 49 of the PILPA confers competence on Slovene courts if at least one of the defendants has his habitual residence in the Republic of Slovenia.

Choice-of-court agreements are regulated in a rather restrictive manner in Articles 52 and 53 of the PILPA.[30] Other provisions provide for special fora for claims in certain fields such as contracts, property and family matters. A novelty is jurisdiction in labor law disputes: As specified in Article 57 PILPA, courts of the Republic of Slovenia are competent to adjudicate individual labor disputes in cases where the work performed was or should have been carried out in the territory of the Republic of Slovenia.

Several provisions of the PILPA confer exclusive jurisdiction on Slovene courts,[31] thus excluding the recognition of foreign judgments rendered in violation of such fora.[32] Some of these rules are new. For instance, courts of the Republic of Slovenia have exclusive jurisdiction in disputes relating to:

- the establishment or dissolution of, and changes in the legal status of a company, other legal entity or association, if its head office is situated in the Republic of Slovenia (Article 60);
- the validity of decisions taken by the bodies of companies, other legal entities or associations mentioned above (Article 60);
- the validity of entries into public registers in the Republic of Slovenia (Article 61); and
- the application and validity of inventions, models and trademarks,[33] if the application was filed in the Republic of Slovenia (Article 62).

---

[30] According to Article 52(1), the 'parties may derogate from the jurisdiction of Slovene courts, only if at least one of them is a foreign citizen or a legal entity with the head office abroad, and unless the dispute is such that (...) it falls within exclusive jurisdiction' of Slovene courts.

[31] See, e.g., Articles 60-64 and 78-81 PILPA.

[32] Article 97 PILPA provides that a foreign decision shall not be recognized if the subject matter falls within the exclusive jurisdiction of the courts or other bodies of the Republic of Slovenia.

[33] See Articles 1 to 55 of the Industrial Property Act, (*Zakon o industrijski lastnini – ZIL VPB1*), in: *Official Gazette of the Republic of Slovenia* 2003, No. 7.

Contrary to the former Yugoslav Act, the rules of the PILPA providing for exclusive fora are bilateral. This follows from Article 50(2) PILPA, which reads:

> 'The courts of the Republic of Slovenia shall not have jurisdiction if the matter is connected with a foreign country, and if the courts of the Republic of Slovenia would have exclusive jurisdiction on the basis of that connection, if such connection existed between the Republic of Slovenia and the said matter, unless otherwise provided by this Act.'

It should be noted that the PILPA has maintained reciprocity as a general ground for the jurisdiction of Slovene courts under Article 51 PILPA, which reads:

> 'If a foreign court has jurisdiction over a dispute against citizens of the Republic of Slovenia in a foreign country on the basis of criteria not contained in the provisions conferring jurisdiction on the courts of the Republic of Slovenia, then such criteria shall be the grounds for conferring jurisdiction on a court of the Republic of Slovenia in disputes in which the defendant is a citizen of that foreign country.'

2. Jurisdiction of Other Slovene Authorities

Articles 82 to 86 PILPA confer jurisdiction on other authorities of the Republic of Slovenia to perform marriage ceremonies (Article 82), grant the adoption of children (Article 83) and make decisions in matters concerning guardianship (Articles 84-86). Since all such matters concern relations between natural persons, jurisdiction is based primarily on the citizenship of the persons concerned, while additional provisions confer jurisdiction on the place of residence in guardianship matters.

3. Other Procedural Rules

Included in a subsection entitled 'Other Provisions', Articles 87 to 93 of the PILPA regulate several procedural issues arising in disputes with a foreign element, including the legal capacity of foreigners in proceedings,[34] *lis pendens* before foreign courts,[35] *perpetuatio jurisdictionis*,[36] and *cautio judicatum solvi* to be paid by a foreign plaintiff.[37] It should be noted that the PILPA does not deal with all procedural issues involving a foreign element. Other issues of this kind are regulated, for example, by Article 44 of the Code of Civil Procedure.

[34] See Article 87(1) PILPA.

[35] See Article 88 PILPA.

[36] See Article 89 PILPA.

[37] See Articles 90 to 93 PILPA.

B. Recognition and Enforcement of Foreign Decisions

Chapter IV of the PILPA (Articles 94 to 111) contains rules on the recognition and enforcement of foreign court decisions and foreign arbitral awards.

1. Foreign Court Decisions

Article 94 of the PILPA reads as follows:

> '(1) Foreign court decisions shall be considered equivalent to decisions rendered by the courts of the Republic of Slovenia and shall have the same legal effect in the Republic of Slovenia only if they have been recognized by a Slovene court.
>
> (2) A settlement reached before a court shall also be considered to be a foreign court decision as described in paragraph 1 above.
>
> (3) A decision by another body that is considered equivalent to a court decision or court settlement in the country where it was rendered shall be treated as a foreign court decision if the subject matter falls under the scope of Article 1 of this Act.'

From the above provision it follows that a special procedure is generally required not only for the enforcement but also for the recognition of foreign decisions in Slovenia. A person applying for recognition must submit the foreign court decision together with a certified copy thereof and a certificate stating that it is legally binding under the law of the country where it was rendered (Article 95(1) PILPA). Similarly, an applicant for enforcement must submit a certificate stating that the decision is enforceable under the law of the country where the decision was rendered (Article 103(2) PILPA).

These are the only positively formulated requirements for recognition. All other recognition requirements are formulated in the negative, i.e., as grounds for the refusal of recognition (Articles 96 to 101 PILPA), as in most international instruments and national codifications. The grounds of refusal include, *inter alia*, any procedural irregularity in the proceedings and the violation of the exclusive jurisdiction of Slovene courts. A foreign court decision shall not be recognized if the court or another body of the Republic of Slovenia has issued a legally binding decision on the same matter, or if some other foreign decision on the same matter has been recognized in the Republic of Slovenia (Article 99(1) PILPA). It is interesting to note that the absence of reciprocity is also a ground of refusal, with some exceptions. However, reciprocity is presumed to exist (Article 101 PILPA).

2. *Recognition and Enforcement of Foreign Arbitral Awards*

An arbitral award shall be considered foreign if it was not rendered in the Republic of Slovenia.[38] Foreign arbitral awards will be recognized[39] and enforced if the applicant submits a request to the court, together with the original award or an authenticated copy thereof and the original arbitration agreement or authenticated copy thereof.

The grounds of refusal enumerated in Article 106 cannot be examined in detail here. However, it is worth mentioning that paragraph 2 of Article 106, which is new,[40] contains a special provision permitting the partial recognition and enforcement of an award in cases where the arbitrators have only partially exceeded their powers.

VII. Closing Remarks

This article does not cover all the issues arising in relations with a foreign element under the PILPA provisions and other relevant legislation. Although the PIL Act of the former SFRY was not excessively 'contaminated' with socio-political and socio-economic arrangements, by virtue of the European Agreement, Slovenia became an associate member of the EU, thus requiring it to achieve the compatibility of Slovene legislation with Community law. The provisions of the PILPA are also included within this framework. Due to the relatively short period of time since the PILPA's adoption, it is still too early to assess the success of the above-mentioned innovations.

---

[38] See Article 104(4) PILA.

[39] On this question see, e.g., PARRA ARANGUREN G. E. (note 14), at pp. 115-116.

[40] This provision was not included in Article 101 of the PIL Act of the former SFRY.

NEWS FROM THE HAGUE

THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

WORK IN PROGRESS (2002-2003)*

J. H. A. VAN LOON**

I. Adoption of the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary
II. Special Commission on General Affairs and Policy of the Conference: Request of the European Community for Admission to the Conference
III. Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters
IV. Towards a New Global Convention on Child Support and Other Forms of Family Maintenance
V. Child Abduction and Transfrontier Access – Contact
VI. Special Commission on the Practical Operation of the Apostille, Service and Evidence Conventions – Celebration of the 110th Anniversary of the Conference
VII. New Member States – Adherence to the Hague Conventions

I. Adoption of the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary

From 2 to 13 December 2002, the Hague Conference held the Second Part of its XIXth Session, chaired by Professor A.V.M. Struycken, Chairman of the Netherlands Standing Government Committee on Private International Law, the First Part

---

* For earlier reviews, see this *Yearbook*, Vol. I, 1999, pp. 205-214; Vol. II, 2000, pp. 169-178; Vol. III, 2001, pp. 237-244; Vol. IV, 2002, pp. 219-226.

** Secretary General of the Hague Conference on Private International Law.

Yearbook of Private International Law, Volume 5 (2003), pp. 169-175
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

having taken place in June 2001.[1] This meeting was devoted entirely to the final negotiations and adoption of the Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary.[2] Thirty-one Member States of the Hague Conference, two non-Member States, eight governmental organisations and nine international non-governmental organisations took part in intense negotiations, chaired by Professor Stefania Bariatti of Italy and lasting until the early morning of 13 December 2002.

Later that morning, the Final Act of the Nineteenth Session, containing both the text of the Convention and the decisions pertaining to the organisation and the Agenda of the Conference, was signed in the Great Hall of Justice of the Peace Palace.

The Hague Securities Convention deals with a very important topic of international finance law in a manner that has already been characterised as 'revolutionary'. For a secured creditor it is critical to know which law applies to the perfection requirement of a disposition involving securities held with an intermediary. Only if these requirements are fulfilled will such a creditor get a perfect interest that can be opposed against third parties. The Convention provides a clear and predictable answer to the conflict of laws issues in this field. Thus it will reduce legal risk, systemic risk and associated costs in relation to cross-border transactions involving securities held with an intermediary, thereby facilitating the international flow of capital and access to capital markets for the benefit of economically developing as well as developed countries.

The Convention has already gained strong support from the financial industry. Several States as well as the European Community have already undertaken the necessary preliminary steps with a view to becoming a party to the Convention. An Explanatory Report is being drawn up by Professors Sir Roy Goode (UK), Karl Kreuzer (Germany), and Hideki Kanda (Japan) with the assistance of the Permanent Bureau, and will be published early in 2004.

[1] See this *Yearbook*, Vol. III, pp. 237-249; see also Vol. IV, pp. 220-222.

[2] See the Hague Conference website at: http://www.hcch.net/e/conventions/ menu-36e.html; see the *Introductory Note* to the text of the Convention by STRUYCKEN A.V.M, in: *Netherlands International Law Review*, 2003, No 1, p. 103; see also BERNASCONI C., *Indirectly held securities: a new venture for the Hague Conference on Private International Law*, in this *Yearbook*, Vol. III, 2001, pp. 63-100.

II. Special Commission on General Affairs and Policy of the Conference: Request for the Admission of the European Community

From 1 to 3 April 2003, the Special Commission on General Affairs and Policy met at The Hague under the chairmanship of Ms Monique Jametti-Greiner of Switzerland to take decisions on several important issues. One was the continuation of the work on the Judgments Convention.[3] Another important issue concerned the admission of the European Community to the Hague Conference. The reason for this request is that, as a result of the Amsterdam Treaty, the European Community may now adopt measures in the field of judicial co-operation and civil matters having cross-border implications in so far as necessary for the proper functioning of the internal market. The EC has already exercised this competence through the adoption of several regulations and directives. Having become a player within the field of private international law, it is important that the EC be integrated into the leading global organisation in the field, the Hague Conference. Since the Statute of the Conference is based on membership of States only, and not of international organisations, negotiations will be necessary to deal with questions such as the following: Is an amendment of the Statute necessary? If so, should the amendment be limited to the admission of the European Community or should it extend to any 'Regional Economic Integration Organisation'? How should the financial aspects and the matter of voting be dealt with? How can it be ensured that the broad body of work contained in the Hague Conventions drawn up before the entry into force of the Treaty of Amsterdam remain readily accessible to all Members States and their citizens, even when competences shift from the EU Member States of the Conference to the European Community? Can a convenient and expedient way be found to ensure that the Community may also be bound by these Conventions?

A major event during the Special Commission, which was attended by forty-five Member States, one observing non-Member State, and representatives for the European Union and the International Commission on Civil Status, was the signing by all the EU States (with the exception of the Netherlands which had already done so in 1997) as well as Switzerland and Australia of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children. On the same occasion the United Kingdom signed the Hague Convention of 13 January 2000 on the International Protection of Adults.[4]

---

[3] See *infra* III.

[4] See also *infra* VII.

III. Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters

As reported in last year's volume of this Yearbook,[5] the Commission on General Affairs and Policy of the XIXth Session, in its meeting of April 2002, decided to take a new approach concerning the working methods and the possible scope of a worldwide Convention on Jurisdiction and Recognition and Enforcement of Judgments. The Permanent Bureau convened a small informal working group of experts from the Member States, ensuring global coverage and representation of the major legal traditions constituting the Conference.

After three meetings, chaired by Professor Allan Philip of Denmark, this informal working group submitted a draft text on choice of court agreements. Following a decision of the Special Commission on General Affairs and Policy, which met from 1 to 3 April 2003, the Secretary General organised a written consultation of the Member States, requesting them to inform him before 1 July 2003 whether they would agree to put this text as the basis for work before a Special Commission to be convened in December 2003. As a result of the overwhelmingly positive response to this consultation, it was decided to convene a meeting of the Special Commission from 1 - 9 December 2003. It was also decided that any decision to convene the Special Commission in December 2003 should not preclude any subsequent work on the remaining issues with regard to jurisdiction and recognition and enforcement of foreign judgments in civil and commercial matters.

Meanwhile a Report on the preliminary text and additional reports on particular aspects were prepared by First Secretary Andrea Schulz of the Permanent Bureau.[6]

IV. Towards a New Global Convention on Child Support and Other Forms of Family Maintenance

From 5 to 16 May 2003, the first meeting took place of the Special Commission charged with the elaboration of a new global convention on child support and other forms of family maintenance. This project grew out of two earlier Special Commissions (in 1995 and 1999), which reviewed the operation of the existing multi-

---

[5] Vol. IV, 2002, pp. 220-223.

[6] Preliminary Document No 20, Preliminary Document No 21, Preliminary Document No 22, Preliminary Document No 23, also accessible on the Hague Conference website: http://www.hcch.net/e/workprog/jdgm.html.

lateral instruments. It has the potential to benefit tens of thousands of children and other family dependants around the world, as well as to relieve the burden on taxpayers. The meeting had before it an extensive study by Deputy Secretary General William Duncan,[7] as well as reports on certain aspects by First Secretary Philippe Lortie.[8] Representatives from thirty-seven Member States of the Hague Conference, nine non-Member States, five intergovernmental organisations, and six non-governmental organisations attended. The meeting was chaired by the Italian expert Judge Fausto Pocar, vice-president of the International Criminal Tribunal for the Former Yugoslavia. Professor Alegría Borrás, expert from Spain, and Ms Jennifer Degeling (Australia) were elected rapporteurs.

A Drafting Committee, a Working Group on applicable law and two other informal groups (one on judicial and administrative co-operation, the other on direct jurisdiction) were constituted. The second meeting of the Special Commission is planned for June 2004.

In addition to the usual English/French interpretation, Spanish interpretation was offered at this meeting. An extensive report has been published by the Permanent Bureau on this first meeting of the Special Commission.[9]

V. Child Abduction and Transfrontier Access – Contact

From 27 September to 1 October 2002, a Special Commission took place, chaired by Judge Catherine McGuinness of the Irish Supreme Court, concerning the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, probably the most well-known of the Hague Conventions, which now has 74 Contracting States. The purpose of the Special Commission was in particular to review and approve the first two parts of a Guide to Good Practice, drawn up by Ms Jenny Degeling and Ms Marion Ely, one on the practice of Central Authorities – the governmental bodies with key responsibilities under the Convention – the other on implementing measures. The Special Commission also discussed an

---

[7] 'Towards a New Global Instrument on the International Recovery of Child Support and Other Forms of Family Maintenance,' report drawn up by William DUNCAN, Preliminary Document No 3 of April 2003 (http://www.hcch.net/e/workprog/maint.html).

[8] 'Parentage and International Child Support, responses to the 2002 Questionnaire and an analysis of the issues', drawn up by Philippe LORTIE, Preliminary Document No 4 of April 2003 (http://www.hcch.net/e/workprog/maint.html).

[9] 'Report on the First meeting of the Special Commission on the International Recovery of Child Support and Other Forms of Family Maintenance', drawn up by the Permanent Bureau, Preliminary Document No 5 of May 2003 (http://www.hcch.net/e/-workprog/maint.html).

extensive final report on transfrontier access and contact drawn up by Deputy Secretary General William Duncan,[10] problems of child abduction, transfrontier access and contact including the relations with Islamic States, on the basis of a research paper drawn up by Ms Caroline Gosselain,[11] and practical mechanisms for facilitating direct international judicial communications in the context of the 1980 Convention, with the assistance of a preliminary report drawn up by First Secretary Philippe Lortie.[12]

The Special Commission recommended that the Permanent Bureau continue its work in all these areas, as well as on measures to prevent abductions from taking place and enforcement of return orders, and remain active in the organising of judicial seminars, continue its publication of the Judges' Newsletter on International Child Protection, its work on the INCADAT database of judicial decisions and its development of a new database on the 1980 Convention (INCASTAT).[13]

VI. Special Commission on the Practical Operation of the Apostille, Service and Evidence Conventions – Celebration of the 110th Anniversary of the Conference

From 28 October to 4 November 2003, a Special Commission on the practical operation of the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, the Convention of 15 November 1965

[10] 'Transfrontier Access/Contact and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Final Report' (reformatted version of September 2002) (Preliminary Document No 5 of July 2002 for the attention of the Special Commission of September/October 2002) (see website at: http://www.hcch.net/e/conventions/reports28e.html).

[11] 'Child Abduction and Transfrontier Access: Bilateral Conventions and Islamic States – a Research Paper' (Preliminary Document No 7 of August 2002 for the attention of the Special Commission of September/October 2002) (see website at: http://www.hcch.net/e/conventions/reports28e.html).

[12] 'Practical Mechanisms for Facilitating Direct International Judicial Communications in the context of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Preliminary Report' (Preliminary Document No 6 of August 2002 for the attention of the Special Commission of September/October 2002) (see website at: http://www.hcch.net/e/conventions/reports28e.html).

[13] 'Report and Conclusions of the Special Commission of September-October 2002 on the Hague Child Abduction Convention' (see website at: http://www.hcch.net/e/ conventions/reports28e.html).

on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters was held. The meeting was chaired by the Scottish expert Mr Peter Beaton. This was the first time a Special Commission was organised to review the practical operation of the Apostille Convention. The Service and Evidence Conventions had already been the subject of a review meeting in 1977, 1978, 1985 and 1989 respectively.

In preparation of the Special Commission, First Secretary Christoph Bernasconi had prepared a provisional new edition of the Practical Handbook on the Service Convention, as well as questionnaires concerning each of these Conventions.[14]

On 27 October 2003, a workshop took place on the impact of electronic communications on the operation of the Conventions.

The conclusions of the Special Commission have been published by the Permanent Bureau.[15]

During the Special Commission, on 31 October, the Hague Conference celebrated its 110th Anniversary with a meeting in the Great Hall of Justice of the Peace Palace. After a welcome by the chairman of the Standing Government Committee on Private International Law, Professor A.V.M. Struycken, introductory remarks were made by the Minister of Foreign Affairs, Mr de Hoop Scheffer and a discourse was delivered by the President of Hungary, former expert and delegate to the Hague Conference on Private International Law, Professor Ferenc Mádl.

VII. New Member States – Adherence to the Hague Conventions

Since the previous review, two new States have joined the Hague Conference: Malaysia on 2 October 2002 and Iceland on 14 November 2003. Many of the Hague Conventions continued to attract new signatories and ratifications, and it is worth noting, in particular, that the Hague Convention of 13 January 2000 on the International Protection of Adults was ratified by the UK (for Scotland only) on 5 November 2003.

[14] See website at: http://www.hcch.net/e/workprog/lse_intro.html.

[15] See website at: http://www.hcch.net/e/workprog/lse_intro.html.

NEWS FROM BRUSSELS

PROJECTS OF THE EUROPEAN COMMUNITY IN THE FIELD OF PRIVATE INTERNATIONAL LAW

Marie-Odile BAUR*

I. Introduction
II. Present Projects in the Council
  A. Parental Responsibility
  B. Compensation to Crime Victims
  C. European Enforcement Order for Uncontested Claims
  D. Regulation on the Law Applicable to Non-Contractual Obligations
III. Instruments under Preparation
  A. Alternative Dispute Resolution
  B. European Order for Payment Procedure and Measures Relating to 'Small Claims' Litigation
    1. European Order for Payment Procedure
    2. Measures to Simplify Small Claims Litigation
  C. The Law Applicable to Contractual Obligations
  D. The Law Applicable to Divorce
  E. Patrimonial Consequences of the Dissolution of Marriage and the Separation of Unmarried Couples; Wills and Successions
    1. Wills and Successions
    2. Dissolution of Matrimonial Property Regimes
  F. Measures Improving Enforcement
  G. Maintenance Claims
IV. International Instruments
  A. Agreements with Denmark
  B. The Lugano Convention
  C. Negotiations within the Framework of UNIDROIT
  D. Accession of the Community to the Hague Conference of Private International Law
V. Conclusion

* National expert on secondment to the European Commission. This text reflects the opinions of the author and may not in any way be regarded as stating an official position of the European Commission.

Yearbook of Private International Law, Volume 5 (2003), pp. 177-190
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

I. Introduction

It is certainly obvious that, while the creation and development of an integrated market was one of the priorities of the group of countries that formed the European Union, consideration given to judicial cooperation in civil matters is more recent. Thanks to the lawyers who drafted the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, the results of their work surpassed the narrow framework of Article 220 of the Rome Treaty on EEC, bringing benefits to European litigants.

Since commercial transactions inevitably lead to disputes, it soon became clear that a free internal market could not function solely on the basis of economic rules, thus making it necessary to adopt legal rules for the settlement of such disputes. With the increase in personal cross-border contacts, practically everybody in Europe has become vulnerable to cross-border litigation, as a result of which the European Treaties have been forced to take account of this new reality.

Although the Treaty of Maastricht of 1992 acknowledged that justice and internal affairs are a matter of common interest to the Member States of the Union, the traditional legislative procedure for enacting conventions in this field was too slow and cumbersome to produce effective results. Of the small number of instruments drafted, none of them became effective in the first six years after the Treaty entered into force: 1) Convention on jurisdiction and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, 2) Convention on insolvency proceedings and 3) Convention on the service of documents.

With the signing of the Treaty of Amsterdam on 2 October 1997, a significant step was taken by transferring judicial cooperation in civil matters into the 'first pillar', thus allowing regulations, directives and decisions to be elaborated on the initiative of the European Commission.

On the basis of these Treaties, the governments of the Member States and the Commission prepared three successive plans in the months that followed.

Adopted in December 1998, the Vienna 'Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam more effectively on an area of freedom, security and justice'[1] stated that the objective of civil judicial cooperation is to improve collaboration between the authorities of the Member States with the aim of facilitating the life of European citizens. An agenda of measures was also established to implement the provisions of the Treaty of Maastricht.

During the Tampere Summit of October 1999, the European Heads of States and Governments shed light on the concept 'European area of justice' introduced by the Treaty of Maastricht, defining it as an area where 'people can approach

[1] *OJ*, C 19, 23/01/1999.

courts and authorities in any Member State as easily as in their own,'[2] where 'judgments and decisions should be respected and enforced throughout the Union, while safeguarding the basic legal certainty of people and economic operators,'[3] and where 'individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States.'[4] They agreed to consider the principle of mutual recognition as 'the cornerstone of judicial cooperation'.[5] Furthermore, they called upon the Commission 'to make a proposal for further reduction' or even abolition 'of the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgment in the requested State' and, if the need arises, 'for the setting of minimum standards on specific aspects of civil procedural law'.[6]

As a means of implementing the Tampere Conclusions, the Council approved at the end of 2000 a 'Draft Programme of measures for the implementation of the principle of mutual recognition of decisions in civil and commercial matters',[7] the so-called 'Mutual Recognition Programme', which aimed at abolishing the exequatur in civil and commercial matters. This Programme is based on a step-by-step approach, which means that legislative action in a given field is to be followed by subsequent legislation to achieve the ultimate goal. While the Programme calls for legislative action to be taken in civil law matters in general, it specifically mentions the areas of family law, successions and wills.

Finally, the Treaty of Nice, which entered into force the beginning of 2003, extends the co-decision procedure of Article 251 to judicial cooperation in civil matters, as well as the principle of qualified majority voting, except in family matters.

After the entry into force of the Treaty of Amsterdam, the Commission launched a series of proposals leading to the conversion of four conventions into Regulations: the Brussels Convention of 1968 and the three above-mentioned Conventions on insolvency proceedings, on divorce and on the service of documents. Several other proposals were made shortly thereafter either by a Member State or the Commission. Two instruments have already been adopted: Regulation 1206/2001/EC on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters,[8] which was elaborated on the basis of a German draft proposal, and Directive 2002/8/EC to improve access to

[2] Presidency Conclusions, Tampere European Council, No. 5.

[3] Presidency Conclusions, Tampere European Council, No. 5.

[4] Presidency Conclusions, Tampere European Council, No. 28.

[5] Presidency Conclusions, Tampere European Council, No. 33

[6] Presidency Conclusions, Tampere European Council, No. 34.

[7] *OJ*, C 12, 15/01/2001.

[8] *OJ*, L 174, 27/06/2001.

justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.[9]

While work on other projects in the Council continued or began under the Italian Presidency, the Commission launched studies on other matters, either internally or with contributions by external partnerships to collect sufficient information before initiating the preparation of draft instruments. The Commission is working on various projects, in particular to regulate relations between Denmark and the other Member States, to enhance cooperation with States outside the European Union, and to participate in negotiations in international organisations.

II. Present Projects in the Council

Three draft Regulations prepared by the Commission are presently being discussed by the Member States in the Council: parental responsibility, a European enforcement order for uncontested claims, and compensation for crime victims. A draft Regulation on the law applicable to non-contractual obligations was discussed for the first time in September 2003.

A. Parental Responsibility

Following adoption of the Regulation on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses[10] ('Brussels II' Regulation), the so-called French initiative was presented by the French Presidency in July 2000 in response to the Tampere Conclusions with the aim of facilitating the implementation of decisions relating to cross-border access rights to children by abolishing the exequatur procedure. This was followed in September 2001 by the Commission's first proposal and in May 2002 the second proposal extending the scope of application of the Brussels II Regulation to all decisions on parental responsibility, including matters of child abduction and cross-border access rights.

Adopted on 27 November 2003, Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000,[11] takes over the provisions of the Brussels II Regulation regarding matrimonial matters and extends the principle of mutual recognition and

[9] *OJ*, L 026, 31/01/2003.

[10] *OJ*, L 160, 30/06/2000.

[11] *OJ*, L 338, 23/12/2003; in this *Yearbook*, *infra*, 'Texts, Materials and Recent Developments', pp. 277-314.

enforcement to all decisions on parental responsibility. It abolishes the exequatur procedure for access rights and return of an abducted child. As regards this last matter, the general rules of the Hague Convention of 25 October 1980 on the civil aspects of child abduction will continue to apply between the Member States of the Union. However, the Regulation adds a number of rules intended to complement and reinforce application of the Convention within the EU. In particular, it introduces innovative solutions extending the jurisdiction of the court of the child's habitual residence, thus aiming to reduce the number of decisions acknowledging wrongful displacements.

B. Compensation to Crime Victims

In response to the Vienna Action Plan, which proposed that a comparative survey on victim support be conducted among the EU Member States, the Commission presented a Communication on this issue in 1999. Taking account of this Communication, the conclusions of the Tampere European Council called for the drawing up of 'minimum standards […] on the protection of the victims of crime, in particular on […] their rights to compensation for damages'.[12]

Based on Title VI of the EU Treaty, a Framework Decision[13] on the standing of victims in criminal proceedings was adopted by the Council in March 2001. This Decision obliges the Member States to ensure that, in the course of criminal proceedings, crime victims are able to obtain a decision awarding compensation from the offender and that measures are put into place to encourage the offender to pay the compensation awarded.

In September 2001, the Commission issued a Green Paper launching a consultation on possible measures to be taken at Community level. Already addressed by the 2001 decision, the issue of compensation by the offender was not included, nor was the enforcement of judgments, which is dealt with in the Brussels I Regulation. Instead, the Green Paper focused on awarding State compensation. As emphasised, crime victims are frequently unable to obtain damages from the offender because the latter remains unknown, cannot be successfully prosecuted or lacks the necessary means to pay compensation to the victim. It also noted that 13 of the 15 Member States currently have State compensation systems; however, they differ considerably and presently there is no system of cross-border cooperation.

This paper was very well received by the Member States, the European Parliament, which has always shown strong support for compensation to crime victims, and all other interested parties. Therefore, at the end of 2002, the Commission presented a proposal with the aim of: 1) establishing a minimum standard for

[12] Presidency Conclusions, Tampere European Council, No. 32.

[13] *OJ*, L 82, 22/03/2001.

compensation from States to crime victims in the European Union, and 2) setting up a system of cross-border cooperation between national authorities to facilitate the compensation claims of cross-border victims. The proposal is currently being discussed in the Civil Law Committee of the Council and significant progress is expected in the coming months.

C. European Enforcement Order for Uncontested Claims

The Mutual Recognition Programme identified the abolition of the exequatur procedure for uncontested claims as one of the Community's priorities. This issue was also designated as a pilot project by the informal Council of Justice and Home Affairs, which took place in Stockholm in February 2001.

After a study was carried out on the basis of the answers of the Member States to a questionnaire and their experts were consulted on a first draft, the Commission presented a proposal for a Regulation creating a European enforcement order for uncontested claims. This proposal aims at abolishing the exequatur procedure for judgments on monetary claims rendered with the debtor's consent or in verifiable absence of opposition by the debtor. According to the draft Regulation, a judgment certified as a European Enforcement Order (EEO) in its Member State of origin would be enforceable in another Member State under the same conditions as if it had been given in that State. No procedure to obtain a declaration of enforceability would be necessary and there would be no possibility of opposing the recognition and enforcement of the judgment. The proposal contains minimum standards concerning the service of documents, which are to be verified by the judge of origin before issuing the EEO certificate.

This draft Regulation was first examined in the Civil Law Committee of the Council in 2002 under the Danish Presidency and work is still in progress.

D. Regulation on the Law Applicable to Non-Contractual Obligations

Preparatory work on a Convention on the law applicable to non-contractual obligations commenced in 1997 but was stopped the following year due to the imminent entry into force of the Treaty of Amsterdam. Therefore, neither the conclusions of the Tampere European Council nor the Mutual Recognition Programme specifically refer to this issue, although the latter states that 'implementation of the mutual recognition principle may be facilitated through harmonisation of conflict of law rules'. Above all, Article 65 of the Treaty of Amsterdam states that it could be useful to promote 'the compatibility of the rules applicable in the Member States concerning the conflict of laws'.

The Commission undertook a revision of the text prepared by experts of the Member States and consulted all interested parties. Two hearings were organised in November 1999 and January 2003. Difficult issues concern the application of fu-

ture rules in the field of E-commerce in respect of businesses and consumers and the question of defamation, a very sensitive matter for the media concerning the freedom of expression. The discussion of the new draft Regulation commenced in October 2003.

III. Instruments under Preparation

A. Alternative Dispute Resolution

While the Vienna Action Plan proposed examining the possibility of drawing up models for the out of court settlement of transnational family disputes, the Tampere Conclusions suggested undertaking a global reflection on alternative modes of dispute resolution. A Green Paper reviewing the existing situation and initiating wide-ranging consultation was presented by the Commission in April 2002, followed by a hearing in February 2003. In response to the comments and opinions favouring some form of action at European level, a programme of best practices in mediation is to be developed. Other initiatives, including the drafting of an instrument promoting mediation, are still under consideration.

B. European Order for Payment Procedure and Measures Relating to 'Small Claims' Litigation

In December 2002 the Commission adopted a Green Paper dealing with a European Order for Payment Procedure and measures to simplify and speed up 'small claims' litigation.

1. European Order for Payment Procedure

Stressing that all Member States seek a solution for the mass recovery of uncontested claims, the Green Paper states that some States have already adopted a payment order procedure that ensures the rapid and cost effective payment of claims in which the nature and extent of the debt are not disputed.

The Tampere Conclusions called for the preparation of new procedural legislation in particular 'on those elements which are instrumental to smooth judicial cooperation' such as 'orders for money payment'.[14] Moreover, the Mutual Recognition Programme recognises that, 'in some areas, abolition of the exequatur might take the form of establishing a true European enforcement order, obtained

[14] Presidency Conclusions, Tampere European Council, No. 38.

following a specific, uniform and harmonised procedure laid down within the Community'.

Inspired by the German *Mahnverfahren* and the French *injonction de payer*, a European order for payment obtained by the claimant in *ex parte* proceedings would place the burden of initiating adversary proceedings on the defendant to prevent the decision from becoming enforceable.

After publication of the Green Paper and the collection of answers and comments, the Commission organised a public hearing in June 2003. One of the questions raised was whether the procedure should apply only to cross-border cases or include internal ones as well. Another issue concerned whether to adopt the German model, a very expeditious system requiring mere control of the procedural regularity of the claim, or the French model, which requires the court to examine justification of the claim, or to create a new model reconciling the two existing ones. Draft legislation will be presented by the Commission in the coming months.

2. *Measures to Simplify Small Claims Litigation*

To create 'a genuine European area of justice where people can approach courts and authorities in any Member State as easily as in their own'[15] and 'should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States,'[16] it is particularly important to speed up proceedings and, above all, reduce costs for the claimant. It is thus envisaged to harmonize or approximate court procedures in respect of small claims to facilitate cross-border access to court dispute resolution.

In particular, the Green Paper raises the question which procedural rules could be adopted to simplify the process of obtaining a decision. The collection of comments on the Green Paper was closed in May 2003 and a public hearing will follow.

C. The Law Applicable to Contractual Obligations

The Vienna Action Plan recommended the revision, if appropriate, of some provisions of the Convention on the law applicable to contractual obligations, taking into account special provisions on conflict of law rules contained in other Community instruments. The Mutual Recognition Programme also includes the harmonisation of conflict of law rules as ancillary measures for facilitating mutual recognition.

---

[15] Presidency Conclusions, Tampere European Council, No. 5.

[16] Presidency Conclusions, Tampere European Council, No. 28.

The Rome Convention on the law applicable to contractual obligations[17] is presently the only instrument dealing with private international law that has not been converted into a Regulation since the entry into force of the Treaty of Amsterdam. Nevertheless, some issues could create difficulties, for example, the law applicable to contracts concluded via the Internet. This issue was already intensely debated within the framework of a hearing held in November 1999 concerning the Brussels I Regulation.

A Green Paper was published in January 2003 and the deadline for comments expired in September 2003. Thereafter a hearing will be organised to collect final comments prior to preparation of a draft Regulation in 2004.

D. The Law Applicable to Divorce

The Commission is presently considering preparing a draft Community instrument on the law applicable to divorce proceedings. The Brussels II Regulation does not contain conflict of law rules, and issues relating to the status of natural persons are excluded from the scope of the Rome Convention on the law applicable to contractual obligations. Moreover, the Brussels II Regulation provides claimants with a long list of alternative jurisdictions, thus entailing the risk of *forum shopping*.

A questionnaire was sent to the Member States in 1999 to gather information on the rules applicable before their courts. Thereafter a study was launched in June 2000 focusing on possible difficulties arising from the lack of harmonisation of conflict of law rules among Member States. The final report presented in December 2002 emphasises significant differences existing between the domestic substantive laws governing divorce. A White Paper presenting various legislative options will be published in 2004.

E. Patrimonial Consequences of the Dissolution of Marriage and the Separation of Unmarried Couples; Wills and Successions

Matrimonial property regimes and successions are explicitly excluded from the scope of application of Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil or commercial matters. Similarly, Regulation (EC) No. 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses contains no provisions relating to the dissolution of matrimonial property regimes or the patrimonial consequences of the dissolution of marriage. The future instrument extending the scope of application of this Regulation to all questions relating to parental responsibility also does not deal with this matter.

[17] *OJ*, C 27, 26/01/1998.

Stressing that these issues are 'of major interest in the creation of a European judicial area', the Mutual Recognition Programme recommends the adoption of new instruments concerning 'international jurisdiction, recognition and enforcement of judgments relating to the dissolution of rights in property arising out of a matrimonial relationship, to property consequences of the separation of unmarried couples and to successions'. It envisages making a distinction between the two main subjects: property issues arising as a result of the breakdown of marriages or non-marital unions on the one hand, and successions on the other.

In light of the extent and different aspects of these matters, the Commission launched two separate studies to be carried out by private external bodies.

1. Wills and Successions

Presented at the end of 2002, the final report of the study relating to wills and successions revealed considerable differences between the national laws and the private international law rules applicable in the various Member States. It proposed the adoption of harmonised rules of jurisdiction and private international law, simplified rules of recognition and enforcement and the creation of a European certificate establishing the rights of heirs. The publication of a Green Paper based on this study is expected in a few months.[18]

2. Dissolution of Matrimonial Property Regimes

It should be noted that the scope of the subject envisaged by the conclusions of the Vienna and the Tampere Councils has been extended by the Mutual Recognition Programme to all patrimonial consequences of the separation of unmarried couples. This, of course, is a sensitive issue, since the full range of different types of 'unions', both different and same-sex ones, is not officially recognised in all Member States at present.

Nevertheless, the study launched by the Commission covers married and unmarried couples. For the purpose of the study, the expression *matrimonial property regimes* is interpreted as including all types of arrangements concerning the property of spouses applicable in the Member States, regardless of whether their law contains rules explicitly dealing with matrimonial property regimes.

[18] The reports can be consulted on the website of the European Commission at http///europe.eu.int/comm/justice_home/unit/civil_en.htm.

F. Measures Improving Enforcement

As a second step in the implementation of the Mutual Recognition Programme, the Commission is considering a series of measures to strengthen the effects in the requested State of decisions taken in the State of origin. Various measures are envisaged, for example, establishing the possibility of provisional enforcement, which would enable a decision declaring enforceability in the requested State to be provisionally enforceable itself, despite the possibility of appeal. Such a move would require an amendment to Article 47(3) of the Brussels I Regulation.

Protective measures are also envisaged at European level. For example, a decision rendered in one Member State would automatically authorise protective measures to be taken against the debtor's assets throughout the territory of the Union. Another protective measure could be the establishment of a European system for the attachment of bank accounts. Finally, the Mutual Recognition Programme recommends the adoption of ancillary measures allowing identification of the debtor's assets.

The Commission has launched a study on these issues, the conclusions of which are expected at the end of 2003. A Green Paper on improving enforcement of the Court decisions could then be presented in 2004.

G. Maintenance Claims

Maintenance claims are cited in the Conclusions of the Tampere European Council as an example of a field in which the first step should be the abolition of intermediate measures required to obtain the recognition and enforcement of a foreign judgment in the requested State. Evidently it is of utmost importance to facilitate the recovery of maintenance claims for the benefit of children or other members of the debtor's family. It is also in the interest of the Member States not to be obliged to provide relief due to the failure of debtors to provide maintenance.

Since the final report of the study launched by the Commission has not yet been presented, it is currently impossible to predict which direction will be taken in future work in this area. Nevertheless, it is clear that this issue is important for the Community not only because it was mentioned in the Tampere Conclusions, but also because it is presently being considered by the Hague Conference of Private International Law. As a matter of fact, the Conference has decided to draft a new comprehensive instrument on the subject and the first meeting was held in May 2003. Since Regulation 44/2001 contains provisions on jurisdiction relating to maintenance claims, the Community itself is competent to negotiate matters concerning jurisdiction and the recognition and enforcement of decisions in maintenance claims with third countries.

IV. International Instruments

The European Community is not an area of uniformity as regards civil judicial cooperation; three States are subject to different rules: Denmark, Ireland and the United Kingdom. Whereas the latter have always opted in and participate in all Community instruments adopted since the entry into force of the Treaty of Amsterdam, Denmark is not in a position to do so. Instead, Denmark can only stay outside or decide to end the special regime put in place by its protocol.

The European Community is also not an isolated area; its legal relationships with third countries have to be organised by international treaties.

A. Agreements with Denmark

The conclusion of two agreements between Denmark and the other Member States of the European Union is envisaged: one relating to Regulation 44/2001 and the other to the service of documents. Denmark is a contracting party to the 1968 Brussels Convention and thus this instrument still applies between Denmark and the other Member States. Since the Convention text was modified when it was converted into Regulation No. 44/2001, different rules apply within the European judicial area when Danish courts are involved.

In regard to the service of documents, the Convention adopted between the Member States never entered into force. Therefore, only the 1965 Hague Convention and bilateral or regional agreements are applicable between Denmark and the other Member States. This situation could also become confusing since Regulation No. 44/2001 provides for the application of Regulation No. 1348/2000 on the service of documents.

B. The Lugano Convention

The Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 16 September 1988 is applicable between all the Member States of the European Union, on the one hand, and Switzerland, Iceland, Norway and Poland, on the other.

At the end of the nineties, parallel projects to revise this Convention and the 1968 Brussels Convention were interrupted in anticipation of the entry into force of the Treaty of Amsterdam and the resulting transfer of civil judicial co-operation into the 'first pillar'. Now that Regulation No. 44/2001 has entered into force, the revision work can resume. The new situation, however, raises the question of the extent of the Community's competence to negotiate and adopt the new Convention.

The opinion of the Court of Justice has been requested pursuant to Article 300(6) of the EC Treaty. Nevertheless, negotiations could soon begin without

prejudice to the nature, either mixed or not, of the future agreement to be concluded with third countries that are party to the Lugano Convention, according to the opinion of the Court.

C. Negotiations within the Framework of UNIDROIT

The Commission participated, on behalf of the European Community, in the negotiations of the Convention on international interests in mobile equipment and its aircraft protocol, which were adopted in November 2001 at Cape Town under the combined auspices of UNIDROIT and the International Civil Aviation Organisation (ICAO). The Convention and the protocol are 'mixed agreements'.

The European Community has jurisdiction over certain matters governed by the Convention and the protocol since they affect Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and Council Regulation (EC) No. 1346/2000 on insolvency proceedings.[19] Intended to facilitate the financing of expensive aircraft equipment, the Convention and its protocol could be of great benefit to the European aerospace industry. Therefore, the Commission has made two proposals for Council decisions on the signing and conclusion of these instruments by the Community.

D. Accession of the Community to the Hague Conference of Private International Law

During the 19th session of the Hague Conference of 21 - 22 June 2001, the Community expressed the wish to accede to the Conference. Having exercised its competence to adopt measures in the field of judicial cooperation in civil matters with cross-border implications, the Community has gained external competence under the Treaty of Amsterdam to negotiate, sign and ratify various instruments under the auspices of the Hague Conference.

The Community believes that its membership in this Organisation would facilitate the expression of its positions and, at the same time, promote the work of the Conference and implementation of its instruments. However, at present, the Statute of the Conference does not permit the membership of regional economic integration organisations.

During the Special Commission on General Affairs and Policy of the Conference in April 2003, the European Community was asked to clarify in writing the possible consequences of its membership. The Community replied by submitting a comprehensive document, which the Permanent Bureau forwarded to all Members States of the Conference. Upon the request of the Special Commission, the Perma-

[19] OJ, L 160, 30/06/2000, p. 1.

nent Bureau has convened an informal advisory group, which will meet in January 2004 to make proposals on how the Statute of the Conference could be modified to permit membership of the Community. At present, the Statute permits the membership of States only.

V. Conclusion

This brief review of current projects of the European Commission certainly demonstrates that the requirements relating to judicial cooperation in civil matters set forth in recent European Treaties, as well as in the Tampere Conclusions and the Mutual Recognition Programme, have not gone unheeded.

The European Constitution prepared by the Convention would undoubtedly, subject to its entry into force, enhance progress towards the creation of a 'genuine European area of justice' since it withdraws the condition requiring proper functioning of the internal market contained in the current provisions of Article 65 of the EC Treaty. In any case, progress in this area will certainly meet the expectations of European citizens, who no longer accept the insurmountable legal barriers impairing their daily relations with other Europeans, which is sadly still the case in many respects today.

FORUM[*]

PRIVATE INTERNATIONAL LAW ASPECTS OF NON-MARITAL UNIONS

Some French Reflections on the Applicable Law[**]

Alain DEVERS[***]

I. The Legal Background
II. Legal Qualification of Non-Marital Unions
  A. An Element of Personal Status
    1. Non-Marital Cohabitation
      a) A Personal Relationship
      b) Significance of Article 515-8 of the Civil Code
    2. Registered Partnerships
      a) A Personal Relationship
      b) The Role of Articles 515-1 to 515-7 of the Civil Code
  B. The Importance of Qualifying Non-Marital Unions as a Matter of Personal Status
    1. Qualifying Non-Marital Unions as Marriage
    2. Creating a Category for Non-Marital Unions
      a) Various Forms of Non-Marital Unions in Comparative Law
      b) Various Forms of Non-Marital Unions in Private International Law
III. Non-Marital Unions in Private International Law
  A. Determining the Applicable Law
    1. The Law Applicable to Non-Marital Cohabitation
    2. The Law Applicable to Registered Partnerships

---

[*] This section contains summaries of books recently published by young authors in languages other than English.

[**] This article summarizes some ideas expressed in Alain DEVERS, *Le concubinage en droit international privé*, Thesis Lyon 3, directed by H. FULCHIRON, October 2002, to be published in Paris (L.G.D.J.) 2004.

[***] Lecturer of Law at the Faculty of Law of the University of Lyon 3 (France), Research Family Law Centre at the Faculty of Law of the University of Lyon 3 (France). The author especially wishes to thank Susan Taponier (Paris) for her invaluable help in translating this text.

Yearbook of Private International Law, Volume 5 (2003), pp. 191-221
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

B. Scope of the Applicable Law
1. Formation of Non-Marital Unions
2. Dissolution of Non-Marital Unions
3. Property Regime of Non-Marital Unions
a) Property Arrangements
b) Maintenance Obligations
c) Inheritance Rights
IV. Conclusion

I. The Legal Background

The number of new laws regulating relations between unmarried couples has constantly increased over the past thirty years. This can be attributed to the fact that it has become extremely difficult as well as ill advised to keep such couples outside the reach of the law.[1] In Europe, the movement began in the former Yugoslavia, where Kosovo (1984), Slovenia (1976), Croatia (1978), Bosnia-Herzegovina (1979) and Serbia (1980) were the first to adopt legislation on unmarried couples[2] – well ahead of the Scandinavian countries. For example, the Slovenian law of 26 May 1976 provided that long-term cohabitation outside of marriage between a man and a woman has the same legal effects as if they were married (Art. 12).[3] Similarly, a law passed in Bosnia-Herzegovina in 1979 provided that a *de facto* stable and lasting union between a man and a woman produces effects similar to those of marriage (Art. 14).[4]

Of all the new legislation, the Danish Law of 7 June 1989 was undoubtedly the most controversial as it conveyed a legal status close to that of marriage on

---

[1] MARTIN CASALS M., 'La situació jurídica de les parelles de fet en alguns països europeus', in: *Revista jurídica de Catalunya* 2000, pp. 189 *et seq.*; GRANET F., 'Concubinages, partenariats enregistrés et mariages homosexuels en Europe', in: *Études offertes à J. Rubellin-Devichi*, Paris (Litec) 2002, pp. 375 *et seq.*; PAPAUX VAN DELDEN M.-L., *L'influence des droits de l'homme sur l'osmose des modèles familiaux*, Basel (Helbing & Lichtenhahn) 2002.

[2] ŠARCEVIC P., 'Les concubinages dans les pays socialistes', in: *Les concubinages en Europe*, Paris (CNRS) 1989, pp. 301 *et seq.*

[3] See ŠARČEVIĆ P., 'Cohabitation Without Marriage: The Yugoslavian Experience', in: *Am. J. Comp. L.* 1981, pp. 315 *et seq.*, esp. p. 321; GEČ-KOROŠEC M./ KRALJIĆ S., 'The influence of validity established cohabitation on legal relations between cohabitants in Slovene law', in: *The International Survey of Family Law* (2001ed.), Bristol (Family Law) 2001, pp. 383 *et seq.*

[4] BUBIC S., 'Family law in Bosnia and Herzegovina', in: *The International Survey of Family Law* (1996 ed.), The Hague, Boston, London (Martinus Nijhoff Publishers) 1998, pp. 51 *et seq.*, esp. p. 67.

same-sex couples who register their partnership.[5] More specifically, the provisions governing the personal and property effects of marriage were declared applicable, by analogy, to registered same-sex partners.[6] However, the law excludes application of the provisions on joint adoption by spouses and the sharing of parental authority between the parent and his or her new spouse (Law No. 372 of 7 June 1989, Art. 4). After the initial shock, the Danish model of registered same-sex partnership was quickly imported by the other Scandinavian countries, where a debate was in progress on the rights of same-sex couples. Despite some opposition[7], Norway was the second Scandinavian country to enact legislation on registered partnerships between same-sex couples.[8] Pursuant to Law No. 40 of 30 April 1993, the registration of a partnership between two persons of the same sex produces the same legal effects as marriage, with the exception of the right of spouses to jointly adopt a child (Art. 4). After some hesitation,[9] three laws were passed in Sweden in less than ten years. The first two regulate the property relations of unmarried cohabitees, regardless of whether the couples are heterosexual or homosexual (Law No. 232 of 14 May 1987 and Law No. 813 of 18 June 1987).[10] Following the Danish law of 1989, the third law introduced the institution of registered same-sex partnership into Swedish law (Law No. 1117 of 23 June 1994), providing that a registered partnership has the same legal effects as marriage, with the exception of adoption, the right to joint custody of children and artificial insemination (Chap. 1, Art. 2).[11] Although entitled the 'Law relating to confirmed Cohabitation' (Law No. 87 of 12 June 1996), the law in Iceland actually created a new institution

[5] NIELSEN L., 'Family Rights and the 'Registered Partnership' in Denmark', in: *International Journal of Law and the Family* 1990, pp. 297 *et seq.*

[6] For a translation of the Danish Act and other Laws on Registered Partnership, see BOELE-WOELKI K./ FUCHS A., *Legal Recognition of Same-Sex Couples in Europe*, Antwerp, Oxford, New York (Intersentia) 2003, pp. 213 *et seq.*

[7] See the Norwegian Act on Registered Partnerships for Homosexual Couples, The Ministry of Children and Family Affairs, Oslo, Norway, August 1993, pp. 41 *et seq.*

[8] LØDRUP P., 'Norway. Registered Partnership in Norway', in: *The International Survey of Family Law* (1994 ed.), The Hague, Boston, London (Martinus Nijhoff Publishers) 1996, pp. 387 *et seq.*; M. ROTH, 'The Norwegian Act on registered partnership for homosexual couples', in: *Journal of Family Law* 1996-1997, pp. 467 *et seq.*

[9] AGELL A., 'The Swedish legislation on marriage and cohabitation: a journey without a destination', in: *Am. J. Comp. L.* 1981, pp. 285 *et seq.*

[10] SALDEEN Å., 'Sweden. Joint custody, special representative for children and cohabitees' property', in: *The International Survey of Family Law* (2001 ed.), Bristol (Family Law) 2001, pp. 405 *et seq.*, esp. p. 408; YTTERBERG H., 'Sweden. Additional regulations besides the registered partnership', in: *Pratique Juridique Actuelle* 2001, pp. 287 *et seq.*

[11] However, adoption, the right to joint custody of children and artificial insemination will soon be possible. See SALDEEN Å., 'Sweden. Minor Amendments and Statutory Proposals: Brussels II, Same-sex Adoption and Other Matters', in: *The International Survey of Family Law* (2003 ed.), Bristol (Family Law) 2003, pp. 411 *et seq.*, esp. p. 414.

for same-sex couples, equivalent to the registered partnership under Danish law.[12] Except for the rules on joint adoption, the provisions governing the effects of marriage apply *mutatis mutandis* to same-sex couples once their cohabitation has been confirmed (Art. 6). Finland, the last of the Scandinavian countries to legislate in this area, now recognizes a registered partnership between persons of the same sex[13] (Law No. 950 of 8 November 2001). The new institution grants same-sex couples a status close to that of marriage, excluding joint adoption, adoption of the spouse's child, and a joint family name (Art. 9).

The wave of registered partnerships soon swept across the Netherlands, followed by the rest of Europe; however, the spirit and legal basis of the new laws vary from country to country. In the Netherlands (Law of 5 July 1997), both same-sex and heterosexual couples may register their partnership, marking a significant departure from the Scandinavian model.[14] Whereas certain Scandinavian laws permit adoption of the other registered partner's child, the Dutch law permits same-sex couples to jointly adopt a child and share parental authority if one of them has a child from a previous relationship.[15] The laws in Belgium (Law of 23 November 1998) and France (Law of 15 November 1999) also establish a mixed status, but provide considerably less protection than to married couples. For example, the Belgian law on legal cohabitation extends basic property rights to unmarried couples, both heterosexual and same-sex; however, the benefits appear to be limited.[16] Similarly, in France, the Law on the *pacte civil de solidarité* (*civil solidarity pact*) (hereinafter: Law of 15 November 1999) imposes some obligations (e.g., joint liability for household debts[17]) and grants certain rights (notably, joint ownership of

---

[12] THÓR BJÖRGVINSSON D., 'Iceland. General principles and recent developments in Icelandic family law', in: *The International Survey of Family Law* (1995 ed.), The Hague, Boston, London (Martinus Nijhoff Publishers) 1997, pp. 215 *et seq.*, esp. pp. 225 *et seq.*, p. 235.

[13] SAVOLAINEN M., 'Registered partnership Act adopted in Finland', in: *Familia* 2002, pp. 775 *et seq.*

[14] SENAEVE P./ COENE E., 'Le partenariat enregistré en droit néerlandais', in: *Revue Trimestrielle de Droit Familial* 1999, pp. 221 *et seq.*; SCHRAMA W., 'Registered partnership in The Netherlands', in: *International Journal of Law, Policy and the Family* 1999, pp. 315 *et seq.*

[15] SCHRAMA W., 'The Netherlands. Reforms in Dutch family law during the course of 2001: increased pluriformity and complexity', in: *The International Survey of Family Law* (2002 ed.), Bristol (Family Law) 2002, pp. 277 *et seq.*, esp. pp. 282 *et seq.* ANTOKOLSKAIA M., 'Recent developments in Dutch filiation, adoption and joint custody law', in: *Familia* 2002, pp. 781 *et seq.*

[16] DE PAGE P., 'La loi du 23 novembre 1998 instaurant la cohabitation légale', in: *Revue Trimestrielle de Droit Familial* 1998, pp. 195 *et seq.*; RENCHON J.-L., 'Mariage, cohabitation légale et union libre', in: *Liber Amicorum M.-T. Meulders-Klein*, Bruxelles (Bruylant) 1998, pp. 549 *et seq.*

[17] PIERRE S., 'La solidarité passive des partenaires du Pacs', in: *Droit de la famille* 2000, chron. No. 16.

property[18]), without clearly defining the status of the partners.[19] On the other hand, the status of unmarried couples in Germany and Switzerland comes closest to registered partnerships under Scandinavian law: the institution is reserved for same-sex couples whose rights are similar to those of married couples. For example, the Swiss bill permits two persons of the same sex to subject their relations to a legal regime based on marriage.[20] In Germany, the status of registered partners is modeled primarily on that of spouses; however, they may neither jointly adopt a child nor adopt their partner's child. At the most, the German law of February 2001 permits a parent's registered partner to exercise certain parental rights such as participating in the education and care of his or her partner's child.[21]

Other European countries – Portugal and Hungary – have preferred to regulate non-marital cohabitation instead of creating a special institution for registered partners. In Portugal, Law No. 135 of 28 August 1999 establishing measures to protect *de facto* heterosexual unions was repealed by Law No. 7 of 11 May 2001, which provides new measures to protect *de facto* heterosexual and same-sex unions.[22] In Spain, 12 autonomous regions[23] – rather than the State – have adopted laws regulating *de facto* unions of both heterosexual and same-sex couples, for example, the Catalan Law No. 10 of 15 July 1998 on stable unions, the Aragon Law No. 6 of 26 March 1999 on stable unions between unmarried persons, the Navarra Law No. 2 of 3 July 2000 on the equality of stable *de facto* unions before the law, the Valencia Law No. 1 of 6 April 2001 on *de facto* unions, the Madrid Law No. 11 of 19 December 2001 on *de facto* unions and the Balearic Islands Law No. 18 of 19 December 2001 on stable couples. In addition to this small circle of

---

[18] FULCHIRON H., 'Les présomptions d'indivision et de communauté dans le couple', in: *Defrénois* 2001, pp. 949 *et seq.*

[19] *Le Pacs: Droit de la famille*, Hors-Série, December 1999, 76 pages.

[20] See *Message relatif à la loi fédérale sur le partenariat enregistré entre personnes du même sexe*, in: *Feuille Fédérale* of 25 February 2003, pp. 1192 *et seq.*; *Loi fédérale du [...] sur le partenariat enregistré entre personnes du même sexe*, in: *Feuille Fédérale* of 25 February 2003, pp. 1276 *et seq.* On the first bill of November 2001, see SANDOZ S., 'Partenariats enregistrés. La situation en Suisse de *lege ferenda*: tendances et options', in: *RSDIE* 2001, pp. 61 *et seq.*, and GUILLOD O., 'Switzerland. Abortion, Registered Partnership and Other Matters', in: *The International Survey of Family Law* (2003 ed.), Bristol (Family Law) 2003, pp. 417 *et seq.*, esp. pp. 419-422.

[21] DETHLOFF N., 'Germany. The registered partnership Act of 2001', in: *The International Survey of Family Law* (2002 ed.), Bristol (Family Law) 2002, pp. 170 *et seq.*, esp. pp. 177 *et seq.*

[22] OLIVEIRA PAIS S., 'Portugal. De facto relationships and same-sex relationships in Portugal', in: *The International Survey of Family Law* (2002 ed.), Bristol (Family Law) 2002, pp. 337 *et seq.*

[23] LOPEZ J.-J., 'La ley catalana de uniones estables de pareja', in: *Revista jurídica de Catalunya* 1999, pp. 641 *et seq.*; GARCIA CANTERO G., 'Spain. The Catalan family Code of 1998 and other autonomous region laws on de facto unions', in: *The International Survey of Family Law* (2001 ed.), Bristol (Family Law) 2001, pp. 397 *et seq.*

European countries, many other States have passed legislation regulating the relations of unmarried couples. Laws on non-marital cohabitation between a man and a woman were enacted at an early date by countries with a Hispanic-Portuguese tradition, such as Mexico,[24] Barbados[25] and Brazil.[26]

Regardless of the form – non-marital cohabitation or registered partnership, heterosexual or same-sex – non-marital unions (*concubinage*) are becoming increasingly international in nature. A non-marital union takes on an international dimension at the time of the formation of the union if the partners do not have the same nationality or in the course of the union if they settle in a State other than that of their nationality. Due to the increased movement of persons and the mixed nationality of couples, the number of international non-marital unions is expected to rise rapidly, thus resulting in numerous and sensitive issues of private international law. Although this subject may be extremely topical, no international law has yet addressed questions such as which court has jurisdiction over disputes involving unmarried couples or which law should apply to non-marital unions. To date, neither the Council of Europe nor the Hague Conference on Private International Law nor the Institute of International Law has proposed legislation dealing with such issues. Nonetheless, the issues are being addressed by each of these institutions. Over the past twenty years, the Council of Europe has organized two international conferences[27] to study legal problems concerning non-marital unions, however without attempting to resolve private international law problems.[28] The Hague Conference on Private International Law has devoted several papers to the topic of non-marital unions, keeping it on the agenda, but without assigning it special priority.[29] At the Vancouver session of the Institute of International Law in

[24] PRINZ VON SACHSEN-GESSAPHE K.A., 'Concubinage in Mexico', in: *International Journal of Law and the Family* 1989, pp. 40 *et seq.*

[25] FORDE N.M., 'Barbados. The emerging legal status of the de facto family in Barbados', in: *The International Survey of Family Law* (1995 ed.), The Hague, London, Boston (Martinus Nijhoff Publishers) 1997, pp. 51 *et seq.*; OWUSU S., 'Union other than marriage under the Barbados family law Act, 1981', in: *Anglo-American Law Review* 1992, pp. 53 *et seq.*

[26] WALD A., 'Le régime de l'union stable en droit brésilien: la situation des concubins', in: *Mélanges en l'honneur de H.-R. Schüpbach*, Basel, Geneva, Munich (Helbing & Lichtenhahn) 2000, pp. 167 *et seq.*

[27] *Legal problems concerning unmarried couples*, 11th Colloquium on European law, Messina, Council of Europe, July 1981; *Civil law aspects of emerging forms of registered partnerships. Legally regulated forms of non-marital cohabitation and registered partnerships*, 5th European Conference on family law, The Hague, Council of Europe, March 1999, CONF5 (99).

[28] See BOELE-WOELKI K., 'Private international law aspects of registered partnerships and other forms of non-marital cohabitation in Europe', in: *Louisiana Law Review* 2000, pp. 1053 *et seq.*

[29] *Private international law aspects of cohabitation outside marriage and registered partnerships*, Note drawn up by the Permanent Bureau, Preliminary doc. No. 9 of May

2001, a Commission was created to study conflicts aspects of registered partnerships. Other international institutions, such as the European Group for Private International Law,[30] are also focusing on this subject matter.

In the absence of a relevant Hague Convention, a Regulation issued by the Council of Europe or a Recommendation by the Institute of International Law, the topic of non-marital unions is still wide open for doctrinal debate in French private international law. In fact, French case law on these issues is virtually non-existent.[31] Since enactment of the Law of 15 November 1999, several French legal scholars have expressed their views on this topic, often favoring different options.[32] My doctoral thesis[33] proposes a legal qualification of non-marital unions that takes account of the special features of such relationships (I) and a connecting factor that some may regard as unusual[34] (II).

2000; *The Law applicable to unmarried couples*, Note drawn up by the Permanent Bureau, Preliminary doc. No. 5 of April 1992, Proceedings of the 7th session 10 to 29 May 1993, tome 1, ed. by the permanent Bureau of the Conference, 1995, pp. 108 *et seq.*

[30] See <http://www.drt.ucl.ac.be/gedip/gedip-reunions-9t.htm> (or -10t.html, -11t.html, -12t.html and -13t.html).

[31] TGI Paris, 21 November 1983, in: *Rev. crit. dr. int. pr.* 1984, p. 628, note LAGARDE P., and Aix-en-Provence, 26 September 1997, in: *Droit de la famille* 1998, comm. No. 128, note FULCHIRON H.

[32] CHANTELOUP H., 'Menus propos autour du pacte civil de solidarité en droit international privé', in: *Gazette du Palais* 1-3 October 2000, pp. 4 *et seq.*; FULCHIRON H., 'Réflexions sur les unions hors mariage en droit international privé', in: *Clunet* 2000, pp. 889 *et seq.*; ID., 'La séparation du couple en droit international privé', in: *Petites affiches* 28 March 2001, No. 62, pp. 4 *et seq.*; GAUDEMET-TALLON H., 'La désunion du couple en droit international privé', in: *Recueil des Cours* 1991-I, tome 226, pp. 9 *et seq.*; GAUTIER P.-Y., 'Union libre', in: Répertoire international Dalloz, 1998; ID., 'L'union libre en droit international privé', in: *Le droit de la famille en Europe*, Strasbourg (Presses Universitaires) 1992, pp. 773 *et seq.*; ID., 'Les couples internationaux de concubins', in: *Rev. crit. dr. int. pr.* 1991, pp. 525 *et seq.*; ID., *L'union libre en droit international privé*, Thesis Paris I, 1986; HUET A., 'La séparation des concubins en droit international privé', in: *Études offertes à J. Rubellin-Devichi*, Paris (Litec) 2002, pp. 539 *et seq.*; JOSSELIN-GALL M., 'Pacte civil de solidarité. Quelques éléments de droit international privé', in: *La Semaine Juridique Notariale et Immobilière* 2000, pp. 489 *et seq.*; KESSLER G., *Les partenariats enregistrés en droit international privé*, Thesis Paris I, 2003; KHAIRALLAH G., 'Les "partenariats organisés" en droit international privé', in: *Rev. crit. dr. int. pr.* 2000, pp. 317 *et seq.*; ID., *La qualification du Pacs en droit international privé*, in: *Regards civilistes sur la loi du 15 novembre 1999 relative au concubinage et au pacte civil de solidarité*, Paris (L.G.D.J.) 2002, pp. 79 *et seq.*; MIGNOT M., 'Le partenariat enregistré en droit international privé', in: *Revue Internationale de Droit Comparé* 2001, pp. 601 *et seq.*; REVILLARD M., 'Les unions hors mariage. Regards sur la pratique du droit international privé', in: *Études offertes à J. Rubellin-Devichi*, Paris (Litec) 2002, pp. 579 *et seq.*; ID., 'Le pacte civil de solidarité en droit international privé', in: *Defrénois* 2000, pp. 337 *et seq.*

[33] DEVERS A. (note **).

[34] For a discussion of the jurisdiction of the French courts and recognition of decisions made by foreign courts, see DEVERS A. (note **), No. 504 *et seq.*, and No. 572 *et seq.*

II. Legal Qualification of Non-Marital Unions

When dealing with the legal qualification of non-marital unions, it is first necessary to show that such a relationship should be qualified as an element of personal status (A) and then to emphasize its significance in comparison with other aspects of personal status (B).

A. An Element of Personal Status

In French private international law, the rules governing personal status (*statut personnel*) include the status and legal capacity of persons. Traditionally, however, the *status of persons* encompassed the rules relating to their *individual identification* (name, address, civil status) and *family relations* (marriage and filiation), but did not include the property ownership system, i.e. matrimonial settlement and estate system.[35] Based on this definition, some experts do not regard non-marital unions as an element of personal status because the relations between unmarried persons are governed by the general rules of civil law.[36] However, after the enactment of the Law of 15 November 1999, this interpretation seems outdated in respect of both non-marital cohabitation (1) and registered partnerships (2).

1. Non-Marital Cohabitation

Non-marital cohabitation is a union with no formal requirements in which two persons live together without being married, maintaining a stable union as a couple for a long period of time. For example, a Frenchman and a Swedish woman who met in Munich finally decided to live together in Mexico. There are two reasons for qualifying their non-marital cohabitation under personal status. Although there are no formal requirements, the relationship is personal in nature (a). The Law of 15 November 1999 defines non-marital unions (*concubinage*) in Book One ('Of Persons') of the Civil Code (b).

---

[35] BATIFFOL H./ LAGARDE P., *Traité de droit international privé*, tome 1, 8th ed., Paris (L.G.D.J.) 1993, No. 277.

[36] HOLLEAUX G./ FOYER J./ DE LA PRADELLE G., *Droit international privé*, Paris (Masson) 1987, No. 1122; LAGARDE P., in: *Rev. crit. dr. int. pr.* 1981, pp. 830 *et seq.*; ID., *Rev. crit. dr. int. pr.* 1984, pp. 23 *et seq.*; BATIFFOL H./ LAGARDE P., *Traité de droit international privé*, tome 2, 7th ed., Paris (L.G.D.J.) 1983, No. 417. See, in Belgium, WATTE N./ BARNICH L., 'L'union libre en droit international privé', in: DE PAGE Ph./ DE VALKENEER R. (dir.), *L'union libre*, Bruxelles (Bruylant) 1992, pp. 293 *et seq.*; BARNICH L., 'Union libre et cohabitation légale. Questions de droit international privé', in: *Mélanges offerts à R. de Valkeneer*, Bruxelles (Bruylant) 2000, pp. 1 *et seq.*, esp. pp. 9-10.

a) A Personal Relationship

Non-marital cohabitation between two persons of different sexes. The case law of the Court of Justice of the European Communities and the European Court of Human Rights has long recognized that non-marital cohabitation between a man and a woman constitutes family life.[37] Indeed, since the *Marckx* decision of 1979, the European Court no longer makes a distinction between a legitimate family and one out of wedlock for the purpose of Article 8 of the European Convention on Human Rights.[38] Thus, in the *Abdulaziz, Cabales and Balkandali* case in 1985, the Court held that the existence of a family is independent of the question whether the two parties are legally married.[39] The Court made this very clear in the *Keegan* decision of 1994, stating that the notion of family in the sense of Article 8 of the European Convention on Human Rights is not restricted solely to unions based on marriage and thus can encompass other *de facto* family ties in which the parties cohabit outside of marriage.[40] Similarly, the Court of Justice of the European Communities ruled in the *Reed* case that, like married couples, the unmarried couple could claim entitlement to family reunification in accordance with Community law.[41] Then, in the *Safet Eyüp* case in 2000, the Court of Justice held that the period during which Mr. and Mrs. Eyüp cohabited without being married could not be considered an interruption of their family life in Austria.[42] Therefore, both European and Community case law regard the non-marital cohabitation of two persons of different sexes as family life, just like marriage. From this case law it follows in the area of French private international law that, as long as a non-marital heterosexual cohabitation can be deemed to constitute a family life, it should be included in the category of personal status together with other family relationships.

Non-marital cohabitation between two persons of the same sex. European case law has regularly refused to regard a same-sex union as a form of family life in the

[37] See COUSSIRAT-COUSTERE V., 'Famille et Convention européenne des droits de l'homme', in: *Mélanges à la mémoire de R. Ryssdal*, Cologne, Berlin, Bonn, Munich (Carl Heymans Verlag KG) 2000, pp. 281 *et seq.*; STALFORD H., 'Concepts of family under EU Law – Lessons from the ECHR', in: *International Journal of Law, Policy and the Family* 2002, pp. 410 *et seq.*

[38] ECHR, judgment of 13 June 1979, *Marckx v. Belgium*, § 31, in: Series A, No. 31.

[39] ECHR, judgment of 28 May 1985, *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, § 63, in: Series A, No. 94.

[40] ECHR, judgment of 26 May 1994, *Keegan v. Ireland*, § 44, in: Series A, No. 290.

[41] Case C-59/85, *Netherlands State v. Reed*, judgment of 17 April 1986, §§ 24-30, in: [1986] ECR 1283.

[42] Case C-65/98, *Safet Eyüp v. Austria*, judgment of 22 June 2000, § 36, in: [2000] ECR I-4747.

sense of Article 8 of the European Convention on Human Rights.[43] Instead, the European Court of Human Rights holds that same-sex cohabitation falls strictly under the protection of private life.[44] Following the same reasoning, the Court of Justice of the European Communities refuses to draw an analogy between stable same-sex unions and stable marriages or non-marital heterosexual unions.[45] Although these decisions do not admit that stable same-sex unions constitute a form of family life, they officially recognize that the parties cohabit as a couple and have 'a personal relationship'. Moreover, the laws in many European countries treat heterosexual and same-sex couples in exactly the same way. For example, the Swedish Law No. 813 of 1987 extended to same-sex couples the regime established for heterosexual cohabitees under Law No. 232 of 14 May 1987. Similarly, the Portuguese Law of 11 May 2001 defines a *de facto* union as a union between two persons, regardless of their sexual orientation, who have cohabited for at least two years. In French law, Article 515-8 of the Civil Code puts unmarried heterosexual and same-sex couples on equal footing by recognizing that persons of the same sex living together outside marriage may be deemed to be living together as a couple. These aspects – recognition by European and Community law that same-sex cohabitees 'live together as a couple' and equal treatment guaranteed by the national law of many EU countries – serve as factors connecting such unions with the private international law category of personal status.[46]

b) Significance of Article 515-8 of the Civil Code

Based on the Law of 15 November 1999, Article 515-8 of the French Civil Code defines a non-marital relationship as 'a *de facto* union, characterized by a communal life presenting a character of stability and continuity, between two persons of different sexes or of the same sex, who live together as a couple'. The non-marital relationship referred to in Article 515-8 constitutes a 'non-marital cohabitation' in French private international law because it is 'characterized by a life in common

[43] LEVINET M., 'L'embarras du juge européen des droits de l'homme face à l'homosexualité', in: *Cohabitation non maritale, Évolution récente en droit suisse et étranger*, Geneva (Librairie Droz) 2000, pp. 61 *et seq*.

[44] See, e.g., ECHR judgment of 9 January 2003, *S.L. v. Austria*, unreported; ECHR judgment of 31 July 2000, *A.D.T. v. The United Kingdom*, in: *Reports* 2000-IX; ECHR judgment of 27 September 1999, *Smith and Grady v. The United Kingdom*, in: *Reports* 1999-VI; ECHR judgment of 27 September 1999, *Lustig-Prean and Beckett v. The United Kingdom*, in: *Reports* 1999-VI; ECHR judgment of 30 July 1998, *Sheffield and Horsham v. The United Kingdom*, in: *Reports* 1998-V; ECHR judgment of 22 April 1993, *Modinos v. Cyprus*, in: Series A, No. 259; ECHR judgment of 26 October 1988, *Norris v. Ireland*, in: Series A, No. 142; ECHR judgment of 22 October 1981, *Dudgeon v. The United Kingdom*, in: Series A, No. 45.

[45] Case C-249/96, *Lisa Jacqueline Grant v. South-West Trains Ltd*, judgment of 17 February 1998, § 35, in: [1998] ECR I-621.

[46] See GAUDEMET-TALLON H. (note 32), p. 167 and footnote No. 482.

offering a character of stability and continuity'. The wording of Article 515-8 makes no distinction as to the sexual orientation of the unmarried cohabitees ('two persons of different sexes or of the same sex'). Finally, it is significant that the definition in Article 515-8 is included in Book One ('Of Persons') of the French Civil Code. According to Professor Audit, 'the fact that a given question is presented within a particular area of civil law or is regulated by a particular chapter of a code may be considered an indication of its qualification within the scope of private international law'.[47] Consequently, there is reason to presume that a non-marital cohabitation – regardless of the sexual orientation of the two persons – is a matter of personal status.[48]

2. Registered Partnerships

A registered partnership can be regarded as a 'formal' relationship in the sense that the partners must officially register their relationship in order to obtain legal status. For example, two male partners of French and German nationality who met in Lyon have their partnership registered in the civil registry at Copenhagen where they have cohabited since 1997. Here again, there are two arguments in favor of qualifying the institution of registered partnership as a matter of personal status. The conditions under which the partnership is registered emphasize the personal nature of the relationship (a), and the Law of 15 November 1999 has been incorporated into Book One of the French Civil Code on the law of persons (b).

a) A Personal Relationship

Conceived as a new way of regulating the relations of an unmarried couple, the institution of registered partnership grants legal status only to partners who manifest their willingness to assume the obligations and rights laid down by law. In all the legislations dealt with in this study, the conditions specified to enter into a registered partnership confirm that such a relationship has a very strong personal dimension. Apart from the traditional requirements that each individual must fulfill (age, consent, legal capacity), the various national laws often stipulate requirements for both persons that are similar to those of marriage. In France, the *Conseil Constitutionnel* requires that the grounds for nullity of a *civil solidarity pact* be identical to the impediments to marriage aimed at preventing incest or constituting a violation of the marriage obligation of fidelity.[49] In regard to the impediments, the Council comments that they are purely personal in nature and are justified because

[47] AUDIT B., *Droit international privé*, 3rd ed., Paris (Economica) 2000, No. 194.

[48] LOUSSOUARN Y./ BOUREL P., *Droit international privé*, 7th ed., Paris (Dalloz) 2001, p. 350, footnote No. 3.

[49] *Conseil constitutionnel*, judgment No. 99-419, of 9 November 1999 on the Act on the *civil solidarity pact*, § 26, in: *Journal Officiel* of 16 November 1999, pp. 16962 *et seq*.

they constitute a legal barrier to marriage.[50] In its decision of 31 May 2001, the Court of Justice of the European Communities also noted that, though not identical, the institutions of registered partnership and marriage are similar.[51]

The prohibition of incest. Except for legal cohabitation under Belgian law (Civil Code, Art. 1475(1)), all the statutory provisions on registered partnership prohibit incest. Danish law requires, as it does for marriage, that the future registered partners may not be close relatives (Law No. 256 of 4 June 1969, Articles 6 and 9). Norwegian law also establishes impediments prohibiting the registration of partnerships between ascendants and descendants and between brothers and sisters (Law No. 47 of 4 July 1991, Art. 3). Under German law, registration is prohibited between relatives in a direct line, i.e., between brothers and sisters and between half-brothers and half-sisters (Law of 16 February 2001, § 1(1)). Whereas Swedish law (Law No. 117 of 23 June 1994) prohibits registered partnerships between ascendants and descendants or full brothers and sisters (Chap. 1, Art. 3, sentence 1), partnerships between half-sisters and half-brothers are permitted, provided governmental authorization is obtained (Chap. 1, Art. 3, sentence 2). The registration of partnerships between close relatives is also prohibited in Icelandic law (Law No. 31 of 14 April 1993, Articles 9 and 10), Dutch law (Civil Code, Articles 1:80a(7) and 1:41) and French law (Civil Code, Art. 515-2-1).

The prohibition of 'polygamy'. Another prohibition common to all statutory provisions on registered partnership is the one barring 'polygamy'. For example, under German law, a partnership is invalid if one of the parties is married or a party to another registered partnership (Law of 16 February 2001, § 1.2). Similarly, Belgian law prohibits the registration of a partnership if one of the future partners is married or a party to any other form of legal cohabitation (Civil Code, Art. 1475 § 2.1). Norwegian law stipulates that only single partners can enter into a registered partnership. Hence, registration is prohibited if one of the partners is married or still committed to a previous registered partnership (Law No. 40 of 30 April 1993, Art. 2, sentence 1). Article 515-2 of the French Civil Code also provides that a *civil solidarity pact* cannot be validly contracted between two persons if one of them is married or already a party to a *civil solidarity pact*. Identical conditions are stipulated in the laws of Sweden (Law No. 1117 of 23 June 1994, Chap. 1, Art. 3, sentence 3), Iceland (Law No. 31 of 14 April 1993, Art. 11) and the Netherlands (Civil Code, Art. 1:80a(3) and (4)).

---

[50] *Conseil constitutionnel* (note 49), § 27.

[51] Joined Cases C-122-99P and C-125-99/P, *D. and Kingdom of The Netherlands v. Council of the European Union*, judgment of 31 May 2001, § 35, in: [2001] ECR I-4319; *Recueil Dalloz* 2001 (jur.), p. 3380, note NOURISSAT C./ DEVERS A.; *Columbia Journal of European Law* 2002, p. 92, note CANOR I. See also Case T-264/97, *D. v. Council of the European Union*, judgment of 28 January 1999, in: [1999] ECR-SC I-A-1 and II-1; *Revue Trimestrielle de Droit Familial* 1999, p. 370, note FALLON M.; *European Law Review* 1999, p. 419, note DENYS C.

The existence of these impediments to registered partnership – close relatives, party to a marriage or other undissolved partnership – makes it necessary to qualify this institution under personal status. Most French doctrine has come to the same conclusion.[52] Like registered partnerships in foreign laws, the *civil solidarity pact* should be subject to the rules on personal status: it 'pursues an objective close to that of marriage, namely, the regulation of the couple's life in common' (*vie commune*);[53] moreover, 'it is first and foremost a union of persons'.[54]

b) The Role of Articles 515-1 to 515-7 of the Civil Code

Based on the Law of 15 November 1999, Article 515-1 of the French Civil Code stipulates that the purpose of a *civil solidarity pact* entered into by two persons of the same or different sexes is 'to regulate their life in common'. Despite the conditions laid down in Article 515-1, the prevailing view in France regards a *civil solidarity pact* not as an ordinary contract but rather as a 'formal' personal relationship.[55] Therefore, it is the French equivalent of a registered partnership: the partners entering into a *civil solidarity pact* make a joint declaration at the office of the county court in the place of their joint residence (Art. 515-3(1)). After the set of documents has been filed, the declaration is entered into a register kept by the registrar of the county court at the place of their joint residence (Art. 515-3(3)). Since the *civil solidarity pact* is regulated by Articles 515-1 to 515-7 of Book One of the French Civil Code, as it is the case of the non-marital relationship in Article 515-8, there is reason to presume that this institution – and the registered partnership in general – is a matter of personal status.[56]

B. The Importance of Qualifying Non-Marital Unions as a Matter of Personal Status

Some French legal scholars believe that non-marital unions should be qualified as marriage for the purpose of private international law (1). In our opinion, non-marital unions cannot be reduced to marriage and thus it is necessary to create a new international category (2) within personal status.

---

[52] MAYER P./ HEUZÉ V., *Droit international privé*, 7th ed., Paris (Montchrestien) 2001, No. 547.

[53] LOUSSOUARN Y./ BOUREL P. (note 48), No. 286.

[54] AUDIT B. (note 47), No. 623*bis*.

[55] See AUDIT B. (note 47), No. 623*bis*; FULCHIRON H., 'Réflexions sur les unions hors mariage en droit international privé' (note 32), pp. 899-900; HUET A. (note 32), pp. 541-544; LOUSSOUARN Y./ BOUREL P. (note 48), No. 286; MAYER P./ HEUZE V. (note 52), No. 547.

[56] See FULCHIRON H., 'Réflexions sur les unions hors mariage en droit international privé' (note 32), p. 900; HUET A. (note 32), p. 543; MAYER P./ HEUZE V. (note 52), No. 547.

1. Qualifying Non-Marital Unions as Marriage

Arguing that non-marital unions are becoming more and more like marriage,[57] several French scholars maintain that such unions should be treated like marriage, regardless of whether non-marital cohabitation[58] or a registered partnership is involved.[59] Above all, they emphasize that the conditions for the formation of a non-marital union are often close to those for marriage, that the effects are similar to those of marriage and that the means of dissolving non-marital unions are becoming increasingly similar to those for terminating marriage. In other words, non-marital unions are similar to marriage in national law, thus apparently justifying their being treated like marriage in private international law. Nonetheless, the arguments in favor of qualifying non-marital unions as marriage are not convincing.

First of all, the various national laws on non-marital unions categorically refuse to equate such relationships with marriage. In regard to registered partnerships under Scandinavian law, Professor Agell notes that 'the underlying philosophy as well as the terminology implies that partnership is not the same thing as marriage. Marriage is a concept that is still reserved for the relationship between men and women, but the legal effects of registered partnership are basically the same'.[60] Taking a stand on the issue, the Court of Justice of the European Communities observed:

> '[I]t is [...] true that since 1989 an increasing number of Member States have introduced, alongside marriage, statutory arrangements granting legal recognition to various forms of union between partners of the same sex or of the opposite sex and conferring on such unions certain effects which, both between the partners and as

---

[57] Comp. GRAHAM-SIEGENTHALER B.E., 'Principles of Marriage Recognition Applied to Same-Sex Marriage Recognition in Switzerland and Europe', in: *Creighton Law Review* 1998, pp. 121 *et seq.*; MARTIN J., 'English Polygamy Law and the Danish Registered Partnership Act: A Case for the Consistent Treatment of Foreign Polygamous Marriages and Danish Same-Sex Marriages in England', in: *Cornell International Law Journal* 1994, pp. 418 *et seq.*; MCNORRIE K., 'Reproductive Technology, Transsexualism and Homosexuality: New problems for International Private Law', in: *I.C.L.Q.* 1994, pp. 757 *et seq.*

[58] CHANTELOUP H. (note 32), p. 8, footnote No. 7. See also GAUDEMET-TALLON H. (note 32), pp. 171 *et seq.*

[59] KHAIRALLAH G., 'Les "partenariats organisés" en droit international privé' (note 32), pp. 321 *et seq.*; ID., 'La qualification du PACS en droit international privé' (note 32), pp. 80 *et seq.* MIGNOT M. (note 32), pp. 650 *et seq.*

[60] AGELL A., 'Family Forms and Legal Policies. A Comparative View from a Swedish Observer', in: *Scandinavian Studies in Law* 1999, pp. 197 *et seq.*, esp. p. 208. See also DINESEN J.K.A., 'L'initiative scandinave: le partenariat enrégistré', in: *Études offertes à J. Rubellin-Devichi*, Paris (Litec) 2002, pp. 417 *et seq.*, esp. p. 423.

> regards third parties, are the same as or comparable to those of marriage.'[61]

However, the Court of Justice insists,

> 'it is clear […] that, apart from their great diversity, such arrangements for registering relationships between couples not previously recognised in law are regarded in the Member States concerned as being distinct from marriage'.[62]

In conclusion, the Court points out that

> 'the existing situation in the Member States of the Community as regards recognition of partnerships between persons of the same sex or of the opposite sex reflects a great diversity of laws and the absence of any general assimilation of marriage and other forms of statutory union.'[63]

Obviously, this remark is also true when non-marital unions are not regulated by statute law.[64]

Secondly, it can be argued that placing non-marital unions in the same category with marriage would require such unions to be compatible with the French concept of marriage. According to the fundamental principles of French law, as well as European law,[65] marriage can only be a union between a woman and a man. Consequently, in keeping with the *lex fori* qualification,[66] it is impossible to qualify a same-sex union as marriage in private international law, as long as French substantive law prohibits marriage between same-sex couples. Indeed, qualifying a same-sex union as marriage would be tantamount to introducing same-sex marriage into French substantive law by way of private international law.[67] It follows that in France it is impossible to qualify a non-marital union between persons of the same sex as marriage.

---

[61] Joined Cases C-122-99P and C-125-99/P (note 51), § 35.

[62] Joined Cases C-122-99P and C-125-99/P (note 51), § 36.

[63] Joined Cases C-122-99P and C-125-99/P (note 51), § 50.

[64] See Case T-65/92, *Arauxo-Dumay v. Commission*, judgment of 17 June 1993, § 28, in: [1993] ECR II-567.

[65] ECHR, judgment of 27 September 1990, *Cossey v. The United Kingdom*, § 46, in: Series A, No. 184. – judgment of 17 October 1986, *Rees v. The United Kingdom*, § 49, in: Series A, No. 106.

[66] See Cass. 1st civ., judgment of 22 June 1955, *Caraslanis*, in: ANCEL B./ LEQUETTE Y., *Les grands arrêts de la jurisprudence française de droit international privé*, 4th ed., Paris (Dalloz) 2001, No. 27.

[67] Comp. GUILLAUME F., 'Une proposition de réglementation du partenariat insérable dans la LDIP', in: *Cohabitation non maritale. Évolution récente en droit suisse et étranger*, Geneva (Droz) 2000, pp. 180 *et seq.*, esp. p. 183.

Thirdly, qualifying an unmarried couple's relationship as marriage would result in the application of the conflicts rules for marriage to non-marital unions, which would not provide a solution. Indeed, in the case of a registered partnership, the conflicts rule must necessarily give jurisdiction to a national law that recognizes that institution, which is not guaranteed by analogously applying the connecting factors of marriage.[68] From this it follows that, since the connecting factors applicable to marriage are not appropriate for non-marital unions, it is absurd to qualify a non-marital relationship as a marriage.

2. *Creating a Category for Non-Marital Unions*

Like other French[69] and non-French[70] legal scholars, this study proposes that a new category of private international law that is different from marriage be created within personal status: the category of non-marital unions (*concubinage*).[71]

a) Various Forms of Non-Marital Unions in Comparative Law

Various forms of non-marital unions are known in comparative law, ranging from non-marital cohabitation, on the one hand, to registered partnerships, on the other.

Non-marital cohabitation is the most common form of non-marital union in the world: unmarried persons simply live together without being married. There are two possible approaches to non-marital cohabitation depending on the country: it is either ignored by the law or all or some of the civil aspects of such unions are regulated by statute. In the first situation, the cohabitees live as a couple without a clearly established legal framework; this is called *de facto* cohabitation. They may conclude a cohabitation contract regulating their property relations, especially in

---

[68] Comp. AUDIT B. (note 47), No. 195: '*Bien que les règles de conflit, une fois adoptées s'énoncent dans un enchaînement "catégorie-rattachement", c'est parfois en fonction du rattachement qu'il faut se prononcer sur l'inclusion de la question dans telle catégorie*'.

[69] FULCHIRON H., 'Réflexions sur les unions hors mariage en droit international privé' (note 32), pp. 901 *et seq.*; GAUTIER P.-Y., 'L'union libre en droit international privé' (note 32).

[70] JESSURUN D'OLIVEIRA H.U., 'Registered partnerships, pacses and private international law. Some reflections', in: *Riv. dir. int. priv. proc.* 2000, pp. 293 *et seq.*; ID., 'Le partenariat enregistré et le droit international privé', in: *Travaux du comité français de droit international privé*, Paris (Pédone) to be published; ŠARČEVIĆ P., 'Private international law aspects of legally regulated forms of non-marital cohabitation and registered partnerships', in this *Yearbook* 1999, pp. 37 *et seq.*; ID., 'Zur nichtelichen Lebensgemeinschaft im internationalen Privatrecht, unter besonderer Berücksichtigung der jugoslawischen Teilrechte', in: *Das Standesamt* 1981, pp. 176 *et seq.* See also SÁNCHEZ LORENZO S., 'Las parejas no casadas ante el derecho internacional privado', in: *REDI* 1989, pp. 487 *et seq.*

[71] DEVERS A. (note **), No. 158 *et seq.*

the event of dissolution.[72] If no such contract has been concluded and the union is dissolved, the competent judge will resolve any property disputes by applying the rules of civil law.[73] In the second situation, the law conveys a legal status on the unmarried cohabitees without them having to request such status; this is known as legal cohabitation. A union produces legal effects when it fulfills certain statutory requirements such as length, stability and heterosexuality.

Bolivian law, for example, defines non-marital cohabitation as follows: '*se entiende haber unión conyugal libre o de hecho cuando el varón y la mujer, voluntariamente, constituyen hogar y hacen vida común en forma estable y singular* [...]' (Family Code, Art. 158). Under Bolivian law, '*uniones conyugales libres o de hecho que sean estables y singulares* […] *producen efectos similares al matrimonio, tanto en las relaciones personales como patrimoniales de los convivientes*' (Art. 159). Colombian Law No. 54 of 28 December 1990 regulates the '*unión maritale de hecho'*, which is '*formada entre un hombre y una mujer, que sin estar casados, hacen una comunidad de vida permanente y singular*' (Art. 1). Under Colombian law, this union gives rise to a joint property regime based on the matrimonial property regime of spouses (Art. 2 – 9). The Slovenian Law No. 15 of 26 May 1976 provides that 'a lasting union between a man and a woman who are unmarried shall have the same legal effects under this law as if they were married, provided there is no ground that would invalidate a marriage between them' (Art. 12).

As mentioned above, the registered partnership is a new institution existing in only a few – mainly European – countries. Like marriage, the future partners formalize their commitment to each other by registering their relationship in a special registry for this purpose. In this case, registering the relationship is the condition for the formation of a registered partnership.

This should not be confused with another situation that is fundamentally different, though apparently similar: an authorized official issues a certificate to the unmarried partners recognizing their non-marital union. For example, in Hungary, 'non-marital relationships are not registered in a civil status registry or any other public registry, but in order to facilitate proof of the relationship, the law allows the unmarried couple to go to the town hall secretary and declare their *de facto* union. The secretary takes down this declaration in writing and issues a public certificate'.[74] In this case, the sole purpose of the certificate is to facilitate proof of

[72] For example, in Italy (DEL PRATO E., 'Patti di convivenza', in: *Familia* 2002, pp. 959 *et seq.*) and in Switzerland (PICHONNAZ P., 'Conventions et couples de concubins', in: *FamPra.ch* 2002, pp. 670 *et seq.*).

[73] See MARTY-SCHMID H., *La situation patrimoniale des concubins à la fin de l'union libre – Étude des droits suisse, français et allemand*, Geneva (Librairie Droz) 1986.

[74] MASSIP J., 'Le partenariat enregistré et l'état civil', in: *Civil law aspects of emerging forms of registered partnerships. Legally regulated forms of non-marital cohabitation and registered partnerships*, 5th European Conference on family law, The Hague, Council of Europe, 1999, CONF5 (99) RAP 3, p. 4.

the non-marital union. On the contrary, in registered partnerships, the act of registration is a procedural requirement for the formation of the partnership.

It often occurs that the same official is authorized to solemnize marriages and to register partnerships.[75] Unlike the law on registered partnerships in other countries, French law authorizes the registrar of the country court to register *civil solidarity pacts*.

Some forms of registered partnership are so close to marriage that lawmakers simply refer to the rules governing marriage. This is the case in the Scandinavian laws: the Danish Law No. 372 of 7 June 1989, the Swedish Law No. 1117 of 23 June 1994, the Icelandic Law No. 87 of 12 June 1996, the Norwegian Law No. 40 of 30 April 1993 and the Finnish Law No. 950 of 8 November 2001. Other types of registered partnerships are farther removed from marriage, thus protecting the institution of marriage. This is the case in the French Law of 15 November 1999 and the Belgian Law of 23 November 1998.

In the end, comparative law recognizes a *summa divisio* of non-marital unions into non-marital cohabitation and registered partnerships.

b) Various Forms of Non-Marital Unions in Private International Law

As Rabel demonstrated, a conflicts rule is appropriate for relations with an international element only if it takes into account differences between similar situations in comparative law.[76] As shown above, differences exist among the various forms of non-marital unions, especially between non-marital cohabitation and registered partnerships. Since non-marital cohabitation is not subject to formal requirements, whereas registered partnerships are, different problems will arise in such unions. On the other hand, and more importantly, the institution of non-marital cohabitation exists throughout the world, whereas only a limited number of countries have regulated registered partnerships. Thus, while a conflicts rule for non-marital cohabitation may be neutral, i.e., it can designate almost any country, a conflicts rule for registered partnerships is restricted in that it should designate a law that recognizes registered partnerships. As a result, we propose that the category of non-marital unions be divided into two subcategories: one for non-marital cohabitation (unions without formal requirements) and another one for registered partnerships (unions with formal requirements).

The subcategory of non-marital cohabitation would include unions of unmarried couples for which there is no act of formation, as opposed to marriage (and registered partnership), but only one condition,[77] i.e., that they live together as a couple. Creating a special category for 'informal' unions is not new in comparative

[75] See MASSIP J., 'L'état civil et les statuts légaux du concubinage', in: *Études offertes à J. Rubellin-Devichi*, Paris (Litec) 2002, pp. 555 *et seq.*

[76] RABEL E., 'Le problème de la qualification', in: *Rev. crit. dr. int. pr.* 1933, pp. 1 *et seq.*, esp. p. 37.

[77] GAUTIER P.-Y., in *Rép. internat. Dalloz* (note 32), No. 11.

private international law.[78] For example, the laws of former Yugoslavia in 1982,[79] Croatia in 1992[80] and Slovenia in 1999[81] contain a special conflicts rule for non-marital cohabitation that differs from that for marriage. Similarly, the Civil Code of the Province of Macao, which entered into force on 1 November 1999, regulates *de facto* unions and contains a conflicts rule for non-marital cohabitation[82] (Art. 58). Under these foreign laws the special conflicts rule for non-marital cohabitation applies only to unions of persons of different sexes. On the contrary, a French conflicts rule for non-marital cohabitation has been proposed that would apply to cohabitees not only of different sexes but also of the same sex. This follows from Article 515-8 of the Civil Code which provides that non-marital cohabitation is 'a *de facto* union, characterized by a communal life [...], between two persons of different sexes or of the same sex, who live together as a couple'. In light of this provision, the French conflicts rule for non-marital cohabitation cannot be reserved for persons of different sexes. Thus it follows that, for the purpose of French private international law, non-marital cohabitation would be a situation in which two persons live together regardless of their sexual orientation.

The subcategory of registered partnerships would include non-marital unions established by a formal act (in this case, registration), comparable to the solemnization of marriage. Since the partnership is a very recent institution, only a few foreign conflicts rules exist at this time. In the Netherlands, the Dutch Committee on Private International Law has proposed several conflicts rules that differ from those for marriage and make a distinction between partnerships registered in the Netherlands and those registered abroad.[83] Similarly, the German Law of 16 February 2001, which introduced the registered partnership into German substantive law, also contains a special private international law rule.[84] Similarly, the

[78] See ŠARČEVIĆ P., 'Cohabitation without Marriage: The Yugoslavian Experience' (note 3), p. 335.

[79] ŠARČEVIĆ P., 'The New Yugoslav Private International Law Act', in: *Am. J. Comp. L.* 1985, pp. 283 *et seq*, esp. p. 291-292.

[80] ŠARČEVIĆ P., 'Private international law aspects of legally regulated forms of non-marital cohabitation and registered partnerships' (note 70), footnote No. 21.

[81] CONETTI G., 'La legge sul diritto internazionale privato della Repubblica di Slovenia', in: *Riv. dir. int. priv. proc.* 2000, pp. 569 *et seq.*, esp. p. 572.

[82] See MARQUES DOS SANTOS A., 'The new private international law rules of Macao', in this *Yearbook* 2000, pp. 133 *et seq.*, esp. p. 149, and MOURA RAMOS R.M., 'The Private International Law Rules of the New Special Administrative Region of Macau of the People's Republic of China', in: *Louisiana Law Review* 2000, pp. 1281 *et seq.*, esp. p. 1294.

[83] For the report, see <http://www.minjust.nl:8080/c_actual/rapport/cie/index.htm>.

[84] See HOHLOCH G./ KJELLAND C., 'The New German Conflicts Rules for Registered Partnerships', in: *this Yearbook* 2001, pp. 223 *et seq.*; LAGARDE P., 'Allemagne. Partenariat enregistré. Loi relative à l'élimination de la discrimination des unions homosexuelles', in: *Rev. crit. dr. int. pr.* 2001, pp. 772 *et seq.*; QUIÑONES ESCAMEZ A., 'Eficacia extraterritorial de las uniones de pareja: nuevas normas de derecho internacional privado en la ley alemana (2001)', in: *Revista jurídica de Catalunya* 2002, pp. 833 *et seq.*

Swiss bill on registered partnerships contains a special conflicts rule different from that for marriage.[85] Only unions between persons of the same sex qualify as a registered partnership under the German law and the Swiss bill. On the other hand, the rules proposed by the Dutch Committee on Private International Law and the Belgian draft on Private International Law[86] apply to both heterosexual and same-sex couples. In our opinion, the subcategory of registered partnership should be open to registered partners of the same or of different sexes. In French private international law such qualification would merely extend Article 515-1 of the Civil Code that states that a 'civil solidarity pact' may be contracted 'by two persons [...] of different sexes or of the same sex'. Accordingly, a registered partnership in the sense of French private international law would be a registered union between two persons of the same sex or of different sexes.

III. Non-Marital Unions in Private International Law

It is first necessary to determine the law applicable to non-marital cohabitation and the law applicable to a registered partnership (A) and then to define their scope (B).

A. Determining the Applicable Law

Since the existence of a non-marital union constitutes an element of the personal status of an unmarried couple, it is important to select a connecting factor that guarantees permanency.[87] Studies have shown that uncertainty as to the status of a couple causes profound stress in the family and thus is deemed a serious threat to the social order.[88] It is necessary to keep this fundamental goal in mind when distinguishing between non-marital cohabitation (1) and registered partnerships (2).

---

[85] Feuille Fédérale of 25 February 2003, p. 1296, § 17.

[86] *Proposition de loi portant le Code de droit international privé* (Senate), No. 3-27/1-2002/2003, of 7 July 2003, Art. 58 (*Notion de 'relation de vie commune'*): '*Au sens de la présente loi, les termes "relation de vie commune" visent une situation de vie commune donnant lieu à enregistrement par une autorité publique et ne créant pas entre les cohabitants de lien équivalent au mariage*.'

[87] See DEVERS A. (note **), No. 229 *et seq*.

[88] Cass. civ., 9 May 1900, *De Wrède*, in : ANCEL B./ LEQUETTE Y. (note 66), No. 10.

1. The Law Applicable to Non-Marital Cohabitation

Since non-marital cohabitation is recognized by the national law of most countries (either by legislation or case law), the determination of the applicable law is not influenced by the terms of the national law of the countries involved. For example, in the case of a Frenchman and a Hungarian woman living together in Sweden, their non-marital cohabitation may be equally subject to French law (case-law), Hungarian law (Civil Code, Art. 578/G) or Swedish law (Law No. 232 of 14 May 1987). Nothing stands in the way of applying the national law with which the non-marital cohabitation is most closely connected. In this sense, the traditional rule of French private international law puts national laws on equal footing. Since it is a question of a personal bond uniting two individuals, it is necessary to choose a single law to govern their non-marital cohabitation. Here, one might hesitate before several competing national laws: the law of the common nationality of the parties, the law of their joint permanent residence or of their habitual joint residence, and the *lex fori*. However, these laws are not all equally effective as regards guaranteeing permanency of the personal status of the unmarried cohabitees. Moreover, they are not all equally closely connected with non-marital cohabitation.

If the couple has a common nationality, this factor guarantees that the law applicable to their non-marital cohabitation and consequently the solutions arising thereform will remain the same in the event the couple changes its permanent residence or place of habitual residence. Furthermore, the factor of a common nationality is very closely linked to personal status (Civil Code, Art. 3, sentence 3). From this point of view, it is wiser for a union between two Bolivians to be governed by Bolivian law (Family Code, Articles 158 – 172) rather than by the laws of the various countries where they have cohabited.

The place of their joint permanent residence or joint habitual residence is less likely to ensure a permanent personal status because unmarried cohabitees often change their residence. As a result, the place of joint permanent residence or joint habitual residence should only play a subsidiary role. Thus it follows that French law should apply to a non-marital union between a Danish man and a Belgian man living together in France.

If the *lex fori* will apply to a non-marital cohabitation, the determination of the applicable law will depend on the competent court, which may be purely fortuitous. Consequently, it may occur that the *lex fori* is not closely connected with the particular non-marital cohabitation. In such situations, recourse to the *lex fori* should be limited to cases where the non-marital cohabitees have no common nationality and no joint permanent or habitual residence. This would be the case, for example, when a Hungarian man and a Finnish woman who, for professional reasons, change their place of residence every six months.

A hierarchy emerges when the comparative merits of these various connecting factors are examined. In view of this, in our opinion, a non-marital cohabitation should be governed by the common nationality of the parties or, in the absence of a common nationality, by the law of the place of their joint permanent residence or joint habitual residence; if the cohabitees have no joint permanent

residence or joint habitual residence, then by the *lex fori*. This proposal differs significantly from Macao's private international law rule for non-marital cohabitation, which designates the law of the place of joint habitual residence or, if there is no such residence, then the law with which the union is the most closely connected.[89] Our proposal agrees largely with the solution contained in the laws of former Yugoslavia of 1982,[90] of Croatia of 1992[91] and of Slovenia of 1999,[92] all of which designate the common *lex patriae* or, in the absence of that, the law of the State of the couple's joint permanent residence.

2. The Law Applicable to Registered Partnerships

Unlike marriage or non-marital cohabitation, the institution of registered partnership is regulated only by a few countries, mainly in Europe. The search for a connecting factor must take account of the fact that this institution is very limited at the international level. If the private international law rule designates a national law that does not recognize registered partnerships, that legal system has no relevant substantive rules to apply, thus resulting in a gap in the law. This is obviously incompatible with the aim of achieving a permanent personal status. Accordingly, the private international law rule should strive to designate a national law that regulates registered partnerships. In this respect, the institution of registered partnership can be compared to that of the Anglo-Saxon trust: the Hague Convention of 1 July 1985 requires that the law designated as applicable must recognize trusts or the category of trusts involved (Art. 5; Art. 6, sentence 2). However, the tradi-

---

[89] Civil Code, Art. 58 (*Lei competente*): '1. *Os pressupostos e os efeitos da união de facto são regulados pela lei da residência habitual comum dos unidos* de facto. 2. *Na falta de residência habitual comum, é aplicável a lei do lugar com o qual a situação se ache mais estreitamente conexa*.'

[90] Act of 15 July 1982, Art. 39: '1) *Les rapports patrimoniaux des personnes vivant en union libre sont régis par le droit de l'État dont elles sont ressortissantes*. 2) *Si les personnes mentionnées à l'alinéa 1er du présent article n'ont pas de nationalité commune, est applicable le droit de l'État dans lequel elles ont leur domicile commun*. 3) *Les rapports patrimoniaux contractuels entre les personnes vivant en union libre sont régis par le droit qui, au moment de la conclusion du contrat, était applicable à leurs rapports patrimoniaux*.' (see *Rev. crit. dr. int. pr.* 1983, p. 360).

[91] See ŠARČEVIĆ P., 'Private international law aspects of legally regulated forms of non-marital cohabitation and registered partnerships' (note 70), footnote No. 21.

[92] Act of 30 June 1999, Art. 41: 'The law of the country of which the partners are citizens shall be used for property relations of people who live in a consensual marriage. If persons referred to in the first paragraph of this Article do not share the same citizenship, then the law of the country of their joint permanent residence shall be applied. The law which applied to their property relations at the time of signing the contract shall be applicable to contractual property relations of partners living in a consensual marriage.' (see *Riv. dir. int. priv. proc.* 2000, p. 835).

tional connecting factors of personal status are inadequate for the purpose of designating a national law that recognizes registered partnerships.

As for using the common nationality as a connecting factor, it should be noted that the laws governing registered partnership no longer reserve this institution for their own citizens. Consequently, the partners may not necessarily share a common nationality or be nationals of a country that recognizes registered partnerships. For example, a partnership may be registered in Sweden between a Swede and a Pole or between two Italians.[93] Another example is a partnership registered at The Hague between a Dutchman and a Dane or between two nationals of Luxembourg (Civil Code, Art. 1:80a(1)). From these examples it follows that using the common nationality of the registered partners as the connecting factor does not always work, either because the partners have different nationalities or because their common national law does not recognize registered partnerships.

Using their joint permanent residence or joint habitual residence as the connecting factor would be satisfactory only if the State where the registered partners lived recognizes registered partnerships. Hence, it is of limited use due to the international movement of persons, which is guaranteed by Community law.[94] Therefore, there is reason to fear that using the permanent residence of the registered partners or their joint habitual residence as a connecting factor would often lead to a law that does not regulate registered partnerships. For example, a Dutchman and a French woman who have registered their partnership at The Hague reside in Rome. Since Italian law does not regulate registered partnerships, the situation is inextricable. Furthermore, it should be emphasized that using the place of permanent residence or joint habitual residence as a connecting factor may lead to a law that does not recognize the particular registered partnership. For example, after living in Rome, the Dutchman and French woman who registered their partnership at The Hague move to Copenhagen. Although Danish law recognizes registered partnerships, it reserves this institution for same-sex couples only. Hence, there is no rule in Danish law that is applicable to this partnership registered under Dutch law.

To avoid such lacuna, the Swiss bill (unlike the first draft of November 2001 which designated the law of the place of registration as applicable) opts for a rule containing a dual connecting factor.[95] First, the bill declares that the private

---

[93] BOGDAN M., 'Amendment of Swedish private international law regarding registered partnerships', in: *IPRax* 2001, pp. 353 *et seq.*

[94] JESSURUN D'OLIVEIRA H.U., 'Freedom of Movement of Spouses and Registered Partners in the European Union', in: *Liber Amicorum K. Siehr*, Zürich (Schulthess) 2000, pp. 527 *et seq.*; KADDOUS C., 'La situation des partenaires de même sexe en droit communautaire et dans le cadre de l'Accord sectoriel sur la libre circulation des personnes entre la Suisse et l'Union européenne', in: *RSDIE* 2001, pp. 143 *et seq.* See the Council Directive 2003/86/CE of 22 September 2003 on the right to family reunification: *OJ*, L 251 of 3.10.2003, pp. 12 *et seq.*, esp. p. 14 (Art. 4, para. 3).

[95] Comp., in Belgium, *Proposition de loi portant le Code de droit international privé* (Senate), No. 3-27/1-2002/2003, of 7 July 2003, Art. 60 (*Droit applicable à la relation de*

international law rules for marriage would be applicable, by analogy, to registered partnerships.[96] Secondly, if the applicable law designated by the conflicts rules for marriage – i.e. the law of the place of joint permanent residence – does not recognize the institution of registered partnership, Swiss law shall apply.[97]

Since the private international law rule applicable to registered partnerships is necessarily a bilateral rule that must designate in a general and abstract manner a law that recognizes the particular partnership, we propose that partnerships be governed by the law of the place where they were registered.[98] Indeed, only by returning to the law of the place of the partnership's registration can we be certain that the law designated as applicable recognizes the partnership. Several French legal scholars have arrived at the same conclusion.[99] In the same sense, the Dutch Committee on Private International Law held that, as a matter of priority, the law of the place of the partnership's registration should apply: *lex loci registrationis.*[100] German legislators also chose to have registered partnerships governed by the law of the place where they were registered.[101]

---

vie commune): '§ 1. *Les conditions de validité de la relation de vie commune sont régies, pour chacun des cohabitants, par le droit de l'Etat dont il a la nationalité au moment de l'enregistrement de la relation. Toutefois, les formalités relatives à la conclusion de la relation de vie commune sont régies par le droit de l'Etat sur le territoire duquel la relation est enregistrée.* § 2. *Les effets entre cohabitants et à l'égard de tiers d'une relation de vie commune enregistrée en Belgique sont régis par le droit belge. Les effets d'une relation de vie commune enregistrée à l'étranger sont régis par le droit désigné en vertu des articles 48 à 54, applicables par analogie.* § 3. *Les conditions de la cessation d'une relation de vie commune enregistrée en Belgique sont régies par le droit belge. Les conditions de cessation d'une relation de vie commune enregistrée à l'étranger sont régies par le droit désigné en vertu de l'article 55, applicable par analogie. Toutefois, les formalités relatives à la cessation de cette relation sont régies par le droit de l'Etat sur le territoire duquel l'acte de cessation est établi.* § 4. *L'application du droit étranger qui régit les effets ou la cessation d'une relation de vie commune en vertu des paragraphes 2 et 3 est écartée si ce droit n'organise pas de relation équivalente. Dans ce cas, il est fait application du droit de l'Etat sur le territoire duquel les parties avaient leur résidence habituelle au moment de l'enregistrement de la relation. A défaut de résidence habituelle dans le même pays ou si ce droit n'organise pas de relation équivalente, il est fait application du droit de l'Etat sur le territoire duquel la relation a été enregistrée.*'

[96] Art. 65a, in: *Feuille Fédérale* of 25 February 2003, p. 1296.

[97] Art. 65c, sentence 1, in: *Feuille Fédérale* of 25 February 2003, p. 1297.

[98] See DEVERS A. (note **), No. 319 *et seq.*

[99] FULCHIRON H., 'Réflexions sur le unions hors mariage en droit international privé' (note 32), pp. 908 *et seq.*; KHAIRALLAH G., 'Les "partenariats organisés" en droit international privé' (note 32), p. 327, No. 18 (concerning the *civil solidarity pact*).

[100] JESSURUN D'OLIVEIRA H.U., 'Registered partnerships, pacses and private international law. Some reflections' (note 70), p. 301.

[101] EGBGB, Art. 17a, sentence 1: 'The formation of a registered partnership, its general and property effects, as well as its dissolution are governed by the substantive

B. Scope of the Applicable Law

Involving relations *inter partes*, the law applicable to non-marital unions governs primarily the formation (1) and dissolution of such unions (2), as well as their personal effects.[102] On the other hand, the property effects are subject to other private international law rules (3). Indeed, it is established in French private international law that the law applicable to a bond of personal status does not govern the property issues arising from such bond.[103]

1. Formation of Non-Marital Unions

Non-marital cohabitation. The requirements for the formation of a union qualifying as non-marital cohabitation are governed by the law of the common nationality of the parties or, in the absence of a common nationality, by the law of their joint permanent residence or joint habitual residence or, if there is none, by the *lex fori*. As regards French substantive law (Civil Code, Art. 515-8), a union between two persons of the same sex qualifies as non-marital cohabitation. On the other hand, under Bolivian law (Family Code, Art. 158), a union between two persons of the same sex never constitutes a *unión conyugal libre*.

Registered partnership. The requirements for the formation of a registered partnership are determined by the national law under which the partnership was registered. This law governs both the informal (age, capacity, etc.) and the formal requirements (jurisdiction, presence of witnesses, etc.). It is the same solution as the Civil Code of Québec (Civil Code, Art. 3090.1: '*L'union civile est régie, quant à ses conditions de fond et de forme, par la loi du lieu où elle est célébrée*'). Thus, a *civil solidarity pact* can be validly contracted in France between a Danish man and a Swedish woman; however, in Copenhagen only two persons of the same sex may register a partnership.

2. Dissolution of Non-Marital Unions

Non-marital cohabitation. The grounds for the dissolution of a non-marital cohabitation are determined by the law of the common nationality of the parties or, in the absence of a common nationality, by the law of the place of their joint permanent residence or joint habitual residence or, if there is none, by the *lex fori*. In practice, national laws do not prescribe specific grounds for the dissolution of a non-marital cohabitation but are concerned mainly with the formation and the

provisions of the State where the partnership is registered [...].' See HOHLOCH G./ KJELLAND C. (note 84), p. 227.

[102] See DEVERS A. (note **), No. 395 *et seq.*

[103] See LOUSSOUARN Y./ BOUREL P. (note 48), No. 154.

effects of the relationship. As a rule, dissolution occurs on the initiative of one of the parties, by mutual consent, or due to the death of one of the unmarried cohabitees.

Registered partnership. The grounds for the dissolution of a registered partnership are determined by the law of the country where the partnership was registered.[104] This is important because the rules of the various national laws governing registered partnerships are very different in this respect. Whereas a *civil solidarity pact* is dissolved by the marriage of one of the registered partners with a third party (Civil Code, Art. 515-7(3), a marriage would not have this effect on a partnership registered under Dutch law (Civil Code, Art. 80c).

3. Property Regime of Non-Marital Unions

Three questions are worthy of our attention: property arrangements (a), maintenance obligations (b) and the succession rights of the surviving cohabitee (c).

a) Property Arrangements

When determining the law applicable to the property regime of unmarried couples, it is necessary to take account of two international conventions: the Hague Convention of 14 March 1978 (effective in France as of 1 September 1992) and the Rome Convention of 19 June 1980 (effective in France as of 1 April 1991). However, neither of these conventions is applicable to the property arrangements of unmarried couples.

The Hague Convention of 14 March 1978 determines the law applicable to the marital property regime of 'spouses' (Art. 1). However, when qualifying non-marital unions, we concluded that French substantive law makes a distinction between non-marital unions and marriage.[105] Since a non-marital union is not a marriage in the sense of French private international law, the Hague Convention of 14 March 1978 does not apply to the property arrangements of unmarried couples. Taking account of such situations, the Dutch Committee on Private International Law did not propose that the Hague Convention apply by analogy to the property arrangements of registered partners.[106]

The Rome Convention of 19 June 1980 on the law applicable to contractual obligations excludes from its scope 'the condition and capacity of physical persons' and the 'contractual obligations concerning [...] marital property systems [and] rights and duties following from family relationships' (Art. 1, § 2). However,

[104] *Contra* HUET A. (note 32), pp. 544 *et seq*.

[105] *Contra* KHAIRALLAH G., 'Les "partenariats organisés" en droit international privé' (note 32), p. 328, No. 20; MIGNOT M. (note 32), p. 653, No. 74.

[106] JESSURUN D'OLIVEIRA H.U., 'Registered partnerships, pacses and private international law. Some reflections' (note 70), p. 302.

we concluded that a non-marital union is an element of personal status, a form of a family, or at the very least, a highly personal relationship. As a result, the Rome Convention does not apply to the property arrangements of unmarried couples.[107] Furthermore, pursuant to the Rome Convention, the law applicable by default is determined by the 'place of habitual residence […] of the party performing the contract' (Art. 4, § 2). Applying this to a non-marital union would be difficult: one would have to determine which party is performing the contract and the exact nature of the contractual performance.[108]

Although the above-mentioned Rome and Hague Conventions are not applicable, the property arrangements of an unmarried couple should be treated like contracts.[109] In accordance with French case law relating to contractual matters,[110] an unmarried couple is free to choose the law applicable to their property arrangements. However, when applying this rule to non-marital unions, it is necessary to make a distinction between registered partners and unmarried cohabitees. Namely, registered partners are required to choose a law that recognizes the institution of registered partnership. Moreover, the chosen law must have a close connection with the parties. Thus, a Dutchman and a Dane may validly choose to apply Dutch law to their property arrangements. Should the partners choose a law that does not recognize their registered partnership, like the Hague Convention on trusts (Art. 6, § 2), their choice of law will have no effect.[111] In such case, their property arrangements will be governed by the law of the place where the partnership was registered. The same law applies in the absence of a choice of law by the parties. Thus, the property arrangements of two partners – a French and a German – who registered their partnership in Berlin without making a choice of law, will be governed by German law. This proposal[112] is closer to those made by the Dutch Committee on Private International Law[113] and in the Swiss bill[114] than to German law, which denies any freedom of choice to registered partners.[115]

On the other hand, cohabitees may freely choose the law applicable to their property arrangements, provided it is closely connected with their union. For

[107] See FULCHIRON H., 'Réflexions sur les unions hors mariage en droit international privé' (note 32), p. 903.

[108] See HUET A. (note 32), p. 542, and footnote No. 20.

[109] See DEVERS A. (note **), No. 421 *et seq*.

[110] See, e.g., Cass. civ., 5 December 1910, *American Trading Cie*, in: ANCEL B./ LEQUETTE Y (note 66), No. 11; Cass. civ., 21 June 1950, *Messageries maritimes*, in: ANCEL B./ LEQUETTE Y. (note 66), No. 22.

[111] See GUILLAUME F. (note 67), p. 189.

[112] DEVERS A. (note **), No. 448 *et seq.*

[113] JESSURUN D'OLIVEIRA H.U., 'Registered partnerships, pacses and private international law. Some reflections' (note 70), pp. 302 *f.*

[114] Art. 65c, al. 2, in: *Feuille Fédérale* of 25 February 2003, p. 1297.

[115] HOHLOCH G./ KJELLAND C. (note 84), p. 231.

example, a Swedish woman and an Italian woman living together in Stockholm may validly choose Swedish law to apply to their property arrangements. If no choice of law is made or if the chosen law has no connection with the circumstances, their property arrangements should be governed by the law of the common nationality of the parties or, in the absence of a common nationality, by the law of their joint permanent residence or joint habitual residence or, if there is none, by the *lex fori*.[116] Thus, in the absence of a choice of law, French law will be applicable to the property arrangements of a Frenchman and a Cambodian woman living together in Rennes.

b) Maintenance Obligations

The Hague Convention of 2 October 1973 on the law applicable to maintenance obligations (effective in France as of 1 October 1977) applies to the maintenance obligations arising from family relationships (Art. 1). Since a non-marital union is a matter of personal status, it follows that the Hague Convention also applies to maintenance obligations arising from a non-marital union. This solution is identical to the proposal of the Dutch Committee on Private International Law.[117] The Permanent Bureau of the Hague Conference on Private International Law had already noted that this Convention applies to non-marital cohabitation as well.[118]

Article 4 of the Hague Convention provides that the law of the place of habitual residence of the person entitled to maintenance is applicable to the maintenance obligations of unmarried couples. Accordingly, this law determines whether or not unmarried cohabitees are obliged to contribute to household expenses and to provide other financial support during their relationship.[119] Thus, a Belgian who habitually resides in Paris has the right to receive a contribution for household expenses from his registered partner under Article 515-4(1) of the French Civil Code. If the entitled person is unable to obtain maintenance under the law of the place of his or her habitual residence, the law of the common nationality of the unmarried couple (Art. 5) or the law of the authorities handling the proceedings (Art. 6) shall apply. In this sense, two Ecuadorians who habitually reside in France are mutually obliged to contribute to household expenses in accordance with Ecuadorian law (Law No. 115 of 29 December 1992, Art. 7). In this context it should be noted that, although the Hague Convention favors the entitled person, there is no guarantee that maintenance will be obtained.

While the Hague Convention contains a special rule on maintenance for spouses in the event of divorce, judicial separation or annulment of the marriage (Art. 8), there is no corresponding rule for non-marital unions. As a result, the

---

[116] DEVERS A. (note **), No. 450 *f.*

[117] JESSURUN D'OLIVEIRA H.U., 'Registered partnerships, pacses and private international law. Some reflections' (note 70), p. 303.

[118] *The Law applicable to unmarried couples* (note 29), p. 142.

[119] DEVERS A. (note **), No. 461 *et seq.*

general rules of Articles 4-6 mentioned above are applicable to maintenance obligations after the dissolution of a non-marital union.[120] This lacuna does not appear to endanger the interests of the entitled party of a dissolved non-marital union. On the contrary, unlike spouses, he or she is entitled to obtain maintenance under the law of his or her place of habitual residence (Art. 4), under the law of the common nationality of the unmarried couple (Art. 5) or under the law of the authorities handling the proceedings (Art. 6). In regard to maintenance claims, German law provides that, if the entitled registered partner is unable to obtain maintenance, the national law of the place of registration shall apply.[121] This solution is an extension of the underlying principle of the Hague Convention favoring the person entitled to maintenance.

c) Inheritance Rights

In this context the question arises as to the inheritance rights of the surviving party of a non-marital union in cases where the other party dies intestate. In regard to the succession of estates, French private international law distinguishes between movable and immovable property. In accordance with the adage *mobilia sequuntur personam*, the law of the last domicile of the deceased was designated as applicable to the movable property of the deceased in the *Labedan* decision.[122] Since the *Stewart* decision[123] the immovable property of the deceased is governed by the law of its location (*lex rei sitae*). Therefore, the applicable law of succession – the law of the last domicile of the deceased in the case of movable property and the law of the place of its location in the case of immovable property – will determine whether or not the surviving party of a non-marital union is entitled to inherit the *de cujus*. Two possibilities should be considered.

The first possibility is that the rules on intestate succession of the applicable law grant inheritance rights to the surviving party of a registered partnership or non-marital cohabitation. In such case, the surviving partner or cohabitee inherits from the deceased in accordance with the conditions and restrictions specified by the applicable law. The second possibility is that the applicable rules on intestate succession grant inheritance rights to surviving spouses, but not to surviving partners or cohabitees of a non-marital union. In such cases, the only conclusion is that the surviving party of a non-marital union has no inheritance rights, even in the absence of a surviving spouse.[124] The rules applicable to surviving spouses cannot be applied by analogy to the surviving party of a non-marital union.

---

[120] DEVERS A. (note **), No. 561 *et seq.*

[121] HOHLOCH G./ KJELLAND C. (note 84), pp. 231-232.

[122] Cass. civ., 19 June 1939, *Labedan*, in: ANCEL B./ LEQUETTE Y. (note 66), No. 18.

[123] Cass. civ., 14 March 1837, *Stewart*, in: ANCEL B./ LEQUETTE Y. (note 66), No. 3.

[124] See GAUTIER P.-Y., in: *Répertoire international Dalloz* (note 32), No. 45-46; FULCHIRON H., 'Réflexions sur les unions hors mariage en droit international privé' (note 32), p. 911.

Since the surviving party of a non-marital union has no inheritance rights under the applicable law,[125] several remedies may be considered. Like the Hague Convention of 1 August 1989 applicable to successions due to death (Articles 5 and 6), some scholars have suggested introducing the *professio juris* into French private international law, thus permitting the parties of a non-marital union to choose the law to be applied to all or part of their respective estates.[126] In our opinion, this proposal is not satisfactory. First, inheritance rules intended to be mandatory in substantive law would become optional in private international law.[127] Secondly, the *professio juris* could be easily abused for the purpose of fraud: the unmarried partners or cohabitees could validly choose the law most advantageous for themselves at the expense of their legal heirs (i.e. children). Both of these reasons lead us to reject the *professio juris* in matters of inheritance.

A second solution is found in the German Law of 16 February 2001: if the surviving registered partner has no right to inherit under the general rules, the succession law of the place of registration shall apply.[128] This conflicts rule encourages granting inheritance rights to the surviving registered partner. However, in our opinion, this solution is also not acceptable as it could be disadvantageous for the legal heirs of the deceased, especially his or her children. If the law of the place of registration of the partnership were applied, the children of the deceased would be required to share the estate with the surviving registered partner, whereas they would otherwise have been the sole heirs.

Finally, our conclusion is that the inheritance rights of the surviving party of a non-marital union should be determined in accordance with the traditional rules of French private international law, i.e., by distinguishing between movable and immovable property.

IV. Conclusion

Determining the law applicable to non-marital unions makes it necessary to return to the traditional questions of private international law, qualification and connect-

[125] DÖRNER H./ LAGARDE P., *Étude de droit comparé sur les règles de conflits de juridictions et de conflits de lois relatives aux testaments et successions dans les États membres de l'Union Européenne*, Étude pour la Commission des Communautés Européennes, Institut Notarial Allemand, 18 septembre/8 novembre 2002, p. 111.

[126] See GAUTIER P.-Y., in: *Répertoire international Dalloz* (note 32), No. 48. FULCHIRON H., 'Réflexions sur les unions hors mariage en droit international privé' (note 32), pp. 911-912.

[127] See GORÉ M., '*De la mode...* dans les successions internationales: contre les prétentions de la professio juris', in: *Mélanges en l'hommage de Y. Loussouarn*, Paris (Dalloz) 1994, pp. 193 *et seq*.

[128] HOHLOCH G./ KJELLAND C. (note 84), p. 232.

ing factors. In this regard, a distinction is made between non-marital cohabitation and registered partnerships, thus leading to a different applicable law for each of these institutions. At a time when private international law rules for non-marital unions are still being proposed, some scholars are already looking ahead to another topic: same-sex marriage. Now that the Netherlands and Belgium have opened up the institution of civil marriage to persons of the same sex, there is an urgent need to analyze the aspects of private international law relating to same-sex marriage.[129] Furthermore, the fact that the characteristic features of family law are deeply bound to the age-old culture of States shows that attempts to harmonize and unify in this field are in vain. Hence, the future does not lie in developing a Community family law but rather a Community private international law in the area of family law. Respecting the traditions of the Member States, the logic of private international law must prevail over the logic of harmonization and unification of the law. It is not only more satisfactory but also more stimulating. However, it should be noted that, while it is legitimate for Community law to take an interest in the question of the applicable law, the question which law shall apply to family relationships must remain within the exclusive jurisdiction of the Member States.[130]

---

[129] See BOUZA VIDAL N./ QUIÑONES ESCAMEZ A., in: *Revista jurídica de Catalunya* 2002, pp. 200 *et seq*. FULCHIRON H., 'Le mariage homosexuel et le droit français (à propos des lois hollandaises du 21 décembre 2000)', in: *Recueil Dalloz* 2001 (*point de vue*), pp. 1628 *et seq*.; ID., 'La reconnaissance de la famille homosexuelle aux Pays-Bas', in: *La Semaine Juridique ed. G* 2001, act., No. 21-22, pp. 1033 *et seq*.; RIGAUX F., 'The Law Applicable to Non Traditional Families', in: *Liber Amicorum K. Siehr*, Zürich (Schulthess) 2000, pp. 647 *et seq*.

[130] See GAUDEMET-TALLON H., 'De l'utilité d'une unification du droit international privé de la famille dans l'Union européenne ?', in: *Estudos en homenagem à I. de Magalhães Collaço*, Coimbra (Almedina) 2002, pp. 159 *et seq.*

DEVELOPMENT OF A EUROPEAN PRIVATE INTERNATIONAL LAW AND THE HAGUE CONFERENCE*

Michael TRAEST**

I. Introduction
II. Growing Impact of the European Community in the Field of Private International Law
    A. Introduction
    B. Analysis of Title IV EC
        1. Relationship with the free movement of persons
        2. Cross-border implications
        3. In so far as necessary for the proper functioning of the internal market
        4. Content of the measures involved
III. Relationship with Third Countries (Non-EC Member States)
    A. Some External Aspects of Internal Community Measures
    B. External Competence of the European Community in Light of the *ERTA* Case: a Tentative for more General Conclusions in the Field of Private International Law
IV. How the Hague Conference Views its Relation with the European Community
    A. Increasing Awareness within the Hague Conference of the Challenges Posed by the Growing Impact of the European Community in the Field of Private International Law
    B. Analysis
V. Principle of Subsidiarity
    A. Introduction
    B. Protocol on the Principle of Subsidiarity
    C. Justification of the Private International Law Community Measures in Light of the Principle of Subsidiarity
    D. Can the Principle of Subsidiarity Be Invoked in Favor of the Hague Conference?
VI. EC Law as an Obstacle to the Application of Private International Law Rules Originating in the Hague Conference
    A. General Remarks
    B. Test of the Compatibility of Hague Conventions with EC Law
VII. Possible Scenario Depicting Future Relations between the European Community and the Hague Conference

---

* This article summarizes some of the ideas expressed in Michael TRAEST's book *De Europese Gemeenschap en de Haagse Conferentie voor het Internationaal Privaatrecht*, Antwerp, Maklu, 2003, XXVI + 527 p.

** Senior Assistant University of Antwerp, Law Clerk Belgian Court of Cassation.

Yearbook of Private International Law, Volume 5 (2003), pp. 223-259
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

I. Introduction

When dealing with the unification of private international law rules, one should also pay attention to the relationship between the Hague Conference on Private International Law, on the one hand, and the European Community, on the other. Whereas the Hague Conference on Private International Law has focused on the global unification of private international law rules since 1893, the European Community has only rather recently developed a special interest in the unification of private international law rules in Europe. In particular, Article 65 (formally Article 61 c) of the EC Treaty, as introduced by the Treaty of Amsterdam of 2 October 1997, has afforded the European Community a more general competence in the field of private international law.

Several measures in the area of private international law have been adopted within the Community on the basis of Article 65, including Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters (Brussels I Regulation)[1] and Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement in matrimonial matters and in matters of parental responsibility for children of both spouses (Brussels II Regulation)[2]. Moreover, other projects are envisaged in the near future, such as a regulation on the law applicable to non-contractual obligations ('Rome II')[3] and the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization.[4]

It goes without saying that the presence of two major players in the field of private international law in Europe – the Hague Conference and the European Community – poses several questions as to the competence of both international organizations to unify private international law, their mutual relationship and whether or not Member States can still participate in the process of unifying private international law. For instance, the question arises whether the subsidiarity principle of Article 5 EC could be an argument to restrict the work of the Community in the unification of private international law. Could the subsidiarity principle be invoked by the Hague Conference or its Member States that are also members of the European Community to limit the EC process of unification in the area of private international law?

---

[1] *OJ* L 012 16.01.2001, p. 1.

[2] *OJ* L 160 30.06.2000, p. 19.

[3] Proposal of 22 July 2003 for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ('Rome II'), COM(2003)427 final.

[4] A green paper was issued on this subject on 14 January 2003. See COM(2002)0654.

In particular, the Hague project for a future convention on international jurisdiction and foreign judgments in civil and commercial matters has focused attention on the mutual relationship between the Hague Conference on Private International Law and the European Community. Since the entry into force of the Brussels I Regulation it is uncertain whether the Member States of the European Community will be able to sign or even ratify such a Hague convention.

These and other similar questions deserve the attention of all persons interested in the unification of private international law. Nevertheless, it seems that an in-depth analysis of the mutual relationship between the two named international organizations has not yet been made. However, in view of the growing role played by regional economic integration[5] in the worldwide harmonization of private law, it is not only opportune but also important to stress the relationship between the Hague Conference on Private International Law and the European Community. Therefore, this article focuses on this relationship after briefly analyzing Article 65 EC, the legal basis of the European Community's recent measures in private international law.

II. Growing Impact of the European Community in the Field of Private International Law

A. Introduction

Article 61c EC 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 for in Article 65. Judicial cooperation in civil matters is explicitly mentioned 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

[5] On 27-28 September 2002 UNIDROIT – the International Institute for the Unification of Private Law – organized a congress in Rome to commemorate its 75th anniversary on the subject 'Worldwide Harmonisation of Private Law and Regional Economic Integration'. One of the starting points for discussion was the assumption that the harmonization of private law – the same applies in regard to private international law – occurs against different backgrounds now than at the beginning of the 20th century. Whereas Europe consisted of independent countries all of which aspired to participate in international trade, we now have a large European region dominated by a single market embedded in a constitutional framework, which provides for private law-making competences. See KRONKE H., 'UNIDROIT 75th Anniversary Congress on Worldwide Harmonisation of Private Law and Regional Economic Integration: Hypotheses, Certainties and Open Questions', in: *Unif. L. Rev.* 2003, (10) 10-12.

and in so far as necessary for the proper functioning of the internal market, shall include:

a) improving and simplifying:
   - the system of cross-border service of judicial and extrajudicial documents,
   - cooperation in 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 compatibility of the rules of civil procedure applicable in the Member States.'

An analysis of this legal basis introduced by the Treaty of Amsterdam should focus *inter alia* on the following points.

Firstly, it follows from the heading of Title IV of the EC Treaty (to which Article 65 belongs) that measures adopted on this basis should be related to the free movement of persons (a). Consequently, the question arises whether this connection with the free movement of persons affects the scope of measures in the field of private international law to be adopted under Article 65 EC. Secondly, Article 65 EC requires not only that the measures have cross-border implications (b) but also that they are necessary for the proper functioning of the internal market (c). Finally, attention should be paid to the content of the measures envisaged in Article 65 EC (d).

The special position of the United Kingdom, Ireland and Denmark[6] is not analyzed in detail here, nor are the provisions concerning preliminary rulings by the Court of Justice[7] and the decision-making procedure.[8]

B. Analysis of Title IV EC

1. Relationship with the free movement of persons

In our opinion, it does not seem possible to deduce from the Vienna Action Plan of 3 December 1998[9] that the reference in the heading of Title IV EC to the free

---

[6] Article 69 EC. See also the Protocols defining the position of the United Kingdom and Ireland (*OJ* C 340 10.11.1997, p. 99) and the Protocol relating to Denmark (*OJ L* 340 10.11.1997, p. 101).

[7] Article 68 EC.

[8] Article 67 EC.

movement of persons is a substantive limitation of the scope and type of measures to be adopted under Article 65 EC. After all, no reference whatsoever is made to the free movement of persons in the part of the action plan dealing with judicial cooperation in civil matters.[10] Indeed, the Action Plan states:

> 'Reinforcement of judicial cooperation in civil matters (…) represents a fundamental stage in the creation of a European judicial area which will bring tangible benefits for every Union citizen. Law-abiding citizens[11] have the right to look to the Union to simplify and facilitate the judicial environment in which they live in the European Union context. Here principles such as legal certainty and equal access to justice should be a main objective, implying identification of the competent jurisdiction, clear designation of the applicable law, availability of speedy and fair proceedings and effective enforcement procedures.'[12]

Nevertheless, in light of the fact that the heading of Title IV EC refers to the free movement of persons, a purely textual analysis could lead to the conclusion that measures in the field of private international law can be adopted on the basis of Article 65 EC only if such measures are clearly related to the free movement of persons. However, this said, it seems a little bizarre to try to make a distinction between private international law measures on the basis of whether or not they relate to the free movement of persons. Consequently, we take the position that it is *not* possible to make such a distinction or, at least, that making such a distinction is rather artificial. On the contrary, we agree with von Hoffmann that acceptable arguments exist for considering the *whole* area of private international law as somehow being related to the free movement of persons.[13] If one accepts this

---

[9] *OJ* C 019 23.01.1999, p. 1. This action plan of 3 December 1998 was called for by the European Council. It could be regarded as a document explaining how the Council and Commission intend to interpret the new provisions on judicial cooperation in civil matters.

[10] Cf. ISRAEL J., 'Conflicts of Law and the EC after Amsterdam. A Change for the Worse?', in: *MJ* 2000, (81) 95.

[11] One could raise the question why such principles should apply only to law-abiding persons. See BETLEM G. and HONDIUS E.H., 'Europees privaatrecht na Amsterdam', in: *Nederlands Juristenblad* 1999, (1137) 1141.

[12] *OJ* C 019 23.01.1999, p. 4.

[13] See VON HOFFMANN B., 'The Relevance of European Community Law', in: VON HOFFMANN B. (ed.), *European Private International Law*, Nijmegen 1998, (19) 30: 'The free movement of persons includes their personal status and family relations: it is in contradiction with the free movement of persons if the personal status of a European citizen is subject to different national legal orders in different Member Countries. By connecting judicial cooperation to the free movement of persons, the whole area of conflict of laws and jurisdiction has been included in the concept of judicial cooperation. One may even include the law of succession in the free movement of persons: the law applicable to succession may

broader view of the free movement of persons – as we tend to do – it could be concluded that the reference in the heading of Title IV to the free movement of persons cannot constitute a limitation of the scope and type of private international law measures to be adopted on the basis of Article 65 EC. The first results seem to confirm this conclusion.

2. *Cross-border implications*

The requirement that the measures to be adopted under Article 65 EC need to have cross-border implications was apparently introduced during the last stage of the negotiations in Amsterdam as a result of pressure by British Prime Minister Tony Blair.[14] Since the cross-border aspect is inherent in private international law, this condition does not appear to add anything at all, at least as far as private international law is concerned.[15] On the other hand, if one considers that measures of substantive private law can be adopted on the basis of Article 65 EC, the requirement of cross-border implications is not devoid of significance: it would mean that the harmonization of substantive private law applicable to both internal and international fact situations cannot be based on Article 65 EC.[16] The question whether or not Article 65 EC can serve as the basis for the harmonization of substantive private law will be discussed later.[17]

3. *In so far as necessary for the proper functioning of the internal market*

This condition was also introduced in Article 65 EC during the final stage of the negotiations of the Amsterdam Treaty, again at the initiative of British Prime Minister Tony Blair.[18] Various authors note the existence of this condition without

---

be an important aspect in the choice of the place of habitual residence.' Cf. REMIEN O., 'European Private International Law, the European Community and its Emerging Area of Freedom, Security and Justice', in: *CML Rev.* 2001, (53) 74.

[14] BETLEM G. and HONDIUS E.H. (note 11), 1140; DE MATOS A.M., 'Consommation transfrontière: d'un espace cloisonné à un espace judiciaire européen', in : *REDC* 2000, (151) 169. Cf. MC ELEAVY P., 'The Brussels II Regulation: how the European Community has moved into Family Law', in: *ICLQ* 2002, (883) 899.

[15] KOHLER C., 'Interrogations sur les sources du droit international privé européen après le traité d'Amsterdam', in: *Rev. crit. dr. int. pr.* 1999, (1) 16; LABAYLE H., 'Un espace de liberté, de sécurité et de justice', in: *Rev. trim. dr. eur.* 1997, (813) 856; REMIEN O. (note 13), 74.

[16] Cf. BASEDOW J., 'The Communautarization of the Conflict of Laws under the Treaty of Amsterdam', in: *CML Rev.* 2000, (687) 702.

[17] See *infra,* point d.

[18] BETLEM G. and HONDIUS E.H. (note 11), 1140.

providing a clear analysis of its exact consequences. For instance, Thoma maintains that the reference to the internal market cannot be limited to the free movement of persons,[19] whereas Kennet comments that it remains to be seen to what extent the requirement puts an effective limit on the legislation adopted as it has sometimes been loosely interpreted in other contexts.[20] Sonnenberger is of the opinion that the harmonization of private international law rules in family and succession matters is not required for the proper functioning of the internal market.[21]

Nonetheless, the first experience with the application of Article 65 EC makes it clear that the condition requiring the measure to be necessary for the proper functioning of the internal market can indeed be interpreted very broadly. Of course, it is not possible to make an exhaustive list of private international law measures on the basis of whether they are deemed necessary or unnecessary for the proper functioning of the internal market. However, there is no doubt that the Community has adopted a broad interpretation in respect of that condition and that its fulfillment has not been extensively motivated in any of the measures adopted so far. One could, for instance, cite the Brussels I Regulation and the Brussels II Regulation,[22] where the introductory recitals rather simply state that differences between national rules governing jurisdiction and enforcement hamper the sound operation of the internal market, which, of course, is undoubtedly true. Similarly, Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters[23] states that the proper functioning of the internal market entails the need to improve and expedite the transmission of judicial and extrajudicial documents in civil and commercial matters for service between the Member States.

Basedow appropriately questions whether Article 65 EC had to be introduced into the EC Treaty at all, since this article stipulates that measures can be adopted only in so far as they are necessary for the proper functioning of the internal market.[24] In his view, Article 95 EC concerning the establishment of the inter-

---

[19] 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: *ERPL* 2002, (397) 406.

[20] KENNET W., 'Current Developments. Private International Law', in: *ICLQ* 1999, (465) 465. Cf. LABAYLE H. (note 15), 856.

[21] SONNENBERGER H.J., 'Das internationale Privatrecht im dritten Jahrtausend – Rückblick und Ausblick', in: *ZvglRWiss* 2001, (107) 121.

[22] Cf. DROUET S., 'La communautarisation de "Bruxelles II". Chronique d'une mutation juridique', in: *RMCUE* 2001, (247) 250.

[23] *OJ L* 160 30.06.2000, p. 37.

[24] BASEDOW J., 'Die Harmonisierung des Kollisionsrecht nach dem Vertrag von Amsterdam', in: *EuZW* 1997, (609) 609. Cf. ADOLPHSEN J., 'Revision des EuGVÜ und neues deutsches Verfahrensrecht. Bericht von der Tagung der Wissenschaftlichen Vereinigung für Internationales Verfahrensrecht vom 7. bis 10.4.1999, Berlin', in: *ZZP*

nal market would be a more adequate legal basis in light, *inter alia*, of the more flexible decision-making procedure and the fact that all Member States, including Denmark, can participate in the Article 95 EC procedure. Moreover, the procedure of Article 234 EC concerning preliminary rulings is more complete for measures adopted on the basis of Article 95 EC. These are undoubtedly advantages in comparison with Article 65 EC.

When evaluating the arguments in favor of Article 95 EC and the doubt expressed as to the usefulness of Article 65 EC, one must take account of paragraph 2 of Article 95 EC, which provides that the procedure of Article 95 EC shall not apply to fiscal provisions, to provisions relating to the free movement of persons and to provisions relating to the rights and interests of employed persons. Therefore, the idea that Article 65 EC is rendered useless because of the requirement that the measures have to be necessary for the proper functioning of the internal market cannot be upheld as far as the free movement of persons is concerned. With the free movement of persons excluded from the scope of Article 95 EC, Article 65 EC undoubtedly remains useful to the extent that measures adopted on the basis of that article are related to the free movement of persons. In light of what has been said earlier, it follows from the heading of Title IV EC that all measures adopted under Article 65 EC have to relate to the free movement of persons. In other words, Article 65 EC could in a certain way be considered as filling the gap caused by the exclusion of the free movement of persons from the scope of Article 95 EC.[25] Given the fact that it can be argued that the whole area of private international law relates to the free movement of persons,[26] we are inclined to conclude that, since the Treaty of Amsterdam became effective, circumstantial measures of private international law have to be based on Article 65 EC. Article 95 EC does not seem to be an appropriate basis for the adoption of circumstantial measures in the field of private international law. Moreover, the same conclusion is reached if Article 65 EC is regarded as a *lex specialis* in relation to Article 95 EC for the purpose of private international law.

However, the latter does not prevent so-called 'pointillistic' conflict of law rules from being adopted on the basis of Article 95 EC in regulations or directives harmonizing substantive law.[27] This conclusion is strengthened by our view that

---

2000, (85) 86; LEIBLE S. and STAUDINGER A., 'Article 65 of the EC Treaty in the EC System of Competencies', in: *ELF* 2000/01, (225) 232.

[25] Cf. BASEDOW J., 'The Communautarization of the Conflict of Laws under the Treaty of Amsterdam' (note 16), 697-698.

[26] See *supra,* point a.

[27] Since the entry into force of the Amsterdam Treaty, several 'pointillistic' conflict of law rules have already been adopted in measures harmonizing substantive private law on the basis of Article 95 EC. See, for instance, Article 9 of Directive (EC) No 2002/47 of 6 June 2002 of the European Parliament and of the Council on financial collateral arrangements, *OJ L* 168 27.06.2002, p. 43; also Article 3(4) and Article 12(2) of Directive 2002/65 of the European Parliament and of the Council of 23 September 2002 concerning the dis-

Article 65 EC does not permit the adoption of substantive law measures but is restricted exclusively to private international law.[28]

4. *Content of the measures involved*

Unlike some authors who have analyzed Article 65 EC, we believe that there are valuable arguments to support the conclusion that Article 65 EC deals only with measures of private international law, not substantive private law.

In the first place, it appears that only the French and Portuguese versions of Article 65 EC lend support to those who contend that measures of substantive private law also fall under this article. Since the term *inter alia* is used in the French version when citing the measures to be adopted,[29] it could be deduced that the list is not exhaustive but also includes matters other than those dealing with subjects generally considered to be part of private international law.[30] On the contrary, it is not certain whether a similar argument could be put forth on the basis of the other language versions of Article 65 EC. Nevertheless, as regards substantive law, the European Council requested, at its Tampere meeting of 15 and 16 October 1999, an overall study on the need to approximate Member States' legislation in civil matters in order to eliminate obstacles to the proper functioning of civil proceedings.[31] Some authors cite this statement as proof that it is possible to adopt a European civil code, especially on the basis of Article 65 EC.[32] In our opinion, it cannot be deduced from the presidency conclusions that Article 65 EC or any other provision of Title IV introduced by the Treaty of Amsterdam constitutes a legal basis for adopting a European civil code. Of course, the presidency conclusions cannot alter the significance or meaning of treaty provisions. Even if one could argue that a study on the need to approximate substantive private law is always

---

tance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, *OJ* L 271 09.10.2002, p. 16.

[28] See *infra,* point d.

[29] 'Les mesures relevant du domaine de la coopération judiciaire dans les matières civiles ayant une incidence transfrontière, qui doivent être prises conformément à l'article 67 et dans la mesure nécessaire au bon fonctionnement du marché intérieur, visent entre autres à (…).'

[30] Here private international law is considered in the broader sense, encompassing not only conflict of law rules but also rules of jurisdiction and enforcement of judgments. On defining private international law for the purpose of unification, see TRAEST M., 'Eenmaking van internationaal privaatrecht: een begripsomschrijving', in: *Tijdschrift voor Privaatrecht* 2002, (1737) 1809-1831.

[31] See Presidency conclusions, No 39.

[32] Cf. LANDO O., 'Optional or Mandatory Europeanisation of Contract Law', in: *ERPL* 2000, (59) 61-62; STAPLES H., 'Wie is familielid volgens het Europees recht?', in: *Tijdschrift voor Familie- en Jeugdrecht* 2000, (82) 90.

possible, the various language versions of Article 65 EC (among other factors) do not permit the conclusion that measures of substantive private law can be adopted under this provision of the EC Treaty.[33]

Secondly, the origin of Article 65 EC makes it clear that the negotiators of the Amsterdam Treaty had only private international law rules in mind, not substantive law rules. It has been pointed out that the communautarization of judicial cooperation in civil matters achieved by the Treaty of Amsterdam is the result of the desire of some Member States to further the development of a European private international law despite opposition by other Member States – including the Anglo-Saxon countries – which prefer to keep the development of private international law rules well embedded in the Hague Conference. One can imagine that the Protocol by means of which the United Kingdom and Ireland opted out of judicial cooperation in civil matters enabled the other Member States to push through the communautarization of that cooperation.[34] Since the drafters had private international law in mind in this context, it can also be concluded that the judicial cooperation in civil matters envisaged under Article 65 EC is intended only for measures of private international law, not substantive private law. The history of this article undoubtedly supports this conclusion.

Thirdly, the results achieved thus far on the basis of Title IV EC, as introduced by the Treaty of Amsterdam, also bear witness to the fact that only private international law rules are envisaged. Apart from the Brussels I Regulation, the Brussels II Regulation and the Regulation on the service of documents, which were already mentioned, other relevant instruments include, *inter alia,* Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings,[35] 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 and commercial matters,[36]

---

[33] Article III-170(2) of the Draft Treaty establishing a Constitution for Europe (*OJ* C 169 18.07.2003, p. 1) clearly lists a number of topics in an exemplary way. To our knowledge, this is true at least for the English, Dutch, German, French and Spanish versions of that article of the draft treaty. However, even then the measures listed in Article III-170(2) do not provide a legitimate basis for the adoption of a European Civil Code. This conclusion is even more convincing in light of Article III-170(1) which stresses the central meaning of the mutual recognition of judgments and decisions in extrajudicial cases for judicial cooperation in civil matters.

[34] Cf. KOHLER C., 'Interrogations sur les sources du droit international privé européen après le traité d'Amsterdam' (note 15), 13; PANDRAUD R., *Révision des traités européens. Avant Amsterdam: treize mois de Conférence intergouvernementale*, in: *Rapport d'information,* nr. 3509, Paris, Assemblée nationale, 21 avril 1997, I, 65; STRUYCKEN A.V.M., 'Het Verdrag van Amsterdam en de Haagse Conferentie voor internationaal privaatrecht. Brusselse schaduwen over Den Haag', in: *Weekblad voor Privaatrecht, Notariaat en Registratie* 2000, nr. 3241, (735) 743.

[35] *OJ* L 160 30.06.2000, p. 1.

[36] *OJ* L 174 27.06.2001, p. 1.

Council Decision 2003/93/EC of 19 December 2002 authorizing the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children[37] and Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.[38] It seems that all the mentioned instruments are considered part of private international law, including international procedural law, rather than substantive law. This could be regarded as a third argument supporting the conclusion that only measures of private international law are admissible under Article 65 EC.

Although some authors defend the opposite view,[39] in conclusion it can briefly be said that, in principle and provided all the conditions of Article 65 EC are met, measures can be adopted on the basis of this provision in the whole area of private international law. Accordingly, it is our opinion that, with the entry into force of the Treaty of Amsterdam, the European Community has acquired the competence to adopt any measure in the field of private international law.

III. Relations with Third Countries (Non-EC Member States)

A. Some External Aspects of Internal Community Measures

Although the recent activity of the European Community in the field of private international law appears at first sight to deal only with purely intra-Community relations, relations with third countries are not completely ignored. Indeed, the European Community has also attempted to enact rules with regard to third countries on certain specific topics. For instance, Article 4(2) of the Brussels I Regulation provides that, against a defendant not domiciled in a Member State, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular the so-called exorbitant rules of jurisdiction, in the same way as the nationals of that State. Article 8(2) of the Brussels II Regulation contains an analogous rule. In our opinion, these two articles can be regarded as examples of external aspects of internal Community measures.

[37] *OJ* L 048 21.02.2003, p. 1.

[38] *OJ* L 026 31.01.2003, p. 1.

[39] Cf. GAUDEMET-TALLON H., 'Droit privé et droit communautaire: quelques réflexions', in: *RMCUE* 2000, (228) 241.

In accordance with the jurisprudence of the European Court of Justice, especially Opinion 1/94 of 15 November 1994,[40] it can be argued that the Community has acquired exclusive external competence in the field of the subject matter regulated by these external aspects. Consequently, in our opinion, the Member States of the European Community – except Denmark, which does not participate in the judicial cooperation in civil matters and is not bound by the said regulations – have lost their competence to conclude international bilateral or multilateral conventions in the area covered by these external measures.

Article 16 of the Brussels II Regulation provides that a court of a Member State may, on the basis of an agreement on the recognition and enforcement of judgments, not recognize a judgment given in another Member State where, in cases provided for in Article 8, the judgment could only be founded on grounds of jurisdiction other than those specified in Articles 2 to 7 of the regulation. As regards Article 16, it is our view that the Member States are no longer permitted to conclude new agreements referred to in this article. The European Commission seems to have adopted the same view,[41] although the Council passed a declaration on the occasion of the adoption of the Brussels II Regulation stating that the Member States shall undertake to inform the Commission of any agreements they envisage to conclude with third States in accordance with Article 16 and of any changes to or repeal of such agreements.[42] Nevertheless, we take the position that the view defended by the Commission is correct. This conclusion seems even more convincing when the Brussels I Regulation is taken into account. It clearly follows from Article 72 of the Brussels I Regulation that Member States are no longer entitled to conclude new agreements with third countries dealing with the rules of jurisdiction mentioned in Article 4 of the Regulation. Article 72 of the Brussels I Regulation provides that the Regulation shall not affect agreements by which Member States undertook, prior to the entry into force of this Regulation, pursuant to Article 59 of the Brussels Convention, not to recognize judgments given, in particular in other contracting States to that convention, against defendants domiciled or habitually resident in a third country where, in cases provided for in Article 4 of that Convention, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3 of the Convention (the so-called 'exorbitant rules of jurisdiction'). The wording of Article 72 makes it clear

---

[40] Opinion 1/94 [1994] *ECR* I-5267, at para 95. Cf. Opinion 2/92 [1995] *ECR* I-521.

[41] See Press release 2251, Council – Justice and Home Affairs, 27 March 2000. Later the Commission declared that implementation of Article 16 could not be contrary to the case law of the Court as regards the conclusion of agreements between a Member State and third countries or international organisations. See Council Document 8627/00 LIMITE JUSTCIV 60 of 22 May 2000.

[42] See Council Document 8627/00, LIMITE JUSTCIV 60 of 22 May 2000.

that, after the entry into force of the Regulation, the Member States can no longer conclude new agreements with third countries.[43]

Similarly, it can be argued that the individual Member States have lost their competence to conclude agreements with third States or international organizations on the rules of jurisdiction mentioned in Articles 22 and 23 of the Brussels I Regulation. These rules are exclusive and delimit the jurisdiction of the national courts of the Member States in respect of third countries.[44] Therefore, parallel agreements on such matters cannot be concluded by the Member States without the approval[45] or cooperation of the European Community.

Applying the same line of reasoning, it can be concluded that, in light of the obligation of the courts of the Member States to apply the Hague Convention of 25 October 1980 on the Civil Aspects on International Child Abduction, and in particular Articles 3 and 16 thereof,[46] the Member States have lost their competence to negotiate and conclude a future treaty modifying this Hague Convention. Due to Denmark's non-participation in the judicial cooperation in civil matters and

[43] A comparison can be made with Article 71 of the Brussels I Regulation, which provides that the regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments. Unlike Article 71 of the Brussels Convention, Article 57(1) of the Brussels Convention provides that the convention shall not affect any conventions to which the contracting States are *or will be* parties and which in relation to particular matters, govern jurisdiction or enforcement of judgments. This change would mean that no new conventions or agreements may be entered into by the Member States after the Brussels I Regulation entered into force. See KENNET W., 'Current Developments. Private International Law', in: *ICLQ* 2001, (725) 736; VLAS P., 'Herziening EEX: van verdrag naar verordening', in: *Weekblad voor Privaatrecht, Notariaat en Registratie* 2000, No 6421, (745) 747.

[44] Cf. STRUYCKEN A.V.M., 'Les conséquences de l'intégration européenne sur le développement du droit international privé', in: *Recueil des Cours* 1992, Vol. 232, (257) 342. See also the heading of section 6, to which Articles 22 and 23 belong.

[45] Even if the Member States have lost the competence to conclude agreements with third countries in a given subject matter, it should be noted that it is nevertheless possible that they are authorized to conclude or sign an agreement with third countries in the interest of the Community. Cf. Council Decision 2003/93/EC of 19 December 2002 authorizing the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsability and measures for the protection of children, *OJ* L 048 21.02.2003, p. 1 or Council Decision 2002/762/EC of 19 September 2002 authorizing the Member States, in the interest of the Community, to sign, ratify or accede to the International Convention on Civil Liability for Bunker Oil Pollution Damage of 2001 (the 'Bunkers Convention'), *OJ* L 256 25.09.2002, p. 7.

[46] See Article 4 of the Brussels II Regulation.

thus in this Regulation, it is the only country that can be regarded as having retained its competence in this matter.[47]

B. External Competence of the European Community in Light of the *ERTA* Case: A Tentative for more General Conclusions in the Field of Private International Law

Apart from the above-mentioned external aspects in Community measures of private international law, it is also possible for the Community to acquire external competence by regulating a certain subject matter so extensively that any parallel action by the individual Member States would be inconceivable, even if the Community measures in question do not deal with external aspects. Indeed, the European Court of Justice has ruled that the capacity of the Community to establish contractual links with third countries arises not only from an express conferral by the Treaty but also from other Treaty provisions and measures adopted by the Community institutions within the framework of those provisions. Whenever the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.[48]

To apply the principles of the *ERTA* case to the field of private international law, it is necessary to determine to what extent the various private international law measures adopted by the Community authorize the Member States to continue negotiating and concluding international conventions, individually or collectively. In a certain respect, this is identical to the question whether or not the Community competence to conclude international conventions is exclusive. In this respect, Lenaerts and Van Ypersele have emphasized that the extent to which a Community competence is exclusive or not must be verified on a case-by-case basis. In particular, it is necessary to answer the question whether a Member State can still act in conformity with the EC Treaty and rules of Community law adopted in conformity with the EC Treaty. According to these authors, it is very difficult to attempt to draw some general conclusions that would shed light on which competences of the European Community should be regarded as exclusive.[49]

---

[47] See, however, Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of foreign judgments in matrimonial matters and in the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, *OJ* L 338 23.12.2003, p. 1, especially Article 11. The entering into force of the Regulation is envisaged for 1 August 2004.

[48] Case 22/70 [1971] *ECR* 263.

[49] LENAERTS K. and VAN YPERSELE P., 'Le principe de subsidiarité et son contexte: étude de l'article 3 B du traité CE', in: *Cahiers de droit européen* 1994, (3) 27.

Nevertheless, the above factors strongly suggest that the European Community has become exclusively competent instead of the Member States in the fields of international jurisdiction of courts and conflict of laws rules determining the applicable law, provided the latter are universal in character. If the Community has adopted measures in those fields – and under the conditions specified for conflict of laws rules – we are of the opinion that the Community has acquired exclusive competence to negotiate and conclude international conventions with third States on the said subject matters. As for Community rules on the recognition of judgments, service of documents and taking of evidence, it appears that the Member States remain competent to establish contractual links with third countries in those fields,[50] provided it is guaranteed that Community rules shall apply in relations between two or more Member States.[51]

For example, if a multilateral convention is concluded in the Hague Conference and that convention contains rules on jurisdiction, in light of the *ERTA* case of the European Court of Justice, it seems obvious that the Member States have lost their capacity to sign or ratify such multilateral convention. From this it follows that, after the entry into force of the Brussels II Regulation, the Member States are no longer entitled to individually sign and ratify the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children. The fact that this Hague Convention contains rules of jurisdiction implies that the Community must ratify the Convention. The Hague Conference has stated that only by ratifying additional protocols would it be possible for regional organizations – in particular the European Community – to become a party to existing Hague conventions which provide that only Member States may become a party to those conventions. Nonetheless, the European Community seems to have another solution in mind,[52]

---

[50] In this respect, the Nineteenth Diplomatic Session of the Hague Conference requested the Secretary General to convene a Special Commission to study the practical operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matter, of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters as well as of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents. This Special Commission was held from 28 October to 4 November 2003 in The Hague.

[51] For instance, if a new Hague Convention on the taking of evidence is concluded, we would defend the view that the Member States remain capable of concluding such a new convention, even after the entry into force of the Regulation on the taking of evidence in civil and commercial matters, provided the Regulation continues to be applied to relations between two or more Member States. The latter could be realized by using a so-called disconnection clause. The same sort of disconnection is envisaged in the Hague Judgments Project.

[52] Cf. Preliminary Document No 14 of June 2001.

i.e., authorizing the Member States to sign or ratify the Hague convention in the interest of the Community.[53]

The application of the *ERTA* case leads to the conclusion that the Member States are no longer free to enter into new agreements with third countries or international organizations in respect of *rules of jurisdiction,* whereas the opposite is true in respect of rules of recognition and enforcement of judgments. Such conclusion seems logical. For example, suppose that France concludes a bilateral agreement with Algeria containing rules of jurisdiction defining when the courts of both countries have jurisdiction to deal with French-Algerian legal relations. This would mean that, under the specific conditions specified in the said bilateral agreement, French courts would be able to have jurisdiction in cases where they normally would not on the basis of Community measures. In such cases, the decisions of the French courts could eventually be subject to recognition and enforcement in other Member States of the Community in compliance with relevant Community rules, such as the Brussels I Regulation. As a result of the bilateral agreement concluded between France and Algeria, the courts of other Member States of the Community would be required to recognize more judgments than if there had been no bilateral agreement. The increase in the jurisdiction of the French courts brought about by the signing of the bilateral agreement causes a corresponding increase in the jurisdiction of the courts of the Member States of the Community and consequently an increase in the number of decisions subject to recognition in the other Member States in compliance with Community rules. On the other hand, a bilateral agreement making it possible for certain cases to be tried by Algerian instead of French courts could possibly undermine the Community rules of jurisdiction.

However, if the bilateral agreement dealt only with the *recognition and enforcement of judgments*, then in our opinion Community measures would not be undermined. For instance, if France were obliged to recognize and enforce Algerian judgments on the basis of such bilateral agreement, the courts of other Member States of the Community would not be affected. Of course, those courts would not be obliged to recognize an Algerian judgment; Community measures on the recognition and enforcement of judgments rendered by courts of other Member States are not applicable in such cases. The Brussels I Regulation, for instance, does not deal with such situations. The fact that Algerian court decisions could be recognized in France on the basis of the French-Algerian agreement does not mean that the Algerian judgments would be entitled to recognition and enforcement in other Member States of the Community. Thus it could be said: '*Reconnaissance sur reconnaissance ne vaut.*'[54]

---

[53] Cf. Council Decision 2003/93/EC of 19 December 2002 authorizing the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, *OJ* L 048 21.02.2003, p. 1

[54] PATAUT E., 'L'exécution des jugements nationaux et la Convention de Bruxelles', in: UNIVERSITE JEAN MOULIN LYON 3. FACULTE DE DROIT. CENTRE D'ETUDES EUROPEENNES

The above-mentioned ideas concerning the extent to which the European Community would be internationally competent to enter into agreements with third countries, together with or instead of the Member States, can be applied to the Hague project for a world-wide judgments convention.[55] In our opinion, the judgments convention should be concluded by the Community together with the Member States (concurrent competence). In the end, of course, only the European Court of Justice can decide to what extent the Member States retain competence to sign agreements with third countries or international organizations in the field of private international law. The Court's answer to the request for an opinion on the question whether the conclusion of the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters falls entirely within the Community's exclusive competence or is a competence shared between the Community and the Member States[56] will probably reveal the direction to be taken by the Court of Justice regarding this subject matter. Strictly speaking, however, it is undoubtedly wise to request a new opinion on the question of the competence to conclude the Hague Judgments Convention, even after the Court of Justice has presented its opinion on the conclusion of the new Lugano Convention.

IV. How the Hague Conference Views its Relation with the European Community

A. Increasing Awareness within the Hague Conference of the Challenges Posed by the Growing Impact of the European Community in the Field of Private International Law

The recent activity of the European Community in the area of private international law in the wake of the Treaty of Amsterdam has certainly not gone unnoticed within the Hague Conference. In this respect, the Hague Conference takes a sub-

(ed.), *Les effets des jugements nationaux dans les autres Etats membres de l'Union européenne*, Brussels 2001, (31) 35. Cf. DE BOER T.M., 'Jurisdiction and Enforcement in International Family Law: A Labyrinth of European and International Legislation', in: *NILR* 2002, (307) 337. *Contra*: BASEDOW J., 'The Communautarization of the Conflict of Laws under the Treaty of Amsterdam' (note 16), 704-705; KOTUBY C., 'External competence of the European Community in the Hague Conference on Private International Law: Community Harmonization and Worldwide Unification', in: *NILR* 2001, (1) 16.

[55] On the progress of this project see also: www.hcch.net.

[56] *OJ* C 101 26.04.2003, p. 1. It was the Council Justice and Home Affairs that decided in its session of 27-28 February 2003 to submit this request for opinion to the European Court of Justice. Cf. JAYME E. and KOHLER C., 'Europäisches Kollisionsrecht 2002. Zur Wiederkehr des Internationalen Privatrechts', in: *IPRax* 2002, (462) 469.

stantially different view of its relationship with the European Community as compared with other international organizations. In 1995 the Permanent Bureau of the Hague Conference did not evaluate the relationship between the Conference and the European Community as positively as those with the United Nations, the Organization of American States, UNIDROIT, the Council of Europe, the Commission internationale de l'état civil or the Commonwealth.[57] In particular, the Permanent Bureau noted a disparity in its 'cooperation' with the European Union: while the European Union participates in the work of the Hague Conference, the work of the European Union in the field of private international law is closed to the Conference.[58]

During the May 2000 session of the Special Commission on General Affairs and Policy of the Conference, the question of the impact of regional integration, especially within the European Union, was raised again. A representative of the European Commission assured that the progress of European regional unification would endanger neither the existence of the Hague Conference nor the important role played by this organization. On the contrary, it was stressed that both organizations should try to find ways to develop a system of co-existence from which each could benefit.[59] The response of the Hague Conference Secretary General Van Loon to the assurances given by the European Commission representative is undoubtedly characteristic of the Permanent Bureau's views of recent developments in the field of private international law within the European Community in that it reflected a certain fear that work of the Hague Conference could be influenced too greatly or even undermined by Community developments. Indeed, the Secretary General confirmed that the Permanent Bureau has always regarded changes within the European Community not as a threat to the Hague Conference but as bringing potential benefit to both the European Community and the Hague Conference on Private International Law. Nonetheless, according to Secretary General Van Loon, the changes within the European Community do represent a challenge since 15 of the Member States of the Conference are also Members of the European Community.[60] Reading in between the lines of this answer, one detects a certain fear that the working methods of the Conference could be affected.

The impact of European regional integration was discussed again during the first part of the nineteenth Session of the Hague Conference. A note drawn up by the Permanent Bureau constituted the basis for the discussion.[61] In addition to the

[57] Preliminary Document No 9 of December 1995.

[58] *Ibid.*

[59] Preliminary Document No 10 of June 2000.

[60] *Ibid.*

[61] Note on the Impact of Regional Integration, in Particular within the European Union, on the Hague Conference and the Hague Conventions, Preliminary Document No 14 of June 2001.

possibility for regional organisations to become party to Hague conventions under negotiation, future Hague conventions and to existing Hague conventions, the note also mentioned the possibility of regional organizations joining the Hague Conference. Until then, several regional and other international organizations – including the European Community – had regularly taken part in the work of the Conference as observers. However, Article 2 of the Statute of the Hague Conference provides that membership is open exclusively to States. As the note correctly stressed, it would be difficult to argue that a regional organization such as the European Community could qualify as a Member State even though all its current Members are members of the organization. In the same note the Permanent Bureau made reference to two other international organisations whose membership is open to regional organisations: the Food and Agriculture Organization of the United Nations (FAO) and the World Trade Organization.

It could be said that, by this act, the Conference put the issue of the membership of the European Community on the political agenda. After all, the Council Justice and Home Affairs approved in its session of 27-28 November 2002 a recommendation authorizing the Commission to open and conduct negotiations with the Hague Conference on Private International Law on the conditions and modalities of accession of the European Community.[62] At the same time, the Council approved a decision authorizing the Commission to open negotiations with the Hague Conference on Private International Law for a convention on the law applicable to certain rights in respect of securities held by an intermediary. The latter Convention was adopted on 13 December 2002.

B. Analysis

An analysis of how the Hague Conference views its relationship with the European Community shows that the relationship between those two international organizations is atypical and is proof of a certain imbalance. Whereas the European Community has almost always participated as an observer in the work of the Conference and the negotiations of Hague Conventions, the opposite is not the case at all. The Conference participated neither in the adoption of the new regulations on the basis of Title IV EC nor in the adoption of the Brussels II Convention on the basis of former Article K.3 of the Treaty on European Union. In other words, when measures in the field of private international law formally emanate from Union or Community institutions, such as the Brussels I Regulation or the Insolvency Regulation, it is not possible for the Conference to be present as an observer in the decision-making process. However, the situation was different in respect of the former Brussels Convention, since that Convention formally emanates from the Member States of the Community. Former Article 220 of the EC Treaty, which formed the legal basis for the adoption of this Convention, provided that the Mem-

[62] Press release 2469 – Council Justice and Home Affairs, 28-29 November 2002.

ber States shall, as far as necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals, *inter alia*, the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards. From this point of view, the European Community merely constitutes a framework within which the Member States must negotiate and conclude international conventions, while playing a certain role in the cooperation between the Member States leading to the conclusion of international conventions referred to in former Article 220 of the EC Treaty.[63] As a result, some authors do not regard those conventions as part of EC law.[64] From this it follows that participation of the Hague Conference as an observer is possible.

Despite the imbalance noted, the impact of the European Community on the work of the Hague Conference is still rather limited. This could, of course, change quickly once the project for a Hague Judgments Convention is finalized. Although the question was raised whether the European Community could become a party to the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, the decision to authorize the Member States to sign that Convention in the interest of the Community[65] avoided the necessity of an additional protocol authorizing the European Community to become a party to that Convention. As for the most recent Hague Convention on the law applicable to certain rights in respect to securities held with an intermediary, Article 18 provides for the possibility for a regional economic integration organization to become a party to the Convention if it has competence over certain matters governed by that

[63] See, *inter alia,* BRÖDERMANN E., 'Europäisches Gemeinschaftsrecht als Quelle und Schranke des Internationalen Privatrechts (Primärrecht, Verordnungen, Richterrecht). Unter besonderer Berücksichtigung des Internationalen Gesellschaftsrechts (Art. 58 EG-Vertrag)', in: BRÖDERMANN E. and IVERSEN H. (eds.), *Europäischen Gemeinschaftsrecht und Internationales Privatrecht*, Tübingen 1994, 45; EKELMANS M., 'La Convention de Bruxelles et le droit communautaire', in: FENTIMAN R., NUYTS A., TAGARAS H. and WATTÉ N. (eds.), *L'espace judiciaire européen en matières civile et commerciale. The European Judicial Area in Civil and Commercial Matters*¸ Brussels 1999, (185) 189-190; FALLON M., 'Les conflits de lois et de juridictions dans un espace économique intégré. L'expérience de la Communauté européenne', in: *Recueil des Cours* 1995, Vol. 253, (9) 164. Cf. ROSSI L.S., 'Sulla base giuridica dell'adesione di Austria, Finlandia e Svezia alle Convenzioni di Bruxelles del 1968 e di Roma del 1980', in: *Diritto dell'Unione europea* 1996, (1125) 1126.

[64] See, *inter alia*, GAJA G., 'Sui rapporti fra la Convenzione di Bruxelles e le altre norme concernenti la giurisdizione ed il riconoscimento di sentenze straniere', in: *Riv. dir. int. priv. proc.* 1991, (253) 259-260; KOHLER C., 'L'article 220 du Traité CEE et les conflits de juridictions en matière de relations familiales: premières réflexions', in: *Riv. dir. int. priv. proc.* 1992, (220) 235. Contra: STRUYCKEN A.V.M., 'Les conséquences de l'intégration européenne sur le développement du droit international privé' (note 44), 295-296; VON HOFFMANN B., 'Richtlinien der Europäischen Gemeinschaft und Internationales Privatrecht', in: *ZfRV* 1995, (45) 48.

[65] See *supra*, note 53.

Convention.[66] In this way the European Community could become a party to a Hague convention for the first time.

V. Principle of Subsidiarity

A. Introduction

Several authors who have focused on this issue maintain that the principle of subsidiarity of Article 5 EC could, in the context of the relationship between the Hague Conference and the European Community, compel the European Community to consider undertaking action at the international level, i.e. within the Hague Conference, instead of taking action itself at the Community level. For instance, Beaumont and Moir argue that the subsidiarity principle should oblige the Union to consider whether action should be taken at international rather than European level. Referring to this principle as 'reverse subsidiarity', the authors cited the technical expertise of the Hague Conference with its practiced and effective personnel and methods as factors definitely in its favor.[67] Other authors expressed hope that the subsidiarity principle as such would keep the European Community from taking action in the field of private international law, leaving the initiative to the Hague Conference.[68]

From the above it follows that the subsidiarity principle could perhaps encourage Member States that have not ratified a Hague convention to do so, instead of the Community adopting a measure in the field covered by that Hague Convention. In this respect, the introductory recitals to 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 can be interpreted as a warning. In the recitals it is stated that, at that time, there was no binding instru-

[66] See the text of this Convention at: www.hcch.net. Cf. Proposal of 15 December 2003 for a Council Decision concerning the signing of the Hague Convention on the law applicable to certain rights in respect of securities held with an intermediary, COM(2003)783, final.

[67] BEAUMONT P. and MOIR G., 'Brussels Convention II: A New Private International Law Instrument in Family Matters for the European Union or the European Community', in: *EL Rev.* 1995, (268) 284.

[68] See, *inter alia*, BOELE-WOELKI K., 'Waarom Brussel II?', in: *Tijdschrift voor Familie- en Jeugdrecht* 1998, (125) 125; BOELE-WOELKI K., 'De toekomst van het IPR na het verdrag van Amsterdam', in: VAN BUREN-DEE J.M., VAN GESTEL M.C. and HONDIUS E.H. (eds.), *Privaatrecht en Gros*, Antwerp 1999, (355) 371; DUINTJER TEBBENS H., 'De Haagse Conferentie, de Europese Gemeenschap en de subsidiariteit', *Nederlands Juristenblad* 1993, (671) 672; SCHULTSZ J.C., 'De Haagse Conferentie voor Internationaal Privaatrecht, 1893-1993', in: *Nederlands Juristenblad* 1993, (659) 668.

ment between the Member States concerning the taking of evidence and that the Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters applied between only 11 Member States of the European Union.[69] We are probably correct in assuming that the authors cited above would have interpreted this as an opportunity to invoke the principle of subsidiarity as a means of encouraging the four remaining Member States to ratify the Hague Convention of 18 March 1970, instead of adopting Regulation 1206/2001 of 28 May 2001.

B. Protocol on the Principle of Subsidiarity

First of all, it should be noted that a Protocol on the application of the principles of subsidiarity and proportionality was adopted together with the Treaty of Amsterdam.[70] This Protocol confirms, *inter alia,* that the criteria referred to in the second paragraph of Article 3b of the Treaty (now Article 5 EC) relate to areas for which the Community does not have exclusive competence and that the principle of subsidiarity provides a guide as to how those powers are to be exercised at Community level. It is also stressed that the principle allows Community action to be expanded within the limits of its powers where the circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified. According to the guidelines[71] in the Protocol, one of the conditions of the principle of subsidiarity is whether the issue under consideration has transnational aspects that cannot be satisfactorily regulated by action undertaken by the Member States. This guideline can, of course, be crucial when it comes to measures in the field of private international law.

Moreover, it follows from the Protocol that the principle of subsidiarity does not play a role in areas for which the European Community has exclusive competence. This is an exclusive competence 'by nature', like the one envisaged in Article 133 EC. On the contrary, the principle of subsidiarity comes into play in

[69] *OJ* L 174 27.06.2001, p. 1.

[70] *OJ* C 340 10.11.1997, p. 105.

[71] Those guidelines clarify the principle of subsidiarity by attempting to make it more concrete; this 'concretization' was called for by some authors who claimed that the formulation of the principle in the Treaty was not always clear. Cf. TANGL S., 'Maastricht's Controversial Subsidiarity Provision and how the Treaty Approaches the Issue of a Decentralised European Union', in: *ELSA L. Rev.* 1995, (12) 16; VAN NUFFEL P., *De rechtsbescherming van overheden in het Europees recht. De beleidsruimte van centrale en decentrale overheden tegen de EG-overheid*, Deventer 2000, 365. The formulation of former Article 3 B of the Treaty could raise the question of whether or not it was sufficient if the Member States altogether could realise the object of an intended Community measure. See PENNINGS F., 'Is the Subsidiarity Principle Useful to Guide the European Integration Process?', in: *Tilburg Foreign Law Review* 1993, (153) 162.

areas for which the Community has acquired exclusive competence after the adoption of Community measures in the area concerned. It is, of course, that sort of exclusive competence that can eventually be exercised in the area of private international law. This means that the principle of subsidiarity can still play a role in judging a potential Community measure even if the Community has acquired exclusive competence in the given area.[72]

C. Justification of Private International Law Community Measures in Light of the Principle of Subsidiarity

When considering the various measures of private international law recently adopted by the Community, one is undoubtedly forced to agree that the mere fact that the requirements of the principle of subsidiarity are met is a rather weak justification for the action taken. In most cases, the statement justifying adoption in light of the principle of subsidiarity is stereotype and very general. In the Brussels II Regulation, as well as in the Regulation on the service of judicial and extrajudicial documents, it is stated in identical terms that, 'in accordance with the principle of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of the Regulation cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community' and that 'the Regulation does not go beyond what is necessary to achieve those objectives'. The same general justification is found in the Brussels I Regulation and the Regulation on cooperation in the taking of evidence. As such, it seems that all that is needed to justify the particular measure is a mere statement by the Community that the conditions of the principle of subsidiarity are met. No further explanation or justification appears to be necessary.[73]

Nevertheless, there is no doubt that a further examination of the private international law rules leads to the conclusion that the requirements of the principle of subsidiarity are effectively fulfilled. Indeed, one could be tempted to say that tackling transnational problems – and the transnational aspect is inherent in the field of private international law – is an objective that by nature cannot be sufficiently realized by the Member States.[74] In that respect, one of the guidelines of the Protocol on the principle of subsidiarity is also complied with. Moreover, it is clear that the objective of the regulations in the field of private international law is the

[72] Cf. BERNARD N., 'The Future of European Economic Law in the Light of the Principle of Subsidiarity', in: *CML Rev.* 1996, (633) 664; LENAERTS K., 'De Europese Unie: doel of middel?', in: *Rechtskundig Weekblad* 1998-99, (689) 701; LENAERTS K. and VAN YPERSELE P. (note 49), 28; SWAINE E.T., 'Subsidiarity and Self-Interest: Federalism at the European Court of Justice', in: *Harv. I.L.J.* 2000, Vol. 41, (1) 73-74.

[73] Cf. the judgment of the European Court of Justice of 9 October 2001, *Kingdom of the Netherlands v. European Parliament*. See No C-377/98 [2001] *ECR* I-7079.

[74] Cf. VAN NUFFEL P. (note 71), 371-372.

integration of conflicts rules. From this point of view, an intervention by the Member States is considered insufficient when the harmonization or integration (of rules of law) is the sole objective of the Community measure in question.[75]

Similarly, if political opposition in a Member State is taken as a criterion for determining that a Member State is lacking capacity and a national intervention is insufficient,[76] then the various private international law measures are justified in light of the principle of subsidiarity. The fact that only 11 Member States had ratified the Hague Convention of 18 March 1970 could undoubtedly be deemed a valid justification of the Regulation on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters. It could be said that the requirements of the principle of subsidiarity were met because not all Member States were ready or able to ratify the Convention. More generally, one could even defend the idea that any measure in the field of private international law based on a provision of the EC Treaty could be justified in light of the principle of subsidiarity.[77]

In this respect, the increased attention paid to the integration of private international law rules since the Treaty of Amsterdam could partly be regarded as a consequence of the principle of subsidiarity. Indeed, certain authors have defended the idea that the principle of subsidiarity – or at least the political context in which the principle is attributed general significance – implies that the Community has intensified its action in the area of private international law instead of being content to harmonize substantive law.[78]

---

[75] VAN NUFFEL P. (note 71), 375.

[76] VAN NUFFEL P. (note 71), 379-380.

[77] Cf. DE LY F., 'Europese Unie en eenvorming internationaal privaatrecht', in: NEDERLANDSE VERENIGING VOOR INTERNATIONAAL PRIVAATRECHT (ed.), *Europees Gemeenschapsrecht en Internationaal Privaatrecht*, Deventer 1996, (3) 24-25; STRUYCKEN A.V.M., 'Les conséquences de l'intégration européenne sur le développement du droit international privé' (note 44), 355.

[78] GAUDEMET-TALLON H. (note 39), 241; GOUNALAKIS G. and RADKE W., 'Das Verhältnis des Internationalen Privatrechts zum Europäischen Gemeinschaftsrecht am Beispiel des Diskriminierungsverbots (Art. 6 EGV), der Niederlassungsfreiheit (Art. 52, 58 EGV) und des Kollisionsrechts der EG-Datenschutzrichtlinie', in: *ZvglRWiss* 1999, (1) 10-11; KREUZER K., 'Internationales Privatrecht und europäische Integration', in BRIESKORN N., MIKAT P., MÜLLER and WILOWEIT D. (eds.), *Vom mittelalterlichen Recht zur neuzeitlichen Rechtswissenschaft. Bedingungen, Wege und Probleme der europäischen Rechtsgeschichte*, Paderborn 1994, (543) 551; ROHE M., 'Binnenmarkt oder Interessenverband? Zum Verhältnis von Binnemarktziel und Subsidiaritätsprinzip nach dem Maastricht-Vertrag', in: *RabelsZ* 1997, (1) 60. Cf. DE MIGUEL ASENSIO P.A., 'Integración europea y derecho internacional privado', in: *Revista de derecho comunitario europeo* 1997, (413) 424; PARTSCH P.E., *Le droit international privé européen. De Rome à Nice*, Brussels 2003, 326-327.

D. Can the Principle of Subsidiarity Be Invoked in Favor of the Hague Conference?

Above it was pointed out that several authors who supported invoking the principle of subsidiarity in favor of the Hague Conference probably would have defended the idea that, instead of adopting the Regulation of 28 May 2001 on the taking of evidence, the four remaining Member States that had not ratified the Hague Convention of 18 March 1970 should have been urged or encouraged to do so. This would have amounted to invoking the principle of subsidiarity in favor of the Hague Conference. Later we saw that, if political opposition in a Member State is taken as a criterion for determining the lack of capacity of that Member State and that a national intervention is insufficient, this could be used as an argument to justify the adoption of the Regulation of 28 May 2001 on the taking of evidence in light of the principle of subsidiarity. At first sight, it seems possible to defend these two opposite ideas by invoking the principle of subsidiarity either in favor of the Hague Conference or in favor of the European Community.

In any case, it appears certain that the existence of the Hague Conference on Private International Law as an international organization and its desire to safeguard its area of work against 'intruders' such as the European Community can as such neither serve interests nor amount to a policy option that could be promoted by the principle of subsidiarity. It is undoubtedly going too far to invoke that principle as a means of securing the area of work of the Hague Conference. Obviously the principle of subsidiarity was not introduced into the EC Treaty for that purpose. After all, the principle of subsidiarity plays a role only in relations between the European Community and the individual Member States or the local authorities of the Member States.[79] Thus the European Community should not care about the interests of the Hague Conference.

Nevertheless, Toth argues that a literal interpretation of the term *Member States* in former Article 3 B of the EC Treaty – now Article 5 EC – may preclude the Community from acting not only when the objectives of the proposed action can be sufficiently achieved by the Member States individually, but also when they can be achieved by intergovernmental co-operation. Such an interpretation, which Toth holds perfectly tenable, would relegate a number of matters to the level of intergovernmental co-operation and would therefore be a major step backwards in the process of integration.[80] Such reasoning makes the interests of the Hague Conference susceptible to protection by the principle of subsidiarity after all, albeit indirectly. For instance, it could mean that the interests of the Member States of the Community vis-à-vis the Hague Conference could be promoted by the principle of

---

[79] VAN NUFFEL P., 'Gebruiksaanwijzing voor subsidiariteit. Een bijsluiter bij de eerste toepassing door het Hof van Justitie', in: *Rechtskundig Weekblad* 1997-98, (273) 293-296.

[80] TOTH A.G., 'The Principle of Subsidiarity in the Maastricht Treaty', in: *CML Rev.* 1992, (1079) 1098-1099.

subsidiarity. However, in our opinion, not only the precursor of the general principle of subsidiarity – Article 130 R (4) of the EC Treaty – but also the European Parliament project for a Treaty on European Union[81] stand in the way of such conclusion.[82] Other authors have already expressed a similar idea.[83] Thus the principle of subsidiarity could be invoked only indirectly in favor of the Hague Conference, i.e., in so far as the principle is invoked successfully in favor of the Member States, thus leaving them a certain degree of freedom to adopt measures of private international law within the Hague Conference. But this possibility seems rather theoretical. Even though the European Community has acquired exclusive competence to enter into international conventions as a result of the jurisprudence of the European Court (*ERTA* case), it seems highly improbable that the principle of subsidiarity could be an obstacle to such an international action by the Community, eventually even outside the Hague Conference.

VI. EC Law as an Obstacle to the Application of Private International Law Rules Originating in the Hague Conference

A. General Remarks

Until now we have focused only on the development of a European private international law and its impact on the Hague Conference, i.e., how the Hague Conference is influenced by private international law rules adopted by the European Community, *inter alia,* on the basis of Title IV EC. In addition, it is important to stress how general EC law, such as the principle of non-discrimination of Article 12 EC and the four freedoms, can constitute an obstacle to the application of private international law rules in Hague conventions. It is well known that general EC law can be an obstacle to the application of national rules of law of the Member States, especially as a result of the supremacy of Community law.[84] In the same

[81] *OJ* C 077 19.03.1984, p. 33.

[82] See also Article I-49 of the Draft Treaty establishing a Constitution for Europe that provides that the Union shall act only if and in so far as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level. Intergovernmental action by the Member States does not constitute a criterion of reference.

[83] LENAERTS K. and VAN YPERSELE P. (note 49), 46-47; VAN NUFFEL P., 'Gebruiksaanwijzing voor subsidiariteit. Een bijsluiter bij de eerste toepassing door het Hof van Justitie' (note 79), 288. Contra: FALLON M. (note 63), 154-155; SCHACK H., 'Das Neue Internationale Eheverfahrensrecht in Europa', in: *RabelsZ* 2001, (613) 619.

[84] Case 6/64 [1964] *ECR* 585 (*Costa v. Enel*).

token, the supremacy of EC law may stand in the way of the application of a Hague convention if any rules of that convention are contrary to the general rules of EC law. Accordingly, the supremacy of EC law comes into play when applying rules of national law, as well as rules of international conventions, including private international law conventions of the Hague Conference.

This is illustrated by the system created under Article 307 EC, which provides, *inter alia,* that the rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaty. However, the supremacy of EC law can play a role in respect of the conventions referred to in Article 307 EC, only if the rights of third countries are not endangered. According to Brödermann, the latter occurs in so-called intra-Community relationships, especially if those conventions contain conflict of law rules.[85] As for conventions concluded after 1 January 1958 or after the accession of a Member State to the European Community, the actions of Member States could in principle be challenged once it is revealed that a Hague convention to which those Member States are a party is in breach of EC law. But even then, the supremacy of EC law will oblige a national judge to refrain from applying the convention in question since, as specified, in Article 307 EC, such conventions have priority only in respect of third States.[86]

In addition, without going into detail, it can be pointed out that the fact that Hague conventions have to pass the test of compatibility with EC law prevents us from pursuing the idea that, due to their abstract character, private international law rules or at least conflict of law rules could not constitute an obstacle to the free movement of persons, goods, services or capital.[87] Examples can be cited where the application of conflict of law rules results in a breach of EC law or, to a lesser degree, is not compatible with EC law. One example is former Article 38 of the

[85] Brödermann E. (note 63), 220-221. Cf. Wilderspin M., 'Le droit international privé des contrats (autres que les contrats conclus par les consommateurs)', in: *Revue des Affaires européennes* 2001-2002, (424) 434.

[86] Cf. Fallon M. (note 63), 156.

[87] See, *inter alia,* Ballarino T., 'Diritto internazionale privato e obblighi di non discriminazione stabiliti da trattati internazionali (con particulare riguardo alle CEE)', in: Grisoli A. (ed.), *L'integrazione economica europea all'inizio degli anni settanta*, Pavia 1973, (115) 125-129; Ballarino T., 'La CEE e il diritto internazionale privato', in: *Dir. comm. scambi int.* 1982, (1) 8-9; Duintjer Tebbens H., 'Les conflits de lois en matière de publicité déloyale à l'épreuve du droit communautaire', in: *Rev. crit. dr. int. pr.* 1994, (451) 474-479; Gebauer M., 'Internationales Privatrecht und Warenverkehrsfreiheit in Europa', in: *IPRax* 1995, (152) 155; Sack R., 'Art. 30, 36 EG-Vertrag und das internationale Wettbewerbrecht', in: *WRP* 1994, (281) 289.

German *Einführungsgesetz zum Bürgerlichen Gesetzbuch (EGBGB).*[88] Several authors maintained that this provision was incompatible with the principle of non-discrimination of the EC Treaty in so far as the application of the provision prevented nationals of other Member States of the Community from invoking the rights guaranteed by that provision.[89] Furthermore, several decisions of the European Court of Justice bear witness to the fact that the application of private international law rules can lead to a breach of Community law.[90] It is therefore reasonable to attempt to determine whether certain conventions of private international law adopted by the Hague Conference could be contrary to the four freedoms or the principle of non-discrimination. Such analysis is undoubtedly important when examining the relationship between the European Community and the Hague Conference.

B. Test of the Compatibility of Hague Conventions with EC Law

Once agreed that that the Hague Conventions must pass the test of compatibility with EC law, it should be stressed that this test can in principle take place in every stage of the process of applying rules of private international law: at the time of qualification, characterization or classification, when determining the appropriate conflict of law rules, addressing *renvoi* and the preliminary question, investigating the application of mandatory rules and applying the public policy exception.

While it might be presumed that EC law has a greater impact on the public policy exception than on the process of qualification[91] it can nevertheless be argued

[88] Former Art. 38 EGBGB read: 'Aus einer in Ausland begangenen unerlaubten Handlung können gegen einen Deutschen nicht weitergehende Ansprüche geltend gemacht werden, als nach den deutschen Gesetzen begründet sind'.

[89] See, *inter alia,* DROBNIG U., 'Verstösst das Staatsangehörigkeitsprinzip gegen das Diskriminierungsverbot des EWG-Vertrages?', in: *RabelsZ* 1970, (636) 660-661; KOCH H., 'Rechtsvergleichung im Internationalen Privatrecht. Wider die Reduktion des IPR aus sich selbst', in: *RabelsZ* 1997, (623) 636; NIESEN H., 'Internationales Privatrecht für unerlaubte Handlungen im Widerspruch zum Diskriminierungsverbot des EWG-Vertrages?', in: *NJW* 1968, (2170) 2171-2172; ROTH W.H., 'Der Einfluß des Europäischen Gemeinschaftsrechts auf das Internationale Privatrecht', in: *RabelsZ* 1991, (623) 642; TAUPITZ J., 'Europäisches Gemeinschaftsrecht versus nationales IPR: Vorgaben der Warenverkehrsfreiheit für den Gestaltungsspielraum des Internationalen Produkthaftungsrechts', in: *ZEuS* 1998, (17) 28-29.

[90] E.g., Case 369/90 [1992] *ECR* I-4239 (*Micheletti*); Case 14/68 [1969] *ECR* 1 (*Wilhelm*). Cf. FISCHER G., 'Gemeinschaftsrecht und Kollisionsrechtliches Staatsangehörigkeitsprinzip', in: VON BAR C. (ed.), *Europäisches Gemeinschaftsrecht und Internationales Privatrecht. Tagung des Instituts für Internationales Privatrecht und Rechtsvergleichung der Fachbereichs Rechtswissenschaften der Universität Osnabrück am 6. und 7. April 1990 in Osnabrück*, Köln 1991, (157) 159-160.

[91] Cf. BRÖDERMANN E. (note 63), 222.

that every national judge of the Member States of the European Community is obliged under Article 10 EC to resolve questions of qualification or characterization and to interpret Hague conventions in a manner that best serves the objectives of the European Community and especially the establishment of an area of freedom, security and justice.[92] Thus one could speak of a sort of qualification *lege communitatis,* instead of a qualification *lege fori* or *lege causae*. In this way the term *civil or commercial matters* in the Hague Conventions of 1 March 1954 and 18 March 1970 or in other Hague conventions could be interpreted in light of the identical term in the Brussels Convention of 1968, the Brussels I Regulation, as well as the Regulation on the taking of evidence. Moreover, such an interpretation would be advantageous not only for the European Community and the realization of its objectives but would also lead to greater uniformity in the application of Hague conventions, at least in the Member States. Similarly, one could plead that the term *maintenance obligations* in the Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations should be interpreted in the same way as the identical term in Article 5(2) of the Brussels Convention, which is now found in Article 5(2) of the Brussels I Regulation.[93]

Leaving aside *renvoi* and the preliminary question, we turn to the application of private international law rules in Hague conventions but limit ourselves to two examples, which make it clear that the application of Hague conventions can be contrary to the principle of non-discrimination of the EC Treaty or one of the four freedoms.

The first example is taken from the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Although this Convention will no longer be applicable between the Member States of the European Community except Denmark after the entry into force of the Regulation of 29 May 2000 on the service of documents, there are situations in which the Convention appears to be contrary to EC law if applied in connection with certain national procedures for service, especially the French system of *remise au parquet.* According to Article 684 of the *Nouveau code de procédure civile,* a *remise au parquet* may be chosen if the person to be served is domiciled abroad. The same system exists apparently in Greek law.[94] On

[92] Cf. EPINEY A. and FELDER A., 'Europäischer Wirtschaftsraum und Europäische Gemeinschaft: Parallelen und Divergenzen in Rechtsordnung und Auslegung', in: *ZvglRWiss* 2001, (425) 427. Contra: HAUSMANN R., 'Der Unterhaltsbegriff in Staatsverträgen des internationalen Privat- und Verfahrensrecht', in: *IPRax* 1990, (382) 389.

[93] Jayme and Kohler referred to qualification conflicts between this Hague Convention and the Brussels Convention. See JAYME E. and KOHLER C., 'Das Internationale Privat- und Verfahrensrecht der EG – Stand 1989', in: *IPRax* 1989, (337)345-346.

[94] See ROTH H., 'Remise au parquet und Auslandzustellung nach dem Haager Zustellungsübereinkommen von 1965', in: *IPRax* 2000, (497) 498. Cf. LINDACHER W.F., 'Europäisches Zustellungsrecht – Die VO (EG) Nr. 1348/2000: Fortschritt, Auslegungsbedarf, Problemausblendung', in: *ZZP* 2001, (179) 189-190.

12 March 1999 the German *Oberlandesgericht* Karlsruhe decided in a judgment supported by extensive reasons that the system of the *remise au parquet* could be in breach of the principle of non-discrimination of the EC Treaty.[95] The German Court found that this system of service, in which the person to be served is legally presumed to have taken note of the document in question once it is serviced to the *parquet*, would obviously affect more foreign than French nationals. Although the system of the *remise au parquet* as such is not contrary to the Hague Convention of 15 November 1965,[96] in our opinion, the fact that the system of document service is held to be contrary to the principle of non-discrimination of the EC Treaty implies that this incompatibility necessarily extends to the Hague Convention itself. To some extent, it can be said that the infringement of EC law by the French *remise au parquet* is derived from the Hague Convention itself. In other words, the Hague Convention can also be deemed to be accessory to the infringement of the principle of non-discrimination.

The second example is taken from the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. One of the leading principles of that Convention is found in Article 12, which reads:

> 'Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.'[97]

In principle, the authority has no discretion once it is established that a period of less than a year has elapsed from the date of the wrongful removal or retention of the child concerned. Nevertheless, the French *Tribunal de grande instance* of Périgueux found that the mechanism of Article 12 forcing a judge to order the return of a child removed for a period of less than a year since the date of the wrongful removal or retention was contrary to the free movement of persons of the EC Treaty.[98] In this case, both parents were British citizens, divorced in the United Kingdom. The British judge had granted custody to the mother but obliged her to raise the child in England or Wales. The mother later moved to France and took the child with her. After proceedings had been initiated by the procureur de la République, the French Court ruled in favor of the mother. According to the Court,

---

[95] OLG Karlsruhe 12 March 1999, in: *RIW* 1999, 538.

[96] OLG Düsseldorf 19 October 1984, in: *IPRax* 1985, 289; OLG Munich 28 September 1988, in: *IPRax* 1999, 111.

[97] Paragraph 1 of Article 12.

[98] Tribunal de grande instance Périgueux 17 March 1992, in: *D.* 1992, 315, obs. G.C., *Clunet* 1993, 938, obs. GAUDEMET-TALLON H., in: *JCP* 1993, no. 22104, 316, obs. CLAY T. and in: *Rev. crit. dr. int. pr.* 1993, 650, obs. ANCEL B.

ordering the return of the child in compliance with Article 12 of the Hague Convention of 25 October 1980 would result in a denial of the child's mother's fundamental freedom. The obligation to raise the child in England or Wales was held by the Court to be in violation of the EC Treaty. The French Court based its decision not to apply the Hague Convention of 25 October 1980 on the free movement of persons. Thus it can also be said that, in the given circumstances, the Court of Périgueux found the Convention to be contrary to EC law.[99]

This case is certainly proof that different fundamental interests can come into play in the same case and be in conflict with each other. On the one hand, the child's mother seeks to protect her interests by invoking the free movement of persons guaranteed by the EC Treaty, whereas the child can claim protection of its interests under the New York Convention on the Rights of the Child. The conflict between the Hague Convention of 25 October 1980 and the EC Treaty can also be regarded as a conflict between the interests of mother and child. In the above case, the interests of the child should undoubtedly take precedence. The French Court's decision not to apply the Hague Convention and not to order the return of the child would be acceptable from the point of view of the Convention on the Rights of the Child only if it is established that the Court acted in the best interests of the child when deciding not to order its return. Such reasoning, however, is not found in the French judgment, thus making it subject to criticism.

Finally, we turn to the public policy exception as an example of how EC law can be an obstacle to the application of Hague conventions. In keeping with what was said above regarding the question of qualification or characterization, it follows from Article 10 EC that every national judge is obliged to invoke the public policy exception in Hague conventions in a Community-friendly way. This would mean that the public policy exception in Hague conventions is not invoked in relations with another Member State of the Community to a greater extent than it would be under the Brussels Convention or the Brussels I Regulation. More than twenty years ago Steindorff had already referred to Article 10 EC when maintaining that a judge of a Member State should be able to invoke the general public policy exception of German law only in exceptional circumstances to reject application of the law of another Member State.[100] In our opinion, there is no reason why

---

[99] It is probably not surprising that some authors welcomed the judgment of the Court of Périgueux more than others. See, e.g., CLAY T., obs. under Tribunal de grande instance Périgueux 17 March 1992, in: *JCP* no. 22104, (317) 318. Critical are, *inter alia,* ANCEL B., obs. under Tribunal de grande instance Périgueux 17 March 1992 and Cass. fr. 16 July 1993, *Rev. crit. dr. int. pr.* 1993, (658) 662-663; GAUDEMET-TALLON H., obs. under Tribunal de grande instance Périgueux 17 March 1992, in: *Clunet* 1993, (941) 944.

[100] See STEINDORFF E., 'Europäisches Gemeinschaftsrecht und deutsches Internationales Privatrecht. Ein Beitrag zum ordre public und zur Sonderanknüpfung zwingenden Rechts', in: *Europarecht* 1981, (426) 439-440. Cf. KÖTZ H., 'Die Rechtsvergleichung im Dienste der europäischen Rechtsvereinheitlichung', in: *RabelsZ* 1951, (387) 393; DE MIGUEL ASENSIO P.A. (note 78), 443.

the same practice could not apply to the public policy exception of the Hague conventions in relations between Member States of the Community.

VII. Possible Scenario Depicting Future Relations between the European Community and the Hague Conference

We have analyzed the two-fold impact of the European Community on private international law rules of the Hague Conference: when the European Community adopts its own conflicts rules and when general rules of EC law are an obstacle to the application of private international law rules of Hague conventions. The following is an attempt to draft a brief scenario depicting the best possible development of future relations between the European Community and the Hague Conference. The purpose of the scenario is to prevent the European Community from becoming the Hague Conference's 'dagger of death'.[101]

The point of departure is undoubtedly a feeling of discomfort in light of the consequences of the jurisprudence of the European Court of Justice in the *ERTA* case. The fact that the effects of such decisions are in constant flux depending on the extent to which the European Community adopts its own measures (of private international law) is a source of insecurity for both the Community and its Member States, as well as for third countries. Third countries often doubt whether the Member States are still interlocutors at the international level or whether the European Community has assumed the role for itself or will act together with the Member States. Before commencing negotiations on a particular subject, the stand taken by the European Court in the *ERTA* case requires the actors to determine which actor has competence at the international level. Eventually it could be necessary to request an opinion of the European Court of Justice clarifying that point; however, that would be time-consuming.

This scenario purports to find a possibility for a suitable coexistence between the two international organizations that would be of mutual benefit for both.[102] Accordingly, it aims at promoting a regional integration of private interna-

[101] This is an allusion to the 'Todestoß für die Haager Konferenz' mentioned by Jayme. See JAYME E, 'Zum Jahrtausendwechsel: das Kollisionsrecht zwischen Postmoderne und Futurismus', in: *IPRax* 2000, (165) 167.

[102] Cf. POLAK M.V. and VAN DEN EECKHOUT V., 'Kroniek van het internationaal privaatrecht', in: *Nederlands Juristenblad* 2001, (507) 507.

tional law that does not undermine the global unification or integration of private international law.[103]

Having regard for the jurisprudence of the European Court in the *ERTA* case, one could first propose increasing the external competence of the European Community. In our view, this would provide the engine needed to speed up the development of a European private international law in a way that would also benefit the position of the Hague Conference. Thus we support the idea that promoting the process of European integration by granting the European Community greater external competence in the whole field of private international law could be a positive factor, providing input for progress in the Hague Conference as well. The Opinion of the Court of Justice of 26 April 1977[104] could be a source of inspiration for strengthing the external competence of the Community. In its Opinion the Court acknowledged that, even if internal measures have not yet been adopted, the power to bind the Community vis-à-vis third countries can also emanate by implication from the provisions of the Treaty creating internal competence in so far as the participation of the Community in the international agreement is necessary for the attainment of one of the objectives of the Community. Accordingly, it can be argued that each time the Hague Conference drafts a private international law convention, it is necessary for the Community to participate in the adoption of the convention with the aim of achieving the goal of Article 65 EC, i.e. the establishment of an area of freedom, security and justice. Contrary to the jurisprudence in the *ERTA* case, in our opinion the European Community should have external competence in the field of private international law, even if it has not adopted internal measures for the particular subject matter. Such external competence of the European Community could be compared to a certain extent to the external competence of the Community in the field of common commercial policy.[105] In order to establish such external competence, it would be necessary not to interpret the conditions of Opinion 1/76 restrictively.

Ideally, securing greater external competence should be based on a modification of the EC Treaty[106] as it is very unlikely that the proposed changes could be

---

[103] Cf. BOELE-WOELKI K., 'De toekommst van het IPR na het verdrag van Amsterdam' (note 68), 372.

[104] Opinion 1/76 [1977], in: *ECR* 741.

[105] See Article 133 EC.

[106] The Draft Treaty establishing a Constitution for Europe is in this respect not fundamentally different from the EC Treaty itself. According to Article 13(1), the Union shall share competence with the Member States where the Constitution confers on it a competence which does not relate to the areas referred to in Articles 12 (exclusive competence) and 16 (areas of supporting, coordinating or complementary action). However, Article 12(2) provides that the Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, is necessary to enable it to exercise its internal competence, or affects an international Union act. As for the judicial cooperation in civil matters Article III-170(1)

effected merely on the basis of changes in the jurisprudence of the European Court of Justice. Furthermore, some institutional changes would also be necessary. First of all, an enlargement of the external competence of the Community in the field of private international law should go hand in hand with the full participation of the European Parliament in the treaty-making process. To date, the approval of the European Parliament is not needed for international conventions in the field of private international law, and the Treaty of Nice did not change that regime.[107] Secondly, the special committee provided for in Article 300 EC[108] should be composed of persons having expertise in the field of private international law, thus ensuring high quality of the proposed measures. In the past, several authors have regretted that the quality of conflict of law rules in the Hague Conference has sometimes been lacking in the European Union.[109] Finally, it is uncertain whether the composition of the court, i.e., only one judge per Member State,[110] would be sufficient to handle the increase in the number of requests for preliminary rulings in the field of private international law that would likely follow.

Parallel to these institutional changes within the European Union, the Hague Conference should also adapt itself to be prepared to work hand in hand with a Community equipped with greater external competence. In addition to making it possible for the European Community – or other regional organizations – to become a party to Hague conventions,[111] the Conference should also modify its statute, enabling the European Community or other regional economic organiza-

provides that the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and decisions in extrajudicial cases and that such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States. In comparison with Article 65 EC, the second paragraph lists some additional topics belonging to the field of judicial cooperation in civil matters. Moreover, all references to the internal market and to the free movement of persons have been deleted. Furthermore, the full application of the preliminary procedure is provided for, rejecting the special regime found in Article 68 EC.

[107] According to Article III-227(7)(e) of the Draft Treaty establishing a Constitution for Europe, the European Parliament's consent shall be required for agreements covering fields for which the legislative procedure applies.

[108] Cf. Article III-227(5) of the Draft Treaty establishing a Constitution for Europe that provides that the Council of Ministers may address negotiating directives to the Union's negotiator and may designate a special committee with which the negotiations must be conducted.

[109] Cf. LEIBLE S. and STAUDINGER A. (note 24), 235; REMIEN O. (note 13), 73.

[110] Article 221 EC.

[111] Cf. Article 18 of the recent Hague Convention on the law applicable to certain rights in respect to securities held with an intermediary, which, as we have seen, provides for the possibility for regional economic integration organizations to become a party to the Convention if it has competence over certain matters governed by that Convention.

tions to become members of the Hague Conference.[112] This would entail modifying Article 2 of its Statute. Moreover, if one agrees that the European Community should have exclusive competence in the field of private international law, it would no longer seem logical to require the usual vote of approval for the admission of new members, as provided by Article 2 of the Statute of the Conference, in order for the European Community to be admitted as a member. Since the European Community would have replaced its Member States as a member of the Conference, submitting the admission of the European Community to a vote would indirectly amount to a new vote on the admission of the constituent Member States of the European Community. Although a modification of the Statute of the Hague Conference requires the approval of third States that are not members of the European Community, it nevertheless would not be logical to submit the admission of the European Community to the membership of the Conference to a new vote. Accordingly, Article 2 of the Statute would have to be modified in this respect as well. Moreover, it is necessary to think about the consequences for the Conference budget and the voting mechanism applied by the Conference when drafting new conventions. Finally, the admission of the European Community as a member of the Conference – eventually instead of its Member States – would make it necessary to rethink the role played by the Dutch government and the Dutch State Commission in the operations of the Hague Conference.[113] The plea for a greater external competence of the European Community – and in the end for Community membership in the Hague Conference – is undoubtedly unreconcilable with the prominent role of the Dutch government in the operations of the Conference. Hence, appropriate modifications of the Statute would be required in this respect as well.

These ideas on the development of the relations between the two international organizations and the unpretentious proposals to modify the Statute of the Conference and carry out other institutional changes within both organizations are, of course, subject to criticism. Nevertheless, it is our hope that they could contribute to a reconciliation between the two different models of integration characterizing the European Community on the one hand and the Hague Conference on the other. Whereas some authors regard the process of European integration as futuristic because it is characterized by what is called velocity,[114] the Hague

---

[112] See also the approval by the Council Justice and Home Affairs in its session of 27-28 November 2002 of a recommendation in order to authorize the Commission to open and conduct negotiations with the Hague Conference on Private International Law on the conditions and modalities of accession of the European Community.

[113] See Articles 3, 4 and 5 of the Statute.

[114] JAYME E., 'Zum Jahrtausendwechsel: das Kollisionsrecht zwischen Postmoderne und Futurismus' (note 101), 167; JAYME E. and KOHLER C., 'Europäisches Kollisionsrecht 2001: Anerkennungsprinzip statt IPR?', in: *IPRax* 2001, (501) 501.

Conference has been called a typical example of post-modernism.[115] For example, in the Brussels II Regulation, the family status of a person is treated more or less in the same way as if it were a good or service. The application of the principle of free movement to family status can be regarded as an attempt to complement the four freedoms. In essence, it makes it possible to choose the forum in which a divorce can be most easily obtained and guarantees that the divorce will be recognized in all other Member States.[116] This is undoubtedly an illustration of the unrelenting speed of futurism. In the Hague Conference, on the other hand, one detects the respect for the cultural identity of a person that characterizes post-modernism, for example, in Article 4(b) of the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. That article requires the competent authorities of the State of origin of the child to first give due consideration to the possibility of placing the child within the State of origin before deciding whether an intercountry adoption is in the child's best interests. Preference is thus given to the placement of the child in its country of origin.[117]

It appears that this division is not a strict one as aspects of post-modernism can also be detected in some Community measures of private international law.[118] Nevertheless, it can be said that the futurism of the European Community and the post-modernism of the Hague Conference confront each other in the relations of the two organizations. If conflicts were to arise between post-modernism, which is globally characteristic of the process of integration of private international law rules in the Hague Conference on the one hand, and futurism that is generally found to be characteristic of the regional integration of private international law rules by the European Community on the other, a greater external competence of the European Community in private international law, as pleaded for here, could in some way play a reconciliatory role in future conflicts between the two integration models: between post-modernism and futurism. If one agrees that the Community should be granted the necessary competence to participate in the universal integra-

[115] JAYME E., 'Zum Jahrtausendwechsel: das Kollisionsrecht zwischen Postmoderne und Futurismus' (note 101), 168.

[116] JAYME E., 'Le droit international privé du nouveau millénaire: la protection de la personne humaine face à la globalisation', in: *Recueil des Cours* 2000, Vol. 282, (9) 23-24.

[117] See, *inter alia,* JAYME E., 'Internationales Privatrecht und postmoderne Kultur', *ZfRV* 1997, (230) 234; JAYME E., 'Zum Jahrtausendwechsel: das Kollisionsrecht zwischen Postmoderne und Futurismus' (note 101), 168.

[118] E.g., Article 9 of Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (*OJ* L 280 29.10.1994, p. 83), which Jayme nevertheless regards as a post-modern private international law rule. See JAYME E., 'Identité culturelle et intégration: le droit international privé postmoderne. Cours général de droit international privé', in: *Recueil des Cours* 1995, Vol. 251, (9) 249.

tion of private international law rules within the Hague Conference, even without internal measures adopted by the Community, this would give the Community the opportunity to play a role in the universal integration of private international law, thus encouraging it to respect the cultural identity of all persons involved in transnational legal relationships. Such development would ultimately guarantee that the regional integration of private international law would be incorporated into the universal integration of private international law.

However, such a result can be achieved only if the area of freedom, security and justice is truly governed by the rule of law. Only then can the Community strive for an integration model that differs from the current one. In the new integration model, the integration of law would become an end in itself and the economic aspect would not necessarily play the crucial or decisive role. Again, however, the precondition is the realization of the rule of law in the area of freedom, security and justice. *Iustitia est fundamentum regnorum*. This also applies to the European Community.

TEXTS, MATERIALS AND RECENT DEVELOPMENTS

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

CONVENTION ON THE LAW APPLICABLE TO CERTAIN RIGHTS IN RESPECT OF SECURITIES HELD WITH AN INTERMEDIARY*

The States signatory to the present Convention,

Aware of the urgent practical need in a large and growing global financial market to provide legal certainty and predictability as to the law applicable to securities that are now commonly held through clearing and settlement systems or other intermediaries,

Conscious of the importance of reducing legal risk, systemic risk and associated costs in relation to cross-border transactions involving securities held with an intermediary so as to facilitate the international flow of capital and access to capital markets,

Desiring to establish common provisions on the law applicable to securities held with an intermediary beneficial to States at all levels of economic development,

Recognising that the 'Place of the Relevant Intermediary Approach' (or PRIMA) as determined by account agreements with intermediaries provides the necessary legal certainty and predictability,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

---

* The text of the Convention is published on the website of the Hague Conference at: http://www.hcch.net.

Yearbook of Private International Law, Volume 5 (2003), pp. 261-276
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

CHAPTER I
DEFINITIONS AND SCOPE OF APPLICATION

Article 1
Definitions and interpretation

1. In this Convention –

   a) 'securities' means any shares, bonds or other financial instruments or financial assets (other than cash), or any interest therein;

   b) 'securities account' means an account maintained by an intermediary to which securities may be credited or debited;

   c) 'intermediary' means a person that in the course of a business or other regular activity maintains securities accounts for others or both for others and for its own account and is acting in that capacity;

   d) 'account holder' means a person in whose name an intermediary maintains a securities account;

   e) 'account agreement' means, in relation to a securities account, the agreement with the relevant intermediary governing that securities account;

   f) 'securities held with an intermediary' means the rights of an account holder resulting from a credit of securities to a securities account;

   g) 'relevant intermediary' means the intermediary that maintains the securities account for the account holder;

   h) 'disposition' means any transfer of title whether outright or by way of security and any grant of a security interest, whether possessory or non-possessory;

   i) 'perfection' means completion of any steps necessary to render a disposition effective against persons who are not parties to that disposition;

   j) 'office' means, in relation to an intermediary, a place of business at which any of the activities of the intermediary are carried on, excluding a place of business which is intended to be merely temporary and a place of business of any person other than the intermediary;

   k) 'insolvency proceeding' means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the debtor are subject to control or supervision by a court

or other competent authority for the purpose of reorganisation or liquidation;

l) 'insolvency administrator' means a person authorised to administer a reorganisation or liquidation, including one authorised on an interim basis, and includes a debtor in possession if permitted by the applicable insolvency law;

m) 'Multi-unit State' means a State within which two or more territorial units of that State, or both the State and one or more of its territorial units, have their own rules of law in respect of any of the issues specified in Article 2(1);

n) 'writing' and 'written' mean a record of information (including information communicated by teletransmission) which is in tangible or other form and is capable of being reproduced in tangible form on a subsequent occasion.

2. References in this Convention to a disposition of securities held with an intermediary include –

a) a disposition of a securities account;

b) a disposition in favour of the account holder's intermediary;

c) a lien by operation of law in favour of the account holder's intermediary in respect of any claim arising in connection with the maintenance and operation of a securities account.

3. A person shall not be considered an intermediary for the purposes of this Convention merely because –

a) it acts as registrar or transfer agent for an issuer of securities; or

b) it records in its own books details of securities credited to securities accounts maintained by an intermediary in the names of other persons for whom it acts as manager or agent or otherwise in a purely administrative capacity.

4. Subject to paragraph (5), a person shall be regarded as an intermediary for the purposes of this Convention in relation to securities which are credited to securities accounts which it maintains in the capacity of a central securities depository or which are otherwise transferable by book entry across securities accounts which it maintains.

5. In relation to securities which are credited to securities accounts maintained by a person in the capacity of operator of a system for the holding and transfer of such securities on records of the issuer or other records which consti-

tute the primary record of entitlement to them as against the issuer, the Contracting State under whose law those securities are constituted may, at any time, make a declaration that the person which operates that system shall not be an intermediary for the purposes of this Convention.

Article 2
Scope of the Convention and of the applicable law

1. This Convention determines the law applicable to the following issues in respect of securities held with an intermediary –
   a) the legal nature and effects against the intermediary and third parties of the rights resulting from a credit of securities to a securities account;
   b) the legal nature and effects against the intermediary and third parties of a disposition of securities held with an intermediary;
   c) the requirements, if any, for perfection of a disposition of securities held with an intermediary;
   d) whether a person's interest in securities held with an intermediary extinguishes or has priority over another person's interest;
   e) the duties, if any, of an intermediary to a person other than the account holder who asserts in competition with the account holder or another person an interest in securities held with that intermediary;
   f) the requirements, if any, for the realisation of an interest in securities held with an intermediary;
   g) whether a disposition of securities held with an intermediary extends to entitlements to dividends, income, or other distributions, or to redemption, sale or other proceeds.

2. This Convention determines the law applicable to the issues specified in paragraph (1) in relation to a disposition of or an interest in securities held with an intermediary even if the rights resulting from the credit of those securities to a securities account are determined in accordance with paragraph (1)(a) to be contractual in nature.

3. Subject to paragraph (2), this Convention does not determine the law applicable to –
   a) the rights and duties arising from the credit of securities to a securities account to the extent that such rights or duties are purely contractual or otherwise purely personal;
   b) the contractual or other personal rights and duties of parties to a disposition of securities held with an intermediary; or

c) the rights and duties of an issuer of securities or of an issuer's registrar or transfer agent, whether in relation to the holder of the securities or any other person.

Article 3
Internationality

This Convention applies in all cases involving a choice between the laws of different States.

CHAPTER II
APPLICABLE LAW

Article 4
Primary rule

1. The law applicable to all the issues specified in Article 2(1) is the law in force in the State expressly agreed in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that another law is applicable to all such issues, that other law. The law designated in accordance with this provision applies only if the relevant intermediary has, at the time of the agreement, an office in that State, which –

   a) alone or together with other offices of the relevant intermediary or with other persons acting for the relevant intermediary in that or another State –

      i) effects or monitors entries to securities accounts;

      ii) administers payments or corporate actions relating to securities held with the intermediary; or

      iii) is otherwise engaged in a business or other regular activity of maintaining securities accounts; or

   b) is identified by an account number, bank code, or other specific means of identification as maintaining securities accounts in that State.

2. For the purposes of paragraph (1)(a), an office is not engaged in a business or other regular activity of maintaining securities accounts –

   a) merely because it is a place where the technology supporting the bookkeeping or data processing for securities accounts is located;

b) merely because it is a place where call centres for communication with account holders are located or operated;

c) merely because it is a place where the mailing relating to securities accounts is organised or files or archives are located; or

d) if it engages solely in representational functions or administrative functions, other than those related to the opening or maintenance of securities accounts, and does not have authority to make any binding decision to enter into any account agreement.

3. In relation to a disposition by an account holder of securities held with a particular intermediary in favour of that intermediary, whether or not that intermediary maintains a securities account on its own records for which it is the account holder, for the purposes of this Convention –

a) that intermediary is the relevant intermediary;

b) the account agreement between the account holder and that intermediary is the relevant account agreement;

c) the securities account for the purposes of Article 5(2) and (3) is the securities account to which the securities are credited immediately before the disposition.

Article 5
Fall-back rules

1. If the applicable law is not determined under Article 4, but it is expressly and unambiguously stated in a written account agreement that the relevant intermediary entered into the account agreement through a particular office, the law applicable to all the issues specified in Article 2(1) is the law in force in the State, or the territorial unit of a Multi-unit State, in which that office was then located, provided that such office then satisfied the condition specified in the second sentence of Article 4(1). In determining whether an account agreement expressly and unambiguously states that the relevant intermediary entered into the account agreement through a particular office, none of the following shall be considered –

a) a provision that notices or other documents shall or may be served on the relevant intermediary at that office;

b) a provision that legal proceedings shall or may be instituted against the relevant intermediary in a particular State or in a particular territorial unit of a Multi-unit State;

c) a provision that any statement or other document shall or may be provided by the relevant intermediary from that office;

d) a provision that any service shall or may be provided by the relevant intermediary from that office;

e) a provision that any operation or function shall or may be carried on or performed by the relevant intermediary at that office.

2. If the applicable law is not determined under paragraph (1), that law is the law in force in the State, or the territorial unit of a Multi-unit State, under whose law the relevant intermediary is incorporated or otherwise organised at the time the written account agreement is entered into or, if there is no such agreement, at the time the securities account was opened; if, however, the relevant intermediary is incorporated or otherwise organised under the law of a Multi-unit State and not that of one of its territorial units, the applicable law is the law in force in the territorial unit of that Multi-unit State in which the relevant intermediary has its place of business, or, if the relevant intermediary has more than one place of business, its principal place of business, at the time the written account agreement is entered into or, if there is no such agreement, at the time the securities account was opened.

3. If the applicable law is not determined under either paragraph (1) or paragraph (2), that law is the law in force in the State, or the territorial unit of a Multi-unit State, in which the relevant intermediary has its place of business, or, if the relevant intermediary has more than one place of business, its principal place of business, at the time the written account agreement is entered into or, if there is no such agreement, at the time the securities account was opened.

Article 6
Factors to be disregarded

In determining the applicable law in accordance with this Convention, no account shall be taken of the following factors –

a) the place where the issuer of the securities is incorporated or otherwise organised or has its statutory seat or registered office, central administration or place or principal place of business;

b) the places where certificates representing or evidencing securities are located;

c) the place where a register of holders of securities maintained by or on behalf of the issuer of the securities is located; or

d) the place where any intermediary other than the relevant intermediary is located.

Article 7
Protection of rights on change of the applicable law

1. This Article applies if an account agreement is amended so as to change the applicable law under this Convention.

2. In this Article –
   a) 'the new law' means the law applicable under this Convention after the change;
   b) 'the old law' means the law applicable under this Convention before the change.

3. Subject to paragraph (4), the new law governs all the issues specified in Article 2(1).

4. Except with respect to a person who has consented to a change of law, the old law continues to govern –
   a) the existence of an interest in securities held with an intermediary arising before the change of law and the perfection of a disposition of those securities made before the change of law;
   b) with respect to an interest in securities held with an intermediary arising before the change of law –
      i) the legal nature and effects of such an interest against the relevant intermediary and any party to a disposition of those securities made before the change of law;
      ii) the legal nature and effects of such an interest against a person who after the change of law attaches the securities;
      iii) the determination of all the issues specified in Article 2(1) with respect to an insolvency administrator in an insolvency proceeding opened after the change of law;
   c) priority as between parties whose interests arose before the change of law.

5. Paragraph (4)(c) does not preclude the application of the new law to the priority of an interest that arose under the old law but is perfected under the new law.

Article 8
Insolvency

1. Notwithstanding the opening of an insolvency proceeding, the law applicable under this Convention governs all the issues specified in Article 2(1) with respect to any event that has occurred before the opening of that insolvency proceeding.

2. Nothing in this Convention affects the application of any substantive or procedural insolvency rules, including any rules relating to –
   a) the ranking of categories of claim or the avoidance of a disposition as a preference or a transfer in fraud of creditors; or
   b) the enforcement of rights after the opening of an insolvency proceeding.

CHAPTER III
GENERAL PROVISIONS

Article 9
General applicability of the Convention

This Convention applies whether or not the applicable law is that of a Contracting State.

Article 10
Exclusion of choice of law rules (renvoi)

In this Convention, the term 'law' means the law in force in a State other than its choice of law rules.

Article 11
Public policy and internationally mandatory rules

1. The application of the law determined under this Convention may be refused only if the effects of its application would be manifestly contrary to the public policy of the forum.

2. This Convention does not prevent the application of those provisions of the law of the forum which, irrespective of rules of conflict of laws, must be applied even to international situations.

3. This Article does not permit the application of provisions of the law of the forum imposing requirements with respect to perfection or relating to priorities between competing interests, unless the law of the forum is the applicable law under this Convention.

Article 12
Determination of the applicable law for Multi-unit States

1. If the account holder and the relevant intermediary have agreed on the law of a specified territorial unit of a Multi-unit State –
   a) the references to 'State' in the first sentence of Article 4(1) are to that territorial unit;
   b) the references to 'that State' in the second sentence of Article 4(1) are to the Multi-unit State itself.

2. In applying this Convention –
   a) the law in force in a territorial unit of a Multi-unit State includes both the law of that unit and, to the extent applicable in that unit, the law of the Multi-unit State itself;
   b) if the law in force in a territorial unit of a Multi-unit State designates the law of another territorial unit of that State to govern perfection by public filing, recording or registration, the law of that other territorial unit governs that issue.

3. A Multi-unit State may, at the time of signature, ratification, acceptance, approval or accession, make a declaration that if, under Article 5, the applicable law is that of the Multi-unit State or one of its territorial units, the internal choice of law rules in force in that Multi-unit State shall determine whether the substantive rules of law of that Multi-unit State or of a particular territorial unit of that Multi-unit State shall apply. A Multi-unit State that makes such a declaration shall communicate information concerning the content of those internal choice of law rules to the Permanent Bureau of the Hague Conference on Private International Law.

4. A Multi-unit State may, at any time, make a declaration that if, under Article 4, the applicable law is that of one of its territorial units, the law of that territorial unit applies only if the relevant intermediary has an office within that territorial unit which satisfies the condition specified in the second sentence of Article 4(1). Such a declaration shall have no effect on dispositions made before that declaration becomes effective.

Article 13
Uniform interpretation

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

Article 14
Review of practical operation of the Convention

The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission to review the practical operation of this Convention and to consider whether any amendments to this Convention are desirable.

CHAPTER IV
TRANSITION PROVISIONS

Article 15
Priority between pre-Convention and post-Convention interests

In a Contracting State, the law applicable under this Convention determines whether a person's interest in securities held with an intermediary acquired after this Convention entered into force for that State extinguishes or has priority over another person's interest acquired before this Convention entered into force for that State.

Article 16
Pre-Convention account agreements and securities accounts

1. References in this Convention to an account agreement include an account agreement entered into before this Convention entered into force in accordance with Article 19(1). References in this Convention to a securities account include a securities account opened before this Convention entered into force in accordance with Article 19(1).

2. Unless an account agreement contains an express reference to this Convention, the courts of a Contracting State shall apply paragraphs (3) and (4) in applying Article 4(1) with respect to account agreements entered into before the entry into force of this Convention for that State in accordance with Article 19. A Contracting State may, at the time of signature, ratification, acceptance, approval or accession, make a declaration that its courts shall not

apply those paragraphs with respect to account agreements entered into after the entry into force of this Convention in accordance with Article 19(1) but before the entry into force of this Convention for that State in accordance with Article 19(2). If the Contracting State is a Multi-unit State, it may make such a declaration with respect to any of its territorial units.

3. Any express terms of an account agreement which would have the effect, under the rules of the State whose law governs that agreement, that the law in force in a particular State, or a territorial unit of a particular Multi-unit State, applies to any of the issues specified in Article 2(1), shall have the effect that such law governs all the issues specified in Article 2(1), provided that the relevant intermediary had, at the time the agreement was entered into, an office in that State which satisfied the condition specified in the second sentence of Article 4(1). A Contracting State may, at the time of signature, ratification, acceptance, approval or accession, make a declaration that its courts shall not apply this paragraph with respect to an account agreement described in this paragraph in which the parties have expressly agreed that the securities account is maintained in a different State. If the Contracting State is a Multi-unit State, it may make such a declaration with respect to any of its territorial units.

4. If the parties to an account agreement, other than an agreement to which paragraph (3) applies, have agreed that the securities account is maintained in a particular State, or a territorial unit of a particular Multi-unit State, the law in force in that State or territorial unit is the law applicable to all the issues specified in Article 2(1), provided that the relevant intermediary had, at the time the agreement was entered into, an office in that State which satisfied the condition specified in the second sentence of Article 4(1). Such an agreement may be express or implied from the terms of the contract considered as a whole or from the surrounding circumstances.

CHAPTER V
FINAL CLAUSES

Article 17
Signature, ratification, acceptance, approval or accession

1. This Convention shall be open for signature by all States.

2. This Convention is subject to ratification, acceptance or approval by the signatory States.

3. Any State which does not sign this Convention may accede to it at any time.

4. The instruments of ratification, acceptance, approval or accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, Depositary of this Convention.

Article 18
Regional Economic Integration Organisations

1. A Regional Economic Integration Organisation which is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that that Organisation has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the Regional Economic Integration Organisation shall not count as a Contracting State in addition to its Member States which are Contracting States.

2. The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the Depositary in writing specifying the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Regional Economic Integration Organisation shall promptly notify the Depositary in writing of any changes to the distribution of competence specified in the notice in accordance with this paragraph and any new transfer of competence.

3. Any reference to a 'Contracting State' or 'Contracting States' in this Convention applies equally to a Regional Economic Integration Organisation where the context so requires.

Article 19
Entry into force

1. This Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Article 17.

2. Thereafter this Convention shall enter into force –

a) for each State or Regional Economic Integration Organisation referred to in Article 18 subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;

b) for a territorial unit to which this Convention has been extended in accordance with Article 20(1), on the first day of the month following the expiration of three months after the notification of the declaration referred to in that Article.

Article 20
Multi-unit States

1. A Multi-unit State may, at the time of signature, ratification, acceptance, approval or accession, make a declaration that this Convention shall extend to all its territorial units or only to one or more of them.

2. Any such declaration shall state expressly the territorial units to which this Convention applies.

3. If a State makes no declaration under paragraph (1), this Convention extends to all territorial units of that State.

Article 21
Reservations

No reservation to this Convention shall be permitted.

Article 22
Declarations

For the purposes of Articles 1(5), 12(3) and (4), 16(2) and (3) and 20 –

a) any declaration shall be notified in writing to the Depositary;

b) any Contracting State may modify a declaration by submitting a new declaration at any time;

c) any Contracting State may withdraw a declaration at any time;

d) any declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned; any declaration made at a subsequent time and any new declaration shall take effect on the first day of the month following the expiration of

three months after the date on which the Depositary made the notification in accordance with Article 24;

e) a withdrawal of a declaration shall take effect on the first day of the month following the expiration of six months after the date on which the Depositary made the notification in accordance with Article 24.

Article 23
Denunciation

1. A Contracting State may denounce this Convention by a notification in writing to the Depositary. The denunciation may be limited to certain territorial units of a Multi-unit State to which this Convention applies.

2. The denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the Depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the Depositary.

Article 24
Notifications by the Depositary

The Depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles 17 and 18, of the following –

a) the signatures and ratifications, acceptances, approvals and accessions referred to in Articles 17 and 18;

b) the date on which this Convention enters into force in accordance with Article 19;

c) the declarations and withdrawals of declarations referred to in Article 22;

d) the notifications referred to in Article 18(2);

e) the denunciations referred to in Article 23.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the […] day of […] 20[…], in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Member States of the Hague Conference on Private International Law as of the date of its Nineteenth Session and to each State which participated in that Session.

COUNCIL REGULATION (EC) No. 2201/2003 of 27 November 2003

CONCERNING JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN MATRIMONIAL MATTERS AND THE MATTERS OF PARENTAL RESPONSIBILITY, REPEALING REGULATION (EC) No. 1347/2000[*]

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) thereof,
Having regard to the proposal from the Commission,[1]
Having regard to the opinion of the European Parliament,[2]
Having regard to the opinion of the European Economic and Social Committee,[3]

Whereas:

(1) The European Community has set the objective of creating an area of freedom, security and justice, in which the free movement of persons is ensured. To this end, the Community is to adopt, among others, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market.

(2) The Tampere European Council endorsed the principle of mutual recognition of judicial decisions as the cornerstone for the creation of a genuine judicial area, and identified visiting rights as a priority.

(3) Council Regulation (EC) No 1347/2000[4] sets out rules on jurisdiction, recognition and enforcement of judgments in matrimonial matters and

---

[*] This text is published in *OJ*, L 338, 23 December 2003, pp. 1-29.

[1] *OJ*, C 203 E, 27.8.2002, p. 155.

[2] Opinion delivered on 20 September 2002 (not yet published in the *OJ*).

[3] *OJ*, C 61, 14.3.2003, p. 76.

[4] *OJ*, L 160, 30.6.2000, p. 19.

Yearbook of Private International Law, Volume 5 (2003), pp. 277-314
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

matters of parental responsibility for the children of both spouses rendered on the occasion of the matrimonial proceedings. The content of this Regulation was substantially taken over from the Convention of 28 May 1998 on the same subject matter.[5]

(4) On 3 July 2000 France presented an initiative for a Council Regulation on the mutual enforcement of judgments on rights of access to children.[6]

(5) In order to ensure equality for all children, this Regulation covers all decisions on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding.

(6) Since the application of the rules on parental responsibility often arises in the context of matrimonial proceedings, it is more appropriate to have a single instrument for matters of divorce and parental responsibility.

(7) The scope of this Regulation covers civil matters, whatever the nature of the court or tribunal.

(8) As regards judgments on divorce, legal separation or marriage annulment, this Regulation should apply only to the dissolution of matrimonial ties and should not deal with issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures.

(9) As regards the property of the child, this Regulation should apply only to measures for the protection of the child, i.e. (i) the designation and functions of a person or body having charge of the child's property, representing or assisting the child, and (ii) the administration, conservation or disposal of the child's property. In this context, this Regulation should, for instance, apply in cases where the parents are in dispute as regards the administration of the child's property. Measures relating to the child's property which do not concern the protection of the child should continue to be governed by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction

---

[5] At the time of the adoption of Regulation (EC) No 1347/2000 the Council took note of the explanatory report concerning that Convention prepared by Professor Alegría Borrás (*OJ*, C 221, 16.7.1998, p. 27).

[6] *OJ*, C 234, 15.8.2000, p. 7.

and the recognition and enforcement of judgments in civil and commercial matters.[7]

(10) This Regulation is not intended to apply to matters relating to social security, public measures of a general nature in matters of education or health or to decisions on the right of asylum and on immigration. In addition it does not apply to the establishment of parenthood, since this is a different matter from the attribution of parental responsibility, nor to other questions linked to the status of persons. Moreover, it does not apply to measures taken as a result of criminal offences committed by children.

(11) Maintenance obligations are excluded from the scope of this Regulation as these are already covered by Council Regulation No 44/2001. The courts having jurisdiction under this Regulation will generally have jurisdiction to rule on maintenance obligations by application of Article 5(2) of Council Regulation No 44/2001.

(12) The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility.

(13) In the interest of the child, this Regulation allows, by way of exception and under certain conditions, that the court having jurisdiction may transfer a case to a court of another Member State if this court is better placed to hear the case. However, in this case the second court should not be allowed to transfer the case to a third court.

(14) This Regulation should have effect without prejudice to the application of public international law concerning diplomatic immunities. Where jurisdiction under this Regulation cannot be exercised by reason of the existence of diplomatic immunity in accordance with international law, jurisdiction should be exercised in accordance with national law in a Member State in which the person concerned does not enjoy such immunity.

---

[7] *OJ*, L 12, 16.1.2001, p. 1. Regulation as last amended by Commission Regulation (EC) No 1496/2002 (*OJ* L 225, 22.8.2002, p. 13).

(15) Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters[8] should apply to the service of documents in proceedings instituted pursuant to this Regulation.

(16) This Regulation should not prevent the courts of a Member State from taking provisional, including protective measures, in urgent cases, with regard to persons or property situated in that State.

(17) In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention of 25 October 1980 would continue to apply as complemented by the provisions of this Regulation, in particular Article 11. The courts of the Member State to or in which the child has been wrongfully removed or retained should be able to oppose his or her return in specific, duly justified cases. However, such a decision could be replaced by a subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention. Should that judgment entail the return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained.

(18) Where a court has decided not to return a child on the basis of Article 13 of the 1980 Hague Convention, it should inform the court having jurisdiction or central authority in the Member State where the child was habitually resident prior to the wrongful removal or retention. Unless the court in the latter Member State has been seised, this court or the central authority should notify the parties. This obligation should not prevent the central authority from also notifying the relevant public authorities in accordance with national law.

(19) The hearing of the child plays an important role in the application of this Regulation, although this instrument is not intended to modify national procedures applicable.

(20) The hearing of a child in another Member State may take place under the arrangements laid down in Council Regulation (EC) No 1206/2001 of

[8] *OJ*, L 160, 30.6.2000, p. 37.

28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.[9]

(21) The recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required.

(22) Authentic instruments and agreements between parties that are enforceable in one Member State should be treated as equivalent to 'judgments' for the purpose of the application of the rules on recognition and enforcement.

(23) The Tampere European Council considered in its conclusions (point 34) that judgments in the field of family litigation should be 'automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement'. This is why judgments on rights of access and judgments on return that have been certified in the Member State of origin in accordance with the provisions of this Regulation should be recognised and enforceable in all other Member States without any further procedure being required. Arrangements for the enforcement of such judgments continue to be governed by national law.

(24) The certificate issued to facilitate enforcement of the judgment should not be subject to appeal. It should be rectified only where there is a material error, i.e. where it does not correctly reflect the judgment.

(25) Central authorities should cooperate both in general matter and in specific cases, including for purposes of promoting the amicable resolution of family disputes, in matters of parental responsibility. To this end central authorities shall participate in the European Judicial Network in civil and commercial matters created by Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters.[10]

(26) The Commission should make publicly available and update the lists of courts and redress procedures communicated by the Member States.

---

[9] *OJ*, L 174, 27.6.2001, p. 1.

[10] *OJ*, L 174, 27.6.2001, p. 25.

(27) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission.[11]

(28) This Regulation replaces Regulation (EC) No 1347/2000 which is consequently repealed.

(29) For the proper functioning of this Regulation, the Commission should review its application and propose such amendments as may appear necessary.

(30) 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 the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(31) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and 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.

(32) Since the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(33) This Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the European Union,

HAS ADOPTED THE PRESENT REGULATION:

---

[11] *OJ*, L 184, 17.7.1999, p. 23.

CHAPTER I
SCOPE AND DEFINITIONS

Article 1
Scope

1. This Regulation shall apply, whatever the nature of the court or tribunal, in civil matters relating to:
   (a) divorce, legal separation or marriage annulment;
   (b) the attribution, exercise, delegation, restriction or termination of parental responsibility.

2. The matters referred to in paragraph 1(b) may, in particular, deal with:
   (a) rights of custody and rights of access;
   (b) guardianship, curatorship and similar institutions;
   (c) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;
   (d) the placement of the child in a foster family or in institutional care;
   (e) measures for the protection of the child relating to the administration, conservation or disposal of the child's property.

3. This Regulation shall not apply to:
   (a) the establishment or contesting of a parent-child relationship;
   (b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;
   (c) the name and forenames of the child;
   (d) emancipation;
   (e) maintenance obligations;
   (f) trusts or succession;
   (g) measures taken as a result of criminal offences committed by children.

Article 2
Definitions

For the purposes of this Regulation:

1. the term ‘court’ shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1;

2. the term ‘judge’ shall mean the judge or an official having powers equivalent to those of a judge in the matters falling within the scope of the Regulation;

3. the term ‘Member State’ shall mean all Member States with the exception of Denmark;

4. the term ‘judgment’ shall mean a divorce, legal separation or marriage annulment, as well as a judgment relating to parental responsibility, pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision;

5. the term ‘Member State of origin’ shall mean the Member State where the judgment to be enforced was issued;

6. the term ‘Member State of enforcement’ shall mean the Member State where enforcement of the judgment is sought;

7. the term ‘parental responsibility’ shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access;

8. the term ‘holder of parental responsibility’ shall mean any person having parental responsibility over a child;

9. the term ‘rights of custody’ shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence;

10. the term ‘rights of access’ shall include in particular the right to take a child to a place other than his or her habitual residence for a limited period of time;

11. the term ‘wrongful removal or retention’ shall mean a child's removal or retention where:

    (a) it is in breach of rights of custody acquired by judgment or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention;

    and

    (b) provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.

CHAPTER II
JURISDICTION

SECTION 1
DIVORCE, LEGAL SEPARATION AND MARRIAGE ANNULMENT

Article 3
General jurisdiction

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

   (a) in whose territory:
   - the spouses are habitually resident, or
   - the spouses were last habitually resident, insofar as one of them still resides there, or
   - the respondent is habitually resident, or
   - in the event of a joint application, either of the spouses is habitually resident, or
   - the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
   - the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her 'domicile' there;

   (b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the 'domicile' of both spouses.

2. For the purpose of this Regulation, 'domicile' shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland.

Article 4
Counterclaim

The court in which proceedings are pending on the basis of Article 3 shall also have jurisdiction to examine a counterclaim, insofar as the latter comes within the scope of this Regulation.

Article 5
Conversion of legal separation into divorce

Without prejudice to Article 3, a court of a Member State that has given a judgment on a legal separation shall also have jurisdiction for converting that judgment into a divorce, if the law of that Member State so provides.

Article 6
Exclusive nature of jurisdiction under Articles 3, 4 and 5

A spouse who:

(a) is habitually resident in the territory of a Member State; or
(b) is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her 'domicile' in the territory of one of the latter Member States,

may be sued in another Member State only in accordance with Articles 3, 4 and 5.

Article 7
Residual jurisdiction

1. Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that State.

2. As against a respondent who is not habitually resident and is not either a national of a Member State or, in the case of the United Kingdom and Ireland, does not have his 'domicile' within the territory of one of the latter Member States, any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State.

SECTION 2
PARENTAL RESPONSIBILITY

Article 8
General jurisdiction

1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.

2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12.

Article 9
Continuing jurisdiction of the child's former habitual residence

1. Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence.

2. Paragraph 1 shall not apply if the holder of access rights referred to in paragraph 1 has accepted the jurisdiction of the courts of the Member State of the child's new habitual residence by participating in proceedings before those courts without contesting their jurisdiction.

Article 10
Jurisdiction in cases of child abduction

In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:

(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention;

or

(b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:
   (i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;
   (ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);

(iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);

(iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.

Article 11
Return of the child

1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter 'the 1980 Hague Convention'), in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

2. When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

3. A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law.
Without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged.

4. A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.

5. A court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard.

6. If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-

return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.

7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.
   Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.

8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.

Article 12
Prorogation of jurisdiction

1. The courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where:
   (a) at least one of the spouses has parental responsibility in relation to the child;
   and
   (b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised, and is in the superior interests of the child.

2. The jurisdiction conferred in paragraph 1 shall cease as soon as:
   (a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final;

(b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in (a), a judgment in these proceedings has become final;

(c) the proceedings referred to in (a) and (b) have come to an end for another reason.

3. The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 where:

   (a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State;

   and

   (b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child.

4. Where the child has his or her habitual residence in the territory of a third State which is not a contracting party to the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, jurisdiction under this Article shall be deemed to be in the child's interest, in particular if it is found impossible to hold proceedings in the third State in question.

Article 13
Jurisdiction based on the child's presence

1. Where a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article 12, the courts of the Member State where the child is present shall have jurisdiction.

2. Paragraph 1 shall also apply to refugee children or children internationally displaced because of disturbances occurring in their country.

Article 14
Residual jurisdiction

Where no court of a Member State has jurisdiction pursuant to Articles 8 to 13, jurisdiction shall be determined, in each Member State, by the laws of that State.

Article 15
Transfer to a court better placed to hear the case

1. By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:
   (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or
   (b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.

2. Paragraph 1 shall apply:
   (a) upon application from a party; or
   (b) of the court's own motion; or
   (c) upon application from a court of another Member State with which the child has a particular connection, in accordance with paragraph 3.
   A transfer made of the court's own motion or by application of a court of another Member State must be accepted by at least one of the parties.

3. The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State:
   (a) has become the habitual residence of the child after the court referred to in paragraph 1 was seised; or
   (b) is the former habitual residence of the child; or
   (c) is the place of the child's nationality; or
   (d) is the habitual residence of a holder of parental responsibility; or
   (e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.

4. The court of the Member State having jurisdiction as to the substance of the matter shall set a time limit by which the courts of that other Member State shall be seised in accordance with paragraph 1.
   If the courts are not seised by that time, the court which has been seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

5. The courts of that other Member State may, where due to the specific circumstances of the case, this is in the best interests of the child, accept jurisdiction within six weeks of their seisure in accordance with para-

graph 1(a) or 1(b). In this case, the court first seised shall decline jurisdiction. Otherwise, the court first seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

6. The courts shall cooperate for the purposes of this Article, either directly or through the central authorities designated pursuant to Article 53.

SECTION 3
COMMON PROVISIONS

Article 16
Seising of a Court

1. A court shall be deemed to be seised:

    (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent;

    or

    (b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

Article 17
Examination as to jurisdiction

Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of its own motion that it has no jurisdiction.

Article 18
Examination as to admissibility

1. Where a respondent habitually resident in a State other than the Member State where the action was brought does not enter an appearance, the court with jurisdiction shall stay the proceedings so long as it is not shown that the respondent has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to

arrange for his defence, or that all necessary steps have been taken to this end.

2. Article 19 of Regulation (EC) No 1348/2000 shall apply instead of the provisions of paragraph 1 of this Article if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that Regulation.

3. Where the provisions of Regulation (EC) No 1348/2000 are not applicable, Article 15 of the Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant to that Convention.

Article 19
Lis pendens *and dependent actions*

1. Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.
In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised.

Article 20
Provisional, including protective, measures

1. In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the

court of another Member State has jurisdiction as to the substance of the matter.

2. The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.

CHAPTER III
RECOGNITION AND ENFORCEMENT

SECTION 1
RECOGNITION

Article 21
Recognition of a judgment

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. In particular, and without prejudice to paragraph 3, no special procedure shall be required for updating the civil-status records of a Member State on the basis of a judgment relating to divorce, legal separation or marriage annulment given in another Member State, and against which no further appeal lies under the law of that Member State.

3. Without prejudice to Section 4 of this Chapter, any interested party may, in accordance with the procedures provided for in Section 2 of this Chapter, apply for a decision that the judgment be or not be recognised.
The local jurisdiction of the court appearing in the list notified by each Member State to the Commission pursuant to Article 68 shall be determined by the internal law of the Member State in which proceedings for recognition or non-recognition are brought.

4. Where the recognition of a judgment is raised as an incidental question in a court of a Member State, that court may determine that issue.

Article 22
Grounds of non-recognition for judgments relating to divorce, legal separation or marriage annulment

A judgment relating to a divorce, legal separation or marriage annulment shall not be recognised:

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought;

(b) where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally;

(c) if it is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought; or

(d) if it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

Article 23
Grounds of non-recognition for judgments relating to parental responsibility

A judgment relating to parental responsibility shall not be recognised:

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;

(b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;

(c) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;

(d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;

(e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;

(f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

or

(g) if the procedure laid down in Article 56 has not been complied with.

Article 24
Prohibition of review of jurisdiction of the court of origin

The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Articles 22(a) and 23(a) may not be applied to the rules relating to jurisdiction set out in Articles 3 to 14.

Article 25
Differences in applicable law

The recognition of a judgment may not be refused because the law of the Member State in which such recognition is sought would not allow divorce, legal separation or marriage annulment on the same facts.

Article 26
Non-review as to substance

Under no circumstances may a judgment be reviewed as to its substance.

Article 27
Stay of proceedings

1. A court of a Member State in which recognition is sought of a judgment given in another Member State may stay the proceedings if an ordinary appeal against the judgment has been lodged.

2. A court of a Member State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the Member State of origin by reason of an appeal.

SECTION 2
APPLICATION FOR A DECLARATION OF ENFORCEABILITY

Article 28
Enforceable judgments

1. A judgment on the exercise of parental responsibility in respect of a child given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland or in Northern Ireland only when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

Article 29
Jurisdiction of local courts

1. An application for a declaration of enforceability shall be submitted to the court appearing in the list notified by each Member State to the Commission pursuant to Article 68.

2. The local jurisdiction shall be determined by reference to the place of habitual residence of the person against whom enforcement is sought or by reference to the habitual residence of any child to whom the application relates.
   Where neither of the places referred to in the first subparagraph can be found in the Member State of enforcement, the local jurisdiction shall be determined by reference to the place of enforcement.

Article 30
Procedure

1. The procedure for making the application shall be governed by the law of the Member State of enforcement.

2. The applicant must give an address for service within the area of jurisdiction of the court applied to. However, if the law of the Member State of enforcement does not provide for the furnishing of such an address, the applicant shall appoint a representative ad litem.

3. The documents referred to in Articles 37 and 39 shall be attached to the application.

Article 31
Decision of the court

1. The court applied to shall give its decision without delay. Neither the person against whom enforcement is sought, nor the child shall, at this stage of the proceedings, be entitled to make any submissions on the application.

2. The application may be refused only for one of the reasons specified in Articles 22, 23 and 24.

3. Under no circumstances may a judgment be reviewed as to its substance.

Article 32
Notice of the decision

The appropriate officer of the court shall without delay bring to the notice of the applicant the decision given on the application in accordance with the procedure laid down by the law of the Member State of enforcement.

Article 33
Appeal against the decision

1. The decision on the application for a declaration of enforceability may be appealed against by either party.

2. The appeal shall be lodged with the court appearing in the list notified by each Member State to the Commission pursuant to Article 68.

3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.

4. If the appeal is brought by the applicant for a declaration of enforceability, the party against whom enforcement is sought shall be summoned to appear before the appellate court. If such person fails to appear, the provisions of Article 18 shall apply.

5. An appeal against a declaration of enforceability must be lodged within one month of service thereof. If the party against whom enforcement is sought is habitually resident in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him or at his residence. No extension of time may be granted on account of distance.

Article 34
Courts of appeal and means of contest

The judgment given on appeal may be contested only by the proceedings referred to in the list notified by each Member State to the Commission pursuant to Article 68.

Article 35
Stay of proceedings

1. The court with which the appeal is lodged under Articles 33 or 34 may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged in the Member State of origin, or if the time for such appeal has not yet expired. In the latter case, the court may specify the time within which an appeal is to be lodged.

2. Where the judgment was given in Ireland or the United Kingdom, any form of appeal available in the Member State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1.

Article 36
Partial enforcement

1. Where a judgment has been given in respect of several matters and enforcement cannot be authorised for all of them, the court shall authorise enforcement for one or more of them.

2. An applicant may request partial enforcement of a judgment.

SECTION 3
PROVISIONS COMMON TO SECTIONS 1 AND 2

Article 37
Documents

1. A party seeking or contesting recognition or applying for a declaration of enforceability shall produce:

   (a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity;

   and

   (b) the certificate referred to in Article 39.

2. In addition, in the case of a judgment given in default, the party seeking recognition or applying for a declaration of enforceability shall produce:
   (a) the original or certified true copy of the document which establishes that the defaulting party was served with the document instituting the proceedings or with an equivalent document;

   or

   (b) any document indicating that the defendant has accepted the judgment unequivocally.

Article 38
Absence of documents

1. If the documents specified in Article 37(1)(b) or (2) are not produced, the court may specify a time for their production, accept equivalent documents or, if it considers that it has sufficient information before it, dispense with their production.

2. If the court so requires, a translation of such documents shall be furnished. The translation shall be certified by a person qualified to do so in one of the Member States.

Article 39
Certificate concerning judgments in matrimonial matters and certificate concerning judgments on parental responsibility

The competent court or authority of a Member State of origin shall, at the request of any interested party, issue a certificate using the standard form set out in Annex I (judgments in matrimonial matters) or in Annex II (judgments on parental responsibility).

SECTION 4
ENFORCEABILITY OF CERTAIN JUDGMENTS CONCERNING RIGHTS OF ACCESS AND OF CERTAIN JUDGMENTS WHICH REQUIRE THE RETURN OF THE CHILD

Article 40
Scope

1. This Section shall apply to:
   (a) rights of access;

and

(b) he return of a child entailed by a judgment given pursuant to Article 11(8).

2. The provisions of this Section shall not prevent a holder of parental responsibility from seeking recognition and enforcement of a judgment in accordance with the provisions in Sections 1 and 2 of this Chapter.

Article 41
Rights of access

1. The rights of access referred to in Article 40(1)(a) granted in an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.
Even if national law does not provide for enforceability by operation of law of a judgment granting access rights, the court of origin may declare that the judgment shall be enforceable, notwithstanding any appeal.

2. The judge of origin shall issue the certificate referred to in paragraph 1 using the standard form in Annex III (certificate concerning rights of access) only if:

(a) where the judgment was given in default, the person defaulting was served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defense, or, the person has been served with the document but not in compliance with these conditions, it is nevertheless established that he or she accepted the decision unequivocally;

(b) all parties concerned were given an opportunity to be heard;

and

(c) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity.

The certificate shall be completed in the language of the judgment.

3. Where the rights of access involve a cross-border situation at the time of the delivery of the judgment, the certificate shall be issued ex officio when the judgment becomes enforceable, even if only provisionally. If the situation

subsequently acquires a cross-border character, the certificate shall be issued at the request of one of the parties.

Article 42
Return of the child

1. The return of a child referred to in Article 40(1)(b) entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.
   Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child mentioned in Article 11(b)(8), the court of origin may declare the judgment enforceable.

2. The judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph 1 only if:
   (a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity;
   (b) the parties were given an opportunity to be heard; and
   (c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.

   In the event that the court or any other authority takes measures to ensure the protection of the child after its return to the State of habitual residence, the certificate shall contain details of such measures.
   The judge of origin shall of his or her own motion issue that certificate using the standard form in Annex IV (certificate concerning return of the child(ren)).
   The certificate shall be completed in the language of the judgment.

Article 43
Rectification of the certificate

1. The law of the Member State of origin shall be applicable to any rectification of the certificate.

2. No appeal shall lie against the issuing of a certificate pursuant to Articles 41(1) or 42(1).

Article 44
Effects of the certificate

The certificate shall take effect only within the limits of the enforceability of the judgment.

Article 45
Documents

1. A party seeking enforcement of a judgment shall produce:

   (a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity;

   and

   (b) the certificate referred to in Article 41(1) or Article 42(1).

2. For the purposes of this Article,

   - the certificate referred to in Article 41(1) shall be accompanied by a translation of point 12 relating to the arrangements for exercising right of access,
   - the certificate referred to in Article 42(1) shall be accompanied by a translation of its point 14 relating to the arrangements for implementing the measures taken to ensure the child's return.

   The translation shall be into the official language or one of the official languages of the Member State of enforcement or any other language that the Member State of enforcement expressly accepts. The translation shall be certified by a person qualified to do so in one of the Member States.

SECTION 5
AUTHENTIC INSTRUMENTS AND AGREEMENTS

Article 46

Documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also agreements between the parties that are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments.

SECTION 6
OTHER PROVISIONS

Article 47
Enforcement procedure

1. The enforcement procedure is governed by the law of the Member State of enforcement.

2. Any judgment delivered by a court of another Member State and declared to be enforceable in accordance with Section 2 or certified in accordance with Article 41(1) or Article 42(1) shall be enforced in the Member State of enforcement in the same conditions as if it had been delivered in that Member State.
   In particular, a judgment which has been certified according to Article 41(1) or Article 42(1) cannot be enforced if it is irreconcilable with a subsequent enforceable judgment.

Article 48
Practical arrangements for the exercise of rights of access

1. The courts of the Member State of enforcement may make practical arrangements for organising the exercise of rights of access, if the necessary arrangements have not or have not sufficiently been made in the judgment delivered by the courts of the Member State having jurisdiction as to the substance of the matter and provided the essential elements of this judgment are respected.

2. The practical arrangements made pursuant to paragraph 1 shall cease to apply pursuant to a later judgment by the courts of the Member State having jurisdiction as to the substance of the matter.

Article 49
Costs

The provisions of this Chapter, with the exception of Section 4, shall also apply to the determination of the amount of costs and expenses of proceedings under this Regulation and to the enforcement of any order concerning such costs and expenses.

Article 50
Legal aid

An applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in the procedures provided for in Articles 21, 28, 41, 42 and 48 to benefit from the most favourable legal aid or the most extensive exemption from costs and expenses provided for by the law of the Member State of enforcement.

Article 51
Security, bond or deposit

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for enforcement of a judgment given in another Member State on the following grounds:

(a) that he or she is not habitually resident in the Member State in which enforcement is sought; or

(b) that he or she is either a foreign national or, where enforcement is sought in either the United Kingdom or Ireland, does not have his or her 'domicile' in either of those Member States.

Article 52
Legalisation or other similar formality

No legalisation or other similar formality shall be required in respect of the documents referred to in Articles 37, 38 and 45 or in respect of a document appointing a representative ad litem.

CHAPTER IV
COOPERATION BETWEEN CENTRAL AUTHORITIES IN MATTERS OF PARENTAL RESPONSIBILITY

Article 53
Designation

Each Member State shall designate one or more central authorities to assist with the application of this Regulation and shall specify the geographical or functional jurisdiction of each. Where a Member State has designated more than one central authority, communications shall normally be sent direct to the relevant central authority with jurisdiction. Where a communication is sent to a central authority

without jurisdiction, the latter shall be responsible for forwarding it to the central authority with jurisdiction and informing the sender accordingly.

Article 54
General functions

The central authorities shall communicate information on national laws and procedures and take measures to improve the application of this Regulation and strengthening their cooperation. For this purpose the European Judicial Network in civil and commercial matters created by Decision No 2001/470/EC shall be used.

Article 55
Cooperation on cases specific to parental responsibility

The central authorities shall, upon request from a central authority of another Member State or from a holder of parental responsibility, cooperate on specific cases to achieve the purposes of this Regulation. To this end, they shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to:

(a) collect and exchange information:
  (i) on the situation of the child;
  (ii) on any procedures under way; or
  (iii) on decisions taken concerning the child;
(b) provide information and assistance to holders of parental responsibility seeking the recognition and enforcement of decisions on their territory, in particular concerning rights of access and the return of the child;
(c) facilitate communications between courts, in particular for the application of Article 11(6) and (7) and Article 15;
(d) provide such information and assistance as is needed by courts to apply Article 56; and
(e) facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end.

Article 56
Placement of a child in another Member State

1. Where a court having jurisdiction under Articles 8 to 15 contemplates the placement of a child in institutional care or with a foster family and where such placement is to take place in another Member State, it shall first con-

sult the central authority or other authority having jurisdiction in the latter State where public authority intervention in that Member State is required for domestic cases of child placement.

2. The judgment on placement referred to in paragraph 1 may be made in the requesting State only if the competent authority of the requested State has consented to the placement.

3. The procedures for consultation or consent referred to in paragraphs 1 and 2 shall be governed by the national law of the requested State.

4. Where the authority having jurisdiction under Articles 8 to 15 decides to place the child in a foster family, and where such placement is to take place in another Member State and where no public authority intervention is required in the latter Member State for domestic cases of child placement, it shall so inform the central authority or other authority having jurisdiction in the latter State.

Article 57
Working method

1. Any holder of parental responsibility may submit, to the central authority of the Member State of his or her habitual residence or to the central authority of the Member State where the child is habitually resident or present, a request for assistance as mentioned in Article 55. In general, the request shall include all available information of relevance to its enforcement. Where the request for assistance concerns the recognition or enforcement of a judgment on parental responsibility that falls within the scope of this Regulation, the holder of parental responsibility shall attach the relevant certificates provided for in Articles 39, 41(1) or 42(1).

2. Member States shall communicate to the Commission the official language or languages of the Community institutions other than their own in which communications to the central authorities can be accepted.

3. The assistance provided by the central authorities pursuant to Article 55 shall be free of charge.

4. Each central authority shall bear its own costs.

Article 58
Meetings

1. In order to facilitate the application of this Regulation, central authorities shall meet regularly.
2. These meetings shall be convened in compliance with Decision No 2001/470/EC establishing a European Judicial Network in civil and commercial matters.

CHAPTER V
RELATIONS WITH OTHER INSTRUMENTS

Article 59
Relation with other instruments

1. Subject to the provisions of Articles 60, 63, 64 and paragraph 2 of this Article, this Regulation shall, for the Member States, supersede conventions existing at the time of entry into force of this Regulation which have been concluded between two or more Member States and relate to matters governed by this Regulation.

2. (a) Finland and Sweden shall have the option of declaring that the Convention of 6 February 1931 between Denmark, Finland, Iceland, Norway and Sweden comprising international private law provisions on marriage, adoption and guardianship, together with the Final Protocol thereto, will apply, in whole or in part, in their mutual relations, in place of the rules of this Regulation. Such declarations shall be annexed to this Regulation and published in the Official Journal of the European Union. They may be withdrawn, in whole or in part, at any moment by the said Member States.
   (b) The principle of non-discrimination on the grounds of nationality between citizens of the Union shall be respected.
   (c) The rules of jurisdiction in any future agreement to be concluded between the Member States referred to in subparagraph (a) which relate to matters governed by this Regulation shall be in line with those laid down in this Regulation.
   (d) Judgments handed down in any of the Nordic States which have made the declaration provided for in subparagraph (a) under a forum of jurisdiction corresponding to one of those laid down in Chapter II of this Regulation, shall be recognised and enforced in the other Member States under the rules laid down in Chapter III of this Regulation.

3. Member States shall send to the Commission:
   (a) a copy of the agreements and uniform laws implementing these agreements referred to in paragraph 2(a) and (c);
   (b) any denunciations of, or amendments to, those agreements or uniform laws.

Article 60
Relations with certain multilateral conventions

In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation:

(a) the Hague Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors;
(b) the Luxembourg Convention of 8 September 1967 on the Recognition of Decisions Relating to the Validity of Marriages;
(c) the Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations;
(d) the European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children;

and

(e) the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

Article 61
Relation with the Hague Convention of 19 October 1996
on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation
in Respect of Parental Responsibility and Measures for the Protection of Children

As concerns the relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, this Regulation shall apply:

(a) where the child concerned has his or her habitual residence on the territory of a Member State;
(b) as concerns the recognition and enforcement of a judgment given in a court of a Member State on the territory of another Member State, even if the child concerned has his or her habitual residence on the territory of a third State which is a contracting Party to the said Convention.

Article 62
Scope of effects

1. The agreements and conventions referred to in Articles 59(1), 60 and 61 shall continue to have effect in relation to matters not governed by this Regulation.

2. The conventions mentioned in Article 60, in particular the 1980 Hague Convention, continue to produce effects between the Member States which are party thereto, in compliance with Article 60.

Article 63
Treaties with the Holy See

1. This Regulation shall apply without prejudice to the International Treaty (Concordat) between the Holy See and Portugal, signed at the Vatican City on 7 May 1940.

2. Any decision as to the invalidity of a marriage taken under the Treaty referred to in paragraph 1 shall be recognised in the Member States on the conditions laid down in Chapter III, Section 1.

3. The provisions laid down in paragraphs 1 and 2 shall also apply to the following international treaties (Concordats) with the Holy See:
   (a) 'Concordato lateranense' of 11 February 1929 between Italy and the Holy See, modified by the agreement, with additional Protocol signed in Rome on 18 February 1984;
   (b) Agreement between the Holy See and Spain on legal affairs of 3 January 1979.

4. Recognition of the decisions provided for in paragraph 2 may, in Italy or in Spain, be subject to the same procedures and the same checks as are applicable to decisions of the ecclesiastical courts handed down in accordance with the international treaties concluded with the Holy See referred to in paragraph 3.

5. Member States shall send to the Commission:
   (a) a copy of the Treaties referred to in paragraphs 1 and 3;
   (b) any denunciations of or amendments to those Treaties.

CHAPTER VI
TRANSITIONAL PROVISIONS

Article 64

1. The provisions of this Regulation shall apply only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to agreements concluded between the parties after its date of application in accordance with Article 72.

2. Judgments given after the date of application of this Regulation in proceedings instituted before that date but after the date of entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation if jurisdiction was founded on rules which accorded with those provided for either in Chapter II or in Regulation (EC) No 1347/2000 or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

3. Judgments given before the date of application of this Regulation in proceedings instituted after the entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation provided they relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings.

4. Judgments given before the date of application of this Regulation but after the date of entry into force of Regulation (EC) No 1347/2000 in proceedings instituted before the date of entry into force of Regulation (EC) No 1347/2000 shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation provided they relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings and that jurisdiction was founded on rules which accorded with those provided for either in Chapter II of this Regulation or in Regulation (EC) No 1347/2000 or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

CHAPTER VII
FINAL PROVISIONS

Article 65
Review

No later than 1 January 2012, and every five years thereafter, the Commission shall present to the European Parliament, to the Council and to the European Economic and Social Committee a report on the application of this Regulation on the basis of information supplied by the Member States. The report shall be accompanied if need be by proposals for adaptations.

Article 66
Member States with two or more legal systems

With regard to a Member State in which two or more systems of law or sets of rules concerning matters governed by this Regulation apply in different territorial units:

(a) any reference to habitual residence in that Member State shall refer to habitual residence in a territorial unit;
(b) any reference to nationality, or in the case of the United Kingdom 'domicile', shall refer to the territorial unit designated by the law of that State;
(c) any reference to the authority of a Member State shall refer to the authority of a territorial unit within that State which is concerned;
(d) any reference to the rules of the requested Member State shall refer to the rules of the territorial unit in which jurisdiction, recognition or enforcement is invoked.

Article 67
Information on central authorities and languages accepted

The Member States shall communicate to the Commission within three months following the entry into force of this Regulation:

(a) the names, addresses and means of communication for the central authorities designated pursuant to Article 53;
(b) the languages accepted for communications to central authorities pursuant to Article 57(2);

and

(c) the languages accepted for the certificate concerning rights of access pursuant to Article 45(2).

The Member States shall communicate to the Commission any changes to this information.
The Commission shall make this information publicly available.

Article 68
Information relating to courts and redress procedures

The Member States shall notify to the Commission the lists of courts and redress procedures referred to in Articles 21, 29, 33 and 34 and any amendments thereto.
The Commission shall update this information and make it publicly available through the publication in the Official Journal of the European Union and any other appropriate means.

Article 69
Amendments to the Annexes

Any amendments to the standard forms in Annexes I to IV shall be adopted in accordance with the consultative procedure set out in Article 70(2).

Article 70
Committee

1. The Commission shall be assisted by a committee (committee).

2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.

3. The committee shall adopt its rules of procedure.

Article 71
Repeal of Regulation (EC) No 1347/2000

1. Regulation (EC) No 1347/2000 shall be repealed as from the date of application of this Regulation.

2. Any reference to Regulation (EC) No 1347/2000 shall be construed as a reference to this Regulation according to the comparative table in Annex V.

Article 72
Entry into force

This Regulation shall enter into force on 1 August 2004.
The Regulation shall apply from 1 March 2005, with the exception of Articles 67, 68, 69 and 70, which shall apply from 1 August 2004.
This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 27 November 2003.

(Annexes omitted)

LAW AMENDING THE CONFLICT OF LAWS ACT OF THE REPUBLIC OF KOREA*

(LAW NO. 6465, PROMULGATED ON 7 APRIL 2001, EFFECTIVE AS OF 1 JULY 2001)

The Conflict of Laws Act shall be amended as follows:

Conflict of Laws Act (*Gukjesabeop*)

CHAPTER 1 – GENERAL PROVISIONS

Article 1
Purpose

The purpose of this Act is to set forth the principles of international jurisdiction to adjudicate and to determine the governing law in respect of legal relationships with a foreign element.

Article 2
International Jurisdiction to Adjudicate

(1) The courts shall have international jurisdiction to adjudicate if the parties or the case in dispute has a substantial connection with the Republic of Korea. In determining whether or not such substantial connection exists, the courts shall follow the reasonable principles in conformity with the ideas underlying the allocation of international jurisdiction to adjudicate.

(2) The courts shall determine whether or not they have international jurisdiction to adjudicate by reference to the provisions on jurisdiction of domestic laws, having full regard for the special characteristics of international jurisdiction to adjudicate in light of the provisions of paragraph (1).

---

* Unofficial English translation by Kwang Hyun SUK, professor at Hanyang University, College of Law. An analytical commentary of the new law by Prof. SUK is included in this *Yearbook*, *supra*, pp. 99-141.

Yearbook of Private International Law, Volume 5 (2003), pp. 315-336
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

Article 3
Lex Patriae

(1) If, in cases where the *lex patriae* of a party governs and the party concerned has two or more nationalities, the *lex patriae* shall be the law of the country with which the party is most closely connected. However, if one of such nationalities is that of the Republic of Korea, the law of the Republic of Korea shall be his *lex patriae*.

(2) In cases where a person has no nationality or it is impossible to ascertain his nationality, the law of the country where he has his habitual residence (hereinafter referred to as the 'law of habitual residence') shall govern; if it is impossible to ascertain his habitual residence, the law of the country where he has his residence shall govern.

(3) With regard to a national of a country with various local laws, the law designated by the relevant choice of law rules of that country shall govern; if there are no such rules, the law of the local district with which he is most closely connected.

Article 4
Law of Habitual Residence

In cases where the law of habitual residence of the party concerned applies but it is impossible to ascertain the party's habitual residence, the law of his residence shall govern.

Article 5
Application of Foreign Law

The courts shall examine and apply *ex officio* the content of the foreign law designated by this Act and may request the parties' cooperation for this purpose.

Article 6
Scope of the Governing Law

The application of provisions of the foreign law designated as the governing law by this Act shall not be excluded for the sole reason that they are public law in nature.

Article 7
Mandatory Application of Korean Law

Provisions of mandatory law of the Republic of Korea, which in view of their legislative purpose must be applied irrespective of the governing law, shall be applicable even if a foreign law is designated as the governing law under this Act.

Article 8
Exception to the Governing Law Designated

(1) If the governing law designated by this Act is only slightly connected with the legal relationship concerned, and it is evident that the law of another country is most closely connected with the legal relationship, the law of the other country shall apply.

(2) The provisions of paragraph (1) shall not be applicable where the parties have chosen the governing law by agreement.

Article 9
Renvoi *in the case of Designation of Governing Law*

(1) If a foreign law is designated as the governing law under this Act and the law of such country provides that the law of the Republic of Korea shall apply, the law of the Republic of Korea (other than the rules of law determining the governing law) shall be applicable.

(2) The provision of paragraph (1) shall not apply in any of the following cases:

1. where the parties have chosen the governing law by agreement;
2. where the law governing the contract is designated by this Act;
3. where the law governing maintenance obligations is designated by the provisions of Article 46;
4. where the law governing the formal requirements of a will is designated by the provisions of paragraph (3) of Article 50;
5. where the law of the country of a ship's registration is designated by the provisions of Article 60; or
6. where the application of the provision of paragraph (1) is contrary to the purpose of the designation of governing laws under this Act.

Article 10
Provisions of Foreign Law Contrary to Public Order

The application of provisions of a foreign law is excluded if such application would be manifestly incompatible with the good morals and other social order of the Republic of Korea.

CHAPTER 2 – PERSONS

Article 11
Capacity to be entitled to Rights

A person's capacity to be entitled to rights shall be governed by his *lex patriae.*

Article 12
Declaration of Disappearance

If it is not clear whether a foreigner is alive or dead, the court may issue a declaration of disappearance under the laws of the Republic of Korea only if the person has property in the Republic of Korea, if a legal relationship exists that is governed by the laws of the Republic of Korea or if there is any other legitimate reason therefor.

Article 13
Capacity to Act

(1) A person's capacity to act shall be governed by his *lex patriae.* The same shall apply where the capacity to act is extended by marriage.

(2) A capacity to act that has been previously acquired shall not be deprived or restricted by a change of nationality.

Article 14
Declaration of Quasi-Incompetence and Incompetence

The court may issue a declaration of quasi-incompetence or incompetence under the laws of the Republic of Korea in respect of a foreigner having his habitual residence or residence in the Republic of Korea.

Article 15
Protection of Transactions

(1) If a person who effects a juridical act and the opposite party are in the same country at the time of the formation of the juridical act, a person who would have capacity under the law of that country cannot invoke incapacity under his *lex patriae,* unless the other party was or could have been aware of his incapacity at the time the juridical act was effected.

(2) The provisions of paragraph (1) shall not apply to juridical acts under the provisions of the family law or the inheritance law and juridical acts relating to real estate located in a country other than the place where the act was effected.

Article 16
Legal persons and Associations

Legal persons or associations shall be governed by the law of the country under the laws of which the persons or associations were incorporated or formed. However, the law of the Republic of Korea shall apply if the head office of the person or association is located in the Republic of Korea or the principal activities of the person or association are conducted in the Republic of Korea.

CHAPTER 3 – JURIDICAL ACTS

Article 17
Formal Validity of Juridical Acts

(1) The formal validity of a juridical act shall be subject to the law governing that act.

(2) A juridical act is formally valid if it satisfies the formal requirements of the law where the act was effected.

(3) If the parties are in different countries at the time of the conclusion of a contract, the contract is formally valid if it satisfies the formal requirements prescribed for juridical acts by the law of one of those countries.

(4) Where a juridical act is effected by an agent, the country in which the agent is located is relevant for the purpose of paragraph (2).

(5) The provisions of paragraphs (2) to (4) shall not apply to the form of a juridical act, the subject matter of which relates to the creation or disposal of a real right or any other right subject to registration.

Article 18
Agency

(1) The relationship between principal and agent shall be subject to the law governing the legal relationship between the parties.

(2) Whether or not the principal is bound to a third party by an act of an agent shall be governed by the law of the country in which the agent has his place of business or, if there is none or if it is not ascertainable by the third party, by the law of the country in which the agent has actually acted in the particular case.

(3) If the agent is employed by the principal and has no place of business of his own, the principal place of business of the principal shall be deemed to be the agent's place of business.

(4) Notwithstanding the provisions of paragraphs (2) and (3), the principal may designate the law governing the agency. The governing law so designated shall be effective only if it is expressly stated in the document proving the agent's authority or notified in writing to the third party by either the principal or the agent.

(5) The provision of paragraph (2) shall apply *mutatis mutandis* to the relationship between an agent without authority and a third party.

CHAPTER 4 – REAL RIGHTS (RIGHTS *IN REM*)

Article 19
Law Governing Real Rights

(1) Real rights concerning immovables and movables, as well as other rights subject to registration shall be governed by law of the site (*lex situs)* of the subject matter.

(2) Acquisition, loss or change of the rights prescribed in paragraph (1) shall be governed by the *lex situs* of the subject matter at the time of the completion of the causal action or event.

Article 20
Means of Transportation

Real rights concerning aircraft shall be subject to the law of its nationality and real rights concerning rolling stock shall be subject to the laws of the country approving its traffic service.

Article 21
Bearer Securities

Acquisition, loss and change of rights concerning a bearer security shall be governed by the *lex situs* of such security at the time of the completion of the causal action or event.

Article 22
Res in transitu

Acquisition, loss and change of real rights concerning goods in transit (*res in transitu*) shall be governed by the law of the country of destination.

Article 23
Contractual Security Interests over Claims, etc.

Contractual security interests over claims (*chaekwon*),[1] shares and other rights, and the securities embodying such claims, shares and other rights shall be governed by the law applicable to the right over which such security interests are created. However, contractual security interests over bearer securities shall be subject to the provisions of Article 21.

Article 24
Protection of Intellectual Property Rights

The protection of intellectual property rights shall be subject to the law where the right was infringed.

---

[1] *Chaekwon* is the Korean counterpart for *la créance* in French and *die Forderung* in German [Translator's Note].

CHAPTER 5 – CLAIMS (*CHAEKWON*)

Article 25
Party Autonomy

(1) A contract shall be governed by the law expressly or impliedly chosen by the parties, provided that an implied choice may be acknowledged only when it is reasonable to do so in light of the terms of the contract or the circumstances of the case.

(2) The parties may choose the law applicable to the whole or to only part of a contract.

(3) The parties may at any time agree to change the law governing a contract designated under this Article or Article 26. Any change of the governing law made by the parties after the conclusion of the contract shall not prejudice its formal validity or the rights of third parties.

(4) Where all the elements relevant to a situation are connected with only one country, the parties' choice of a foreign law shall not exclude the application of mandatory rules of the law of that country.

(5) The provisions of Article 29 shall apply *mutatis mutandis* to the formation and validity of the parties' agreement on their choice of law.

Article 26
Objective Connection of Governing Law

(1) If the law governing a contract has not been chosen by the parties, the contract shall be governed by the law of the country with which it is most closely connected.

(2) It shall be presumed that the contract is most closely connected with the country where the party who is to carry out one of the performances in subparagraphs (1) to (3) has his habitual residence at the time of conclusion of the contract; (in the case of a legal person or association, with the country where the party has its principal place of business); if the contract is entered into during the course of a party's profession or business activity, that country shall be deemed the party's place of business:

- in contracts of transfer, the performance of the transferor;
- in contracts granting the use of a thing or a right, the performance of the party granting the use; or

- in mandate contracts, contracts for completion of work and similar contracts for services, the performance of the party providing the services.

(3) If the subject matter of the contract is a right in immovables, the law of the country where the immovable is situated is presumed to be most closely connected with the contract.

Article 27
Consumer Contracts

(1) If a contract entered into by a consumer for a purpose that can be regarded as being outside his profession or business activity falls into any of the following cases, a choice of law made by the parties cannot deprive the consumer of the protection afforded to him by the mandatory rules of the law of the country of his habitual residence:

1. where, prior to the conclusion of the contract, the other party engaged in or directed to that country professional or business activities including soliciting business through publicity, and the consumer had taken steps in that country necessary for the conclusion of the contract;
2. where the other party received the consumer's order in that country; or
3. where the other party arranged the consumer's journey to a foreign country for the purpose of inducing the consumer to order.

(2) Notwithstanding the provisions of Article 26, a contract subject to paragraph (1) of this Article shall, in the absence of a choice of the governing law by the parties, be governed by the law of the country of the consumer's habitual residence.

(3) Notwithstanding the provisions of paragraphs (1) to (3) of Article 17, a contract subject to paragraph (1) of this Article shall be formally valid if it satisfied the formal requirements of the law of the country of the consumer's habitual residence.

(4) In the case of a contract subject to paragraph (1) of this Article, a consumer may also bring an action in the country of his habitual residence.

(5) In the case of a contract subject to paragraph (1) of this Article, an action against the consumer may be brought by the other party only in the country of the consumer's habitual residence.

(6) The parties to a contract subject to paragraph (1) of this Article may, by written agreement, enter into an agreement on international jurisdiction to adjudicate. Such agreement is effective only if one of the following conditions is satisfied:

1. if such agreement is entered into after the dispute has arisen; or
2. if it allows the consumer to bring an action before another court in addition to those having jurisdiction under this Article.

Article 28
Employment Contracts

(1) In the case of an employment contract, a choice of law by the parties cannot deprive the employee of the protection afforded to him by the mandatory rules of the law otherwise applicable under the provisions of paragraph (2).

(2) Notwithstanding the provisions of Article 26, an employment contract shall, in the absence of a choice of law by the parties, be governed by the law of the country in which the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, by the law of the country where the place of business that engaged him is situated.

(3) In the case of an employment contract, an employee may also bring an action against an employer in the country where the employee habitually carries out his work or in the last country where he did so, or if the employee does not or did not habitually carry out his work in any one country, in the country where the place of the business that engaged him is or was situated.

(4) In the case of an employment contract, an action against an employee may be brought by the employer only in the country of the employee's habitual residence or in the country where the employee habitually carries out his work.

(5) The parties to an employment contract may agree in writing on an international jurisdiction to adjudicate. Such agreement is effective only if one of the following conditions is satisfied:

1. if such agreement is entered into after the dispute has arisen; or
2. if it allows the employee to bring an action before another court in addition to those having jurisdiction under this Article.

Article 29
Formation and Validity of Contracts

(1) The formation and validity of a contract shall be determined by the law which would govern it under this Act if the contract were valid.

(2) A party may nevertheless take recourse to the law of the country of his habitual residence to establish that he did not consent to the contract if it is evident from the circumstances that it would be clearly unreasonable to determine the effect of his conduct by the law designated in paragraph (1).

Article 30
Management of Affairs without Mandate

(1) Management of affairs without mandate shall be governed by the law of the country in which the management took place. However, if the management of affairs without mandate was based on a legal relationship between the parties, it shall be subject to the law governing the legal relationship.

(2) Claims resulting from payment of another person's obligations shall be subject to the law governing the obligations concerned.

Article 31
Unjust Enrichment

Unjust enrichment shall be governed by the law of the country in which the enrichment took place. However, if unjust enrichment has resulted from a performance effected on the basis of a legal relationship between the parties, it shall be subject to the law governing the legal relationship.

Article 32
Torts

(1) A tort shall be governed by the law of the place where the tort occurred.

(2) Notwithstanding the provisions of paragraph (1), if the tortfeasor and the injured party had their habitual residences in the same country at the time the tort occurred, the tort shall be governed by the law of that country.

(3) Notwithstanding the provisions of paragraphs (1) and (2), if the tort violates an existing legal relationship between the tortfeasor and the injured party, the tort shall be governed by the law applicable to the legal relationship.

(4) In cases where a tort is governed by foreign law under the provisions of paragraphs (1) to (3), damages arising from the tort shall not be awarded if the nature of the damages is clearly not appropriate to merit compensation to the injured party or if the extent of the damages substantially exceeds appropriate compensation to the injured party.

Article 33
Subsequent Agreement on the Governing Law

Notwithstanding the provisions of Articles 30 to 32, the parties may agree, after an event constituting the management of affairs without mandate, unjust enrichment or a tort has occurred, that such event shall be subject to the law of the Republic of Korea. However, rights of third parties shall not be prejudiced by such agreement.

Article 34
Contractual Assignment of Claims (Chaekwon) *and Assumption of Obligations*

(1) The legal relationship between the assignor and assignee of a contractual assignment of a claim shall be governed by the law applicable to the contract between the assignor and assignee. However, the law governing a claim (*chaekwon*) to be assigned shall determine its assignability and the effect of assignment as against the debtor and third parties.

(2) The provisions of paragraph (1) shall apply *mutatis mutandis* to the assumption of obligations.

Article 35
Transfer of Claims (Chaekwon) *by Operation of Law*

(1) The transfer of a claim (*chaekwon*) by operation of law shall be subject to the law governing the underlying legal relationship between the former and the new creditors on the basis of which the transfer takes place. However, if any provision in the law governing the claim to be assigned protects the debtor, such provision shall apply.

(2) If there is no such legal relationship referred to in paragraph (1), the transfer of a claim (*chaekwon*) by operation of law shall be subject to the law governing the claim (*chaekwon*).

CHAPTER 6 – KINSHIP

Article 36
Formation of Marriage

(1) The requirements for the formation of a marriage shall be governed by the *lex patriae* of each of the parties.

(2) The form of the marriage ceremony shall be governed by the law of the place where the ceremony takes place or by the *lex patriae* of either party. If the marriage ceremony is performed in the Republic of Korea and one of the parties is a national of the Republic of Korea, the form of the ceremony shall be governed by the law of the Republic of Korea.

Article 37
General Effects of Marriage

The general effects of a marriage shall be governed by the law designated in the following order:

1. the *lex patriae* of the spouses if they have the same *lex patriae*;
2. the law of the habitual residence of the spouses if they have the same law of the habitual residence; and
3. the law of the place with which the spouses are most closely connected.

Article 38
Matrimonial Property Regime

(1) The provisions of Article 37 shall apply *mutatis mutandis* to the matrimonial property regime.

(2) Notwithstanding the provisions of paragraph (1), the matrimonial property regime shall be governed by any of the following laws chosen by the spouses:

1. the law of the nationality of one of the spouses,
2. the law of the habitual residence of one of the spouses, or
3. in the case of immovables, the law where the immovable is located,
provided that their agreement on the governing law is in writing and affixed with the date, name and seal or signature of the spouses.

(3) A matrimonial property regime governed by foreign law may not be enforceable against *bona fide* third parties with respect to juridical acts effected in the Republic of Korea or property located in the Republic of Korea. If a matrimonial property regime governed by foreign law is unenforceable in such cases, for the purpose of relations *vis-à-vis* third parties, such matrimonial property regime shall be governed by the law of the Republic of Korea.

(4) Notwithstanding the provisions of paragraph (3), a matrimonial property contract entered into under foreign law may be enforceable against *bona fide* third parties if it is registered in the Republic of Korea.

Article 39
Divorce

The provisions of Article 37 shall apply *mutatis mutandis* to divorce. However, if one of the spouses is a national of the Republic of Korea having his or her habitual residence in the Republic of Korea, the divorce shall be governed by the law of the Republic of Korea.

Article 40
Relationships between Parents and Legitimate Children

(1) The formation of a relationship between a parent and a legitimate child shall be governed by the *lex patriae* of one of the parents at the time of the child's birth.

(2) If the husband has died before the child's birth, the husband's *lex patriae* at the time of his death shall be deemed his *lex patriae* for the purpose of paragraph (1).

Article 41
Relationships between Parents and Illegitimate Children

(1) The formation of a relationship between a parent and an illegitimate child shall be governed by the law of the mother's *lex patriae* at the time of the child's birth. However, the formation of a parent and child relationship between the father and the child may also be governed by the law of the father's *lex patriae* at the time of the child's birth or by the law of the child's current habitual residence.

(2) Recognition may also be governed by the *lex patriae* of the person recognizing the child in addition to the laws set forth in paragraph (1).

(3) In cases under paragraph (1) where the father has died before the child's birth, the father's *lex patriae* at the time of his death shall be deemed his *lex patriae;* in cases under paragraph (2) where the person recognizing the child has died before the recognition, the *lex patriae* of the person at the time of his death shall be deemed his *lex patriae*.

Article 42
Legitimation of Illegitimate Children

(1) Matters concerning whether an illegitimate child is changed to a legitimate child shall be governed by the father's or mother's *lex patriae* or by the law of the child's habitual residence at the time of the completion of the event which constitutes legitimation.

(2) In cases under paragraph (1) where the father or mother has died before completion of the event constituting legitimation, the father's or mother's *lex patriae* at the time of death shall be deemed his or her *lex patriae*.

Article 43
Adoption and its Dissolution

Adoption and its dissolution shall be governed by the adoptive parent's *lex patriae* at the time of the adoption.

Article 44
Consent

If the child's *lex patriae* requires the consent or approval of the child or a third party with respect to the formation of a parent and child relationship under the provisions of Articles 41 to 43, such requirement shall also be satisfied.

Article 45
Legal Relationships between Parents and Children

A legal relationship between a parent and a child shall be governed by the child's *lex patriae* if it is also the *lex patriae* of both father and mother; in other cases it shall be governed by the law of the child's habitual residence.

Article 46
Maintenance

(1) Maintenance obligations shall be governed by the law of the habitual residence of the maintenance creditor. However, if the maintenance creditor is unable to obtain maintenance from the debtor under such law, the law of their common nationality shall apply.

(2) Notwithstanding the provisions of paragraph (1), if the spouses have divorced or their divorce has been recognized in the Republic of Korea, the maintenance obligations between the divorced spouses shall be governed by the law under which they divorced.

(3) In cases of a maintenance obligation between persons related collaterally or by affinity, the debtor may contest the creditor's request on the ground that no such obligation exists under the law of their common nationality or, in the absence of a common nationality, under the law of the debtor's habitual residence.

(4) If creditor and debtor are both nationals of the Republic of Korea and if the debtor has his habitual residence in the Republic of Korea, the law of the Republic of Korea shall apply to the maintenance obligations.

Article 47
Other Kinship

Formation of kinship and the rights and obligations arising therefrom shall be governed by the *lex patriae* of each party concerned, unless otherwise provided by this Act.

Article 48
Guardianship

(1) Guardianship shall be governed by the *lex patriae* of the ward.

(2) The guardianship over a foreigner who has his habitual residence or residence in the Republic of Korea shall be governed by the law of the Republic of Korea only if one of the following applies:

1. if there is no person to perform the guardianship duties although the grounds for commencement of guardianship exist under the ward's *lex patriae* or the person intended to perform the guardianship duties cannot perform his duties;

2. if a declaration of quasi-incompetence or incompetence has been issued in the Republic of Korea; or
3. if there is an otherwise urgent need to protect the ward.

CHAPTER 7 – INHERITANCE

Article 49
Inheritance

(1) Inheritance shall be governed by the *lex patriae* of the deceased at the time of his death.

(2) Notwithstanding the provisions of paragraph (1), inheritance shall be governed by one of the following laws selected by the deceased in any form applicable to a will:

1. the law of the country where the deceased had his habitual residence at the time of designation. Such designation shall be effective only when the deceased maintained his habitual residence in that country until death; or
2. as regards the inheritance of immovables, the law of the place where they are situated.

Article 50
Will

(1) A will shall be governed by the *lex patriae* of the testator at the time the will was made.

(2) The amendment or withdrawal of a will shall be governed by the *lex patriae* of the testator at the time of the amendment or withdrawal of the will.

(3) The form of a will shall be governed by any of the following:

1. the law of the nationality of the testator, either when he made the will or at the time of his death;
2. the law of the testator's habitual residence, either when he made the will or at the time of his death;
3. the law of the place where the testator made the will; or
4. as regards a will relating to immovables, the law of the place where they are situated.

CHAPTER 8 – BILLS OF EXCHANGE, PROMISSORY NOTES / CHECKS

Article 51
Capacity to Act

(1) The capacity of a person who assumes obligations under a bill of exchange, promissory note or check shall be governed by the *lex patriae* of such person. If the *lex patriae* provides that such capacity shall be governed by the law of another country, the law of the other country shall apply.

(2) If a person who lacks capacity under the provisions of paragraph (1) has signed within the territory of another country where he is considered legally capable, he shall be held capable of undertaking such obligations.

Article 52
Qualification of Payer of Check

(1) The qualification of a person who may become the payer of a check shall be governed by the law of the place of payment.

(2) If a check is invalid because the payer is a person who may not become a payer under the law of the place of payment, the obligations arising from the person's signature in another country where there are no such provisions shall not be affected.

Article 53
Form

(1) The form of an act on a bill of exchange, promissory note or check[2] shall be governed by the law of the place where the signature was affixed. However, the form of an act on a check may also be governed by the law of the place of payment.

(2) If an act is invalid under the provisions of paragraph (1) but valid under the law of the place where a subsequent act is effected, the validity of any subsequent act shall not be affected by the invalidity of the previous act.

---

[2] An 'act on a bill of exchange, promissory note or check' is a generic term referring to various acts encompassing issuance, endorsement, acceptance, aval, etc. effected in connection with a bill of exchange, promissory note or check [Translator's Note].

(3) If an act on a bill of exchange, promissory note or check effected by a national of the Republic of Korea in a foreign country is invalid under the law of the place where the act was effected, but valid under the law of the Republic of Korea, such act shall be effective as against other nationals of the Republic of Korea.

Article 54
Effect

(1) The obligations of the acceptor of a bill of exchange and of the issuer of a promissory note shall be governed by the law of the place of payment, the obligations arising from a check by the law of the place of signature.

(2) The obligations under a bill of exchange, promissory note and check of persons other than those specified in paragraph (1) shall be governed by the law of the place of signature.

(3) The period allowed for exercising the right of recourse relating to a bill of exchange, promissory note or check shall be governed by the law of the place of issuance of such instrument with regard to all the signatories.

Article 55
Acquisition of Underlying Claims

Whether or not the holder of a bill of exchange or promissory note acquires a claim underlying the issuance of such instrument shall be governed by the law of the place of issuance of such instrument.

Article 56
Partial Acceptance and Partial Payment

(1) Whether or not the acceptance of a bill of exchange may be restricted to part of the sum payable, and whether or not the holder is obliged to accept partial payment shall be governed by the law of the place of payment.

(2) The provisions of paragraph (1) shall apply *mutatis mutandis* to the payment under a promissory note.

Article 57
Form of Act for Exercising and Preserving Rights

The form of and limits of time for protest, as well as the form of other measures necessary for exercising or preserving the rights relating to a bill of exchange, promissory note, or check shall be governed by the law of the place where the protest must be drawn up or the measures in question are to be taken.

Article 58
Loss or Theft

The measures to be taken in the event of the loss or theft of a bill of exchange, promissory note or check shall be governed by the law of the place of payment.

Article 59
Law of Place of Payment

The law of the place of payment of a check shall apply to any of the following:

1. whether a check must be payable at sight or may be drawn payable at a fixed period after sight, and also the effects of post-dating a check;
2. the limit of time for presenting a check;
3. whether a check may be accepted, guaranteed, confirmed or visaed, and the effects of such acceptance, guarantee, confirmation or visa;
4. whether the holder of a check may demand and shall be bound to accept partial payment;
5. whether a check may be crossed and the effects of such crossing or of the words 'payable in account' or any equivalent expression written on a check. Where the issuer or holder has forbidden payment of a check in cash by writing 'payable in account' or an equivalent expression on the instrument and such check has been drawn in a foreign country and is to be paid in the Republic of Korea, it shall have the effect of a generally crossed check;
6. whether the holder of a check has special rights to the cover and the nature of these rights;
7. whether the issuer may revoke the mandate for payment of a check or take measures to stop its payment; and
8. whether a protest or an equivalent declaration is necessary to preserve the right of recourse against the endorsers, issuer or any other party liable under the instrument.

CHAPTER 9 – MARITIME COMMERCE

Article 60
Maritime Commerce

The following matters relating to maritime commerce shall be governed by the law of the country of the ship's registration:

1. the ownership, mortgage, maritime lien and other real rights (rights *in rem*) in a ship;
2. the priority order of the security interests in a ship;
3. the scope of the shipowner's liability for acts of the shipmaster and crew;
4. whether the shipowner, charterer, manager, operator or other users of the ship shall be entitled to invoke limitation of liability and the scope of such limitation of liability;
5. general average; and
6. the power of agency of a shipmaster.

Article 61
Collision of Ships

(1) The liability resulting from a collision of ships at an open port and on inland or territorial waters shall be governed by the law of the place of the collision.

(2) The liability resulting from a collision of ships on the high seas shall be governed by the law of the country of registration if both ships are registered in the same country or by the law of the country of registration of the ship causing the damage if the ships are registered in different countries.

Article 62
Salvage

The right to claim remuneration for salvage shall be governed by the law of the place where the salvage took place when the salvage was performed in territorial waters or by the law of the country of registration of the ship performing the salvage when the salvage took place on the high seas.

ADDENDA

(1) *(Entry into Force)*
This Act shall enter into force on 1 July 2001.

(2) *(Scope of Application of Governing Law in Terms of Timing)*
Matters that occurred before the entry into force of this Act shall be governed by the prior Act (*Seoboesabeop*). Legal relationships entered into prior to the entry into force of this Act but continuing after it has become effective shall be governed by this Act, however, only with respect to the parts of such a legal relationship in effect as from the entry into force of this Act.

(3) *(Transitional Measures on International Jurisdiction)*
Provisions on international jurisdiction under this Act shall not apply to cases pending before courts on the date on which this Act takes effect.

(4) *(Revision of other Acts)*
The Arbitration Act shall be revised as follows:
'*Seoboesabeop*' in paragraph 1 of Article 29 shall be revised to read '*Gukjesabeop*'.

INSTITUT DE DROIT INTERNATIONAL
SESSION DE BRUGES – 2003
(SECOND COMMISSION)

RESOLUTION

THE PRINCIPLES FOR DETERMINING WHEN THE USE OF THE DOCTRINE OF *FORUM NON CONVENIENS* AND ANTI-SUIT INJUNCTIONS IS APPROPRIATE

Rapporteur: Sir Lawrence Collins
Co-rapporteur: M. Georges Droz

Whereas:

a. Transitional litigation has greatly increased in recent years.

b. National court systems have developed differing solutions to deal with questions of transnational jurisdiction and litispendence, including the practice of declining to assume or exercise jurisdiction on the ground that a court in another country is more appropriate to deal with issues (*forum non conveniens*) and the practice of granting injunctions to restrain parties from commencing or continuing proceedings in another country (anti-suit injunctions).

c. Issues of transnational jurisdiction and litispendence have increasingly become the subject of international conventions and regional instruments.

d. Parallel litigation in more than one country between the same, or related parties in relation to the same, or related, issues may lead to injustice, delay, increased expense, and inconsistent decisions.

e. It is universally recognized that (subject to special rules based on the policy of the protection of the interests of the weaker party) effect should be given to choice of court agreements in international transactions.

f. Anti-suit injunctions may result in interference in foreign proceedings in breach of comity.

Yearbook of Private International Law, Volume 5 (2003), pp. 337-340
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

g. Nothing in the following principles is intended to prevent the grant of bona fide provisional or protective measures by court having a reasonable connection with the parties or the measures to be taken.

The Institute recognizes, in the interests of justice, the applicability of the following principles, which relate to proceedings in civil and commercial matters (excluding family law) and are subject to any applicable international conventions or other provisions of law.

1. When the jurisdiction of the court seised is not founded upon an exclusive choice of court agreement, and where its law enables the court to do so, a court may refuse to assume or exercise jurisdiction in relation to the substance of the claim on the ground that the courts of another country, which have jurisdiction under their law, are clearly more appropriate to determine the issues in question.

2. In deciding whether the courts of another country are clearly more appropriate, the court seised may take into account (in particular): (a) the adequacy of the alternative forum; (b) the residence of the parties; (c) the location of the evidence (witnesses and documents) and the procedures for obtaining such evidence; (d) the law applicable to the issues; (e) the effect of applicable limitation or prescription periods; (f) the effectiveness and enforceability of any resulting judgment.

3. Parallel litigation in more than one country between the same, or related, parties, in relation to the same, or related, issues, should be discouraged.

4. In principle, the court first seised should determine the issues (including the issue whether it has jurisdiction) except (a) when the parties have conferred exclusive jurisdiction on the courts of another country, or (b) when the first seised court is seised in proceedings which are designed (e.g. by an action for a negative declaration) to frustrate proceedings in a second forum which is clearly more appropriate.

5. Courts which grant anti-suit injunctions should be sensitive to the demands of comity, and in particular should refrain from granting such injunctions in cases other than (a) a breach of a choice of court agreement or arbitration agreement; (b) unreasonable or oppressive conduct by a plaintiff in a foreign jurisdiction; or (c) the protection of their own jurisdiction in such matters as the administration of estates and insolvency.

INSTITUT DE DROIT INTERNATIONAL
SESSION DE BRUGES – 2003
(TWELFTH COMMISSION)

DECLARATION

ARBITRAL SETTLEMENT OF INTERNATIONAL DISPUTES OTHER THAN BETWEEN STATES INVOLVING MORE THAN TWO PARTIES

Rapporteur: Mr. Allan Philip

The Institut de droit international approves the Report of the 12th Commission.

The Commission has studied problems arising in private law arbitrations of an international character between more than two parties (multiparty arbitration). The problems arise, in particular, in connection with the appointment of arbitrators, and out of requests to consolidate several independent arbitrations or to join parties in the arbitration proceedings who are not parties to the arbitration agreement. Multiparty arbitrations are not infrequent.

The Commission's studies have confirmed the general principle underlying earlier resolutions of the Institut de droit international, that the consent of the parties to an international arbitration agreement must be required in all circumstances.

Issues of an international character such as appointment of arbitrators in multiparty arbitration, consolidation of arbitration proceedings and related issues should be regulated either by the parties' agreement or by the arbitration rule of arbitration institutions and not by national legislation.

In the interests of economy and efficiency, national courts may consolidate judicial proceedings and permit the participation therein of third parties regardless of the parties' wishes. Attempts to transfer these practices to international arbitration run the risk of compromising both the integrity of arbitration as a dispute resolution method and the principle that arbitration rests on the consent of the parties. Parties should retain the right to choose those with whom they wish to go to arbitration, the rules to which they wish to subject themselves, and the arbitrators to whom they are willing to entrust their case. Arbitrators are appointed for a variety of reasons, including their expertise and experience in the type of controversy that the arbitration involves. That is particularly so in international arbitration where knowledge of, and experience in, international trade and relations often are of great importance. There is no assurance that in consolidated

arbitrations, where only some, if any, of the original arbitrators will take part, a party will consider that its chosen arbitrator has been replaced by an equally appropriate substitute. Similarly, other basic rights, such as to choose the party with whom one wishes to arbitrate and the applicable arbitration rules, may be set aside where consolidation or third party intervention are imposed.

Where consolidation or other similar measures have been imposed upon the parties without their agreement, the question will inevitably arise whether the resulting award will be enforceable in other countries.

COMMISSION OF THE EUROPEAN COMMUNITIES

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL ON THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS ('ROME II')

Brussels, 22.7.2003
COM(2003) 427 final
2003/0168 (COD)

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. Introduction

1.1. Context

By Article 2 of the Treaty on European Union, the Member States set themselves the objective of maintaining and developing the Union as an area of freedom, security and justice, in which the free movement of persons is assured and litigants can assert their rights in the courts and before the authorities of all the Member States, enjoying facilities equivalent to those they enjoy in their own country.

To establish a genuine European law-enforcement area, the Community, under Articles 61(c) and 65 of the Treaty establishing the European Community, is to adopt measures in the field of judicial cooperation in civil matters in so far as necessary for the proper functioning of the internal market. The Tampere European Council on 15 and 16 October 1999[1] acknowledged the mutual recognition principle as the cornerstone of judicial cooperation in the Union. It asked the Council and the Commission to adopt, by December 2000, a programme of measures to implement the mutual recognition principle.

The joint Commission and Council programme of measures to implement the principle of mutual recognition of decisions in civil and commercial matters, adopted

[1] Presidency conclusions of 16 October 1999, points 28 to 39.

© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

by the Council on 30 November 2000,[2] states that measures relating to harmonisation of conflict-of-law rules, which may sometimes be incorporated in the same instruments as those relating to jurisdiction and the recognition and enforcement of judgments, actually do help facilitate the mutual recognition of judgments. The fact that the courts of the Member States apply the same conflict rules to determine the law applicable to a practical situation reinforces the mutual trust in judicial decisions given in other Member States and is a vital element in attaining the longer-term objective of the free movement of judgments without intermediate review measures.

1.2. Complementarity with Instruments of Private International Law already in Force in the Community

This initiative relates to the Community harmonisation of private international law in civil and commercial matters that began late in the 1960s. On 27 September 1968 the six Member States of the European Economic Community concluded a Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the 'Brussels Convention') on the basis of the fourth indent of Article 293 (formerly 220) of the EC Treaty. This was drawn up on the idea, already described in the EC Treaty, that the establishment of a common market implied the possibility of having a judgment given in any Member State recognised and enforced as easily as possible. To facilitate the attainment of that objective, the Brussels Convention begins by setting out rules identifying the Member State whose courts have jurisdiction to hear and determine a cross-border dispute.

The mere fact that there are rules governing the jurisdiction of the courts does not generate reasonable foreseeability as to the outcome of a case being heard on the merits. The Brussels Convention and the 'Brussels I' Regulation that superseded it on 1 March 2001[3] contain a number of options enabling claimants to prefer this or that court. The risk is that parties will opt for the courts of one Member State rather than another simply because the law applicable in the courts of this state would be more favourable to them.

That is why work began on codifying the rules on conflicts of laws in the Community in 1967. The Commission convened two meetings of experts in 1969, at which it was agreed to focus initially on questions having the greatest impact on the operation of the common market the law applicable to tangible and intangible

[2] *OJ* C 12, 15.1.2001, p. 1.

[3] Council Regulation (EC) No 44/2001 of 22 December 2000, *OJ* L 12, 16.1.2001, p. 1, replacing the Brussels Convention of 1968, of which a consolidated version was published in *OJ* C 27, 26.1.1998, p. 1. But the Brussels Convention remains in force for relations between Denmark and the other Member States.

property, contractual and non-contractual obligations and the form of legal documents. On 23 June 1972, the experts presented a first preliminary draft convention on the law applicable to contractual and non-contractual obligations. Following the accession of the United Kingdom, Ireland and Denmark, the group was expanded in 1973, and that slowed progress. In March 1978, the decision was taken to confine attention to contractual obligations so that negotiations could be completed within a reasonable time and to commence negotiations later for a second convention on non-contractual obligations.

In June 1980 the Convention on the law applicable to contractual obligations (the 'Rome Convention') was opened for signature, and it entered into force on 1 April 1991.[4] As there was no proper legal basis in the EC Treaty at the time of its signing, the convention takes the traditional form of an international treaty. But as it was seen as the indispensable adjunct to the Brussels Convention, the complementarity being referred to expressly in the Preamble, it is treated in the same way as the instruments adopted on the basis of Article 293 (ex-220) and is an integral part of the Community acquis.

Given the substantial difference in scope between the Brussels and Rome Conventions the former covers both contractual and non-contractual obligations whereas the latter covers only contractual obligations the proposed Regulation, commonly known as 'Rome II', will be the natural extension of the unification of the rules of private international law relating to contractual and non-contractual obligations in civil or commercial matters in the Community.

1.3. Resumption of Work in the 1990s under the Maastricht and Amsterdam Treaties

Article K.1(6) of the Union Treaty in the Maastricht version classified judicial cooperation in civil matters in the areas of common interest to the Member States of the European Union. In its Resolution of 14 October 1996 laying down the priorities for cooperation in the field of justice and home affairs for the period from 1 July 1996 to 30 June 1998,[5] the Council stated that, in pursuing the objectives set by the European Council, it intended to concentrate during the above period on certain priority areas, which included the 'launching of discussions on the necessity and possibility of drawing up (...) a convention on the law applicable to extra-contractual obligations'.

---

[4] The consolidated text of the Convention as amended by the various Conventions of Accession, and the declarations and protocols annexed to it, is published in *OJ* C 27, 26.1.1998, p. 34.

[5] *OJ* C 319, 26 October 1996, p. 1.

In February 1998 the Commission sent the Member States a questionnaire on a draft convention on the law applicable to non-contractual obligations. The Austrian Presidency held four working meetings to examine the replies to the questionnaire. It was established that all the Member States supported the principle of an instrument on the law applicable to non-contractual obligations. At the same time the Commission financed a GROTIUS project[6] presented by the European Private International Law Group (GEDIP) to examine the feasibility of a European Convention on the law applicable to non-contractual obligations, which culminated in a draft text.[7] The Council' s ad hoc 'Rome II' Working Party continued to meet throughout 1999 under the German and Finnish Presidencies, examining the draft texts presented by the Austrian Presidency and by Gedip. An initial consensus emerged on a number of conflict rules, which this proposal for a Regulation duly reflects.

The Amsterdam Treaty, which entered into force on 1 May 1999, having moved cooperation in civil matters into the Community context, the Justice and Home Affairs Council on 3 December 1998 adopted the 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.[8] It recalls that principles such as certainty in the law and equal access to justice require among other things '*clear designation of the applicable law*' and states in paragraph 40 that '*The following measures should be taken within two years after the entry into force of the Treaty: (…) b) drawing up a legal instrument on the law applicable to non-contractual obligations (Rome II)*'.

On 3 May 2002, the Commission launched consultations with interested circles on an initial preliminary draft proposal for a 'Rome II' Regulation prepared by the Directorate-General for Justice and Home Affairs. The consultations prompted a very wide response, and the Commission received 80 or so written contributions from the Member States, academics, representatives of industry and consumers' associations.[9] The written consultation procedure was followed by a public hearing in Brussels on 7 January 2003. This proposal duly reflects the comments received.

---

[6] Project No GR/97/051.

[7] Accessible at http://www.drt.ucl.ac.be/gedip/gedip_documents.html.

[8] *OJ* C 19, 23.1.1999, p. 1.

[9] The contributions received by the Commission can be consulted at: http://europa.eu.int/comm/justice_home/news/consulting_public/rome_ii/news_summary_rome2_en.htm.

2. Proposal for a European Parliament and Council Regulation

2.1. General Purpose - to Improve the Foreseeability of Solutions Regarding the Applicable Law

The purpose of this proposal for a regulation is to standardise the Member States' rules of conflict of laws regarding non-contractual obligations and thus extend the harmonisation of private international law in relation to civil and commercial obligations which is already well advanced in the Community with the 'Brussels I' Regulation and the Rome Convention of 1980.

The harmonisation of conflict rules, which must be distinguished from the harmonisation of substantive law, seeks to harmonise the rules whereby the law applicable to an obligation is determined. This technique is particularly suitable for settling cross-border disputes, as, by stating with reasonable certainty the law applicable to the obligation in question irrespective of the forum, it can help to develop a European area of justice. Instead of having to study often widely differing conflict rules of all the Member States' courts that might have jurisdiction in a case, this proposal allows the parties to confine themselves to studying a single set of conflict rules, thus reducing the cost of litigation and boosting the foreseeability of solutions and certainty as to the law.

These general observations are particularly apt in the case of non-contractual obligations, the importance of which for the internal market is clear from sectoral instruments, in force or in preparation, governing this or that specific aspect (product liability or environmental liability, for example). The approximation of the substantive law of obligations is no more than embryonic. Despite common principles, there are still major divergences between Member States, in particular as regards the following questions: the boundary between strict liability and fault-based liability; compensation for indirect damage and third-party damage; compensation for non-material damage, including third-party damage; compensation in excess of actual damage sustained (punitive and exemplary damages); the liability of minors; and limitation periods. During the consultations undertaken by the Commission, several representatives of industry stated that these divergences made it difficult to exercise fundamental freedoms in the internal market. They realised that harmonisation of the substantive law was not a short-term prospect and stressed the importance of the rules of conflict of laws to improve the foreseeability of solutions.

A comparative law analysis of the rules of conflict of laws reveals that the present situation does not meet economic operators' need for foreseeability and that the differences are markedly wider than was the case for contracts before the harmonisation achieved by the Rome Convention. Admittedly, the Member States virtually all give pride of place to the *lex loci delicti commissi*, whereby torts/delicts are governed by the law of the place where the act was committed. The application of

this rule is problematic, however, in the case of what are known as 'complex' torts/delicts, where the harmful event and the place where the loss is sustained are spread over several countries.[10] There are variations between national laws as regards the practical impact of the *lex loci delicti commissi* rule in the case of cross-border non-contractual obligations. While certain Member States still take the traditional solution of applying the law of the country where the event giving rise to the damage occurred, recent developments more commonly tend to support the law of the country where the damage is sustained. But to understand the law in force in a Member State, it is not enough to ascertain whether the harmful event or the damage sustained is the dominant factor. The basic rule needs to be combined with other criteria. A growing number of Member States allow a claimant to opt for the law that is most favourable to him. Others leave it to the courts to determine the country with which the situation is most closely connected, either as a basic rule or exceptionally where the basic rule turns out to be inappropriate in the individual case. Generally speaking most Member States use a sometimes complex combination of the different solutions. Apart from the diversity of solutions, their legibility is not improved by the fact that only some of the Member States have codified their conflict-of-laws rules; in the others, solutions emerge gradually from the decisions of the courts and often remain uncertain, particularly as regards special torts/delicts.

There is no doubt that replacing more than fifteen national systems of conflict rules[11] by a single set of uniform rules would represent considerable progress for economic operators and the general public in terms of certainty as to the law.

The next need is to analyse the conflict rules in the context of the rules governing the international jurisdiction of the courts. Apart from the basic jurisdiction of the courts for the place of the defendant' s habitual residence, provided for by Article 2 of the 'Brussels I' Regulation, Article 5(3) provides for a special head of jurisdiction in relation to torts/delicts and quasi-delict in the form of '*the courts for the place where the harmful event occurred (...)*'. The Court of Justice has always held that where the place where the harmful act occurred and the place where the loss is sustained are not the same, the defendant can be sued, at the claimant's choice, in the courts either of the place where the harmful act occurred or of the place where the loss is sustained.[12] Admittedly, the Court acknowledged that each of the two places could constitute a meaningful connecting factor for jurisdiction purposes,

[10] See the decision of the Court of Justice in the following notes as regards the account to be taken of this spreading of factors for the international jurisdiction of the courts.

[11] There are more than fifteen national systems because the United Kingdom does not have a unitary system.

[12] Case 21/76 *Mines de Potasse d' Alsace* [1976] ECR 1735 (judgment given on 30.11.1976).

since each could be of significance in terms of evidence and organisation of the proceedings, but it is also true that the number of forums available to the claimant generates a risk of forum-shopping.

This proposal for a Regulation would allow parties to determine the rule applicable to a given legal relationship in advance, and with reasonable certainty, especially as the proposed uniform rules will receive a uniform interpretation from the Court of Justice. This initiative would accordingly help to boost certainty in the law and promote the proper functioning of the internal market. It is also in the Commission's programme of measures to facilitate the extra-judicial settlement of disputes, since the fact that the parties have a clear vision of their situation makes it all the easier to come to an amicable agreement.

2.2. Legal Basis

Since the Amsterdam Treaty came into force, conflict rules have been governed by Article 61(c) of the EC Treaty. Under Article 67 of the EC Treaty, as amended by the Nice Treaty that entered into force on 1 February 2003, the Regulation will be adopted by the codecision procedure laid down by Article 251 of the EC Treaty.

Article 65(b) provides: '*Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken (...) in so far as necessary for the proper functioning of the internal market, shall include: promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws (...)*'

The Community legislature has the power to put flesh on the bones of this Article and the discretion to determine whether a measure is necessary for the proper functioning of the internal market. The Council exercised this power when adopting the Vienna action plan of 3 December 1998[13] on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, point 40(c) of which calls expressly for a 'Rome II' instrument.

Harmonisation of the conflict rules helps to promote equal treatment between economic operators and individuals involved in cross-border litigation in the internal market. It is the necessary adjunct to the harmonisation already achieved by the 'Brussels I' Regulation as regards the rules governing the international jurisdiction of the courts and the mutual recognition of judgments. Given that there are more than fifteen different systems of conflict rules, two firms in distinct Member States, A and B, bringing the same dispute between them and a third firm in country C before their respective courts would have different conflict rules applied to them,

[13] *OJ* C 19, 23.1.1999, p. 1.

which could provoke a distortion of competition. Such a distortion could also incite operators to go forum-shopping.

But the harmonisation of the conflict rules also facilitates the implementation of the principle of the mutual recognition of judgments in civil and commercial matters. The mutual recognition programme[14] calls for the reduction and ultimately the abolition of intermediate measures for recognition of a judgment given in another Member State. But the removal of all intermediate measures calls for a degree of mutual trust between Member States which is not conceivable if their courts do not all apply the same conflict rule in the same situation.

Title IV of the EC Treaty, which covers the matters to which this proposal for a Regulation applies, does not apply to Denmark by virtue of the Protocol concerning it. Nor does it apply to the United Kingdom or Ireland, unless those countries exercise their option of joining the initiative (opt-in clause) on the conditions set out in the Protocol annexed to the Treaty. At the Council meeting (Justice and Home Affairs) on 12 March 1999, these two Member States announced their intention of being fully associated with Community activities in relation to judicial cooperation in civil matters. They were also fully associated with the work of the ad hoc Council working party before the Amsterdam Treaty entered into force.

2.3. Justification for Proposal in Terms of Proportionality and Subsidiarity Principles

The technique of harmonising conflict-of-laws rules fully respects the subsidiarity and proportionality principles since it enhances certainty in the law without demanding harmonisation of the substantive rules of domestic law.

As for the choice of instrument, point 6 of the Protocol on the application of the principles of subsidiarity and proportionality provides that '*Other things being equal, directives should be preferred to regulations and framework directives to detailed measures*.' But for the purposes of this proposal a Regulation is the most appropriate instrument. It lays down uniform rules for the applicable law. These rules are detailed, precise and unconditional and require no measures by the Member States for their transposal into national law. They are therefore self-executing. The nature of these rules is the direct result of the objective set for them, which is to enhance certainty in the law and the foreseeability of the solutions adopted as regards the law applicable to a given legal relationship. If the Member States had room for manoeuvre in transposing these rules, uncertainty would be reintroduced into the law, and that is precisely what the harmonisation is supposed to abolish.

[14] *OJ* C 12, 15.1.2001, p. 8.

The Regulation is therefore the instrument that must be chosen to guarantee uniform application in the Member States.

3. Individual Provisions

Article 1 - Material scope

Like the Brussels Convention and the 'Brussels I' Regulation, the proposed Regulation covers civil and commercial obligations. This is an autonomous concept of Community law that has been interpreted by the Court of Justice. The reference to this makes it clear that the 'Brussels I' Regulation, the Rome Convention and the Regulation proposed here constitute a coherent set of instruments covering the general field of private international law in matters of civil and commercial obligations.

The scope of the Regulation covers all non-contractual obligations except those in matters listed in paragraph 2. Non-contractual obligations are in two major categories, those that arise out of a tort or delict and those that do not. The first category comprises obligations relating to tort or delict, and the second comprises obligations relating to what in some jurisdictions is termed 'quasi-delict' or 'quasi-contract', including in particular unjust enrichment and agency without authority or negotiorum gestio. The latter category is governed by section 2. But the demarcation line between contractual obligations and obligations based on tort or delict is not identical in all the Member States, and there may be doubts as to which instrument the Rome Convention or the proposed Regulation should be applied in a given dispute, for example in the event of pre-contractual liability, of *culpa in contrahendo* or of actions by creditors to have certain transactions by their debtors declared void as prejudicial to their interests. The Court of Justice, in actions under Articles 5(1) and (3) of the Brussels Convention, has already had occasion to rule that tort/delict cases are residual in relation to contract cases, which must be defined in strict terms.[15] It will no doubt refine its analysis when interpreting the proposed Regulation.

The proposed Regulation would apply to all situations involving a conflict of laws, i.e. situations in which there are one or more elements that are alien to the domestic social life of a country that entail applying several systems of law. Under Article 1(2), the following are excluded from the scope of the proposed Regulation:

---

[15] Case 34/82 *Martin Peters* [1983] ECR I-987 (judgment given on 22 March 1983); Case C-26/91 *Jacob Handte* [1992] ECR I-3697 (judgment given on 17 June 1992); Case C-334/00 *Fonderie Officine Meccaniche Tacconi* [202] ECR I-7357 (judgment given on 17.9.2002).

a) non-contractual obligations arising out of family or similar relationships: family obligations do not in general arise from a tort or delict. But such obligations can occasionally appear in the family context, as is the case of an action for compensation for damage caused by late payment of a maintenance obligation. Some commentators have suggested including these obligations within the scope of the Regulation on the grounds that they are governed by the exception clause in Article 3(3), which expressly refers to the mechanism of the 'secondary connection' that places them under the same law as the underlying family relationship. Since there are so far no harmonised conflict-of-laws rules in the Community as regards family law, it has been found preferable to exclude non-contractual obligations arising out of such relationships from the scope of the proposed Regulation.

b) Non-contractual obligations arising in connection with matrimonial property regimes and successions: these are excluded for similar reasons to those given at point a).

c) Non-contractual obligations arising out of bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character; this point is taken over from Article 1(2)(c) of the Rome Convention. It is incorporated here for the same reasons as are given in the Giuliano-Lagarde Report,[16] namely that the Regulation is not the proper instrument for such obligations, that the Geneva Conventions of 7 June 1930 and 19 March 1931 regulate much of this matter and that these obligations are not dealt with uniformly in the Member States.

d) The personal legal liability of officers and members as such for the debts of a company or firm or other body corporate or unincorporate, and the personal legal liability of persons responsible for carrying out the statutory audits of accounting documents: this question cannot be separated from the law governing companies or firms or other bodies corporate or unincorporate that is applicable to the company or firm or other body corporate or unincorporate in connection with whose management the question of liability arises.

e) Non-contractual obligations among the settlers, trustees and beneficiaries of a trust: trusts are a sui generis institution and should be excluded from the scope of this Regulation as previously from the Rome Convention.

f) non-contractual obligations arising out of nuclear damage: this exclusion is explained by the importance of the economic and State interests at stake and

[16] Report on the Convention on the law applicable to contractual obligations, *OJ* C 282, 31.10.1980, p. 1.

> the Member States' contribution to measures to compensate for nuclear damage in the international scheme of nuclear liability established by the Paris Convention of 29 July 1960 and the Additional Convention of Brussels of 31 January 1963, the Vienna Convention of 21 May 1963, the Convention on Supplementary Compensation of 12 September 1997 and the Protocol of 21 September 1988.

These being exceptions, the exclusions will have to be interpreted strictly.

The proposed Regulation does not take over the exclusion in Article 1(2)(h) of the Rome Convention, which concerns rules of evidence and procedure. It is clear from Article 11 that, subject to the exceptions mentioned, these rules are matters for the *lex fori*. They would be out of place in a list of non-contractual obligations excluded from the scope of this Regulation.

Article 2 – Universal application

Under Article 2, this is a universal Regulation, meaning that the uniform conflict rules can designate the law of a Member State of the European Union or of a third country.

This is a firmly-rooted principle of the law concerning conflict of laws and already exists in the Rome Convention, the conventions concluded in the Hague Conference and the domestic law of the Member States.

Given the complementarily between 'Brussels I' and the proposed Regulation, the universal nature of the latter is necessary for the proper functioning of the internal market as avoiding distortions of competition between Community litigants. If the 'Brussels I' Regulation distinguishes *a priori* between situations in which the defendant is habitually resident in the territory of a Member State and those in which he is habitually resident in a third country,[17] it still governs both purely 'intra-Community' situations and situations involving a 'foreign' element. For the rules of recognition and enforcement, first of all, all judgments given by a court in a Member State that are within the scope of the 'Brussels I' Regulation qualify for the simplified recognition and enforcement scheme; the law under which the judgment was given the law of a Member State or of a third country therefore has very little impact. As for the rules of jurisdiction, the 'Brussels I' Regulation also applies where the defendant is habitually resident outside Community territory: this is the case where the dispute is within an exclusive jurisdiction rule,[18] where the

[17] Article 2(1).

[18] Article 22.

jurisdiction of the court proceeds from a jurisdiction clause,[19] where the defendant enters an appearance[20] and where the *lis pendens* rule applies;[21] in general, Article 4(2) specifies that where the defendant is habitually resident in a third country, the claimant, if habitually resident in a Member States, may rely on exorbitant rules of the law of the country where he is habitually resident, irrespective of his nationality. It follows from all these provisions that the 'Brussels I' Regulation applies both to 'intra-Community' situations and to situations involving an 'extra-Community' element.

What must be sought, therefore, is equal treatment for Community litigants, even in situations that are not purely 'intra-Community'. If there continue to be more than fifteen different systems of conflict rules, two firms in distinct Member States, A and B, bringing the same dispute between them and a third firm in country C before their respective courts, would have different conflict rules applied to them, which could provoke a distortion of competition as in purely intra-Community situations.

Moreover, the separation between 'intra-Community' and 'extra-Community' disputes is by now artificial. How, for instance, are we to describe a dispute that initially concerns only a national of a Member State and a national of a third country but subsequently develops into a dispute concerning several Member States, for instance where the Community party joins an insurer established in another Member State or the debt in issue is assigned. Given the extent to which economic relations in the internal market are now intertwined, all disputes potentially have an intra-Community nature.

And on purely practical grounds, evidence presented to the Commission by the legal professions – both bench and bar – in the course of the written consultation emphasised that private international law in general and the conflict rules in particular are perceived as highly complex. This complexity would be even greater if this measure had the effect of doubling the sources of conflict rules and if practitioners now had to deal not only with Community uniform rules but also with distinct national rules in situations not connected as required with Community territory. The universal nature of the proposed Regulation accordingly meets the concern for certainty in the law and the Union' s commitment in favour of transparent legislation.

---

[19] Article 23.

[20] Article 24.

[21] Article 27.

Article 3 – General rules

Article 3 lays down general rules for determining the law applicable to non-contractual obligations arising out of a tort or delict. It covers all obligations for which the following Articles lay down no special rule.

The Commission' s objectives in confirming the *lex loci delicti commissi* rule are to guarantee certainty in the law and to seek to strike a reasonable balance between the person claimed to be liable and the person sustaining the damage. The solutions adopted here also reflect recent developments in the Member States' conflict rules.

Paragraph 1 - General rule

Article 3(1) takes as the basic rule the law of the place where the direct damage arises or is likely to arise. In most cases this corresponds to the law of the injured party's country of residence. The expression 'is likely to arise' shows that the proposed Regulation, like Article 5(3) of the 'Brussels I' Regulation, also covers preventive actions such as actions for a prohibitive injunction.

The place or places where indirect damage, if any, was sustained are not relevant for determining the applicable law. In the event of a traffic accident, for example, the place of the direct damage is the place where the collision occurs, irrespective of financial or non-material damage sustained in another country. In a Brussels Convention case the Court of Justice held that the '*place where the harmful event occurred*' does not include the place where the victim suffered financial damage following upon initial damage arising and suffered by him in another Contracting State.[22]

The rule entails, where damage is sustained in several countries, that the laws of all the countries concerned will have to be applied on a distributive basis, applying what is known as 'Mosaikbetrachtung' in German law.

The proposed Regulation also reflects recent developments in the Member States' conflict rules. While the absence of codification in several Member States makes it impossible to give a clear answer for the more than fifteen systems, the connection to the law of the place where the damage was sustained has been adopted by those Member States where the rules have recently been codified. The solution applies to the Netherlands, the United Kingdom and France, but also in Switzerland. In Germany, Italy and Poland, the victim may opt for this law among others.

The solution in Article 3(1) meets the concern for certainty in the law. It diverges from the solution in the draft Convention of 1972, which takes as its basic rule the

[22] Case C-364/93 *Marinari v Lloyds Bank* [1995] ECR I-2719 (judgment given on 19.9.1995).

place where the 'harmful event' occurred. But the Court of Justice has held that the 'harmful event' covers both the act itself and the resultant damage. This solution reflects the specific objectives of international jurisdiction but it does not enable the parties to foresee the law that will be applicable to their situation with reasonable certainty.

The rule also reflects the need to strike a reasonable balance between the various interests at stake. The Commission has not adopted the principle of favouring the victim as a basic rule, which would give the victim the option of choosing the law most favourable to him. It considers that this solution would go beyond the victim' s legitimate expectations and would reintroduce uncertainty in the law, contrary to the general objective of the proposed Regulation. The solution in Article 3 is therefore a compromise between the two extreme solutions of applying the law of the place where the event giving rise to the damage occurs and giving the victim the option.

Article 3(1), which establishes an objective link between the damage and the applicable law, further reflects the modern concept of the law of civil liability which is no longer, as it was in the first half of the last century, oriented towards punishing for fault-based conduct: nowadays, it is the compensation function that dominates, as can be seen from the proliferation of no-fault strict liability schemes.

But the application of the basic rule might well be inappropriate where the situation has only a tenuous connection with the country where the damage occurs. The following paragraphs therefore exclude it in specified circumstances.

Paragraph 2 – Law of the common place of residence

Paragraph 2 introduces a special rule where the person claimed to be liable and the person who has allegedly sustained damage are habitually resident in the same country, the law of that country being applicable. This is the solution adopted by virtually all the Member States, either by means of a special rule or by the rule concerning connecting factors applied in the courts. It reflects the legitimate expectations of the two parties.

Paragraph 3 – General exception and secondary connection

Like Article 4(5) of the Rome Convention, paragraph 3 is a general exception clause which aims to bring a degree of flexibility, enabling the court to adapt the rigid rule to an individual case so as to apply the law that reflects the centre of gravity of the situation.

Since this clause generates a degree of unforeseeability as to the law that will be applicable, it must remain exceptional. Experience with the Rome Convention, which begins by setting out presumptions, has shown that the courts in some Member States tend to begin in fact with the exception clause and seek the law that best meets the proximity criterion, rather than starting from these presumptions.[23] That is why the rules in Article 3(1) and (2) of the proposed Regulation are drafted in the form of rules and not of mere presumptions. To make clear that the exception clause really must be exceptional, paragraph 3 requires the obligation to be '*manifestly more closely connected*' with another country.

Paragraph 3 then allows the court to be guided, for example, by the fact that the parties are already bound by a pre-existing relationship. This is a factor that can be taken into account to determine whether there is a manifestly closer connection with a country other than the one designated by the strict rules. But the law applicable to the pre-existing relationship does not apply automatically, and the court enjoys a degree of discretion to decide whether there is a significant connection between the non-contractual obligations and the law applicable to the pre-existing relationship.

The text states that the pre-existing relationship may consist of a contract that is closely connected with the non-contractual obligations in question. This solution is particularly interesting for Member States whose legal system allows both contractual and non-contractual obligations between the same parties. But the text is flexible enough to allow the court to take account of a contractual relationship that is still only contemplated, as in the case of the breakdown of negotiations or of annulment of a contract, or of a family relationship. By having the same law apply to all their relationships, this solution respects the parties' legitimate expectations and meets the need for sound administration of justice. On a more technical level, it means that the consequences of the fact that one and the same relationship may be covered by the law of contract in one Member State and the law of tort/delict in another can be mitigated, until such time as the Court of Justice comes up with its own autonomous response to the situation. The same reasoning applies to the consequences of the nullity of a contract, already covered by a special rule in Article 10(1)(e) of the Rome Convention. Certain Member States having expressed a reservation as to this Article, the use of the secondary connection mechanism will overcome the difficulties that might flow from the application of two separate instruments.

But where the pre-existing relationship consists of a consumer or employment contract and the contract contains a choice-of-law clause in favour of a law other

[23] Cf. point 3.2.5 of the Green Paper on converting the Convention of Rome of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation.

than the law of the consumer' s habitual place of residence, the place where the employment contract is habitually performed or, exceptionally, the place where the employee was hired, the secondary connection mechanism cannot have the effect of depriving the weaker party of the protection of the law otherwise applicable. The proposed Regulation does not contain an express rule to this effect since the Commission considers that the solution is already implicit in the protective rules of the Rome Convention: Articles 5 and 6 would be deflected from their objective if the secondary connection validated the choice of the parties as regards non-contractual obligations but their choice was at least partly invalid as regards their contract.

Article 4 – Product liability

Article 4 introduces a specific rule for non-contractual obligations in the event of damage caused by a defective product. For the definition of product and defective product for the purposes of Article 4, Articles 2 and 6 of Directive 85/374 will apply.[24]

Directive 85/374 approximated the Member States' substantive law regarding strict liability, i.e. no-fault liability. But there is no full harmonisation, as the Member States are authorised to exercise certain options. The Directive does not affect national law concerning fault-based liability, which the victim can always rely on, and covers only certain types of damage. The scope of the special rule in Article 4 is consequently broader than the scope of Directive 85/374, as it also applies to actions based on purely national provisions governing product liability that do not emanate from the Directive.

Apart from respecting the parties' legitimate expectations, the conflict rule regarding product liability must reflect also the wide scatter of possible connecting factors (producer's headquarters, place of manufacture, place of first marketing, place of acquisition by the victim, victim' s habitual residence), accentuated by the development of international trade, tourism and the mobility of persons and goods in the Union. Connection solely to the place of the direct damage is not suitable here as the law thus designated could be unrelated to the real situation, unforeseeable for the producer and no source of adequate protection for the victim.[25]

---

[24] Council Directive 85/374/EEC of 25.7.1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (*OJ* L 210, 7.8.1985, p. 29), as amended by Directive 1999/34/EC of 10 May 1999 (*OJ* L 141, 4.6.1999, p. 20).

[25] Such a case might be a German tourist buying French-made goods in Rome airport to take to an African country, where they explode and cause him to sustain damage.

Countries in which there are special rules thus tend to provide for a rule requiring several elements to be present in the same country for that country' s law to be applicable. This is also the approach taken in the Hague Convention 1973 on the law applicable to products liability, in force in five Member States.[26] Under Article 25 of the proposed Regulation, the Convention will remain in force in the Member States that have ratified it when the Regulation comes into force. The 1973 Convention determines the law applicable to the liability of manufacturers, producers, suppliers and repairers on the basis of the following factors, whether distributed or combined on a complex basis: the place of damage, place of the habitual residence of the victim, principal place of business of the manufacturer or producer, place where the product was acquired.

The proposed Regulation acknowledges the specific constraints inherent in the subject-matter in issue but nevertheless proceeds from the need for a rule to avoid being unnecessarily complex.

Under Article 4, the applicable law is basically the law of the place of where the person sustaining damage has his habitual residence. But this solution is conditional on the product having been marketed in that country with the consent of the person claimed to be liable. In the absence of consent, the applicable law is the law of the country in which the person claimed to be liable has his habitual residence. Article 3(2) (common habitual residence) and (3) (general exception clause) also apply.

The fact that this is a simple and predictable rule means that it is particularly suitable in an area where the number of out-of-court settlements is very high, partly because insurers are so often involved. Article 4 strikes a reasonable balance between the interests in issue. Given the requirement that the product be marketed in the country of the victim's habitual residence for his law to be applicable, the solution is foreseeable for the producer, who has control over his sales network. It also reflects the legitimate interests of the person sustaining damage, who will generally have acquired a product that is lawfully marketed in his country of residence.

Where the victim acquires the product in a country other than that of his habitual residence, perhaps while travelling, two hypotheses need to be distinguished: the first is where the victim acquired abroad a product also marketed in their country of residence, for instance in order to enjoy a special offer. In this case the producer had already foreseen that his activity might be evaluated by the yardstick of the rules in force in that country, and Article 4 designates the law of that country, since both parties could foresee that it would be applicable.

---

[26] Finland, France, Luxembourg the Netherlands and Spain. The convention is also in force in Norway, Croatia, Macedonia, Slovenia and Yugoslavia.

In the second hypothesis, by contrast, where the victim acquired abroad a product that is not lawfully marketed in their country of habitual residence, none of the parties would have expected that law to be applied. A subsidiary rule is consequently needed. The two connecting factors discussed during the Commission' s consultations were the place where the damage is sustained and the habitual residence of the person claimed to be liable. Since the large-scale mobility of consumer goods means that the connection to the place where the damage is sustained no longer meets the need for certainty in the law or for protection of the victim, the Commission has opted for the second solution.

The rule in Article 4 corresponds not only to the parties' expectations but also to the European Union's more general objectives of a high level of protection of consumers' health and the preservation of fair competition on a given market. By ensuring that all competitors on a given market are subject to the same safety standards, producers established in a low-protection country could no longer export their low standards to other countries, which will be a general incentive to innovation and scientific and technical development.

The expression '*person claimed to be liable*' does not necessarily mean the manufacturer of a finished product; it might also be the producer of a component or commodity, or even an intermediary or a retailer. Anybody who imports a product into the Community is considered in certain conditions to be responsible for the safety of the products in the same way as the producer.[27]

Article 5 – Unfair competition

Article 5 provides for an autonomous connection for actions for damage arising out of an act of unfair competition.

The purpose of the rules against unfair competition is to protect fair competition by obliging all participants to play the game by the same rules. Among other things they outlaw acts calculated to influence demand (misleading advertising, forced sales, etc.), acts that impede competing supplies (disruption of deliveries by competitors, enticing away a competitor's staff, boycotts), and acts that exploit a competitor's value (passing off and the like). The modern competition law seeks to protect not only competitors (horizontal dimension) but also consumers and the public in general (vertical relations). This three-dimensional function of competition law must be reflected in a modern conflict-of-laws instrument.

Article 5 reflects this triple objective since it refers to the effect on the market in general, the effect on competitors' interests and the effect on the broad and rather vague interests of consumers (as opposed to the individual interests of a specific

[27] Directive 85/374, Article 3(2).

consumer). This last concept is taken over from a number of Community consumer-protection directives, in particular Directive 98/27 of 19 May 1998.[28] This is not to say that the concept relates solely to actions brought by a consumers' association; given the triple objective of competition law, virtually any act of unfair competition also affects the collective interests of consumers, and it is neither here nor there whether the action is brought by a competitor or an association. But Article 5 applies also to actions for injunctions brought by consumer associations. The proposed Regulation thus sits well with recent decisions of the Court of Justice on the Brussels Convention holding, for instance, that '*a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of that convention*'.[29]

Comparative analysis of the Member States' private international law shows that there is a broad consensus in favour of applying the law of the country in which the market is distorted by competitive acts. This result is obtained either through the general principle of the *lex loci delicti* or by a specific connection (Austria, Netherlands, Spain and also Switzerland) and corresponds to recommendations extensively made by academic writers and by the Ligue internationale du droit de la concurrence en matière de publicité.[30] The current situation, however, is one of uncertainty, particularly in countries where the courts have not had an opportunity to rule on how the *lex loci delicti* rule should operate in practice. The establishment of a uniform conflict rule here would thus enhance the foreseeability of court decisions.

Article 5 provides for connection to the law of the State in whose territory '*competitive relations or the collective interests of consumers are affected or are likely to be affected*' by '*an act of unfair competition*'. This is the market where competitors are seeking to gain the customer's favour. This solution corresponds to the victims' expectations since the rule generally designates the law governing their economic environment. But it also secures equal treatment for all operators on the same market. The purpose of competition law is to protect a market; it pursues a macro-economic objective. Actions for compensation are purely secondary and must be dependent on the overall judgement of how the market functions.

---

[28] Parliament and Council Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumers' interests: *OJ* L 166, 11.6.1998, p. 51.

[29] Case C-167/2000 *Henkel* (judgment given on 1.10.2002).

[30] Resolution passed at the Amsterdam congress in October 1992, published in the *Revue internationale de la concurrence* 1992 (No 168), p. 51, this Resolution having also called for an effort to harmonise the substantive rules here.

Regarding the assessment of the impact on the market, academic writers generally acknowledge that only the direct substantial effects of an act of unfair competition should be taken into account. This is particularly important in international situations since anti-competitive conduct commonly has an impact on several markets and gives rise to the distributive application of the laws involved.

The need for a special rule here is sometimes disputed on the ground that it would lead to the same solution as the general rule in Article 3, the damage for which compensation is sought being assimilated to the anti-competitive effect on which the application of competition law depends. While the two very often coincide in territorial terms, they will not automatically do so: for instance, the question of the place where the damage is sustained is tricky where two firms from State A both operate on market B. Moreover, the rules of secondary connection, of the common residence and the exception clause are not adapted to this matter in general.

Paragraph 2 deals with situations where an act of unfair competition targets a specific competitor, as in the case of enticing away a competitor's staff, corruption, industrial espionage, disclosure of business secrets or inducing breach of contract. It is not entirely excluded that such conduct may also have a negative impact on a given market, but these are situations that have to be regarded as bilateral. There is consequently no reason why the victim should not enjoy the benefit of Article 3 relating to the common residence or the general exception clause. This solution is in conformity with recent developments in private international law: there is a similar provision in section 4(2) of the Dutch Act of 2001 and section 136(2) of the Swiss Act. The German courts take the same approach.

Article 6 - Violations of privacy and rights relating to the personality

The Regulation follows the approach generally taken by the law of the Member States nowadays and classifies violations of privacy and rights relating to the personality, particularly in the event of defamation by the mass media, in the category of non-contractual obligations rather than matters of personal status, except as regards rights to the use of a name.

There are specific provisions on respect for privacy and freedom of expression and information, also covering respect for media freedom and pluralism, in the Charter of Fundamental Rights of the European Union and in the Council of Europe Convention on the Protection of Human Rights and Fundamental Freedoms. The Community institutions and the Member States are required to respect these fundamental values. The European Court of Human Rights has already given valuable pointers to how to reconcile the two principles in the event of defamation proceedings. International conventions have helped to approximate the rules governing freedom of the press in the Member States, but differences remain as regards

the practical application of that freedom. Operators regard the foreseeability of the law applicable to their business as of the greatest importance.

A study of the conflict rules in the Member States shows that there is not only a degree of diversity in the solutions adopted but also considerable uncertainty as to the law. In the absence of codification, court decisions laying down general rules are still lacking in many Member States.[31] The connecting factors in the other Member States vary widely: the publisher' s headquarters or the place where the product was published (Germany and Italy, at the victim' s option); the place where the product was distributed and brought to the knowledge of third parties (Belgium, France, Luxembourg); the place where the victim enjoys a reputation, presumed to be his habitual residence (Austria). Other Member States follow the principle of favouring the victim, by giving the victim the option (Germany, Italy), or applying the law of the place where the damage is sustained where the *lex loci delicti* does not provide for compensation (Portugal). The UK solution is very different from the solutions applied in other Member States, for it differentiates depending whether the publication is distributed in the UK or elsewhere: in the former case the only law applicable is the law of the place of distribution; in the latter case the court applies both the law of the place of distribution and the *lex fori* ('double actionability rule'). This rule protects the national press, as the English courts cannot give judgment against it if there is no provision for this in English law.[32]

Given the diversity and the uncertainties of the current situation, harmonising the conflict rule in the Community will increase certainty in the law.

The content of the uniform rule must reflect the rules of international jurisdiction in the 'Brussels I' Regulation. The effect of the *Mines de Potasse d'Alsace* and *Fiona Shevill* judgments[33] is that the victim may sue for damages either in the courts of the State where the publisher of the defamatory material is established, which have full jurisdiction to compensate for all damage sustained, or in the courts of each State in which the publication was distributed and the victim claims to have suffered a loss of reputation, with jurisdiction to award damages only for damage sustained in their own State. Consequently, if the victim decides to bring the action in a court in a State where the publication is distributed, that court will apply its own law to the damage sustained in that State. But if the victim brings the action in the court for the place where the publisher is headquartered, that court

---

[31] Denmark, Finland, Greece, Ireland (doctrine of the 'proper law of the tort'), Netherlands, Spain and Sweden.

[32] Some academic writers in England doubt, however, whether invasions of privacy are also covered by this rule.

[33] Case C 68/93 *Fiona Shevill and others v Press Alliance SA* [1995] ECR I - 415 (judgment given on 7 March 1995).

will have jurisdiction to rule on the entire claim for damages: the *lex fori* will then govern the damage sustained in that country and the court will apply the laws involved on a distributive basis if the victim also claims compensation for damage sustained in other States.

In view of the practical difficulties in the distributive application of several laws to a given situation, the Commission proposed, in its draft proposal for a Council Regulation of May 2002, that the law of the victim' s habitual residence be applied. But there was extensive criticism of this during the consultations, one of the grounds being that it is not always easy to ascertain the habitual residence of a celebrity and another being that the combination of rules of jurisdiction and conflict rules could produce a situation in which the courts of the State of the publisher' s establishment would have to give judgment against the publisher under the law of the victim' s habitual residence even though the product was perfectly in conformity with the rules of the publisher's State of establishment and no single copy of the product was distributed in the victim' s State of residence. The Commission has taken these criticisms on board and reviewed its proposal.

Article 6(1) of the proposed Regulation now provides for the law applicable to violations of privacy and rights relating to the personality to be determined in accordance with the rules in Article 3, which posit the law of the place where the direct damage is sustained, unless the parties reside in the same State or the dispute is more closely connected with another country.

In *Fiona Shevill* the Court of Justice ruled on the actual determination of the place where the damage was sustained in the event of defamation by the press, opting for the '*State in which the publication was distributed and where the victim claims to have suffered injury to his reputation*'. The place where a publication is distributed is the place where it comes to the knowledge of third parties and a person' s reputation is liable to be harmed. This solution is in conformity with the victim's legitimate expectations without neglecting those of media firms. A publication can be regarded as distributed in a country only if is actually distributed there on a commercial basis.

But the Commission has been sensitive to concerns expressed both in the press and by certain Member States regarding situations in which a court in Member State A might be obliged to give judgment against a publisher with its own nationality A under the laws of Member State B, or even a third country, even though the publication in dispute was perfectly in conformity with the rules applicable in Member State A. It has been pointed out that the application of law B could be unconstitutional in country A as violating the freedom of the press. Given that this is a sensitive issue, where the Member States' constitutional rules diverge quite considerably, the Commission has felt that Article 6(1) should make it explicitly clear that the law designated by Article 3 must be disapplied in favour of the *lex fori* if it is

incompatible with the public policy of the forum in relation to freedom of the press.

The law designated by Article 6(1) does not seem to provide a proper basis for settling the question whether and in what conditions the victim can oblige the publisher to issue a corrected version and exercise a right of reply. Paragraph 2 accordingly provides that the right of reply and equivalent measures will be governed by the law of the country in which the broadcaster or publisher is established.

Article 7 - Violation of the environment

Article 7 lays down a special rule for civil liability in relation to violations of the environment. Reflecting recent developments in the substantive law, the rule covers both damage to property and persons and damage to the ecology itself, provided it is the result of human activity.

European or even international harmonisation is particularly important here as so many environmental disasters have an international dimension. But the instruments adopted so far deal primarily with questions of substantive law or international jurisdiction rather than with harmonisation of the conflict rules. And they address only selected types of cross-border pollution. In spite of this gradual approximation of the substantive law, not only in the Community, major differences subsist – for example in determining the damage giving rise to compensation, limitation periods, indemnity and insurance rules, the right of associations to bring actions and the amounts of compensation. The question of the applicable law has thus lost none of its importance.

Analysis of the current conflict rules shows that the solutions vary widely. The *lex fori* and the law of the place where the dangerous activity is exercised play a certain role, particularly in the international Conventions, but the most commonly applied solution is the law of the place where the loss is sustained (France, United Kingdom, Netherlands, Spain, Japan, Switzerland, Romania, Turkey, Quebec) or one of the variants of the principle of the law that is most favourable to the victim (Germany, Austria, Italy, Czech Republic, Yugoslavia, Estonia, Turkey, Nordic Convention of 1974 on the protection of the environment, Convention between Germany and Austria of 19 December 1967 concerning nuisances generated by the operation of Salzburg airport in Germany). The Hague Conference has also put an international convention on cross-border environmental damage on its work programme, and preparatory work seems to be moving towards a major role for the place where the damage is sustained, though the merits of the principle of favouring the victim are acknowledged.

The uniform rule proposed in Article 7 takes as its primary solution the application of the general rule in Article 3(1), applying the law of the place where the damage

is sustained but giving the victim the option of selecting the law of the place where the event giving rise to the damage occurred.

The basic connection to the law of the place where the damage was sustained is in conformity with recent objectives of environmental protection policy, which tends to support strict liability. The solution is also conducive to a policy of prevention, obliging operators established in countries with a low level of protection to abide by the higher levels of protection in neighbouring countries, which removes the incentive for an operator to opt for low-protection countries. The rule thus contributes to raising the general level of environmental protection.

But the exclusive connection to the place where the damage is sustained would also mean that a victim in a low-protection country would not enjoy the higher level of protection available in neighbouring countries. Considering the Union' s more general objectives in environmental matters, the point is not only to respect the victim's legitimate interests but also to establish a legislative policy that contributes to raising the general level of environmental protection, especially as the author of the environmental damage, unlike other torts or delicts, generally derives an economic benefit from his harmful activity. Applying exclusively the law of the place where the damage is sustained could give an operator an incentive to establish his facilities at the border so as to discharge toxic substances into a river and enjoy the benefit of the neighbouring country' s laxer rules. This solution would be contrary to the underlying philosophy of the European substantive law of the environment and the 'polluter pays' principle.

Article 7 accordingly allows the victim to make his claim on the basis of the law of the country in which the event giving rise to the damage occurred. It will therefore be for the victim rather than the court to determine the law that is most favourable to him. The question of the stage in proceedings at which the victim must exercise his option is a question for the procedural law of the forum, each Member State having its own rules to determine the moment from which it is no longer possible to file new claims.

A further difficulty regarding civil liability for violations of the environment lies in the close link with the public-law rules governing the operator's conduct and the safety rules with which he is required to comply. One of the most frequently asked questions concerns the consequences of an activity that is authorised and legitimate in State A (where, for example, a certain level of toxic emissions is tolerated) but causes damage to be sustained in State B, where it is not authorised (and where the emissions exceed the tolerated level). Under Article 13, the court must then be able to have regard to the fact that the perpetrator has complied with the rules in force in the country in which he is in business.

Article 8 – Infringement of intellectual property rights

Article 8 lays down special rules for non-contractual obligations flowing from an infringement of intellectual property rights. According to Recital 14 the term intellectual property rights means copyright, related rights, *sui generis* right for protection of databases and industrial property rights.

The treatment of intellectual property was one of the questions that came in for intense debate during the Commission' s consultations. Many contributions recalled the existence of the universally recognised principle of the *lex loci protectionis*, meaning the law of the country in which protection is claimed on which e.g. the Bern Convention for the Protection of Literary and Artistic Works of 1886 and the Paris Convention for the Protection of Industrial Property of 1883 are built. This rule, also known as the 'territorial principle', enables each country to apply its own law to an infringement of an intellectual property right which is in force in its territory: counterfeiting an industrial property right is governed by the law of the country in which the patent was issued or the trade mark or model was registered; in copyright cases the courts apply the law of the country where the violation was committed. This solution confirms that the rights held in each country are independent.

The general rule contained in Article 3(1) does not appear to be compatible with the specific requirements in the field of intellectual property. To reflect this incompatibility, two approaches were discussed in the course of preparatory work. The first is to exclude the subject from the scope of the proposed Regulation, either by means of an express exclusion in Article 1 or by means of Article 25, which preserves current international conventions. The second is to lay down a special rule, and this is the approach finally adopted by the Commission with Article 8.

Article 8(1) enshrines the *lex loci protectionis* principle for infringements of intellectual property rights conferred under national legislation or international conventions.

Paragraph 2 concerns infringements of unitary Community rights such as the Community trade mark, Community designs and models and other rights that might be created in future such as the Community patent for which the Commission has adopted a proposal for a Council regulation[34] on 1 August 2000. The *locus protectionis* referring to the Community as a whole, the non contractual obligations that are covered by the present proposal for a regulation are directly governed by the unitary Community law. In case of infringements and where for a specific question the Community instrument neither contains a provision of substantive law nor a special conflict of laws' rule, Article 8(2) of the proposed regulation contains

[34] *OJ* C 337 E, 28.11.2000, p. 78.

a subsidiary rule according to which the applicable law is the law of the Member State in which an act of infringement of the Community right has been committed.

Article 9 – Law applicable to non-contractual obligations arising out of an act other than a tort or delict

In all the Member States' legal systems there are obligations that arise neither out of a contract nor out of a tort or delict. The situations that are familiar to all the Member States are payments made by mistake and services rendered by a person that enable another person to avoid sustaining personal injury or loss of assets.

Since these obligations are clearly distinguished by their own features from torts and delicts, it has been decided that there should be a special section for them.

To reflect the wide divergences between national systems here, technical terms need to be avoided. This Regulation refers therefore to '*non-contractual obligations arising out of an act other than a tort or delict*'. In most Member States there are sub-categories for repayment of amounts wrongly received or unjust enrichment on the one hand and agency without authority (*negotiorum gestion*) on the other. Both the substantive law and the conflict rules are still evolving rapidly in most of the Member States, which means that the law is far from certain. The uniform conflict rule must reflect the divergences in the substantive rules. The difficulty is in laying down rules that are neither so precise that they cannot be applied in a Member State whose substantive law makes no distinction between the various relevant hypotheses nor so general that they might be open to challenge as serving no obvious purpose. Article 9 seeks to overcome the problem by laying down specific rules for the two sub-categories, unjust enrichment and agency without authority, while leaving the courts with sufficient flexibility to adapt the rule their national systems.

The secondary connection technique, confirmed by paragraph 1, is particularly important here, for example where an agent exceeds his authority or where a third-party debt is settled. The rule is accordingly a strict one. The obligation is so closely connected with the pre-existing relationship between the parties that it is preferable for the entire legal situation to be governed by the same law. As in the case of the general exception clause in Article 3(3), the expression 'pre-existing relationship' applies particularly to pre-contractual relationships and to void contracts.

Paragraph 2 reflects the legitimate expectations of the parties where they are habitually resident in the same country.

Paragraph 3 concerns unjust enrichment in the absence of a pre-existing relationship between the parties, in which case the non-contractual obligation is governed

by the law of the country in which the enrichment occurs. The proposed rule is a conventional one, found also in the GEDIP draft and the Swiss legislation.

Paragraph 4, concerning *negotiorum gestio* (agency without authority), distinguishes between measures to be described as assistance and measures that might be described as interference. Measures of assistance mean one-off initiatives taken on an exceptional basis by the 'agent', who deserves special protection since he acted in order to preserve the interests of the 'principal', which justifies a local connection to the law of the property or person assisted. In the case of measures of interference in the assets of another person, as in the case of payment of a third-party debt, it is the 'principal' who deserves protection. The applicable law is therefore generally the law of the latter' s place of habitual residence.

Paragraph 5, like the first sentence of Article 3, provides an exception clause.

To ensure that several different laws are not applicable to one and the same dispute, paragraph 6 excludes from this Article non-contractual obligations relating to intellectual property, to which Article 8 alone applies. E.g. an obligation based on unjust enrichment arising from an infringement of an intellectual property right is accordingly governed by the same law as the infringement itself.

Article 10 - Freedom of choice

Paragraph 1 allows the parties to choose the law applicable to the non-contractual obligation after the dispute has arisen. The proposed Regulation thus follows recent developments in national private international law, which likewise tend to encourage greater freedom of will,[35] even if the situation is less frequent that in contract cases. For this reason, the rule is based on objective connecting factors, unlike the Rome Convention.

Freedom of will is not accepted, however, for intellectual property, where it would not be appropriate.

As in Article 3 of the Rome Convention, it is stated that the choice must either be explicit or emerge clearly from the circumstances of the case. Since the proposed Regulation does not allow an *ex ante* choice, there is no need for special provisions to protect a weaker party.

Paragraph 1 further specifies that the parties' choice may not affect the rights of third parties. The typical example is the insurer's obligation to reimburse damages payable by the insured.

---

[35] Examples include section 6 of the Dutch Act of 11 April 2001 and section 42 of the German EGBGB.

Paragraph 2 puts a restriction on freedom of will, which is inspired by Article 3(3) of the Rome Convention and applies where all the elements of the situation (except the choice of law) are located in a country other than the one whose law is chosen. In reality this is a purely internal situation regarding a Member State and is within the scope of the Regulation only because the parties have agreed on a choice of law. The choice by the parties is not deactivated, but it may not operate to the detriment of such mandatory provisions of the law which might otherwise be applicable.

In this Article the concept of 'mandatory rules', unlike the overriding mandatory rules referred to in Article 12, refers to a country' s rules of internal public policy. These are rules from which the parties cannot derogate by contract, particularly those designed to protect weaker parties. But internal public policy rules are not necessarily mandatory in an international context. They must be distinguished from the rules of international public policy of the forum referred to in Article 22 and from the overriding mandatory rules referred to in Article 12.

Paragraph 3 represents an extension by analogy of the limit provided for by paragraph 2 and applies where all the elements of the case apart from the choice of law are located in two or more Member States. It has the same objective, i.e. to prevent the parties frustrating the application of mandatory rules of Community law through the choice of the law of a third country.

Article 11 – Scope of the law applicable to non-contractual obligations

Article 11 defines the scope of the law determined under Articles 3 to 10 of the proposed Regulation. It lists the questions to be settled by that law. The approach taken in the Member States is not entirely uniform: while certain questions, such as the conditions for liability, are generally governed by the applicable law, others, such as limitation periods, the burden of proof, the measure of damages etc., may fall to be treated by the *lex fori*. Like Article 10 of the Rome Convention, Article 11 accordingly lists the questions to be settled by the law that is actually designated.

In line with the general concern for certainty in the law, Article 11 confers a very wide function on the law designated. It broadly takes over Article 10 of the Rome Convention, with a few changes of detail:

a) 'The conditions and extent of liability, including the determination of persons who are liable for acts performed by them'; the expression 'conditions (...) of liability' refers to intrinsic factors of liability. The following questions are particularly concerned: nature of liability (strict or fault-based); the definition of fault, including the question whether an omission can constitute a fault; the causal link between the event giving rise to the

damage and the damage; the persons potentially liable; etc. 'Extent of liability' refers to the limitations laid down by law on liability, including the maximum extent of that liability and the contribution to be made by each of the persons liable for the damage which is to be compensated for. The expression also includes division of liability between joint perpetrators.

b) 'The grounds for exemption from liability, any limitation of liability and any division of liability': these are extrinsic factors of liability. The grounds for release from liability include *force majeure*; necessity; third-party fault and fault by the victim. The concept also includes the inadmissibility of actions between spouses and the exclusion of the perpetrator' s liability in relation to certain categories of persons.

c) 'The existence and kinds of damage for which compensation may be due': this is to determine the damage for which compensation may be due, such as personal injury, damage to property, moral damage and environmental damage, and financial loss or loss of an opportunity.

d) 'the measures which a court has power to take under its procedural law to prevent or terminate damage or to ensure the provision of compensation': this refers to forms of compensation, such as the question whether the damage can be repaired by payment of damages, and ways of preventing or halting the damage, such as an interlocutory injunction, though without actually obliging the court to order measures that are unknown in the procedural law of the forum.

e) 'the measure of damages in so far as prescribed by law': if the applicable law provides for rules on the measure of damages, the court must apply them.

f) 'the question whether a right to compensation may be assigned or inherited': this is self-explanatory. In succession cases, the designated law governs the question whether an action can be brought by a victim's heir to obtain compensation for damage sustained by the victim.[36] In assignment cases, the designated law governs the question whether a claim is assignable[37] and the relationship between assignor and debtor.

g) The law that is designated will also determine the 'persons entitled to compensation for damage sustained personally': this concept particularly refers to the question whether a person other than the 'direct victim' can obtain compensation for damage sustained on a 'knock-on' basis, following

[36] It goes without saying that the law governing the injured party's succession applies to the determination of the heirs, this being a preliminary to the main action.

[37] Article 12(2) of the Rome Convention.

damage sustained by the victim. Such damage might be non-material, as in the pain and suffering caused by a bereavement, or financial, as in the loss sustained by the children or spouse of a deceased person.

h) 'liability for the acts of another person': this concept concerns provisions in the law designated for vicarious liability. It covers the liability of parents for their children and of principals for their agents.

i) 'the manners in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation and the interruption and suspension of the period'; the law designated governs the loss of a right following failure to exercise it, on the conditions set by the law.

Article 12 - Overriding mandatory rules

This Article closely follows the corresponding Article of the Rome Convention.

In *Arblade,* the Court of Justice gave an initial definition of overriding mandatory rules (also called public-order legislation) as '*national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State*'.[38] What is specific about them is that the courts do not even apply their own conflict rules to determine the law applicable to a given situation and to evaluate in practical terms whether its content would be repugnant to the values of the forum, but they apply their own rules as a matter of course.[39]

Paragraph 2 allows the courts to apply the overriding mandatory rules of the forum. As the Court also held in *Arblade*, in intra-Community relations the application of the mandatory rules of the forum must be compatible with the fundamental freedoms of the internal market.[40]

---

[38] Cases C-369/96 and C-376/96 [1999] ECR I-8453 (judgment given on 23.11.1999).

[39] This is the international public policy exception, to which Article 22 is devoted.

[40] Paragraph 31 of the judgment states that '*The fact that national rules are categorised as public-order legislation does not mean that they are exempt from compliance with the provisions of the Treaty*' and that '*The considerations underlying such national legislation can be taken into account by Community law only in terms of the exceptions to Community freedoms expressly provided for by the Treaty and, where appropriate, on the ground that they constitute overriding reasons relating to the public interest*'.

Paragraph 1 refers to foreign mandatory rules, where the court enjoys considerable discretion if there is a close connection with the situation, depending on its nature, its purposes and the consequences of applying it. Under the Rome Convention, Germany, Luxembourg and the United Kingdom have exercised their right to refrain from applying Article 7(1), relating to foreign mandatory rules. But the Commission like most of the contributors during the written consultations sees no reason to exclude this possibility since references to foreign mandatory rules have been perfectly exceptional hitherto.

Article 13 – Rules of safety and conduct

Where the law that is designated is not the law of the country in which the event giving rise to the damage occurred, Article 13 of the proposed Regulation requires the court to take account of the rules of safety and conduct which were in force at the place and time of the relevant event.

This Article is based on the corresponding articles of the Hague Conventions on traffic accidents (Article 7) and product liability (Article 9). There are equivalent principles in the conflict systems of virtually all the Member States, either in express statutory provisions or in the decided cases.

The rule in Article 13 is based on the fact that the perpetrator must abide by the rules of safety and conduct in force in the country in which he operates, irrespective of the law applicable to the civil consequences of his action, and that these rules must also be taken into consideration when ascertaining liability. Taking account of foreign law is not the same thing as applying it: the court will apply only the law that is applicable under the conflict rule, but it must take account of another law as a point of fact, for example when assessing the seriousness of the fault or the author' s good or bad faith for the purposes of the measure of damages.

Article 14 – Direct action

Article 14 determines the law applicable to the question whether the person sustaining damage may bring a direct action against the insurer of the person liable. The proposed rule strikes a reasonable balance between the interests at stake as it protects the person sustaining damage by giving him the option, while limiting the choice to the two laws which the insurer can legitimately expect to be applied the law applicable to the non-contractual obligation and the law applicable to the insurance contract.

At all events, the scope of the insurer's obligations is determined by the law governing the insurance contract.

As in Article 7, relating to the environment, the form of words used here will avert the risk of doubts where the victim does not exercise his right of option.

Article 15 – Subrogation and multiple liability

This Article is identical to Article 13 of the Rome Convention.

It applies in particular to the relationship between insurer and perpetrator to determine whether the form has a right of action by way of subrogation against the latter.

Where there are several perpetrators, it also applies where one of the joint and several debtors makes a payment.

Article 16 – Formal validity

Article 16 is inspired by Article 9 of the Rome Convention.

Although the concept of formal validity plays a minor role in the creation of non-contractual obligations, an obligation can well arise as a result of a unilateral act by one or other of the parties.

To promote the validity of such acts, Article 16 provides for an alternative rule along the lines of Article 9 of the Rome Convention, whereby the act is formally valid if it satisfies the formal requirements of the law which governs the non-contractual obligation in question or the law of the country in which this act is done.

Article 17 - Burden of proof

Article 17 is identical to Article 14 of the Rome Convention.

It provides that the law governing non-contractual obligations applies to the extent that it contains, in matters of non-contractual obligations, rules which raise presumptions of law or determine the burden of proof. This is a useful provision as questions relating to evidence are basically matters for the procedural law of the *lex fori*.

Paragraph 2 concerns the admissibility of modes of proving acts intended to have legal effect referred to in Article 16. It does not cover evidence of legal facts, which is also covered by the *lex fori*. The very liberal system of Article 14(2) of the Rome Convention is used here, providing for the alternative application of the *lex fori* and the law governing the form of the relevant act.

Article 18 – Assimilation to the territory of a State

Article 18 applies to situations in which one or more of the connecting factors in the conflict rules of the proposed Regulation relate to an area that is not subject to territorial sovereignty.

The text proposed by the Commission in the written consultation procedure in May 2002 contained a special conflict rule. One of the difficulties with this rule lay in the diversity of the situations concerned. It is by no means certain that a single rule will adequately cover the position of a collision between ships on the high seas, the explosion of an electronic device or the breakdown of negotiations in an aircraft in flight, pollution caused by a ship at sea etc.

The contributions received by the Commission have made it aware that the proposed rule made it all too easy to designate the law of a flag of convenience, which would be contrary to the more general objectives of Community policy. Many contributors had doubts about the value added by a rule which, where two or more laws are potentially involved, as in collision cases, merely refers to the principle of the closest connection.

Rather than introducing a special rule here, Article 18 offers a definition of the 'territory of a State'. This solution is founded on the need to strike a reasonable balance between divergent interests by means of the different conflict rules in the proposed Regulation where one or more connecting factors are located in an area subject to no sovereignty. The general rule in Article 3 and the special conflict rules accordingly apply.

The definitions in the proposed text are inspired by section 1 of the Dutch Act on conflicts of laws in relation to obligations arising out of unlawful acts (11 April 2001).

Article 19 – Assimilation to habitual residence

This Article deals with the concept of habitual residence for companies and firms and other bodies corporate or unincorporate and for natural persons exercising a liberal profession or business activity in a self-employed capacity.

In general terms the proposed Regulation is distinguished from the 'Brussels I' Regulation by the fact that, in accordance with the generally accepted solution in conflict matters, the criterion used here is not domicile but the more flexible criterion of habitual residence.

With regard to companies and firms and other bodies corporate or unincorporate, simply taking over the alternative rule in Article 60 of the 'Brussels I' Regulation, whereby the domicile of a body corporate is either its registered office, or its cen-

tral administration, or its principal establishment, would not make the applicable law adequately foreseeable.

Article 19(1) accordingly provides that the principal establishment of a company or firms or other body corporate or unincorporate is considered to be its habitual residence. However, the second sentence of paragraph 1 states that where the event giving rise to the damage occurs or the damage is sustained in the course of operation of a subsidiary, a branch or any other establishment, the establishment takes the place of the habitual residence. Like Article 5(5) of the 'Brussels I' Regulation, the purpose of this is to respect the legitimate expectations of the parties.

Paragraph 2 determines the habitual residence of a natural person exercising a liberal profession or business activity in a self-employed capacity, for whom the professional establishment operates as habitual residence.

Article 20 – Exclusion of renvoi

This Article is identical to Article 15 of the Rome Convention.

To avoid jeopardising the objective of certainty in the law that is the main inspiration for the conflict rules in the proposed Regulation, Article 20 excludes renvoi. Consequently, designating a law under uniform conflict rules means designating the substantive rules of that law but not its rules of private international law, even where the law thus designated is that of a third country.

Article 21 – States with more than one legal system

This Article is identical to Article 19 of the Rome Convention.

The uniform rules also apply where several legal systems coexist in a single State. Where a State has several territorial units each with its own rules of law, each of those units is considered a country for the purposes of private international law. Examples of those States are the United Kingdom, Canada, the United States and Australia. For example, if damage is sustained in Scotland, the law designated by Article 3(1) is Scots law.

Article 22 – Public policy of the forum

This Article corresponds to Article 16 of the Rome Convention relating to the mechanism of the public policy exception. Like the Rome Convention, this concerns a State's public policy in the private international law sense, a more restrictive concept than public policy in the domestic law sense. The words 'of the

forum' have been added to distinguish the rules of public policy in the private international law sense, which proceed solely from the national law of a State, from those flowing from Community law, to which the specific rule of Article 23 applies.

The mechanism of the public policy exception allows the court to disapply rules of the foreign law designated by the conflict rule and to replace it by the *lex fori* where the application of the foreign law in a given case would be contrary to the public policy of the forum. This is distinguished from overriding mandatory rules: in the latter case, the courts apply the law of the forum automatically, without first looking at the content of the foreign law. The word 'manifestly' incompatible with the public policy of the forum means that the use of the public policy exception must be exceptional.

In a Brussels Convention case the Court of Justice held that the concept of public policy remains a national concept and that '*(…) it is not for the Court to define the content of the public policy of a Contracting State (…)*', but it must none the less '*review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from another Contracting State*'.[41]

Article 23 – Relationship with other provisions of Community law

Paragraph 1 refers to the traditional mechanisms of private international law that can be found in the treaties and the secondary legislation and entail special conflict rules in specific matters, mandatory rules of Community and the Community public policy exception.

Paragraph 2 refers more particularly to the specific principles of the internal market relating to the free movement of goods and services, commonly known as the 'mutual recognition' and 'home-country control' principles.

Article 24 – Non-compensatory damages

Article 24 is the practical application of the Community public policy exception provided for by the third indent of Article 23(1) in the form of a special rule.

In the written consultation, many contributors expressed concern at the idea of applying the law of a third country providing for damages not calculated to compensate for damage sustained. It was suggested that it would be preferable to adopt

[41] Case C-38/98 *Renault v Maxicar* [2000] ECR I-2973 (judgment given on 11.5.2000).

a specific rule rather than to apply the public policy exception of the forum, as is the case of section 40-III of the German EGBGB.

The effect of Article 24 is accordingly that application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded will be contrary to Community public policy.

The words used are descriptive rather than technical legal terms, too loosely tied to a specific legal system. Compensatory damages serve to compensate for damage sustained by the victim or liable to be sustained by him at a future date. Non-compensatory damages serve a punitive or deterrent function.

Article 25 – Relationship with existing international conventions

Article 25 allows Member States to go on applying choice of law rules laid down in international conventions to which they are party when this Regulation is adopted.

These conventions include the Hague Conventions on traffic accidents (4 May 1971) and product liability (2 October 1973).

Article 26 – List of conventions referred to in Article 25

To make it easier to identify the conventions to which Article 25 applies, Article 26 provides that the Member States are to notify the Commission of the list, which the Commission is then to publish in the *Official Journal of the European Union*. The Member States are also to notify the Commission of denunciations of these conventions so that it can update the list.

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL ON THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS ('ROME II')

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in Article 61(c) thereof,

Having regard to the proposal from the Commission,[42]

Having regard to the opinion of the European Economic and Social Committee,[43]

Acting in accordance with the procedure laid down in Article 251 of the Treaty,[44]

Whereas:

(1) The Union has set itself the objective of establishing an area of freedom, security and justice. To that end the Community must adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market, including measures promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

(2) For the purposes of effectively implementing the relevant provisions of the Amsterdam Treaty, the Council (Justice and Home Affairs) on 3 December 1998 adopted a plan of action specifying that the preparation of a legal instrument on the law applicable to non-contractual obligations is among

[42] *OJ* C [...], [...], p. [...].

[43] *OJ* C [...], [...], p. [...].

[44] Opinion of the European Parliament of [...] (*OJ* C [...], [...], p. [...].

the measures to be taken within two years following the entry into force of the Amsterdam Treaty.[45]

(3) The Tampere European Council on 15 and 16 October 1999[46] approved the principle of mutual recognition of judgments as a priority matter in the establishment of a European law-enforcement area. The Mutual Recognition Programme[47] states that measures relating to harmonisation of conflict-of-law rules are measures that 'actually do help facilitate the implementation of the principle'.

(4) The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law and the free movement of judgments, for the rules of conflict of laws in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.

(5) The scope of the Regulation must be determined in such a way as to be consistent with Regulation (EC) No 44/2001[48] and the Rome Convention of 1980.[49]

(6) Only uniform rules applied irrespective of the law they designate can avert the risk of distortions of competition between Community litigants.

(7) The principle of the lex loci delicti commissi is the basic solution for non-contractual obligations in virtually all the Member States, but the practical application of the principle where the component factors of the case are spread over several countries is handled differently. This situation engenders uncertainty in the law.

(8) The uniform rule must serve to improve the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (lex loci delicti commissi) strikes a fair balance between the interests of the person causing the damage

---

[45] 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: *OJ* C 19, 23.1.1999.

[46] Presidency conclusions of 16 October 1999, points 28 to 39.

[47] *OJ* C 12, 15.1.2001, p. 1.

[48] *OJ* L 12, 16.1.2001, p. 1.

[49] The consolidated text of the Convention as amended by the various Conventions of Accession, and the declarations and protocols annexed to it, is published in *OJ* C 27, 26.1.1998, p. 34.

and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability.

(9) Specific rules should be laid down for special torts/delicts where the general rule does not allow a reasonable balance to be struck between the interests at stake.

(10) Regarding product liability, the conflict rule must meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade. Connection to the law of the place where the person sustaining the damage has his habitual residence, together with a foreseeability clause, is a balanced solution in regard to these objectives.

(11) In matters of unfair competition, the conflict rule must protect competitors, consumers and the general public and ensure that the market economy functions properly. The connection to the law of the relevant market generally satisfies these objectives, though in specific circumstances other rules might be appropriate.

(12) In view of the Charter of Fundamental Rights of the European Union and the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the conflict must strike a reasonable balance as regards violations of privacy and rights in the personality. Respect for the fundamental principles that apply in the Member States as regards freedom of the press must be secured by a specific safeguard clause.

(13) Regarding violations of the environment, Article 174 of the Treaty, which provides that there must a high level of protection based on the precautionary principle and the principle that preventive action must be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage.

(14) Regarding violations of intellectual property rights, the universally acknowledged principle of the *lex loci protectionis* should be preserved. For the purposes of the present Regulatio, the term intellectual property rights means copyright, related rights, sui generis right for the protection of databases and industrial property rights.

(15) Similar rules should be provided for where damage is caused by an act other than a tort or delict, such as unjust enrichment and agency without authority.

(16) To preserve their freedom of will, the parties should be allowed to determine the law applicable to a non-contractual obligation. Protection should be given to weaker parties by imposing certain conditions on the choice.

(17) Considerations of the public interest warrant giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory rules.

(18) The concern to strike a reasonable balance between the parties means that account must be taken of the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the non-contractual obligations is governed by another law.

(19) The concern for consistency in Community law requires that this Regulation be without prejudice to provisions relating to or having an effect on the applicable law, contained in the treaties or instruments of secondary legislation other than this Regulation, such as the conflict rules in specific matters, overriding mandatory rules of Community origin, the Community public policy exception and the specific principles of the internal market. Furthermore, this regulation is not intended to create, nor shall its application lead to obstacles to the proper functioning of the internal market, in particular free movement of goods and services.

(20) Respect for international commitments entered into by the Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties. To make the rules easier to read, the Commission will publish the list of the relevant conventions in the *Official Journal of the European Union* on the basis of information supplied by the Member States.

(21) Since the objective of the proposed action, namely better foreseeability of court judgments requiring genuinely uniform rules determined by a mandatory and directly applicable Community legal instrument, cannot be adequately attained by the Member States, who cannot lay down uniform Community rules, and can therefore, by reason of its effects throughout the Community, be better achieved at Community level, the Community can take measures, in accordance with the subsidiarity principle set out in Article 5 of the Treaty. In accordance with the proportionality principle set out in that Article, a Regulation, which increases certainty in the law without requiring harmonisation of the substantive rules of domestic law, does not go beyond what is necessary to attain that objective.

(22) [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 the Treaty establishing the European Community, these Member States have stated their intention of participating in the adoption and application of this Regulation. / In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and the Treaty establishing the European Community,

these Member States are not participating in the adoption of this Regulation, which will accordingly not be binding on those Member States.]

(23) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community, that Member State is not participating in the adoption of this Regulation, which will accordingly not be binding on that Member State,

HAVE ADOPTED THIS REGULATION:

CHAPTER I - SCOPE

Article 1
Material scope

1. This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters.
It shall not apply to revenue, customs or administrative matters.

2. The following are excluded from the scope of this Regulation:

   a) non-contractual obligations arising out of family relationships and relationships deemed to be equivalent, including maintenance obligations;
   b) non-contractual obligations arising out of matrimonial property regimes and successions;
   c) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;
   d) the personal legal liability of officers and members as such for the debts of a company or firm or other body corporate or incorporate, and the personal legal liability of persons responsible for carrying out the statutory audits of accounting documents;
   e) non-contractual obligations among the settlers, trustees and beneficiaries of a trust;
   f) non-contractual obligations arising out of nuclear damage.

3. For the purposes of this Regulation, 'Member State' means any Member State other than [the United Kingdom, Ireland or] Denmark.

Article 2
Universal application

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

CHAPTER II - UNIFORM RULES

SECTION 1
RULES APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS ARISING OUT OF A TORT OR DELICT

Article 3
General rule

1. The law applicable to a non-contractual obligation shall be the law of the country in which the damage arises or is likely to arise, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event arise.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country when the damage occurs, the non-contractual obligation shall be governed by the law of that country.

3. Notwithstanding paragraphs 1 and 2, where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country shall apply. A manifestly closer connection with another country may be based in particular on a pre-existing relationship between the parties, such as a contract that is closely connected with the non-contractual obligation in question.

Article 4
Product liability

Without prejudice to Article 3(2) and (3), the law applicable to a non-contractual obligation arising out of damage or a risk of damage caused by a defective product shall be that of the country in which the person sustaining the damage is habitually resident, unless the person claimed to be liable can show that the product was mar-

keted in that country without his consent, in which case the applicable law shall be that of the country in which the person claimed to be liable is habitually resident.

Article 5
Unfair competition

1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are or are likely to be directly and substantially affected.

2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 3(2) and (3) shall apply.

Article 6
Violations of privacy and rights relating to the personality

1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality shall be the law of the forum where the application of the law designated by Article 3 would be contrary to the fundamental principles of the forum as regards freedom of expression and information.

2. The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.

Article 7
Violation of the environment

The law applicable to a non-contractual obligation arising out of a violation of the environment shall be the law determined by the application of Article 3(1), unless the person sustaining damage prefers to base his claim on the law of the country in which the event giving rise to the damage occurred.

Article 8
Infringement of intellectual property rights

1. The law applicable to a non-contractual obligation arising from an infringement of a intellectual property right shall be the law of the country for which protection is sought.

2. In the case of a non-contractual obligation arising from an infringement of a unitary Community industrial property right, the relevant Community instrument shall apply. For any question that is not governed by that instrument, the applicable law shall be the law of the Member State in which the act of infringement is committed.

SECTION 2
RULES APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS ARISING OUT OF AN ACT OTHER THAN A TORT OR DELICT

Article 9
Determination of the applicable law

1. If a non-contractual obligation arising out of an act other than a tort or delict concerns a relationship previously existing between the parties, such as a contract closely connected with the non-contractual obligation, it shall be governed by the law that governs that relationship.

2. Without prejudice to paragraph 1, where the parties have their habitual residence in the same country when the event giving rise to the damage occurs, the law applicable to the non-contractual obligation shall be the law of that country.

3. Without prejudice to paragraphs 1 and 2, a non-contractual obligation arising out of unjust enrichment shall be governed by the law of the country in which the enrichment takes place.

4. Without prejudice to paragraphs 1 and 2, the law applicable to a non-contractual obligation arising out of actions performed without due authority in connection with the affairs of another person shall be the law of the country in which the beneficiary has his habitual residence at the time of the unauthorised action. However, where a non-contractual obligation arising out of actions performed without due authority in connection with the affairs of another person relates to the physical protection of a person or of specific tangible property, the law applicable shall be the law of the country in which the beneficiary or property was situated at the time of the unauthorised action.

5. Notwithstanding paragraphs 1, 2, 3 and 4, where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country shall apply.

6. Nowithstanding the present Article, all non-contractual obligations in the field of intellectual property shall be governed by Article 8.

SECTION 3
COMMON RULES APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS ARISING OUT OF A TORT OR DELICT AND OUT OF AN ACT OTHER THAN A TORT OR DELICT

Article 10
Freedom of choice

1. The parties may agree, by an agreement entered into after their dispute arose, to submit non-contractual obligations other than the obligations to which Article 8 applies to the law of their choice. The choice must be expressed or demonstrated with reasonable certainty by the circumstances of the case. It may not affect the rights of third parties.

2. If all the other elements of the situation at the time when the loss is sustained are located in a country other than the country whose law has been chosen, the choice of the parties shall be without prejudice to the application of rules of the law of that country which cannot be derogated from by contract.

3. The parties' choice of the applicable law shall not debar the application of provisions of Community law where the other elements of the situation were located in one of the Member States of the European Community at the time when the loss was sustained.

Article 11
Scope of the law applicable to non-contractual obligations

The law applicable to non-contractual obligations under Articles 3 to 10 of this Regulation shall govern in particular:

a) the conditions and extent of liability, including the determination of persons who are liable for acts performed by them;
b) the grounds for exemption from liability, any limitation of liability and any division of liability;
c) the existence and kinds of injury or damage for which compensation may be due;

d) within the limits of its powers, the measures which a court has power to take under its procedural law to prevent or terminate injury or damage or to ensure the provision of compensation;

e) the assessment of the damage in so far as prescribed by law;

f) the question whether a right to compensation may be assigned or inherited;

g) persons entitled to compensation for damage sustained personally;

h) liability for the acts of another person;

i) the manners in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation and the interruption and suspension of the period.

Article 12
Overriding mandatory rules

1. Where the law of a specific third country is applicable by virtue of this Regulation, effect may be given to the mandatory rules of another country with which the situation is closely connected, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the non-contractual obligation. 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.

2. Nothing in this Regulation shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.

Article 13
Rules of safety and conduct

Whatever may be the applicable law, in determining liability account shall be taken of the rules of safety and conduct which were in force at the place and time of the event giving rise to the damage.

Article 14
Direct action against the insurer of the person liable

The right of persons who have suffered damage to take direct action against the insurer of the person claimed to be liable shall be governed by the law applicable

to the non-contractual obligation unless the person who has suffered damage prefers to base his claims on the law applicable to the insurance contract.

Article 15
Subrogation and multiple liability

1. Where a person ('the creditor') has a non-contractual claim upon another ('the debtor'), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship in whole or in part.

2. The same rule shall apply where several persons are subject to the same claim and one of them has satisfied the creditor.

Article 16
Formal validity

A unilateral act intended to have legal effect and relating to a non-contractual obligation is formally valid if it satisfies the formal requirements of the law which governs the non-contractual obligation in question or the law of the country in which this act is done.

Article 17
Burden of proof

1. The law governing a non-contractual obligation under this Regulation applies to the extent that, in matters of non-contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

2. Acts intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 16 under which that act is formally valid, provided that such mode of proof can be administered by the forum.

CHAPTER III – OTHER PROVISIONS

Article 18
Assimilation to the territory of a State

For the purposes of this Regulation, the following shall be treated as being the territory of a State:

a) installations and other facilities for the exploration and exploitation of natural resources in, on or below the part of the seabed situated outside the State' s territorial waters if the State, under international law, enjoys sovereign rights to explore and exploit natural resources there;

b) a ship on the high seas which is registered in the State or bears *lettres de mer* or a comparable document issued by it or on its behalf, or which, not being registered or bearing *lettres de mer* or a comparable document, is owned by a national of the State;

c) an aircraft in the airspace, which is registered in or on behalf of the State or entered in its register of nationality, or which, not being registered or entered in the register of nationality, is owned by a national of the State.

Article 19
Assimilation to habitual residence

1. For companies or firms and other bodies or incorporate or unincorporate, the principal establishment shall be considered to be the habitual residence. However, where the event giving rise to the damage occurs or the damage arises in the course of operation of a subsidiary, a branch or any other establishment, the establishment shall take the place of the habitual residence.

2. Where the event giving rise to the damage occurs or the damage arises in the course of the business activity of a natural person, that natural person's establishment shall take the place of the habitual residence.

3. For the purpose of Article 6 (2), the place where the broadcaster is established within the meaning of the directive 89/552/EEC, as amended by the directive 97/36/EC, shall take the place of the habitual residence.

Article 20
Exclusion of renvoi

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law.

Article 21
States with more than one legal system

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

2. A State within which different territorial units have their own rules of law in respect of non-contractual obligations shall not be bound to apply this Regulation to conflicts solely between the laws of such units.

Article 22
Public policy of the forum

The application of a rule of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy ('*ordre public*') of the forum.

Article 23
Relationship with other provisions of Community law

1. This Regulation shall not prejudice the application of provisions contained in the Treaties establishing the European Communities or in acts of the institutions of the European Communities which:
   - in relation to particular matters, lay down choice-of-law rules relating to non-contractual obligations; or
   - lay down rules which apply irrespective of the national law governing the non-contractual obligation in question by virtue of this Regulation; or
   - prevent application of a provision or provisions of the law of the forum or of the law designated by this Regulation.

2. This regulation shall not prejudice the application of Community instruments which, in relation to particular matters and in areas coordinated by such

instruments, subject the supply of services or goods to the laws of the Member State where the service-provider is established and, in the area coordinated, allow restrictions on freedom to provide services or goods originating in another Member State only in limited circumstances.

Article 24
Non-compensatory damages

The application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded shall be contrary to Community public policy.

Article 25
Relationship with existing international conventions

This Regulation shall not prejudice the application of international conventions to which the Member States are parties when this Regulation is adopted and which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations.

CHAPTER IV – FINAL PROVISIONS

Article 26
List of conventions referred to in Article 25

1. The Member States shall notify the Commission, no later than 30 June 2004, of the list of conventions referred to in Article 25. After that date, the Member States shall notify the Commission of all denunciations of such conventions.

2. The Commission shall publish the list of conventions referred to in paragraph 1 in the *Official Journal of the European Union* within six months of receiving the full list.

Article 27
Entry into force and application in time

This Regulation shall enter into force on 1 January 2005.

It shall apply to non-contractual obligations arising out of acts occurring after its entry into force.

This Regulation shall be binding in its entirety and directly applicable in all Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, […].

For the European Parliament	For the Council
The President	The President

BOOK REVIEWS

Arthur Taylor VON MEHREN, *Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common- and Civil-Law Systems; Recueil des Cours / Collected Courses of the Hague Academy of International Law,* 2002, vol. 295, The Hague/Boston/London (Martinus Nijhoff Publishers) 2003, 431 pp.

Although Professor VON MEHREN held the general course on private international law at the Hague Academy in 1996, the manuscript was not published in book form until seven years later. As a rule, the course materials for the Hague Academy are published shortly after the course. As it happened, this exception was fortunate as there was considerable activity during this period in the field of adjudicatory authority in private international law, especially at the international level, thus enabling the author to enrich his theoretical approach with a broad comparative analysis. Work on a jurisdiction and enforcement convention within the framework of the Hague Conference on Private International Law commenced in October 1996 when it was decided 'to include in the Agenda of the Nineteenth Session the question of jurisdiction, and recognition and enforcement of foreign judgments in civil and commercial matters' (p. 408). A member of the US delegation to the 1996 and 2001 sessions of the Hague Conference, Professor VON MEHREN experienced first hand the 'deep-seated divergences on basic issues', making it impossible to achieve harmony and strike meaningful compromises, as a result of which 'harmonization proved to be an illusive goal' and 'the drafters came to an impasse' (p. 408).

Although it is common knowledge that the common-law and civil-law approaches differ considerably in civil procedure and international procedural law, only a truly comparative expert with extensive theoretical and practical knowledge of the procedural law institutions of different jurisdictions can comprehend the actual extent of these deep-rooted divergences. The greatness of this treatise, which received the 2003 Canada Prize even prior to its publication, lies in the author's scholarly analysis of the basic divergences in the theoretical, philosophical, legislative and judicial approaches to adjudicatory authority in different legal orders.

The book is divided into three parts: 1) 'The foundations and emergence of jurisdictional theory', 2) 'Basic themes and pervasive issues', and 3) 'Epilogue'. Part I introduces the reader to the subject of adjudicatory authority by presenting the reasons for its exercise and its principal types (Chapter I), the design of jurisdictional provisions (Chapter II), and the emergence of jurisdictional theory in the United States and Germany (Chapter III). Dealing with specific issues, Part II analyses the *actor sequitur* principle, raising the questions whether defendants are

Yearbook of Private International Law, Volume 5 (2003), pp. 393-396
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

jurisdictionally preferred and whether they should be (Chapter IV), discusses the role of consent, in particular the consequences of splitting causes of action, participating as a litigant, and choice of forum agreements (Chapter V), and, finally, addresses the problem of forum shopping by examining attempts at 'fine tuning' such as *forum non conveniens*, antisuit injunctions and *lis pendens* (Chapter VI). The Epilogue is devoted to the role of international instruments and the sensitive problems of convergence and compromise in private international law.

Of the broad range of issues discussed by the author, we focus on some of the basic systemic divergences that became apparent at the Hague Conference on Private International Law, ultimately blocking its attempts to achieve worldwide harmonization in the areas of international jurisdiction and the recognition of foreign judgments. Examining French, German and US law, Professor VON MEHREN maintains that their traditional terminologies are inadequate for comparative and theoretical purposes. As for French terminology, it has 'very little explanatory power and rests on developments particular to French law', whereas common-law usages 'have greater explanatory potential' but are closely linked to 'historical developments' and to a 'specific jurisdictional theory' based on power. According to the author, the distinction made in German law between general and specific jurisdiction is useful, but the German concepts are also 'unsatisfactory for comparative purposes'; in particular, the special-jurisdiction category is 'too broad and lumps together jurisdictional bases that lack a significant common denominator' (pp. 62-63). In an attempt to find a doctrinally neutral terminology, VON MEHREN proposes that a distinction be made between general and specific jurisdiction and that the latter be further divided into a category-specific jurisdiction and a specific jurisdiction.

Moving on to the *actor sequitur forum rei* principle, it should be mentioned that this is the starting point of the German rules for international jurisdiction, as confirmed by R. GEIMER.[1] Pursuant to this legal maxim, which dates back to Roman times, the defendant is sued in principle in the country of his residence. Citing Ch. FRAGISTAS (note 546),[2] Professor VON MEHREN describes the *actor sequitur* principle as 'an expression of the laws conservative spirit which gives priority to him who defends the status quo and not to him who seeks to change it' (p. 181). Those who regard this principle as universal quickly become aware of the danger of such simplification when reading this stimulating book.

Before discussing the various procedural approaches, the author raises several questions, the first of which concerns the criteria for determining whether a given forum is a defendant's, a plaintiff's or a neutral one (p. 180). As to the contemporary systems and jurisdictions claimed to practice the *actor sequitur* principle, the author mentions German law, the Brussels and Lugano Conventions, the

---

[1] GEIMER R., *Internationales Zivilprozessrecht*, Köln 2001, p. 409.

[2] FRAGISTAS Ch., *La compétence internationale en droit privé,* in: *Recueil des cours* 199, 1961.

Brussels Regulation and the practice of the European Court of Justice. However, other approaches are taken in Europe as well, in particular he mentions the French code civil (Arts. 14 and 15) and the Dutch Code of Civil Procedure (Art. 126(3)). For instance, the latter provides that an action can be brought at the place of the plaintiff's domicile if the defendant has no recognized residence in the Netherlands (note 567). VON MEHREN regards Article 3 of the Swiss PIL Act as another 'erosion' of the *actor sequitur* principle, although**,** to our knowledge, the article is used very restrictively in practice.

On the other hand, in common law countries there are numerous examples where a defendant is forced to litigate in a plaintiff's forum, such as tag-jurisdiction, in which the jurisdiction is based on service of process upon a 'present' defendant. Similarly, the well-known decision in *International Shoe v. Washington* (326 US 310 (1945)) shows that increasing the number of available fora ordinarily leads to a plaintiff's forum. As regards, the US approach, the author remarks that 'contemporary American practice can hardly be seen as embracing even a weak version of the *actor sequitur* principle' (p. 191). Such pronounced diversity was obviously the main source of the problems at the Hague Conference, making it impossible to agree on a basis for international jurisdiction and resulting in the impasse.

This brief review cannot deal with all matters worthy of comment. In closing, it is fitting to mention the final conclusions in the Epilogue, which is actually one of several possible epilogues. Unable to predict with certainty the direction that will be taken in this field in the international arena, the author envisages that, in the course of the third millennium, the civil-law and common-law traditions could 'interpenetrate and create one – or several – new legal traditions' (p. 401).

In his analysis of what went wrong at The Hague regarding the proposed Convention on International Jurisdiction and Foreign Judgments, VON MEHREN summarizes the US proposal for a mixed convention as follows:

> '[F]irstly, the proposed convention should not be limited, as was traditionally the case, to recognition and enforcement but should address as well jurisdiction to adjudicate; secondly, the convention should provide certain jurisdictional bases that could be invoked as of right and prohibit the use of other bases… The enforceability of judgments rendered on these bases would depend not upon the convention but on the law of the state addressed' (p. 409).

On the contrary, the Special Commission of the Hague Conference on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters had envisaged a double convention such as the Brussels and Lugano Conventions. Unfortunately, by that time it was too late to reach a compromise on such diverse concepts and philosophies, thus making it necessary to scale down the initial plan. Having learned from the past impasse, the Special Commission resumed its work but with a more limited task. Looking into von Mehren's crystal

ball, we are reminded that producing results at The Hague will depend on whether consensus can be reached. While he is uncertain as to what will transpire, he believes that whatever transpires will reveal how 'thinking and practice are likely to develop in the twenty-first century respecting adjudicator authority and recognition and enforcement of foreign judgments' (425).

This excellent book should be read by all those involved in harmonization efforts in the field of international procedural law. It is a thought-provoking book written by a dedicated scholar with a vast comparative law experience to draw upon as he sheds light on the past, present and future developments in this field, making us aware of all the fine- tuning that will be necessary to agree on uniform solutions in the twentieth-first century. As a step in this direction we refer to the recent fruits of the Special Commission's work: the session held in The Hague in early December 2003 resulted in the Draft on Exclusive Choice of Court Agreements. This can be regarded as a confirmation of von Mehren's prediction.

Petar ŠARČEVIĆ

Diego P. FERNÁNDEZ ARROYO (ed.), *Derecho Internacional Privado de los Estados del MERCOSUR*, Buenos Aires (Zavalía) 2003, 1438 pp.

At a time when the intensive and somewhat bulimic legislative efficiency of the EU institutions has brought about a 'European Conflict Revolution' on the old continent, this extensive and original treatise on the private international law of the Mercosur States provides a unique opportunity to learn about the developments taking place on the other side of the Atlantic, in the Latin American world.

Thirteen years after the Mercosur was formally created under the 1991 Asunción Treaty, it is time to make an initial assessment of the results achieved and the future objectives of this organization in the field of private international law. Based on the traditional instruments of intergovernmental co-operation, harmonization among the Mercosur States is still quite limited; hence, it cannot be compared with the 'communitarization' taking place in Europe.

This book, however, is much more than a mere analysis of the Mercosur treaties and protocols in the field of private international law. Its originality lies, first of all, in the fact that it is conceived and structured like a real traditional private international law treatise, dealing with both general and special conflict-of-laws and jurisdictional issues.

Divided into a general and a special part, the book begins with an introductory section containing a discussion of the subject matter and main trends in the conflict of laws, as well as an analysis of the various sources and components of the private international law systems of the Mercosur States (national sources, on the one hand, CIDIP, Mercosur and universal treaties, on the other). As in classic treatises, this introduction is followed by four sections devoted to international judicial jurisdiction (section II), general applicable law issues (such as characterization, *renvoi*, preliminary questions, etc., section III), procedural aspects of civil proceedings involving international situations (such as the law applicable to the proceedings, the service of documents and the taking of evidence abroad, section IV) and the recognition and enforcement of foreign decisions and documents (section V). Of course, all these general issues are dealt with from a Latin American perspective, taking into account the main doctrinal and judicial trends of this particular area of the world and comparing them with US and European approaches.

The special part is devoted to the resolution of jurisdictional and choice-of-law issues in individual areas of civil law, which are divided into three main categories: the 'subjects' of private international law (natural and legal persons, section I), 'essentially non-economic relations' ('*situaciones esencialmente non patrimoniales*', such as the protection of children, kinship, marriage and non-marital unions, maintenance, successions, etc., section II) and 'essentially economic relations' ('*situaciones esencialmente patrimoniales*', such as property

Yearbook of Private International Law, Volume 5 (2003), pp. 397-399
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

rights in movables and immovables, contractual and non-contractual obligations, negotiable instruments, carriage, companies and bankruptcy, section III). As professor Fernandez Arroyo explains in his foreword, this systematization typically reflects the traditional Latin American approach.

This short overview of the content of the book already gives a good idea of its density and richness. To fully appreciate its merits, however, one should mention another unique feature. All the topics mentioned above are not only examined from the perspective of existing or future unification in the framework of the Mercosur or the CIDIP but also analysed in detail with respect to the existing national laws of the four Mercosur Members States (Argentina, Brazil, Paraguay and Uruguay). Each section or chapter of the book is thus divided into one part on uniform law instruments and another on the 'autonomous' private international law systems of the States concerned.

Taking, for instance, a classical subject such as the law applicable to contractual obligations, we find that the theoretical discussion of the basic approaches and doctrines (section IV, chapter 24), is followed (chapter 25) not only by a detailed description of the conventional sources (in particular, the CIDIP Mexico Convention on the law applicable to contracts and the Mercosur Buenos Aires Protocol on jurisdiction in contractual matters, both of 1994), but also by an in-depth analysis of the national sources of each Member State. As regards the freedom of the parties to choose the law applicable to the contract – which is generally regarded as self-evident and as a sort of 'universal' principle in Europe and is widely recognized by Article 7 of the Mexico Convention (ratified only by Mexico and Venezuela) – we learn that party autonomy is still expressly prohibited in at least one of the Mercosur countries (Uruguay, pp. 1021 *et seq.*), that its admissibility is uncertain in two others (Brazil and Paraguay, pp. 1014 *et seq.* and 1016 *et seq.*) and that it is permitted with certainty only in Argentina (p. 1009).

Such detailed information – on both statutory law and court practice – is presented on each of the subject matters covered in the book. This, of course, is invaluable not only as a preparatory work for future unification of private international law in the region but also and particularly for practitioners seeking rapid and concrete data on the conflict rules in force in the Mercosur countries.

The comprehensive approach of the book is unique compared with other Latin American publications and collective works on 'European Private International Law', which are increasingly being published in many EU States. Such collections usually deal only with European texts, especially with the new regulations adopted by the EU on the basis of Articles 61 and 65 of the EC Treaty, and/or with the general features and future perspectives of the EU conflict system, however, without providing comprehensive information on the autonomous rules in force in the individual Member States.

The third original feature of this book is its uniformity, which is unique for a collective work of such length. Written by a motivated group of experts from the various Mercosur States (Fernando AGUIRRE RAMÍREZ, Jorge R. ALBORNOZ, Nadia DE ARAUJO, Miguel ARMANDP, Adrana DREYZIN DE KLOR, Cecilia

FRESNEDO DE AGUIRRE, Delia LIPSZYC, Claudia LIMA MARQUES, Maria Blanca NOODT TAQUELA, Beatriz PALLARÉS, Roberto RUÍZ DÍAZ LABRANO, Amalia URIONDO DE MARTINOLI and Eduardo VÉSCOVI), it is not simply a collection of individual national reports but is conceived as a single uniform book in which each chapter shares a common structure and treats the same problems in a similar way. The result is a piece of work of remarkable consistency.

The merit for this goes to the editor of the book, Diego FERNÁNDEZ ARROYO, who not only conceived this ambitious project but – thanks to his broad and solid international academic background on both sides of the Atlantic – also brought it to a successful conclusion.

The treatise also offers the reader a complementary bibliography at the end of each chapter and a list of general works on the subject at the end of the book. Moreover, the Internet addresses of the most important websites are also included, which is very useful for those wishing to obtain update information on recent developments. The only shortcoming is the absence of an index: although the structure and table of contents are very clear and logical, an index would have been a useful research and orientation tool for a work of almost 1400 pages, in particular for a reader whose mother tongue is not Spanish. This minor criticism should be interpreted as a suggestion for the second edition, which will hopefully appear in a few years.

Andrea BONOMI

BOOKS RECEIVED

AHRENS Walter, *Rechte und Pflichten ausländischer Insolvenzverwalter im internationalen Insolvenzrecht*, Berlin (Dunker & Humblot) 2002.

ALVAREZ Henri C./ KAPLAN Neil/ RIVKIN David W., *Model law decisions: cases applying the UNCITRAL model law on international commercial arbitration (1985-2001)*, The Hague [etc.] (Kluwer) 2003.

BACKMANN Jan L., *Künstliche Fortpflanzung und Internationales Privatrecht unter besonderer Berücksichtigung des Persönlichkeitsschutzes*, München (Beck) 2002.

BARCELÓ III John J./ CLERMONT Kevin M., *A global law of jurisdiction and judgments: lessons from The Hague*, The Hague [etc.] (Kluwer) 2002.

BARNICH Laurent, *Les actes juridiques en droit international privé: essai de méthode*, Bruxelles (Bruylant) 2001.

BARROS FIGUEIRÊDO Luiz Carlos de, *Adoção internacional. A Convenção da Haia e a normativa brasileira: uniformização de procedimentos*, Curitiba (Juruá) 2003.

BAUMGARTNER Samuel P., *The proposed Hague Convention on Jurisdiction and Foreign Judgments: Trans-Atlantic Lawmaking for Transnational Litigation*, Tübingen (Mohr Siebeck) 2003.

BORCHERS Patrick J./ ZEKOLL Joachim, *International conflict of laws for the third millenium: Essays in honor of Friedrich K. Juenger*, Ardsley [etc.] (Transnational Publishers) 2001.

BELL Andrew S., *Forum Shopping and Venue in Transnational Litigation*, Oxford (University Press) 2003.

BLESSING Marc, *EG/U.S. Kartellrecht in internationalen Schiedsverfahren: 77 aktuelle Fragen aus der Praxis*, Basel [etc.] (Helbing & Lichtenhahn) 2002.

Yearbook of Private International Law, Volume 5 (2003), pp. 401-408
© Kluwer Law International & Swiss Institute of Comparative Law
Printed in the Netherlands

BONELL Michael Joachim, *I principi UNIDROIT nella pratica: casistica e bibliografia riguardanti i principi UNIDROIT dei contratti commerciali internazionali*, Milano (Giuffrè) 2002.

BORN Gary B., *International commercial arbitration: commentary and materials*, 2nd ed., Ardsley [etc.] (Transnational Publishers) - The Hague [etc.] (Kluwer) 2001.

BRENN Christoph, *Europäische Zustellungsverordnung*, Wien (Manz) 2002.

BRIGGS Adrian, *Civil jurisdiction and judgments*, 3rd ed., London [etc.] (LLP) 2002.

BRILMAYER Lea/ GOLDSMITH Jack, *Conflict of laws: cases and materials*, 5th ed., New York [etc.] (Aspen) 2002.

BRUINIER Stefan, *Der Einfluss der Grundfreiheiten auf das Internationale Privatrecht*, Frankfurt am Main - Bern [etc.] (Lang) 2003.

BUCHER Andreas, *L'enfant en droit international privé*, Genève - Bâle [etc.] (Helbing & Lichtenhahn) - Paris (LGDJ) 2003.

CALVO BABÍO Flora, *Reconocimiento en España de las adopciones simples realizadas en el extranjero*, Madrid (Dykinson) 2003.

CALVO CARAVACA Alfonso-Luis/ CARRASCOSA GONZÁLEZ Javier, *Derecho internacional privado*, 4th ed., Granada (Comares) 2003.

CARBONE Sergio M./ FRIGO Manlio/ FUMAGALLI Luigi, *Diritto processuale civile e commerciale comunitario*, Milano (Giuffrè) 2004.

CHRISTOU Richard, *International agency, distribution and licensing agreements*, 4th ed., London (Sweet & Maxwell) 2003.

CONSOLO Claudio, *Nuovi problemi di diritto processuale civile internazionale*, Milano (Giuffrè) 2002.

DE CESARI Patrizia, *Autonomia della volontà e legge regolatrice delle successioni*, Padova (CEDAM) 2001.

DELLAPENNA Joseph W., *Suing foreign governments and their corporations*, 2nd ed., Ardsley [etc.] (Transnational Publishers) 2003.

DIAGO DIAGO Maria del Pilar, *La Obtención de Pruebas en la Unión Europea*, Cizur Menor (Aranzadi) 2003.

DREXL Josef (ed.), *The future of transnational antitrust: from comparative to common competition law*, Bern (Stämpfli) - The Hague [etc.] (Kluwer) 2003.

DÜRRENMATT E./ FRATINI S., *Recouvrement des pensions alimentaires en Suisse et à l'étranger: cadre juridique et moyens d'action*, Genève (Fondation suisse du service social international) 2002.

ESPLUGUES MOTA Carlos, *El divorcio internacional (jurisdicción, ley aplicable, reconocimiento y ejecución de sentencias extranjeras)*, Valéncia (Tirant lo Blanch) 2003.

FACH Gómez Katia, *La contaminación transfronteriza en derecho internacional privado: estudio de derecho aplicable*, Zaragoza 2001.

FERNÁNDEZ ROZAS José Carlos/ SÁNCHEZ LORENZO Sixto, *Derecho internacional privado*, 2nd ed., Madrid (Civitas) 2001.

FERRARI Franco (ed.), *The 1980 uniform sales law: old issues revisited in the light of recent experiences*, Milano (Giuffrè) – München (Sellier) 2003.

FRICKE Verena, *Der Unterlassungsanspruch gegen Presseunternehmen zum Schutze des Persönlichkeitsrechts im internationalen Privatrecht*, Tübingen (Mohr Siebeck) 2003.

GARCÍA CANO Sandra, *Protección del menor y cooperación internacional entre autoridades*, Madrid (COLEX) 2003.

GAUDEMET-TALLON Hélène, *Compétence et exécution des jugements en Europe. Règlement n° 44/2001, Conventions de Bruxelles et de Lugano*, 3rd éd., Paris (LGDJ) 2002.

GAUTHEY LADNER Danielle, *Solidarité et consorité en matière délictuelle en droit suisse et américain, en particulier new-yorkais*, Zürich [etc.] (Schulthess) 2002.

GEEROMS Sofie, *Foreign Law in Civil Litigation: A Comparative and Functional Analysis*, Oxford (University Press) 2003.

GHARAVI Hamid G., *The international effectiveness of the annulment of an arbitral award*, The Hague [etc.] (Kluwer) 2002.

GLATT Christoph, *Vertragsschluss im Internet: unter besonderer Berücksichtigung der Rechtsentwicklung in der Europäischen Union und des internationalen Verbrauchervertrages*, Baden-Baden (Nomos) 2002.

GRAF Ulrike, *Die Anerkennung ausländischer Insolvenzentscheidungen*, Tübingen (Mohr Siebeck) 2003.

GRANDINO RODAS João (ed.), *Contratos internacionais*, 3rd ed. São Paulo (Revista dos Tribunais) 2002.

GRAUL Astrid, *Die Tendenz zur Aufenthaltsanknüpfung im Internationalen Kindschaftsrecht: Untersuchung der rechtspraktischen Konsequenzen einer Abkehr vom Staatsangehörigkeitsprinzip in den Art. 19ff. EGBGB und im Haager Kinderschutzübereinkommen*, Regensburg (Roderer) 2002.

HAY Peter/ WEINTRAUB Russel J./ BORCHERS Patrick J., *Conflict of laws: cases and materials*, 11th ed., New York (Foundation Press) 2000.

HÖFLING Barbara Sabine, *Das englische internationale Gesellschaftsrecht*, Heidelberg (Recht und Wirtschaft) 2002.

JAKOB Dominique, *Die eingetragene Lebenspartnerschaft im internationalen Privatrecht*, Köln (Schmidt) 2002.

JAKŠIC Aleksandar, *Arbitration and human rights*, Frankfurt am Main - Bern [etc.] (Lang) 2002.

JUNKER Markus, *Anwendbares Recht und internationale Zuständigkeit bei Urheberrechtsverletzungen im Internet*, Kassel (Kassel Univ. press) 2002.

KASSIR Walid J., *Réflexions sur le renvoi en droit international privé comparé: contribution au dialogue des cultures juridiques nationales à l'aube du XXIème siècle*, Bruxelles (Bruylant) - Beyrouth (Delta) - Paris (LGDJ) 2002.

KNOEPFLER François/ SCHWEIZER Philippe, *Arbitrage international: jurisprudence suisse commentée depuis l'entrée en vigueur de la LDIP*, Zurich [etc.] (Schulthess) 2003.

KREITLOW Maike, *Das domicile-Prinzip im englischen Internationalen Privatrecht und seine europäische Perspektive*, Frankfurt am Main - Bern [etc.] (Lang) 2003.

KRETSCHMER Natalie, *Das Internationale Privatrecht der zivilen Verkehrsluftfahrt*, Franfurt am Main - Bern [etc.] (Lang) 2003.

LOWENFELD Andreas F./ SILBERMAN Linda J., *The Hague Convention on jurisdiction and judgments: records of the conference held at New York University School of Law on the proposed convention* (with the assistance of Katrina C. SZAKAL), Yonkers N.Y. (Juris Publishing) 2001.

LUPOI Michele A., *Conflitti transnazionali di giurisdizioni*, Milano (Giuffrè) 2002.

MARKUS Alexander R./ KELLERHALS Andreas/ JAMETTI GREINER Monique, *Das Haager Trust-Übereinkommen und die Schweiz*, Zürich [etc.] 2003.

MELIN François, *Droit international privé: conflits de juridictions, conflits de lois*, Paris (Gualino) 2002.

MUSOLINO Giuseppe, *L'appalto internazionale*, Milano (Giuffrè) 2003.

NAFZIGER James A.R./ SYMEONIDES Symeon C. (eds.), *Law and justice in a multistate world: Essays in honor of Arthur T. von Mehren*, Ardsley [etc.] (Transnational Publishers), 2002.

NAGEL Heinrich/ GOTTWALD Peter, *Internationales Zivilprozessrecht*, 5th ed., Münster (Aschendorff) - Köln (Schmidt) 2002.

NEWTON Justin, *The uniform interpretation of the Brussels and Lugano Conventions*, Oxford - Portland Oregon (Hart) 2002.

NIKLAS Isabella Maria, *Die europäische Zuständigkeitsordnung in Ehe- und Kindschaftsverfahren*, Tübingen (Mohr Siebeck) 2003.

OETIKER Christian, *Eintritt und Wirkungen der Rechtshängigkeit in der internationalen Schiedsgerichtsbarkeit*, Buttikon (Prisma) 2003.

OMAR Paul J., *Procedures to enforce foreign judgments*, Aldershot [etc.] (Ashgate) 2002.

PAPAUX Alain, *Essai philosophique sur la qualification juridique: de la subsomption à l'abduction: l'exemple du droit international privé*, Zürich [etc.] (Schulthess) 2002.

PEREZ VERA Elisa (ed.), *Derecho internacional privado*, 3rd ed., Madrid (Colex) 2001.

POCAR Fausto, *Il nuovo diritto internazionale privato italiano* (with the collaboration of Costanza HONORATI), 2nd ed., Milano (Giuffrè) 2002.

POUDRET Jean-François/ BESSON Sébastien, *Droit comparé de l'arbitrage international*, Bruxelles (Bruylant) - Paris (LGDJ) - Zurich [etc.] (Schulthess) 2002.

REVILLARD Mariel, *Droit international privé et pratique notariale*, 5th ed., Paris (Répertoire du notariat Defrénois) 2001.

RUBINO-SAMMARTANO Mauro, *International arbitration law and practice*, 2nd ed., The Hague [etc.] (Kluwer) 2001.

RUGULLIS Sven, *Litispendenz im Europäischen Insolvenzrecht*, Köln [etc.] (Heymann) 2002.

RÜTTEN Michael, *Gesetzesumgehung im internationalen Privatrecht*, Zürich [etc.] (Schulthess) 2003.

SABATER MARTÍN Aníbal, *La eficacia en España de los laudos arbitrales extranjeros*, Madrid (Tecnos) 2002.

SCHLECHTRIEM Peter, *Internationales UN-Kaufrecht: ein Studien- und Erläuterungsbuch zum Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG)*, 2nd ed., Tübingen (Mohr Siebeck) 2003.

SCHLOSSER Peter F., *EU-Zivilprozessrecht: EuGVVO, EuEheVO, AVAG, HZÜ, EuZVO, HBÜ, EuBVO. Kommentar*, 2nd ed., München (Beck) 2003.

SCHÜTZE Rolf A., *Die Allzuständigkeit amerikanischer Gerichte*, Berlin (de Gruyter) 2003.

SHELKOPLYAS Natalya, *The application of EC law in arbitration proceedings*, Groningen (Europa Law) 2003.

SONNENTAG Michael, *Der Renvoi im Internationalen Privatrecht*, Tübingen (Mohr Siebeck) 2001.

SPÜHLER Karl (ed.), *Aktuelle Probleme des Internationalen Insolvenzrechtes*, Zürich [etc.] (Schulthess) 2003.

SPÜHLER Karl (ed.), *Internationales Zivilprozess- und Verfahrensrecht II*, Zürich [etc.] (Schulthess) 2003.

SYMEONIDES Symeon C., *The American Choice-of-Law Revolution in the Courts, Today and Tomorrow, Recueil des Cours 2002* (vol. 298), The Hague [etc.] (Martinus Nijhoff) 2003.

THIEFFRY Patrick, *Commerce électronique: droit international et européen*, Paris (Litec) 2002.

THUE Helge Johan, *Internasjonal privatrett: personrett, familierett og arverett: alminnelige prinsipper og de enkelte reguleringer*, Oslo (Gyldendal Akademisk) 2002.

TORREMANS Paul, *Cross border insolvencies in EU, English and Belgian law*, The Hague [etc.] (Kluwer) 2002.

VAN DEN BERG Albert Jan (ed.), *International commercial arbitration: important contemporary questions* (with the assistance of the International Bureau of the Permanent Court of Arbitration), The Hague [etc.] (Kluwer) 2003.

VÁRADY Tibor, BARCELÓ III John J., VON MEHREN Arthur T., *International commercial arbitration: a transnational perspective,* 2nd ed., St. Paul Minn. (Thomson/West) 2003.

VERSCHRAEGEN Bea (ed.), *Private international law* (International Encyclopaedia of Laws), Vol. 1, The Hague [etc.] (Kluwer) 2001.

VOLTZ Markus, *Menschenrechte und ordre public im internationalen Privatrecht*, Frankfurt am Main - Bern [etc.] (Lang) 2002.

VON BAR Christian/ MANKOWSKI Peter, *Internationales Privatrecht*, 2nd ed., München (Beck) 2003.

VON HOFFMANN Bernd, *Internationales Privatrecht: einschliesslich der Grundzüge des internationalen Zivilverfahrensrechts* (with the collaboration of Karsten THORN), 7th ed., München (Beck) 2002.

VON MEHREN Arthur Taylor, *Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common and Civil-Law Systems, General Course of Private International Law (1996), Recueil des Cours 2002* (vol. 295), The Hague [etc.] (Martinus Nijhoff) 2003.

WEINBERG DE ROCA Inés Mónica, *Derecho internacional privado*, 2nd ed., Buenos Aires (Depalma) 2002.

WINKEL Georg, *Grenzüberschreitendes Sorge- und Umgangsrecht und dessen Vollstreckung*, Bielefeld (Gieseking) 2001.

ZEECK Sebastian, *Das internationale Anfechtungsrecht in der Insolvenz: die Anknüpfung der Insolvenzanfechtung*, Tübingen (Mohr Siebeck) 2003.

ZHU Kepeng, *Guoji Shangshi Zhongcai De Falü Shiyong = Applicable law in international commercial arbitration*, Beijing (Falü Chubanshe) 1999.

ZULEGER Christian, *Die UNCITRAL-Schiedsregeln - 25 Jahre nach ihrer Schaffung: eine Untersuchung wichtiger Problemkreise unter besonderer Berücksichtigung der Rechtsprechung des Iran-U.S. Claims Tribunals und der Regelungen ausgewählter Schiedsordnungen*, Frankfurt am Main - Bern [etc.] (Lang) 2002.

INDEX

Adoption
Bulgaria 147-150
Agency
Korean PIL 118
Alternative connecting factors
Korean PIL 106, 117
Alternative dispute resolution 183
Amsterdam Treaty 13, 54, 39, 178
Anti-suit injunctions
Institute of International Law 337-338
Appearance, theory of - 83-84
Arbitral awards
Slovenia 167
Arbitration agreements
applicable law 62
Arbitration
Institute of International Law 339-340
Assignment of claims
Rome Convention 93-96
Korean PIL 129
Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (27 September 1968) 178
effets réflexes 60
Bulgarian PIL 143-153
intercountry adoption 148-150
and the Rome Convention 145-147
and the Hague Conference 147
Characteristic performance
Rome Convention 71-72
Slovenia 161
Characterization
lege communitatis of the Hague Conventions 251
non-marital unions 198-210
Child abduction
Bulgaria 150-151
Choice of court
applicable law 62-63
Draft Hague convention 35-51
Slovenia 164
Institute of International Law 337, 338
validity 48-49
Choice of law
see 'Party autonomy'
CIDIP 393-394
Closest connection
Rome Convention 72-76
Korean PIL 105, 125-126
Slovenia 159, 161
Cohabitation
see 'Non-marital unions'
Comity
Institute of International Law 337, 338
Commercial agents 70
Communitarization of PIL
see 'EC and PIL Matters'
Consumer contracts
choice of court 42
Gran Canaria Fälle 70, 82-83
Rome Convention 76-84
party autonomy 68-71
definition of - 78-79
mandatory rules 68-71, 87-88
Bulgaria 147
Korean PIL 115, 124
Slovenia 161
Contractual obligations
Rome Convention 53-97, 184-185

Bulgaria 145-146
Slovenia 161
Mercosur States 394
Convention on the Settlement of Certain Conflicts of Laws in Connection with Bills Of Exchange (7 June 1930)
Korean PIL 137
Convention of the Settlement of Certain Conflicts of Laws in Connection with Cheques (19 March 1931)
Korean PIL 137
Crime victims 181-182
Denmark
and EC-PIL 188, 234, 235-236, 252
Dissolution
non-marital unions 215-216
Divorce
Korean PIL 132
Slovenia 162
European conflict rules 185
EC and PIL matters 53-97, 177-190, 223-258
erga omnes instruments 59-61
external competences 39-41, 188, 233-239, 255-256
ERTA doctrine 236-239, 255-256
and the Hague Conference 230-258
EC membership to the Hague Conference 240-241, 243, 257-258
supremacy of EC PIL over the Hague Conventions 249-251
EC-Directive No. 2002/8 to improve access to justice 179-180
E-commerce 81-84, 185
EC-Regulation on jurisdiction and recognition of judgements in civil and commercial matters (No. 44/2001) ('Brussels I Regulation') 11, 12, 13, 185, 224, 229, 233, 234, 235, 238
and the revision of the Rome Convention 56, 58 68, 72, 81-83
EC-Regulation No. 1347/2000 on jurisdiction and the recognition and enforcement in matrimonial matters and in matters of parental responsibility for children of both spouses ('Brussels II Regulation') 180, 185, 229, 234, 237, 245
EC-Regulation No. 2201/2003 concerning jurisdiction and the recognition and enforcement in matrimonial matters and the matters of parental responsibility, repealing EC-Regulation No. 1347/2000 180-181, 277-314
EC-Regulation on the law applicable to non-contractual obligations ('Rome II'), proposal 54, 56, 182-183, 341-391
erga omnes application 59-60
EC-Regulation No. 1348/2000 on the service of judicial and extrajudicial documents 229, 245
EC-Regulation No. 1206/2001 on the taking of evidence in civil and commercial matters 179, 247

and the Hague Convention on the Taking of Evidence Abroad 229, 246

EC-Treaty 12, 56, 178-179
- Article 65 225-233
- Article 95 229-231
- Article 307 249
- Article 5 243-249
- Article 10 255

'Effects doctrine'
- US tort law 10

Employment contracts
- choice of court 42
- Rome Convention 85-86
- Korean PIL 115, 125-126
- Slovenia 161

Escape clause
- Rome Convention 72-76
- Korean PIL 110
- Slovenia 159

European civil code
- Article 65 EC as a basis for its adoption 231

European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children 151

European Court of Human Rights
- non-marital unions 199-201

European Court of Justice
- EC external competences 41
- non-marital unions 199

European enforcement order 182

European order for payment procedure 183-184

Exception clause
- see 'Escape clause'

Exclusive jurisdiction
- exclusive choice of court agreements 44-46
- Slovenia 164-165

Exequatur
- abolition of - 179, 180, 182

External competences of the EC in the field of PIL 39-41, 188, 233-239, 255-256

Extraterritoriality and PIL
- US tort law 10, 11

Favor negotii
- Korean PIL 117

Favor testamenti
- Korean PIL 137

Foreign decisions
- see 'Recognition and enforcement of foreign decisions'

Foreign law
- Korean PIL 109
- Slovenia 160

Forum non conveniens 45
- Korean PIL 114
- Institute of International Law 99-100

Forum shopping 61, 185

France
- non-marital unions 191-276

Free movement of persons and PIL 61, 226-228, 252-253

Gender equality in PIL
- Korean PIL 104

Germany
- non-marital unions 214, 216, 218-219

Gifts 64

Grouping-of-contact technique
- US tort law 114

Guardianship
- Korean PIL 111

Habitual residence
- Korean PIL 108

Hague draft text on choice of court 35-51

Hague Conference on Private International Law
  current activities 169-175
  maintenance 173-174, 187
  non-marital unions 196
  new members States 147, 175
  EC membership 170-171, 189-190, 240-241, 243, 257-259
  its attitude towards EC action in PIL matters 240-258
  'post modernism' in its action 258
Hague Conventions
  their compatibility with EC law 150-254
Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (15 November 1965) 252
Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (18 March 1970) 244, 246
Hague Convention on the Law Applicable to Maintenance (2 October 1973)
  non-marital unions 218
Hague Convention on the Law Applicable to Matters Relating to Product Liability (2 October 1973) 162
Hague Convention on Matrimonial Property Regimes (17 March 1978)
  non-marital unions 216
Hague Convention on the Civil Aspects of International Child Abduction (25 October 1980) 181
  and its relation with EC law 235, 253-254, 173-174
Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (29 May 1993) 147, 258
Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (19 October 1996) 243
  and Bulgaria 152-153
Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (13 December 2002) 170, 243, 261-275
  Korean PIL 120
Institute of International Law
  non-marital unions 196
  forum non conveniens and antisuit injunctions 337-338
  multiparty arbitration 339-340
Insurance contracts 63
Intellectual property rights
  and choice of court 43, 50
  Korean PIL 121
Interest analysis
  US tort law 13-14, 17-18, 19-21, 21-23, 24, 25, 29, 30
  true conflicts 21, 23, 24, 28
  false conflicts 26
  sovereignty and PIL 25
Interlocal conflict rules
  and European PIL 59-61

Internal market
  and its impact on PIL 59-61, 228-229
Jurisdiction
  choice of court 35-51
  Korean PIL 105, 112-116
  Slovenia 164-166
Kinship
  Korean PIL 131-137
Korea, Republic of -
  new PIL Act 99-142, 315-336
Legal persons
  Korean PIL 116
  Slovenia 160
Lex cartae sitae
  Korean PIL 120
Lex fori
  arbitration and choice of court agreements 62-63
  non marital unions 211
Lex loci delicti
  US tort law 14
Lex loci registrationis
  non-marital unions 214
Lex mercatoria 65
Lex rei sitae
  Korean PIL 119
Lex societatis
  Korean PIL 116
Lis pendens
  Institute of International Law 337, 338
Lois d'application immediate
  see 'Mandatory rules'
Lois de police
  see 'Mandatory rules'
Lugano Convention
  revision of- 188-189
Maastricht Treaty 178
Maintenance
  Korean PIL 135-136
  European projects 187
  Hague Conference 173-174, 187
  non-marital unions 218-219
Mandatory rules
  definition 86-88
  and EC law 68-71, 88-89, 92-93
  foreign - 91-93
  Korean PIL 110
Maritime commerce
  Korean PIL 138
Marriage dissolution
  EC-Regulation No.2201/2003 277-314
Marriage
  Korean PIL 131-132
  same-sex - 221
Matrimonial property regime
  Korean PIL 132
  Slovenia 162-163
  European projects 185-186
  non-marital unions 216-218
Means of transportation
  Korean PIL 119
Mercosur 393-394
Mexico Convention on the Law Applicable to Contractual Obligations (17 March 1994) 75, 394
Mutual recognition
  principle of - 179
Natural persons
  Slovenia 160
New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 41, 46, 47, 51, 62
Non-discrimination (EC Principle)
  its violation by the Hague Conventions 252-253

Non-marital unions 191-276
characterization 198-210
applicable law 210-276
comparative substantive law 192-196
Slovenia 163
EC projects 186
Ordre public
and punitive damages 4
interne and *international* 4
Parental responsibility
EC regulations 180-181, 277-314
Parent-child relationship
Korean PIL 133-134
Parties' expectations 28
Party autonomy
Rome Convention 64-71
Bulgaria 146-147
Korean PIL 107, 122
Slovenia 161-162, 164
choice of non-State rules 65-66
and incorporation into the contract 66
tacit choice 67-68
non-marital unions 217-218
succession 220
Post-modernism in PIL 258-259
Principles of European Contract Law 65
Product liability
US law 23
Professio iuris 220
Property rights
Korean PIL 119
Slovenia 161
Proportionality principle 90-91
Public policy
in the Hague Conventions 254
its conformity with the EC law 254
Public policy
choice of court 46
Punitive damages
US law 1-34
Swiss PIL 31-32
Hague draft on judgments 3
Hague draft on choice of courts 51
Qualification
see 'Characterization'
Real rights
see 'Property rights'
Reciprocity
Slovenia 165, 167
Recognition and enforcement of foreign decisions
Korean PIL 139-140
Slovenia 166-167
and choice of court agreements 46-48
simple, double and mixed conventions 36-37
Registered partnership
see 'Non-marital unions'
Renvoi
Korean PIL 111
Slovenia 159
Res in transitu
Korean PIL 121
Slovenia 161
Rome Convention on the Law Applicable to Contractual Obligations (19 June 1980) 53-97, 184-185
scope of application 59-64
party autonomy 64-71
law applicable in the absence of choice 71-76
consumer contracts 76-84

employment contracts 85-86
mandatory rules 86-93
assignment of receivables 93-96
its conversion into an EC regulation 53-97
and Slovene PIL 161
non-marital unions 216-217
Securities
Korean PIL 119
Hague Convention 170, 243, 261-275
Separation of spouses
see 'Marriage dissolution'
Ships
Korean PIL 138
Slovenia
new PIL statute 155-167
Statut personnel
non-marital unions 198, 203-210
Slovenia 162-163
Subsidiarity (EC Principle)
impact on EC-PIL 243-248
Substantive-law approach 14
Successions
Korean PIL 136
Slovenia 163
European projects 186
non-marital unions 219-220
Switzerland
and punitive damages 31-32
characteristic performance 72
Torts
US law 1-34
Korean PIL 127
Slovenia 162
punitive damages 1-34, 51
double actionability 127
'Rome II' proposal 182-183 341-391
UK and Ireland
and EC-PIL 232
UNCITRAL Model Law on International Commercial Arbitration 66
UNIDROIT Principles on International Commercial Contract 65-66, 68
UNIDROIT
and the EC 189
Unmarried couples
see 'Non-marital unions'
United States of America
'conflicts revolution' 13-14
new methodologies 13-14
interlocal conflict rules 61
foreign public law 271-273
illegality/immorality 287
torts 1-34
punitive damages 1-34
Unjust enrichment
Korean PIL 126
Vienna Convention on Contracts for the International Sale of Goods (11 April 1980) 119, 139